COMMENT

Cocaine Base: Not All It's Cracked Up to Be

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INTRODUCTION

In 2003, the Drug Enforcement Administration ("DEA") arrested 11,794 people for cocaine-related offenses.[1] Of the total number arrested, 6,522 offenses involved powder cocaine and 3,842 involved crack cocaine.[2] During the first nine months of 2005, 4,242 federal offenders were sentenced on powder cocaine-related charges and 4,077 were sentenced for crack cocaine-related offenses.[3] These numbers highlight the severity of the cocaine problem facing America today. More importantly, they indicate that the problem persists, despite Congress's movement toward harsher penalties for drug offenders.[4]

Under United States law, 21 U.S.C. § 841(b) sets mandatory minimum sentences for drug-related offenses.[5] The penalty's severity depends on the type and the amount of the drug involved in the offense.[6] Under § 841(b), a person who commits a crime involving five kilograms of cocaine triggers a mandatory minimum sentence of ten years in prison.[7] By contrast, a person who commits a crime involving fifty grams — one one-hundredth the amount — of cocaine base triggers the same mandatory minimum.[8] The disparity between the amount of cocaine and cocaine base that triggers the mandatory

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[1] Office of National Drug Control Policy, Drug Facts: Cocaine, http://www.whitehousedrugpolicy.gov/drugfact/cocaine/index.html (last visited Nov. 10, 2006).

[2] *Id.*

[3] *Id.*

[4] *See* sources cited *infra* notes 73-75.

[5] 21 U.S.C. § 841(b) (2000 & Supp. III 2003); United States v. Edwards, 397 F.3d 570, 571 (7th Cir. 2005); United States v. Jackson, 968 F.2d 158, 160 (2nd Cir. 1992).

[6] § 841(b)(1).

[7] *Id.*

[8] *Id.*; *Jackson*, 968 F.2d at 160.

minimum sentence makes some legal scholars question the appropriateness of this ratio.[9]

Similarly, confusion over the meaning of the term "cocaine base" as used in § 841 has produced many appeals.[10] The federal circuit courts have adopted multiple definitions of "cocaine base" in the context of this statute.[11] Some courts construe the term "cocaine base" narrowly so that it only covers crack cocaine.[12] Other courts construe the term broadly so that it covers all forms of cocaine base and not simply crack.[13] The circuit split over the interpretation of cocaine base in § 841 has led to a nonuniform application of this drug penalty statute.[14] Since the 1980s, Congress has passed laws aimed at achieving uniformity in federal sentencing.[15] The inconsistent application of

[9] *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1275-79 (1996) (discussing opposing views of African American legal scholars regarding disparate impact of ratio on African Americans); Andrew N. Sacher, Note, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1150-51 (1997) (noting "powder keg" of legal debate stemming from racially disparate impact of 100:1 ratio); Carolyn Wolpert, Note, *Considering Race and Crime: Distilling Non-Partisan Policy from Opposing Theories*, 36 AM. CRIM. L. REV. 265, 273-74 (1999) (highlighting legal academia's attack on 100:1 sentencing disparity).

[10] *Jackson*, 968 F.2d at 160; *see, e.g.*, *Edwards*, 397 F.3d at 570 (analyzing meaning of cocaine base in § 841); United States v. Barbosa, 271 F.3d 438 (3d Cir. 2001) (same); United States v. Crawford, 83 F.3d 964 (8th Cir. 1996) (same); United States v. Butler, 988 F.2d 537 (5th Cir. 1993) (same); United States v. Easter, 981 F.2d 1549 (10th Cir. 1992) (same); United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (same).

[11] *Edwards*, 397 F.3d at 572; *Barbosa*, 271 F.3d at 463-64.

[12] *Edwards*, 397 F.3d at 577; *Crawford*, 83 F.3d at 966.

[13] *Barbosa*, 271 F.3d at 467; *Butler*, 988 F.2d at 543-53; *Jackson*, 968 F.2d at 163; *Easter*, 981 F.2d at 1558.

[14] *See generally Edwards*, 397 F.3d 570 (interpreting "cocaine base" in context of enhanced penalties for drug offenses); *Barbosa*, 271 F.3d 438 (same); *Crawford*, 83 F.3d 964 (same); *Butler*, 988 F.2d 537 (same); *Jackson*, 968 F.2d 158 (same); *Easter*, 981 F.2d 1549 (same).

[15] *See* Spade, *supra* note 9, at 1249 (discussing reemergence of determinate sentencing and uniformity in federal sentencing through Sentencing Reform Act of 1984 and mandatory minimums enacted in 1984, 1986, and 1988); Kelley Elaine Lockman, Note, *Who Brought the Kid?* United States v. McClain *and the Application of Sentencing Enhancements When Use of a Minor in a Concerted Criminal Activity Was Foreseeable*, 36 GA. L. REV. 863, 869-70 (2002) (providing history of United States Sentencing Guidelines); James Charles Tecce, Comment, *Prisoners Paying for the Costs of Their Own Incarceration: United States Circuit Courts of Appeal Spar Over the Validity and Application of United States Sentencing Guideline § 5E1.2(i)*, 99 DICK. L. REV. 221, 224 (1994) ("The Sentencing Guidelines . . . were promulgated in an attempt to rectify these disparities and to establish uniformity in the sentencing process.").

§ 841, however, undermines the goal of a uniform sentencing scheme.[16]

This Comment analyzes the circuit split over the meaning of cocaine base as used in § 841(b).[17] Part I of this Comment discusses the chemical distinctions between different cocaine forms.[18] It then describes the history of cocaine legislation in the United States, including Congress's creation of the United States Sentencing Commission.[19] Next, Part I details § 841 and the problem of defining the meaning of "cocaine base" for purposes of setting mandatory minimum sentences.[20] Finally, it describes the 1993 amendments to the United States Sentencing Guidelines.[21] Part II then examines the law in its present state. In particular, Part II evaluates how courts interpret the meaning of "cocaine base" in § 841, and describes the differing rationales behind their conclusions. Part III proposes a broad definition of "cocaine base," based on an analysis of the plain meaning of the statutory language and the statute's legislative history.[22] Part III also argues that, as a matter of policy, adopting a broad definition furthers the proper goals of modern criminal sentencing.[23] This Comment concludes by advocating that the Supreme Court adopt a uniform definition of "cocaine base" based on the arguments for a broad definition. In the alternative, this Comment advocates for clarification by Congress.

I. BACKGROUND

When cocaine first appeared in the United States, physicians recognized its beneficial medicinal qualities.[24] However, they did not

[16] *See* sources cited *supra* note 15.

[17] *See* cases cited *supra* note 10.

[18] *See infra* Part I.A. (explaining chemical composition of different cocaine forms).

[19] *See infra* Part I.B. (tracing history of cocaine legislation in United States).

[20] *See infra* Part I.C. (discussing Anti-Drug Abuse Act of 1986).

[21] *See infra* Part I.D. (describing 1993 amendments to United States Sentencing Guidelines).

[22] *See infra* Part III.A-B. (analyzing statutory language and legislative history).

[23] *See infra* Part III.C. (discussing goals of modern sentencing policy).

[24] *See* David F. Allen, *History of Cocaine*, *in* THE COCAINE CRISIS 7, 9 (David F. Allen ed., 1987) (discussing use of cocaine as local anesthetic and treatment for drug addiction); Elaine M. Johnson, *Cocaine: The American Experience*, *in* THE COCAINE CRISIS, *supra*, at 33, 33 (noting use of cocaine in many patent medicines in late nineteenth and early twentieth centuries); David F. Musto, *Cocaine's History, Especially the American Experience*, *in* COCAINE: SCIENTIFIC AND SOCIAL DIMENSIONS 7, 9 (1992) (discussing various medical uses for cocaine in late 19th century); Kathleen R. Sandy, Commentary, *The Discrimination Inherent in America's Drug War: Hidden*

recognize its harmful effects until several decades later.[25] Prompted by the increasing awareness of the harms caused by cocaine, Congress passed laws regulating cocaine use.[26] With time, physicians and lawmakers also began to recognize that different forms of cocaine affect the body in different ways.[27] The evolution of cocaine regulation in the United States mirrors the growing awareness of these differing harms.[28]

A. The Chemistry of Cocaine

A basic understanding of the chemical distinctions between different forms of cocaine is essential to defining the meaning of "cocaine base."[29] Cocaine starts out as a paste that results from grinding up coca leaves and adding sulfuric acid and a solvent.[30] In this crude form, cocaine is a base.[31]

A base, in the scientific sense, is a substance that reacts with acid to form a salt.[32] Following this definition, cocaine base describes all

Racism Revealed by Examining the Hysteria over Crack, 54 ALA. L. REV. 665, 678 (2003) (discussing history of America's drug war); Spade, *supra* note 9, at 1241 (discussing history of cocaine).

[25] *See* LESTER GRINSPOON & JAMES B. BAKALAR, COCAINE: A DRUG AND ITS SOCIAL EVOLUTION 29 (1976) (noting discovery of cocaine's addictive powers); Allen, *supra* note 24, at 9 (discussing emerging awareness in "medical circles" of problems with cocaine use); Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 953 (1995) (discussing history of cocaine use in America).

[26] *See* Allen, *supra* note 24, at 10 (discussing impact of increasing fear of crime and effects of cocaine addiction on legislation); Bowman, *supra* note 25, at 953-55 (discussing legislative reaction to evils of cocaine first initiated by states and, later, Congress); Spade, *supra* note 9, at 1242-43 (noting that increased awareness of harms of cocaine spurned efforts toward regulation by state and federal governments).

[27] *See infra* Part I.A.

[28] *See infra* Part I.B-C.

[29] *See* United States v. Edwards, 397 F.3d 570, 574 (7th Cir. 2005) (discussing distinctions between different forms of cocaine in analysis of meaning of cocaine base); United States v. Booker, 70 F.3d 488, 490-91 (7th Cir. 1995) (same); United States v. Jackson, 968 F.2d 158, 161-62 (2d Cir. 1992) (same).

[30] *See* Sidney Cohen, *The Implications of Crack*, *in* THE COCAINE CRISIS, *supra* note 24, at 27, 27 (discussing production of coca paste); Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 J. AM. MED. ASS'N 1580, 1581-82 (1996) (same); Spade, *supra* note 9, at 1257 (same).

[31] *See infra* notes 35-36 and accompanying text.

[32] *See* United States v. Barbosa, 271 F.3d 438, 462 (3d Cir. 2001); *Jackson*, 968 F.2d at 161; United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180 (3d ed. 1981)).

forms of cocaine that react with acid to form a salt.[33] One such salt is cocaine hydrochloride, the chemical name for powder cocaine.[34] Cocaine hydrochloride results from the mixture of coca paste with hydrochloric acid and a solvent.[35] Coca paste (a base) and cocaine hydrochloride (a salt) have different chemical formulae.[36] In addition to crude coca paste, cocaine base, as defined above, also includes cocaine freebase and crack cocaine.[37] Cocaine freebase and crack are both derivatives of cocaine hydrochloride, but the steps in the conversion processes differ and the end products are chemically distinct.[38]

All three forms of cocaine base described above are smokable.[39] Smoking leads to rapid ingestion of a high concentration of cocaine.[40] In contrast, snorting is the most common method of ingesting cocaine hydrochloride (powder cocaine).[41] Snorting powder cocaine limits the

[33] *Easter*, 981 F.2d at 1558; *see* United States v. Turner, 928 F.2d 956, 960 n.1 (10th Cir. 1991).

[34] *See* David F. Allen, *Modes of Use, Precursors, and Indicators of Cocaine Abuse*, *in* THE COCAINE CRISIS, *supra* note 24, at 15, 15-16 (describing method of using cocaine hydrochloride powder); Hatsukami & Fischman, *supra* note 30, at 1580; Spade, *supra* note 9, at 1257 (describing chemical process of making cocaine hydrochloride).

[35] *See Barbosa*, 271 F.3d at 462; *Easter*, 981 F.2d at 1558; Spade, *supra* note 9, at 1257.

[36] *See Barbosa*, 271 F.3d at 462; *Jackson*, 968 F.2d at 161; *Easter*, 981 F.2d at 1558.

[37] *See* United States v. Edwards, 397 F.3d 570, 574 (7th Cir. 2005) (discussing different forms of cocaine and various conversion processes); Hatsukami & Fischman, *supra* note 30, at 1581-82 (discussing coca paste, cocaine freebase, and crack cocaine, and chemical processes involved in conversion from one to another); Spade, *supra* note 9, at 1257-59 (discussing pharmacology of cocaine). People can smoke coca paste; this use is popular in South America. *See* Allen, *supra* note 34, at 15 (describing smoking coca paste as predominant form of cocaine abuse in South America); Cohen, *supra* note 30, at 27 (noting use of coca paste in tobacco or marijuana cigarettes "in the countries where the coca bush is grown"); Spade, *supra* note 9, at 1257 (noting that coca paste is widely smoked in South America).

[38] *See* Cohen, *supra* note 30, at 28 (discussing process of converting cocaine hydrochloride into crack cocaine); Hatsukami & Fischman, *supra* note 30, at 1582 (same); Spade, *supra* note 9, at 1257 (same).

[39] *See* Allen, *supra* note 34, at 15-16 (describing coca paste and crack as smokable forms of cocaine); Hatsukami & Fischman, *supra* note 30, at 1582 (describing freebase and crack as similar, smokable forms of cocaine); Spade, *supra* note 9, at 1257-59 (describing coca paste, freebase cocaine, and crack as smokable forms of cocaine).

[40] *See* Allen, *supra* note 34, at 17 (describing crack and freebase as highly addictive); Hatsukami & Fischman, *supra* note 30, at 1582 (stating that rapidity and magnitude of effect increase likelihood of drug abuse); Spade, *supra* note 9, at 1261-62 (discussing addictive effects of inhaling crack vapors).

[41] *See* Arnold M. Washton, *Cocaine: Drug Epidemic of the '80s*, *in* THE COCAINE CRISIS, *supra* note 24, at 45, 45-46 (describing method of ingesting cocaine

surface area of absorption to the membranes in the nose, causing a much slower rate of reaction.[42] Smoking cocaine base generally leads to higher levels of addiction compared to snorting powder cocaine because of the differing methods of administration.[43]

When cocaine first appeared in the United States, its dangers were largely unknown.[44] As public awareness of the dangers of cocaine use became more prevalent, Congress began passing laws regulating all aspects of the cocaine trade.[45] Congressional regulation of cocaine started with medicine labeling requirements and progressed significantly to today's mandatory minimum prison sentences for cocaine-related offenses.[46]

B. The Evolution of Cocaine Regulation in the United States

Throughout the 1800s, Americans legally used cocaine as a cure for ailments like sinusitis and hay fever.[47] People also used cocaine to cure opium, morphine, and alcohol addictions.[48] In the 1890s, however, physicians began to recognize the detrimental effects of cocaine use.[49] As a result, states passed laws aimed at reducing the use

hydrochloride); Spade, *supra* note 9, at 1257; Office of National Drug Control Policy, *supra* note 1.

[42] *See* Allen, *supra* note 34, at 16 (stating that high from snorting cocaine hydrochloride rises and falls gradually); Hatsukami & Fischman, *supra* note 30, at 1582 (discussing rates of cocaine absorption depending on method of administration); Spade, *supra* note 9, at 1259 (discussing absorption and distribution of cocaine within body).

[43] *See* Allen, *supra* note 34, at 17 (discussing extremely addictive nature of freebase and crack cocaine); Hatsukami & Fischman, *supra* note 30, at 1582 (discussing likelihood of abuse depending on method of administration); Spade, *supra* note 9, at 1258 (discussing high addition potential of crack).

[44] *See infra* Part I.B.

[45] *See infra* Part I.B.

[46] *See infra* notes 52-55 and accompanying text.

[47] *See* Musto, *supra* note 24, at 9 (noting that in 1886 cocaine was official remedy of United States Hay Fever Association); Sandy, *supra* note 24, at 678 (noting cocaine used as cure for sinusitis and hay fever); Spade, *supra* note 9, at 1241 (describing some hay fever snuffs as pure cocaine).

[48] *See* Allen, *supra* note 24, at 9 (noting failure of cocaine to cure opiate and alcohol addictions); Johnson, *supra* note 24, at 33 (noting use of cocaine in treatment for opium, morphine, and alcohol addictions); Sandy, *supra* note 24, at 678.

[49] *See supra* note 25 and accompanying text.

of cocaine.[50] By 1915, the majority of states had passed laws outlawing the sale of cocaine without a prescription.[51]

The federal government began regulating narcotics with the passage of the Pure Food and Drug Act of 1906.[52] This Act required medicine labels to include a list of all narcotics.[53] Eight years later, in 1914, Congress passed the Harrison Act, restricting the possession, manufacture, sale, and importation of cocaine.[54] In addition, Congress began to pass laws imposing severe sentences for violating the Harrison Act restrictions.[55]

Congress enacted the Boggs Act in 1951, which imposed mandatory minimum sentences on drug offenders.[56] Then, in 1956, Congress added to this regulatory framework by passing the Narcotic Control Act.[57] The Narcotic Control Act continued Congress's shift toward harsh sentencing for drug offenses by setting mandatory minimum sentences for those convicted of drug importation and distribution.[58]

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[50] *See* Bowman, *supra* note 25, at 953 (noting states' responses to harms of cocaine); Gopal Das, *Cocaine Abuse in North America: A Milestone in History*, 33 J. CLINICAL PHARMACOLOGY 296, 298 (1993); Spade, *supra* note 9, at 1242 (noting all 48 states had placed restrictions on use and distribution of cocaine by 1914).

[51] *See* Bowman, *supra* note 25, at 953; Das, *supra* note 50, at 298; Spade, *supra* note 9, at 1242.

[52] Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768; *see* Bowman, *supra* note 25, at 953 (citing Pure Food and Drug Act as Congress's response to ineffective state regulation of cocaine); MaryBeth Lipp, *A New Perspective on the "War on Drugs": Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 985-86 (2004); Sandy, *supra* note 24, at 678.

[53] *See* Bowman, *supra* note 25, at 953; Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1454-55 (2000); Sandy, *supra* note 24, at 678.

[54] Harrison Anti-Narcotic Act, ch. 1, 38 Stat. 785-90 (1914) (codified as part of 21 U.S.C. §§ 801-904 (2005)); *see* Das, *supra* note 50, at 298; Douglas J. Quivey, Note, *Market-Oriented Approach to Determining Drug Quantity Under the Federal Sentencing Guidelines*, 1993 U. ILL. L. REV. 653, 657.

[55] *See* Das, *supra* note 50, at 307 (noting "harsh penalties" for violating drug laws); Lipp, *supra* note 52, at 988-95 (tracing federal mandatory minimum sentencing); Spade, *supra* note 9, at 1245-56 (detailing cocaine legislation from early twentieth century through reemergence of determinate sentencing in 1980s); Quivey, *supra* note 54, at 658-62 (tracing federal mandatory minimum sentencing).

[56] Boggs Act of 1951, 21 U.S.C. § 174 (1952), *repealed by* Pub. L. No. 91-513, § 1101(a)(2), (4), 84 Stat. 1291 (1970); J. Ryan Conboy, *Smoke Screen: America's Drug Policy and Medical Marijuana*, 55 FOOD & DRUG L.J. 601, 602 (2000); Lipp, *supra* note 52, at 987 (noting trend indicating imposition of mandatory minimum sentences on drug offenders).

[57] Lipp, *supra* note 52, at 988 (describing Narcotic Control Act of 1956 as continuing shift toward harsh sentencing policy); Sandy, *supra* note 24, at 680; Quivey, *supra* note 54, at 658.

[58] *See* Narcotic Control Act of 1956, ch. 629, Title I, § 104(a), 70 Stat. 567, 570

The reemergence of cocaine abuse in the 1960s, however, prompted Congress to take a different approach.[59]

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act.[60] This legislation moved away from determinate sentences based on objective, offense-specific criteria by repealing mandatory minimum sentences for drug offenses.[61] Consequently, judges gained broad sentencing discretion.[62] In the 1980s, however, Congress grew concerned about the disparate sentences caused by an indeterminate sentencing policy.[63] As a result, in 1984, Congress once again made determinate sentencing the center of federal sentencing policy by passing the Sentencing Reform Act ("SRA").[64]

The SRA created the United States Sentencing Commission as an independent agency within the judicial branch.[65] The SRA charged

(repealed 1984); Lipp, *supra* note 52, at 988 (describing Narcotic Control Act as continuing shift toward increased mandatory minimum sentences); Quivey, *supra* note 54, at 658 ("Under the Narcotic Control Act, Congress designated minimum sentences for drug importation and distribution offenses.").

[59] *See* Quivey, *supra* note 54, at 658-59 (noting adoption of indeterminate sentencing through Comprehensive Drug Abuse Prevention and Control Act of 1970); *see also* Spade, *supra* note 9, at 1247 (noting move away from determinate sentencing through Comprehensive Drug Abuse Prevention and Control Act); Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal "Statutory Safety Valve" to Act as an Effective Mechanism for Clemency in Appropriate Cases*, 21 HAMLINE L. REV. 109, 111 (1997) (stating that Congress repealed nearly all mandatory penalties for drug violations in 1970).

[60] *See* Lipp, *supra* note 52, at 990 (chronicling Comprehensive Drug Abuse Prevention and Control Act as part of history of federal drug control); Spade, *supra* note 9, at 1247; Quivey, *supra* note 54, at 658.

[61] *See* sources cited *supra* note 59.

[62] *See* Lipp, *supra* note 52, at 992 (stating that before Congress instituted mandatory minimum sentences, judges had broad authority in sentencing); Quivey, *supra* note 54, at 659 (noting judges' near total discretion in determining sentence length under Comprehensive Drug Abuse and Prevention Control Act).

[63] *See* sources cited *infra* note 69.

[64] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; *see* Lipp, *supra* note 52, at 995-96 (stating that purpose of SRA was to eliminate disparate sentences for similarly situated defendants); Spade, *supra* note 9, at 1249 (classifying SRA as one form of determinate sentencing enacted by Congress in 1980s); Quivey, *supra* note 54, at 660 (chronicling SRA as beginning of modern system of sentencing guidelines and mandatory minimums).

[65] *See* Mistretta v. United States, 488 U.S. 361, 368 (1989); Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 630 (2002) ("The Sentencing Commission is a small independent agency in the judicial branch designed to be an expert sentencing body outside of the typically counter-

the Commission with developing the United States Sentencing Guidelines.[66] Congress promulgated the Sentencing Guidelines to create a federal sentencing structure that would provide consistent sentences for similarly situated defendants.[67] The SRA was only Congress's first step in the shift back to determinate sentencing.[68] Two years later, Congress continued this shift by enacting the Anti-Drug Abuse Act of 1986 ("ADAA").[69]

C. 21 U.S.C. § 841: Setting Mandatory Minimums for Drug-Related Offenses

In 1986, Congress enacted the ADAA, which amended § 841.[70] Congress passed the ADAA after the House of Representatives defeated three prior versions of the bill.[71] All three of the defeated versions used the term "cocaine freebase" instead of "cocaine base" when establishing the enhanced penalties provision.[72]

The amendments to § 841 established mandatory minimum sentences for drug-related offenses based on the type and quantity of the drug involved.[73] The ADAA included enhanced penalties for

productive partisan political arena."); Lockman, *supra* note 15, at 870.

[66] *See* Lipp, *supra* note 52, at 996; Spade, *supra* note 9, at 1249; Quivey, *supra* note 54, at 660.

[67] *See* Lipp, *supra* note 52, at 995 (discussing purpose of United States Sentencing Guidelines); Spade, *supra* note 9, at 1249 (describing Sentencing Guidelines as part of reemergence of determinate sentencing); Sacher, *supra* note 9, at 1154 (stating that purpose of Sentencing Commission was to create uniformity in criminal sentencing).

[68] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; *see* Lipp, *supra* note 52, at 992-93, 995-96 (stating that Congress passed SRA to address problem of indeterminate sentencing); Spade, *supra* note 9, at 1249 (chronicling reemergence of determinate sentencing through SRA and, later, ADAA); Quivey, *supra* note 54, at 660-62 (tracing modern sentencing system beginning with SRA).

[69] *See* Lipp, *supra* note 52, at 992 (noting that ADAA eliminated judicial flexibility in sentencing); Spade, *supra* note 9, at 1249 (tracing reemergence of determinate sentencing in 1980s through several key pieces of legislation); Quivey, *supra* note 54, at 661 (expanding practice of linking sentences to drug quantity begun in SRA).

[70] 21 U.S.C. § 841 (2000 & Supp. III 2003); United States v. Jackson, 968 F.2d 158, 160 (2d Cir. 1992); United States v. Levy, 904 F.2d 1026, 1032 (6th Cir. 1990).

[71] *See* H.R. 5484, 99th Cong. (1986) (as read second time and placed on calendar, Sept. 24, 1986); H.R. 5484, 99th Cong. (1986) (as received and read first time, Sept. 15, 1986); H.R. 5484, 99th Cong. (1986).

[72] *See* § 841 (statute as enacted); H.R. 5484 (as read second time and placed on calendar, Sept. 24, 1986); H.R. 5484 (as received and read first time, Sept. 15, 1986); H.R. 5484.

[73] *See* § 841; Lipp, *supra* note 52, at 993; Spade, *supra* note 9, at 1251; Quivey, *supra* note 54, at 661 (linking sentences to drug quantity).

certain drug-related offenses.[74] Specifically, the ADAA imposed identical sentences for offenses involving smaller amounts of cocaine base as it did for offenses involving greater amounts of other forms of cocaine.[75]

The amended statute, in clause (ii) of § 841(b)(1)(A), imposes a mandatory minimum of ten years in prison for offenses involving five kilograms or more of cocaine.[76] In contrast, under clause (iii) of § 841(b)(1)(A), the statute imposes the same mandatory minimum for only fifty grams of cocaine base.[77] Congress did not further clarify the meaning of "cocaine base" or "cocaine" in relation to these enhanced penalty provisions.[78] As a result, the United States Sentencing Commission enacted the Sentencing Guidelines based on two inconsistent definitions of "cocaine" and "cocaine base."

Even though Congress created the United States Sentencing Commission in 1984, the Sentencing Guidelines did not take effect until 1987.[79] The ADAA prompted the Sentencing Commission to consider whether the Act's mandatory minimum sentences aligned the Guidelines with existing law.[80] It was not until 1993, however, that the United States Sentencing Commission addressed the scope of "cocaine base" under the Guidelines.[81]

D. The 1993 Amendments to the Sentencing Guidelines

Prior to 1993, the United States Sentencing Guidelines did not contain a definition of the term "cocaine base."[82] In 1993, the United

[74] *See* § 841; *Jackson*, 968 F.2d at 160 (stating that Congress passed ADAA to provide enhanced penalties); *Levy*, 904 F.2d at 1032 (noting ADAA provided longer sentences for offenses involving cocaine).

[75] § 841(b)(1)(A)(ii)-(iii); *see Jackson*, 968 F.2d at 160 (noting greater penalties for offenses involving cocaine base compared to cocaine); *Levy*, 904 F.2d at 1032.

[76] § 841(b)(1)(A)(ii).

[77] § 841(b)(1)(A)(iii).

[78] *Id.*; *see Jackson*, 968 F.2d at 160 (noting Congress's failure to define cocaine base); Quivey, *supra* note 54, at 666.

[79] *See* Lipp, *supra* note 52, at 996 (discussing promulgation of United States Sentencing Guidelines); Lockman, *supra* note 15, at 870.

[80] *See* Lipp, *supra* note 52, at 996 (discussing effect of ADAA on creation of Sentencing Guidelines); Spade, *supra* note 9, at 1249 (describing uniform federal sentences as purpose of Sentencing Guidelines); Lockman, *supra* note 15, at 869 (same).

[81] Amendments to the Sentencing Guidelines for United States Courts, 58 Fed. Reg. 27,148, 27,156 (May 6, 1993); *see* United States v. Barbosa, 271 F.3d 438, 463 (3d Cir. 2001) (discussing definition of cocaine base under Sentencing Guidelines).

[82] *See supra* note 81 and accompanying text; *see also* United States v. Munoz-

States Sentencing Commission amended the Guidelines to limit the scope of cocaine base to include only crack cocaine under the Guidelines.[83] Congress did not take any action within 180 days after the Commission proposed the amendment, so the amendment automatically became effective.[84]

However, Congress left the meaning of "cocaine base" in § 841 undefined.[85] Thus, courts independently construe the meaning of "cocaine base" within the context of § 841.[86] As a result, courts have taken divergent approaches to analyzing the meaning of "cocaine base" under § 841.

II. THE SPLIT

The federal circuit courts are split over the correct interpretation of cocaine base in the context of 21 U.S.C. § 841.[87] The Seventh and Eighth Circuits have limited the meaning of "cocaine base" to include only crack cocaine.[88] The Second, Third, Fifth, and Tenth Circuits have adopted a broad interpretation of "cocaine base" encompassing all cocaine bases, not just crack.[89] The application of § 841 to offenses

Realpe, 21 F.3d 375, 377 (11th Cir. 1994) (discussing 1993 amendment to Sentencing Guidelines).

[83] *See supra* note 81 and accompanying text.

[84] *See Barbosa*, 271 F.3d at 466 (noting Congress's silent approval of Sentencing Guideline amendment); *Munoz-Realpe*, 21 F.3d at 377 (describing process by which amendments to Sentencing Guidelines become effective). When the Sentencing Commission proposes an amendment to the Guidelines, Congress has 180 days to disapprove or change the proposed amendment. 28 U.S.C. § 994(p) (2005) (describing amendment process); *see* Paula J. Desio, *Introduction to Organizational Sentencing and the U.S. Sentencing Commission*, 39 WAKE FOREST L. REV. 559, 563 (2004); Phillip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 528 n.144 (2005).

[85] *Barbosa*, 271 F.3d at 463 ("[E]ven after the approval of the Commission's amendment in November 1993, Congress has not seen fit to adopt any definition or similar delineation of 'cocaine base,' contrary or otherwise."); *see* 21 U.S.C. § 841 (2000 & Supp. III 2003).

[86] *See* cases cited *supra* note 10.

[87] *See* United States v. Edwards, 397 F.3d 570, 572 (7th Cir. 2005) (noting "substantial divergence" among circuits over meaning of "cocaine base"); Quivey, *supra* note 54, at 666 (noting differing opinions among courts as to meaning of "cocaine base").

[88] *See Edwards*, 397 F.3d at 577 (equating cocaine base with crack); United States v. Crawford, 83 F.3d 964, 965-66 (8th Cir. 1996).

[89] *Barbosa*, 271 F.3d at 467 (adopting definition encompassing all forms of cocaine base); United States v. Butler, 988 F.2d 537, 542-43 (5th Cir. 1993); United States v. Jackson, 968 F.2d 158, 163 (2d Cir. 1992); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992).

involving non-crack cocaine bases differs depending on whether a court chooses the narrow or broad interpretation.[90]

A. The Narrow Interpretation: Statutory Interpretation and Legislative History

One rationale used to support a narrow definition, equating cocaine base with crack, rests upon the premise that cocaine and cocaine base are chemically identical.[91] The Seventh Circuit, in *United States v. Edwards*, defined "cocaine base" narrowly.[92] After finding no chemical distinction between cocaine and cocaine base, the court concluded that cocaine base included only crack cocaine.[93]

In *Edwards*, the defendant pled guilty to possessing, with intent to distribute, more than fifty grams of a substance containing cocaine base.[94] Despite his guilty plea, the defendant reserved the right to challenge whether or not the substance found in his possession contained either cocaine base or crack.[95] At the evidentiary hearing, the district court found the substance contained a non-crack form of cocaine base.[96] The district court, however, held that the mandatory minimum for cocaine base applied to more than just crack cocaine.[97]

On appeal, the Seventh Circuit reversed, holding that the statute's enhanced penalties applied only to crack cocaine.[98] The court primarily based its decision on two rationales.[99] First, the court relied on its findings in *United States v. Booker*[100] and concluded that cocaine

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[90] *See, e.g.*, *Edwards*, 397 F.3d 570 (interpreting cocaine base in context of enhanced penalties for drug offenses); *Barbosa*, 271 F.3d 438 (same); *Crawford*, 83 F.3d 964 (same); United States v. Fisher, 58 F.3d 96 (4th Cir. 1995) (same); *Butler*, 988 F.2d 537 (same); *Jackson*, 968 F.2d 158 (same); *Easter*, 981 F.2d 1549 (same).

[91] *See Edwards*, 397 F.3d at 573-74 (analyzing chemical similarity between cocaine and cocaine base).

[92] *Id.* at 577.

[93] *See id.* at 574 ("Cocaine in its natural state is a base; 'cocaine' and 'cocaine base' thus have the same chemical formula . . . .").

[94] *Edwards*, 397 F.3d at 572.

[95] *Id.*

[96] *Id.* at 572-73.

[97] *Id.* at 573.

[98] *Id.* at 577.

[99] *Id.* at 573-77 (analyzing scientific meaning and legislative history).

[100] In *United States v. Booker*, the Seventh Circuit limited the meaning of cocaine base in § 841 to include only crack. 70 F.3d 488, 494 (7th Cir. 1995). The defendant pled guilty to distribution of crack cocaine. *Id.* at 488. The district court sentenced him under the provisions for cocaine base. *Id.* The defendant appealed his sentence claiming that the court should have sentenced him under the lesser penalties applying

is a base in its natural state.[101] Consequently, the court reasoned that cocaine and cocaine base have the same chemical formula.[102] The court noted, however, that Congress intended to give cocaine and cocaine base different meanings;[103] otherwise, the enhanced penalties for cocaine base are meaningless.

Second, the court looked to legislative history to determine Congressional intent.[104] Based on the legislative history, the Seventh Circuit concluded that Congress amended § 841 to include enhanced penalties because it was concerned about the rise in the use of crack.[105] The court relied primarily on statements made by individual legislators to ascertain legislative intent.[106] The court specifically relied upon individual statements applauding the ADAA's enhanced penalties for all drugs, especially crack cocaine.[107] Thus, the Seventh Circuit concluded that Congress intended cocaine base to refer only to crack, and cocaine to refer to all other forms of cocaine.[108] The Eighth Circuit, in *United States v. Crawford*, accepted the Seventh Circuit's conclusion without elaboration.[109]

B. The Broad Interpretation: Statutory Interpretation and Legislative History

Like the courts that have adopted a narrow definition of "cocaine base," courts broadly construing cocaine base start with the plain language of the statute.[110] Unlike courts that have adopted a narrow definition, however, courts adopting a broad definition have found

to cocaine because the statute was ambiguous. *Id.* The Seventh Circuit affirmed the sentence set by the district court after finding no ambiguity in the statutory provisions. *Id.*

[101] *Edwards*, 397 F.3d at 574.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See id.* (referring to its analysis of legislative history of ADAA in United States v. Booker, 70 F.3d 488, 492-93 (7th Cir. 1995)).

[107] *See* United States v. Booker, 70 F.3d 488, 492-93 (7th Cir. 1995) (citing statements by individual legislators supporting restrictive definition).

[108] *See Edwards*, 397 F.3d at 574 (analyzing legislative history of statute to corroborate court's definitions of cocaine and cocaine base).

[109] United States v. Crawford, 83 F.3d 964, 965-66 (8th Cir. 1996).

[110] *See* United States v. Jackson, 968 F.2d 158, 161 (2d Cir. 1992) (analyzing meaning of cocaine base in § 841); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992) (starting with analysis of language used by Congress).

cocaine and cocaine base chemically distinguishable.[111] In *United States v. Easter*, for example, the Tenth Circuit adopted a broad definition of "cocaine base" based on this chemical dissimilarity.[112]

In *Easter*, the trial court convicted the defendant of possession, distribution, and conspiracy to possess and distribute cocaine base.[113] The defendant appealed,[114] and the Tenth Circuit affirmed both the conviction and the sentence.[115] In discussing the meaning of "cocaine base," the circuit court noted that Webster's Dictionary defines a "base" as "a compound capable of reacting with an acid to form a salt."[116] From this, the court reasoned that cocaine base, under the statute, constitutes a form of cocaine that forms a salt when mixed with an acid.[117] Thus, the Tenth Circuit found cocaine base chemically distinguishable from other forms of cocaine due to the absence of hydrochloric acid in cocaine base.[118]

The Second and Third Circuits also adopted a broad definition of "cocaine base."[119] In *United States v. Jackson*, the Second Circuit relied on an expert chemist's testimony that distinguished cocaine base from cocaine on the basis of their chemical formulae.[120] In addition, the Third Circuit, like the Tenth Circuit, looked to the chemical definition of a base in analyzing the meaning of "cocaine base."[121] The court

[111] *See* United States v. Barbosa, 271 F.3d 438, 462 (3d Cir. 2001) (explaining chemistry of cocaine and cocaine base); *Jackson*, 968 F.2d at 161; *Easter*, 981 F.2d at 1558.

[112] 981 F.2d at 1558 ("[T]he plain language of the statute indicates that cocaine base is the alkaloid form of cocaine which is capable of reacting with an acid to form a salt.").

[113] *Id.* at 1552.

[114] *Id.*

[115] *Id.* at 1559.

[116] *Id.* at 1558; *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 180 (3d ed. 1993) (defining "base" in scientific terms).

[117] *Easter*, 981 F.2d at 1558; United States v. Turner, 928 F.2d 956, 960 (10th Cir. 1991).

[118] *Easter*, 981 F.2d at 1558. The court also indicated that the legislative history of the statute did not show a contrary congressional intent. *Id.* at 1558 n.6.

[119] *See* United States v. Barbosa, 271 F.3d 438, 463-67 (3d Cir. 2001) (discussing impact of 1993 Sentencing Guidelines amendment on meaning of "cocaine base" in context of § 841); United States v. Jackson, 968 F.2d 158, 162 (2d Cir. 1992) (canvassing legislative history for meaning of cocaine base contrary to scientific one adopted by court).

[120] *Jackson*, 968 F.2d at 161.

[121] *See Barbosa*, 271 F.3d at 462 (analyzing meaning of "cocaine base"); *Easter*, 981 F.2d at 1558.

concluded that distinct forms of cocaine base, such as crack and coca paste, are chemically indistinguishable.[122]

In each of their decisions, the Second, Third, and Tenth Circuits also noted other characteristics that distinguish cocaine from cocaine base.[123] These characteristics include different melting points, solubility levels, and molecular weights.[124] In each case, the courts held that the chemical differences supported distinct definitions of cocaine base and cocaine.[125]

The Second, Third, and Tenth Circuits also relied on the legislative history of § 841 in determining what Congress meant by "cocaine base."[126] The plain meaning and legislative history analyses these courts applied mirrored the analysis of the Seventh and Eighth Circuits.[127] Unlike the Seventh and Eighth Circuits, however, the Second, Third, and Tenth Circuits adopted a broad definition after analyzing § 841's legislative history.[128]

Looking to the plain meaning and legislative history of § 841, the Second Circuit in *United States v. Jackson* held that cocaine base in § 841 covers all forms of cocaine base and not just crack.[129] In *Jackson*, the defendant pled guilty to possession of crack cocaine with intent to distribute.[130] The district court found the enhanced penalty provisions of § 841(b) to be unconstitutionally vague because the statute did not define "cocaine base."[131] Consequently, the district court imposed a lesser penalty upon the defendant.[132]

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[122] *Barbosa*, 271 F.3d at 462.

[123] *See id.* at 462; *Jackson*, 968 F.2d at 161; *Easter*, 981 F.2d at 1558. *See generally* THE MERCK INDEX: AN ENCYCLOPEDIA OF CHEMICALS, DRUGS, AND BIOLOGICALS 383 (11th ed. 1989) (noting distinguishing characteristics of cocaine and cocaine base).

[124] *See Jackson*, 968 F.2d at 161; *Easter*, 981 F.2d at 1558; *see also* THE MERCK INDEX, *supra* note 123, at 383.

[125] *See Barbosa*, 271 F.3d at 467 (holding that under § 841, cocaine base includes all forms of cocaine base as chemically defined); *Jackson*, 968 F.2d at 163 (applying chemical definition of "cocaine base" to facts of case to determine proper sentence); *Easter*, 981 F.2d at 1558 (finding cocaine base scientifically distinguishable from other forms of cocaine).

[126] *See Barbosa*, 271 F.3d at 466; *Jackson*, 968 F.2d at 162; *Easter*, 981 F.2d at 1558 n.7.

[127] *See supra* Part II.A.

[128] *See infra* notes 129-141 and accompanying text.

[129] 968 F.2d at 163 (giving cocaine base its scientific definition).

[130] *Id.* at 159.

[131] *Id.* at 158.

[132] *Id.* at 159.

The Second Circuit reversed, determining that cocaine base had a clear scientific definition, which Congress intended.[133] The circuit court noted that Congress used the term "cocaine base" without explaining or limiting its meaning.[134] In addition, nothing in the legislative history of § 841 indicated Congress's intent to vary the meaning from the scientific definition of cocaine base.[135] Therefore, the court concluded that Congress intended the term to encompass all forms of cocaine base.[136] While Congress intended cocaine base to *include* crack, the legislative history did not suggest an intent to *limit* it to crack.[137]

Other circuits have also concluded that the legislative history does not show Congress's intent to limit the meaning of "cocaine base" to crack.[138] For example, the Third Circuit, in *United States v. Barbosa*, adopted the conclusion of the Second Circuit in *Jackson* on the issue of congressional intent.[139] The Tenth Circuit in *Easter* acknowledged Congress's primary concern with the crack problem but concluded that nothing in the legislative history indicated an intent to limit cocaine base to crack.[140] These divergent outcomes illustrate disagreement among the circuits in the length of sentences imposed for similar drug offenses.[141]

III. SYNTHESIS

The circuit courts of appeal disagree on the proper interpretation of cocaine base in the context of § 841.[142] A broad interpretation of cocaine base, however, comports best with the plain meaning of the statutory text and modern sentencing policy.[143] Penalties applicable to

[133] *Id.* at 163.

[134] *Id.* at 162.

[135] *Id.*

[136] *See id.* at 163.

[137] *Id.* at 162.

[138] *See* United States v. Barbosa, 271 F.3d 438, 466 (3d Cir. 2001); United States v. Easter, 981 F.2d 1549, 1558 n.7 (10th Cir. 1992).

[139] *Barbosa*, 271 F.3d at 466.

[140] *Easter*, 981 F.2d at 1558 n.7.

[141] *See* cases cited *supra* note 14.

[142] *See generally* United States v. Edwards, 397 F.3d 570 (7th Cir. 2005) (interpreting cocaine base in context of enhanced penalties for drug offenses); *Barbosa*, 271 F.3d 438 (same); United States v. Crawford, 83 F.3d 964 (8th Cir. 1996) (same); United States v. Butler, 988 F.2d 537 (5th Cir. 1993) (same); *Jackson*, 968 F.2d at 158 (same); *Easter*, 981 F.2d 1549 (same).

[143] *See infra* Part III.A-C.

cocaine base should extend to offenses involving more than just crack cocaine for three reasons. First, a plain reading of § 841 results in the adoption of the scientific definition of cocaine base, which includes more than crack.[144] Second, the legislative history does not suggest congressional intent to limit cocaine base to crack cocaine.[145] Finally, broad interpretation serves the goals of criminal law.[146]

A. The Plain Meaning of § 841 Supports a Broad Definition of "Cocaine Base"

The Supreme Court should adopt the scientific meaning of cocaine base because Congress used a scientific term to define the offense.[147] Statutory construction begins with the language used by Congress.[148] Congress used the scientific term "cocaine base," which describes forms of cocaine that react with acid to form salts.[149] When Congress uses a technical word or term of art, the court must give the term its technical or scientific meaning.[150]

Clause (ii) of § 841(b)(1)(A) relates to offenses involving cocaine.[151] Clause (iii) relates to offenses involving any of the substances described in clause (ii) that contain cocaine base.[152] The way Congress constructed the statute, clause (iii) essentially carves out an

[144] *See* cases cited *infra* note 148.

[145] *See infra* Section III.B.

[146] *See generally* Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215 (2004) (discussing consequentialism versus retributivism); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003) (discussing new theory of "modified just desert"); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233 (discussing competing theories of punishment).

[147] *See Jackson*, 968 F.2d at 161 (stating that when Congress uses technical terms courts should define those terms by their scientific meaning); *Easter*, 981 F.2d at 1558; *see also* Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974).

[148] *See* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979); *Easter*, 981 F.2d at 1558.

[149] *See* United States v. Barbosa, 271 F.3d 438, 462 (3d Cir. 2001) (describing process used to make cocaine hydrochloride); *Jackson*, 968 F.2d at 161 (defining cocaine base as substance that reacts with acid to form salt); *Easter*, 981 F.2d at 1558 ("[T]he plain language of the statute indicates that cocaine base is the alkaloid form of cocaine which is capable of reacting with an acid to form a salt."); GRINSPOON & BAKALAR, *supra* note 25, at 83 (describing reaction between cocaine base and hydrochloric acid resulting in formation of cocaine salt).

[150] *See* cases cited *supra* note 147.

[151] 21 U.S.C. § 841(b)(1)(A) (2000 & Supp. III 2003).

[152] *Id.*

exception to clause (ii).[153] Creating two separate clauses shows that Congress intended to create two separate definitions.[154] If cocaine in clause (ii) meant exactly the same thing as cocaine base in clause (iii), it would be unnecessary for Congress to create two separate clauses.[155] Clause (iii) would lack any independent meaning, thus eliminating the enhanced penalty provisions altogether.[156] Courts should interpret statutes in a way that gives independent meaning to each part of the statute.[157] Therefore, cocaine in clause (ii) must refer to any form of cocaine that is not a base, and thus not covered by clause (iii).[158]

If no ambiguity exists in the text of the statute, then courts must adopt the plain meaning provided by the text.[159] Clause (iii) of § 841(b)(1)(A) provides enhanced penalties for substances included under clause (ii) that contain cocaine base.[160] Cocaine base has a scientific definition that gives the term a separate meaning.[161] Therefore, the distinction between cocaine and cocaine base is not ambiguous, and courts should adopt the plain meaning indicated by the text of § 841.[162]

Opponents of a broad interpretation argue that there is no chemical distinction between cocaine and cocaine base as used in § 841.[163] They claim that cocaine and cocaine base must have the same chemical formula because cocaine is a base in its natural state.[164] Under this line of reasoning, § 841 provides different penalties for the

[153] *Id.*

[154] *See infra* note 157 and accompanying text.

[155] *See infra* note 157 and accompanying text.

[156] *See* § 841(b).

[157] *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 36 (1992) (stating that courts must construe statutes to give all words some effect); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 103 (1989); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

[158] *See* § 841(b)(1)(A).

[159] *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (stating that statutory interpretation starts and ends with language of statute when language is clear); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992); Demarest v. Manspeaker, 498 U.S. 184, 190 (1991).

[160] 21 U.S.C. § 841(b)(1)(A).

[161] *See supra* note 149 and accompanying text.

[162] *See supra* note 159 and accompanying text.

[163] United States v. Edwards, 397 F.3d 570, 574 (7th Cir. 2005); United States v. Booker, 70 F.3d 488, 490 (7th Cir. 1995).

[164] *Edwards*, 397 F.3d at 574; *Booker*, 70 F.3d at 490.

same substance.[165] Therefore, opponents of a broad definition find ambiguity in the text of § 841.[166]

However, the flaw in this argument comes from concluding that cocaine is chemically the same as cocaine base because cocaine is a base in its natural state. Cocaine can take many forms, some of which are forms of cocaine base, such as coca paste and crack.[167] Other forms of cocaine, however, such as powder cocaine, are not bases.[168] Powder cocaine and cocaine base have distinct chemical formulae, melting points, solubility levels, and molecular weights.[169] A careful reading of clauses (ii) and (iii) of § 841(b)(1)(A) should take this distinction into account. This line of analysis finds an independent meaning in both clauses, without limiting the meaning of cocaine base to crack cocaine.[170]

B. The Legislative History of § 841 Further Supports a Broad Definition of "Cocaine Base"

The legislative history of the ADAA also supports a broad definition of "cocaine base." Legislative intent comes from the plain language of the statute, unless the legislative history demonstrates a contrary intent.[171] Here, the legislative history of the ADAA supports adopting a broad, scientific definition of "cocaine base."[172]

When Congress considered the ADAA, it used the term "cocaine freebase" in clause (iii) of § 841(b)(1)(A) in all versions of the bill

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[165] *See Edwards*, 397 F.3d at 574 (explaining chemical composition of cocaine and cocaine base); *Booker*, 70 F.3d at 490 (defining cocaine and cocaine base).

[166] *See supra* Part II.A (discussing narrow interpretation of § 841).

[167] *See* Cohen, *supra* note 30, at 27 (discussing chemical composition of coca paste and crack cocaine); Hatsukami & Fischman, *supra* note 30, at 1581-82; Spade, *supra* note 9, at 1257-59.

[168] *See* Cohen, *supra* note 30, at 27 (describing chemical process used to make cocaine hydrochloride); Hatsukami & Fischman, *supra* note 30, at 1581-82; Spade, *supra* note 10, at 1257.

[169] *See* United States v. Barbosa, 271 F.3d 438, 462 (3d Cir. 2001) (noting differences between powder cocaine and cocaine base); United States v. Jackson, 968 F.2d 158, 161 (2d Cir. 1992); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992).

[170] 21 U.S.C § 841 (2000 & Supp. III 2003).

[171] *See* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (stating that words of statute express legislative intent); Richards v. United States, 369 U.S. 1, 9 (1962); *Easter*, 981 F.2d at 1558.

[172] *See* United States v. Lopez-Gil, 965 F.2d 1124, 1134 (1st Cir. 1992); *Jackson*, 968 F.2d at 162; *Easter*, 981 F.2d at 1558 n.7 (analyzing legislative history of § 841(b)(1)).

except the last.[173] In the final version, Congress replaced cocaine freebase in clause (iii) with cocaine base.[174] Cocaine freebase is a specific form of cocaine base suitable for smoking, such as crack.[175] By substituting the broader term, "cocaine base," for the narrow term, "cocaine freebase," Congress expanded the scope of the offenses to which clause (iii)'s enhanced penalties apply.[176]

Opponents of a broad definition of "cocaine base" find support for a narrow definition in the legislative history of the ADAA.[177] They argue that the ADAA's legislative history indicates an overriding congressional concern with the use of crack cocaine.[178] Opponents also note the growing publicity of crack and its deadly consequences at the time Congress passed the ADAA.[179]

This argument, however, fails to grasp that Congress could have acknowledged this concern, yet dealt with the crack problem by enhancing penalties for a broad class of cocaine bases.[180] A broad definition of "cocaine base" still addresses the rising use of crack cocaine by providing higher penalties for crack than for powder cocaine (cocaine hydrochloride).[181] Additionally, opponents of a broad definition derived their view of legislative history solely from

[173] *See* sources cited *supra* note 71.

[174] *See* sources cited *supra* note 72.

[175] *See* Cohen, *supra* note 30, at 27-28 (describing processes used to make cocaine freebase and crack and methods of using them); Hatsukami & Fischman, *supra* note 30, at 1582; Spade, *supra* note 9, at 1258.

[176] *See* Russello v. United States, 464 U.S. 16, 23-24 (1983) (stating that when Congress uses limiting language in bill and later deletes it, there is presumption that Congress did not intend to limit language); Arizona v. California, 373 U.S. 546, 580-81 (1963) (analyzing Congress's deletion of limiting language prior to enactment of statute); Edward C. Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U. L. REV. 225, 238 (1981) (analyzing broadening of scope of Racketeer Influenced and Corrupt Organizations statute through addition of subsection).

[177] *See* United States v. Edwards, 397 F.3d 570, 574 (7th Cir. 2005); United States v. Rodriguez, 980 F.2d 1375, 1378 (11th Cir. 1992); *see* Spade, *supra* note 9, at 1251 (discussing congressional motivation behind passage of Anti-Drug Abuse Act of 1986).

[178] *See* sources cited *supra* note 177.

[179] *See* Lipp, *supra* note 52, at 991-92 (noting media coverage of crack and cocaine poisoning death of basketball star Len Bias); Spade, *supra* note 9, at 1249-50.

[180] *See* United States v. Palacio, 4 F.3d 150, 153 (2d Cir. 1993) (noting possibility of addressing crack problem through enhanced penalties for all cocaine bases); *Rodriguez*, 980 F.2d at 1378.

[181] *See Palacio*, 4 F.3d at 153 (providing higher penalties for crack through broad definition); *Rodriguez*, 980 F.2d at 1378.

statements made by individual legislators.[182] Such statements do not carry much weight in the realm of legislative history.[183] Differences in the language of prior versions of the ADAA should carry more weight than statements by individual legislators.[184] The limited legislative history of the ADAA does not indicate legislative intent contrary to the plain, scientific meaning of the statutory text.[185]

C. A Broad Definition of "Cocaine Base" Furthers the Modern Sentencing Philosophy

A broad interpretation of "cocaine base" leads to a sentencing scheme that promotes the goals of modern sentencing philosophy. Including more than just crack in the meaning of "cocaine base" enhances penalties for a broader range of narcotics.[186] This creates longer periods of incapacitation, which protects the public from future

[182] *See* United States v. Booker, 70 F.3d 488, 492-93 (7th Cir. 1995); *see also Edwards*, 397 F.3d at 574 (relying on analysis in *Booker*).

[183] *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 979 (3d ed. 2002) (noting that courts have traditionally given less weight to statements made during committee hearings and floor debates); Michael W. Kelly, Note, *Multiemployer Pension Plan Withdrawal Liability: Limitations Without Limits*, 42 CASE W. RES. L. REV. 255, 275 (1992) (stating that statements made by individual members may not reflect views of majority of legislature and may instead represent positions advocated by special interest groups); Cindy L. Petersen, Note, *The Congressional Response to the Supreme Court's Treatment of Dial-a-Porn*, 78 GEO. L.J. 2025, 2040-41 (1990) (stating that court found little probative value in legislative history because it consisted mainly of statements made by individual members of Congress).

[184] *See* Russello v. United States, 464 U.S. 16, 23-24 (1983) (stating that when Congress uses limiting language in bill and later deletes it there is presumption that Congress did not intend to limit language); Arizona v. California, 373 U.S. 546, 580-81 (1963) (analyzing Congress's deletion of limiting language prior to enactment of statute); Weiner, *supra* note 176 at 238 (analyzing removal of limiting language in Racketeer Influenced and Corrupt Organizations statute); *see also* ESKRIDGE, JR., ET AL., *supra* note 183 at 979 (noting that courts have traditionally given less weight to statements made during committee hearings and floor debates); Kelly, *supra* note 183, at 275 (stating that statements made by individual members may not reflect views of majority of legislature and may instead represent positions advocated by special interest groups); Petersen, *supra* note 183, at 2040-41 (stating that court found little probative value in legislative history because it consisted mainly of statements made by individual members of Congress).

[185] *See supra* note 171.

[186] *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2000) (enhancing penalties for offenses involving cocaine base).

crimes.[187] A broad definition also ensures just punishment by aligning the severity of the punishment with the severity of the offense.[188]

In general, there are two distinct theories of punishment.[189] The first is consequentialism, or utilitarianism, which focuses on preventing future harm.[190] The main objectives of a utilitarian theory of punishment are deterrence, incapacitation, and rehabilitation.[191] The second theory is retributivism, which focuses on making punishment proportionate to the specific offense.[192] In tandem with the shift away from indeterminate sentencing, however, a third theory has become the accepted basis for modern sentencing policy.[193] This theory of "modified just desert" combines aspects of the other two.[194] The primary objectives of the modified just desert theory are incapacitation and just punishment.[195]

The modern theory of modified just desert began with the passage of the SRA.[196] Congress then passed the ADAA at a time when it considered just punishment and incapacitation to be the primary goals of punishment.[197] A broad interpretation of the ADAA's

[187] *See infra* notes 196-200 and accompanying text.

[188] *See infra* notes 201-03 and accompanying text.

[189] *See* Bilz & Darley, *supra* note 146, at 1217 (discussing consequentialism versus retributivism); Tonry, *supra* note 146, at 1240 (discussing competing theories of punishment); Daniel Weiss, Note, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1577-80 (comparing utilitarian and retributive theories of punishment).

[190] *See* sources cited *supra* note 189.

[191] *See* Driessen & Durham, *supra* note 65, at 624-25 (noting various forms of utilitarian punishment); Edward Rubin, *Just Say No to Retribution*, 7 BUFF CRIM. L. REV. 7, 55 (2003); *Weiss*, *supra* note 189, at 1577-80.

[192] *See* sources cited *supra* note 189.

[193] *See* Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 277-78 (2005) (describing philosophy of modified just desert as used in state and federal sentencing); Hofer & Allenbaugh, *supra* note 146, at 52 (discussing new theory of modified just desert); Jonathan Hecht, Comment, *Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 Am. U. L. Rev. 289, 303-05 (1999) (tracing history of sentencing principles).

[194] *See* sources cited *supra* note 193.

[195] *See* sources cited *supra* note 193.

[196] *See* Driessen & Durham, *supra* note 65, at 627 (noting rejection of rehabilitative model of sentencing); Spade, *supra* note 9, at 1249 (describing growing concerns over indeterminate sentencing and ability of prisons to rehabilitate offenders as impetus to passage of SRA); Hecht, *supra* note 193, at 304-05 (describing SRA and creation of United States Sentencing Commission as congressional rejection of rehabilitation as goal of criminal sentencing).

[197] *See* Driessen & Durham, *supra* note 65, at 627 (noting rejection of determinate

enhanced penalty provisions reflects these two goals and promotes just punishment and longer periods of incarceration.

Adopting a broad definition will put a greater number of cocaine base offenders behind bars for longer periods of time.[198] Longer prison terms for a wider range of offenses further the policy underlying incapacitation by protecting the public from future crimes.[199] Not only does incapacitation prevent crimes committed by that particular individual, it may also deter prospective criminals by increasing the cost of committing the crime.[200]

In addition, by enhancing penalties proportionately to the resultant harm from using certain types of cocaine, a broad interpretation promotes just punishment.[201] A broader, scientific definition is more just because the definition reflects the increased harm of using cocaine base as compared with other, nonsmokable forms of cocaine.[202] The increased harm comes from the immediate high caused by smoking cocaine bases and the resulting higher potential for addiction.[203]

A narrow definition of "cocaine base" singles out one form of smokable cocaine — crack — and disregards other cocaine bases that have similar harmful effects.[204] Conversely, a broad interpretation provides similar sentences for defendants who are similarly situated in

sentencing and rehabilitation with creation of federal sentencing guidelines); Tonry, *supra* note 146, at 1241 (discussing peak periods of determinate and indeterminate sentencing and underlying theories of punishment); Hecht, *supra* note 193, at 303-05.

[198] *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2000) (setting enhanced penalties for offenses involving cocaine base).

[199] *See* Hofer & Allenbaugh, *supra* note 146, at 56-57 (discussing theory of incapacitation).

[200] *See* Scott M. Bennett, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1, P33 (2004) (discussing deterrent effect as part of cost-benefit analysis); Bowman, *supra* note 25, at 982 (describing incapacitation as method of deterring prospective criminals by affecting cost-benefit analysis); Hofer & Allenbaugh, *supra* note 146, at 60-62 (discussing deterrent effect of sentence on commission of offense by others).

[201] *See* Bilz & Darley, *supra* note 146, at 1229-30 (discussing one goal of criminal justice system as matching crime with punishment); Deirdre Golash & James P. Lynch, *Public Opinion, Crime Seriousness, and Sentencing Policy*, 22 AM. J. CRIM. L. 703, 705 (1995) (noting one SRA purpose to impose sentence that reflects seriousness of crime); Hofer & Allenbaugh, *supra* note 146, at 24 (discussing modified just desert approach to punishment and matching severity of punishment with seriousness of offense).

[202] *See supra* Part I.A.

[203] *See* Allen, *supra* note 34, at 16 (noting high addictive potential related to this method of administering cocaine); Cohen, *supra* note 30, at 28 (discussing dependence created by inhaling cocaine vapors); Spade, *supra* note 9, at 1259 (relating method of use to drug absorption rates).

[204] *See supra* Parts I.A, II.A.

terms of the harm caused.[205] A broader, more inclusive form of punishment conforms to the modern trend toward sentencing uniformity.[206]

CONCLUSION

The ADAA, codified in 21 U.S.C. § 841, provides mandatory minimum sentences for criminal drug offenses.[207] As discussed, the statute provides harsher penalties for offenses involving cocaine base as opposed to cocaine.[208] The result has been divergent sentences for drug offenses based on a particular court's interpretation of the statutory term "cocaine base."[209]

To bring consistency in criminal penalties, three reasons justify adopting a broad definition of "cocaine base" to include harsher penalties for more than just crack cocaine.[210] First, a broad definition is consistent with the accepted scientific definition of cocaine base and, thus, with the plain meaning of the term. Second, the legislative history of the statute reveals that Congress intended a broad definition.[211] Third, a broad interpretation furthers the goals of modern sentencing policy.[212] A broad definition would still apply harsher penalties to offenses involving crack as compared with powder cocaine. However, it would also apply these penalties uniformly to other offenses involving non-crack cocaine bases. This interpretation addresses Congress's concern about the increasing use of crack cocaine without deviating from the plain meaning of the statute.[213]

Since the 1980s, the focus of the federal sentencing laws has shifted away from a discretionary system toward a system of uniform laws.[214]

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[205] *See* sources cited *supra* note 201.

[206] *See* sources cited *supra* note 15. A broad interpretation does little to further rehabilitation, but neither would a shorter sentence. *See* Bowman, *supra* note 25, at 983. However, a broad interpretation does not diminish the rehabilitation provided to an offender during the period of reentry into society. *See* 21 U.S.C. § 841 (2000 & Supp. III 2003) (providing specified terms of supervised release); Hofer and Allenbaugh, *supra* note 146, at 55 (discussing theory of rehabilitation and supervised release in federal sentencing).

[207] § 841.

[208] § 841(b)(1)(A)(iii).

[209] *See supra* Part I.

[210] *See supra* Part III.

[211] *See supra* Part III.

[212] *See supra* Part III.

[213] *See supra* Part III.

[214] *See* sources cited *supra* note 69.

However, as discussed, circuit courts are currently split over the scope of cocaine base as used in § 841.[215] When the courts apply different definitions to the same word, the resulting inconsistency erodes the concept of sentencing uniformity. This shift back toward discretionary sentencing undermines the goals of federal sentencing and requires resolution. Therefore, Congress should amend the ADAA to clarify the meaning of "cocaine base." Alternatively, the Supreme Court should resolve the circuit split over the definition of "cocaine base" by adopting a broad definition in applying the statute.

[215] *See supra* Part II.