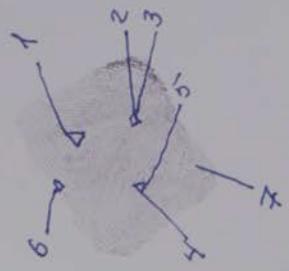


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WISCONSIN'S WAR ON DRUGS— THE COCAINE FRONT, 1986–1990

By Michael O'Hear

In the 1970s, Wisconsin's War on Drugs was really a war on marijuana—a police action that came and went without much impact on imprisonment. The surge of several thousand additional drug arrests per year simply did not translate into many additional prisoners. By the mid-1980s, though, the first signs of a new war on cocaine were apparent. This new emphasis on cocaine would result in much greater changes to Wisconsin's drug sentencing laws and would produce many more inmates for Wisconsin's prisons. The Uniform Controlled Substances Act (UCSA), as originally drafted and then adopted by Wisconsin, had placed cocaine into the same severity class as marijuana. However, the war on cocaine effectively resulted in the substance's recategorization as a hard drug in the same class as heroin.

Changes in Wisconsin largely mirrored changes nationally. The United States of the mid- and late 1980s was in full-blown panic mode when it came to cocaine. Historian David Musto has noted the cyclical nature of American attitudes toward cocaine, in which “the perception of cocaine [changes] from that of an apparently harmless, perhaps ideal, tonic for one’s spirits or to get more work done, to that of a fearful substance whose seductiveness in its early stages of ingestion only heightens the necessity of denouncing it.” In the 1970s and early 1980s, cocaine’s reputation was going through one of its positive phases.

The cocaine-related death of actor John Belushi in 1982 may have served as something of a wake-up call, but it also reinforced cocaine’s reputation as a glamorous, celebrity drug. Within a few years, though, crack cocaine changed everything.

Cocaine came to be seen as an insidious drug of the black underclass, linked to a national surge in violent crime and the deepening of ghetto misery.

The crack form of cocaine offered a high that was particularly quick, intense, and cheap. It first appeared in several American cities in the mid-1980s. Hardcore crack users tended to be young, unemployed blacks. Violent gangs handled much of the lucrative distribution business, and their armed confrontations became regular headline fodder beginning in 1985. Public concern seemed to reach a peak in the summer of 1986 in the wake of the overdose death of college basketball star Len Bias, which was repeatedly and incorrectly attributed to crack.

Following Bias’s death, national politicians almost immediately put anti-crack legislation on a fast track in Congress, aiming to produce a new law before the November elections. Mandatory minimums for dealing crack would be the centerpiece. There was broad ➤



Michael O'Hear, professor of law at Marquette University, recently published *Wisconsin Sentencing in the Tough-on-Crime Era: How Judges Retained Power and Why Mass Incarceration Happened Anyway*. This excerpt from chapter 7 of the book is reprinted with the permission of the University of Wisconsin Press. ©2017 by the Board of Regents of the University of Wisconsin System. All rights reserved.

agreement that crack sentences should be tougher than regular (“powder”) cocaine sentences, but how much tougher defied logical analysis. One aide described the legislative process as simply “pulling numbers out of the air.” Congress ultimately settled on the now-notorious 100:1 ratio—the mandatory minimums for crack would be triggered by quantities that were only 1/100 of the quantities of powder cocaine associated with the same minimums. Thus, for instance, 500 grams of powder would net you a five-year minimum, but you would face the same punishment for a mere five grams of crack.

Wisconsin lawmakers moved even more quickly, albeit with much less harsh results. In May 1986, Democratic Governor Anthony Earl, facing reelection in the fall, called a special session of the legislature for various specific purposes, including “increasing the penalties for the possession, manufacture, or delivery of cocaine.” The Democratic legislature complied with stunning rapidity, passing Earl’s bill just two days after it was introduced.

The path had been paved by the work of Wisconsin’s Cocaine Task Force, which was sponsored by the State Council on Alcohol and Other Drug Abuse and chaired by Assembly Democrat John Medinger. Following its creation in 1985, the task force consulted with national experts on drug abuse and conducted five public hearings across the state, at which participants repeatedly called for tougher penalties. The task force issued its alarmist final report in April 1986, a month before Governor Earl introduced his cocaine bill. “[C]ocaine,” the task force declared, “is an extremely serious problem that has reached epidemic proportions. . . . Instead of being the benign substance which is commonly believed, cocaine is one of the most addictive substances known.” The task force insisted that “drug abuse must be treated as a public health problem” and drew analogies to communicable diseases. Yet, the task force’s first policy recommendation was to increase penalties for both distribution and simple possession. In part, this reflected the task force’s comparative assessment of cocaine penalties across the United States, which revealed that Wisconsin’s were among the nation’s most lenient; the 30-day maximum for simple possession, for instance, ranked 50th out of 50 states and paled by comparison to the national average of nearly six years. The task force concluded that Wisconsin needed tougher sentences to achieve greater deterrence.

Largely following the task force’s lead, Governor Earl’s cocaine bill, as introduced, contained three key sentencing features. First, the bill revived the concept of mandatory minimums, which had been abandoned only 14 years earlier with passage of the Uniform Controlled Substances Act. Earl’s minimums were comparatively modest—just six months or one year, depending on the volume involved—but established a precedent for the tougher minimums that would be adopted in subsequent years. Second, the bill introduced into Wisconsin law the concept of weight-based sentence enhancements for drug distribution. While distributing as much as 13 grams of cocaine could result in any sentence up to five years, more than 13 grams would trigger a six-month mandatory minimum, and more than 55 grams a one-year minimum. Exceeding 55 grams also triggered an enhanced, 15-year maximum. Such a weight-based sentencing system had precedent in the federal Controlled Substances Penalties Amendments Act of 1984. Third, and finally, the maximum penalty for simple possession of cocaine was raised from 30 days to one year. The overall effect of these three features was to sharply distinguish cocaine from marijuana, which had been lumped together under the Uniform Controlled Substances Act, and to move cocaine much closer to heroin.

With its proud tradition of wide judicial sentencing discretion, Wisconsin did not adopt Earl’s mandatory minimums without a fight. Introduced into the Senate, the governor’s bill was referred to the Committee on Judiciary and Consumer Affairs, chaired by Lynn Adelman, the liberal senator with an impressive track record of quietly killing or watering down tough-on-crime proposals. Adelman likely would have been happy to keep Earl’s bill in his committee indefinitely, but the closer media scrutiny and political pressures of a special session made simple neglect a problematic strategy. Adelman thus adopted a more direct plan of attack. At his behest, the Judiciary Committee simply stripped the mandatory minimums from the bill. At the same time, however, perhaps reflecting a compromise within the committee, the triggering weight for the 15-year maximum was reduced from 55 to 30 grams. Thus modified, the cocaine bill then swiftly passed the full Senate.

Although Adelman and his fellow Senate liberals were often quite successful in the 1980s in holding in

check the Assembly's tougher-on-crime inclinations, it was the Assembly that prevailed on the 1986 cocaine bill. First, conservative Democrats led by Milwaukee's Louise Tesmer restored Governor Earl's mandatory minimums. Then, Tommy Thompson, the minority leader and soon to be anointed as Earl's opponent in the gubernatorial election, secured passage of a series of amendments to further toughen the bill. Most notably, Thompson introduced a school-zone provision, which increased the maximum sentence by five years for cocaine distribution within a thousand feet of a school building. The provision's drafting file indicates that the concept had been borrowed—like so much else in Wisconsin

drug law—from federal precedent; the Controlled Substances Penalties Amendments Act had also included a similar school-zone enhancement. A large share of the Wisconsin Legislature's drug-control efforts over the next four years would be devoted to extending this protected-zone concept in various ways.

The Assembly adopted the toughened cocaine bill by an overwhelming 94–4 margin, and, in an election-year special session, the Senate had no stomach for a fight. Adelman's motion to strip the mandatory minimums from the bill failed, and the Assembly's version became law in short order.

The 1986 cocaine law established the template for the way the legislature would fight the War on Drugs over the coming years. Despite the turn to increased harshness, Wisconsin law never returned to the indiscriminate toughness of pre-UCSA days. Rather, Wisconsin continued to distinguish sharply between distribution and simple possession, and between heroin and marijuana. If the UCSA's sentencing structure can be analogized to a house, several additions have been completed since 1972, but much of the original architectural scheme is still apparent.



Even simple possession of marijuana saw a severity increase, with the maximum sentence raised to six months for a first offense and one year for a second. This reflected a national trend in the late 1980s to try to ensure greater accountability for all drug offenses, no matter how minor.

Still, the structure has become rather ungainly. As printed in the Wisconsin Code, the UCSA's sentencing provisions grew from a mere three pages in 1985 to seven by 1997.

In 1988, the legislature essentially normalized the 1986 cocaine sentencing system as the general system for all drugs of concern. Leading the charge were Assembly Democrat Peter Barca from Kenosha, which was always among the state leaders in number of drug arrests, and Republican Attorney General Donald Hanaway, who had promised to focus on drugs after his election in 1986. Their bill extended the weight-based approach from cocaine distribution to heroin, methamphetamine, LSD, and

marijuana, with six-month and one-year mandatory minimums associated with higher-volume distribution. Additionally, the five-year school-zone enhancement for cocaine distribution was extended to all controlled substances. Even simple possession of marijuana saw a severity increase, with the maximum sentence raised to six months for a first offense and one year for a second. This reflected a national trend in the late 1980s to try to ensure greater accountability for all drug offenses, no matter how minor. At about the same time, Congress was adopting a five-year mandatory minimum for simple possession of crack.

By now, the tough-on-drug laws were coming fast and furious. In 1989, the legislature expanded the school zone law yet again. First, the protected zones were extended to include parks, public pools, youth and community centers, and school buses. Then, a three-year mandatory minimum was added to the penalty for distributing heroin, cocaine, or marijuana in any of the protected zones (or just one year for a small quantity of marijuana). And, as if the prison terms were not enough, the legislature also mandated 100 hours of community

service and a loss of driver's license for protected-zone violations. Included in the biennial budget bill, these changes were able to avoid a potentially fatal referral to Lynn Adelman's Judiciary Committee.

But these amendments to the school-zone law proved only a preliminary foray by the 1989–1990 legislature into the drug arena. National polls were indicating that drugs had become the nation's number one public concern, and individual legislators responded by introducing a multitude of new bills on the topic. Pressure for a major new reform package came particularly from two directions. Initially, three Democratic legislators began to press for Governor Thompson to call a special session of the legislature to adopt increased penalties for "drug kingpins." As they put it in a letter to the governor, "While we properly spend a lot of money on drug education to prevent people from becoming abusers, it is clear that a tougher focus on the drug pusher is long overdue." With the expansion of the school-zone law less than three weeks old, the letter may have slightly stretched the meaning of "long overdue," but it is fair to say that the proponents had in mind an extraordinary ratcheting up of penalties for the highest-volume traffickers; their minimums would be upped from 1 to 10 years and their maximums from 15 to 30. The legislators' concerns specifically focused on cocaine, which was said to account for over half of the value of all illegal drugs sold in Wisconsin. But why a special session? Sen. Joseph Andrea, one of the three proponents, publicly cited a desire to circumvent Lynn Adelman's Judiciary Committee. In any event, Governor Thompson, never one to allow the Democrats to outflank him to the right on crime issues, did call a special session in the fall of 1989.

A second key initiative was the Task Force for a Drug Free Milwaukee, which was established in September 1989 and cochaired by a pair of Democrats, U.S. Sen. Herb Kohl and Milwaukee's fiery young mayor, John Norquist. The task force focused on obtaining enhanced funding for drug education, treatment, and enforcement efforts, but also called on the legislature to increase penalties. "Drug treatment is important and needed, but not enough," the task force opined. "If we are to be successful, we urgently need a combination of drug enforcement,

prevention, education, and treatment programs."

The work of the task force proceeded parallel to the legislature's special session in the fall of 1989 and early winter of 1990. A Milwaukee prosecutor acted as a liaison between the two efforts and helped to ensure that the law finally passed in Madison in January would embody many of the task force's priorities, including longer sentences for drug traffickers.

Was all of this just a matter of crass politics? It was certainly disingenuous to suggest that the legislature had been ignoring penalties, and perhaps ill-advised to adopt a fifth wave of sentence increases in less than four years—much too soon for anyone to know the costs and benefits of the earlier get-tough efforts. There can be little doubt that political considerations must have figured prominently in many legislators' minds as they put together and enacted the special-session drug law.

On the other hand, putting the superficial political posturing to one side, there were good reasons for Wisconsinites to view cocaine with increasing concern over the course of the 1980s. The 1986 Cocaine Task Force found that the drug had become much cheaper and more readily available in Wisconsin beginning in 1982, and documented corresponding sharp increases in cocaine-related overdose deaths and emergency room admissions by the mid-1980s. Moreover, cocaine trafficking was becoming a significant quality-of-life issue in some Wisconsin communities in this time period. The Milwaukee Police Department set up a new "Community Against Pushers" hotline in October 1984 and within six months had received about 1,300 drug-trafficking complaints, the vast majority of which related to cocaine dealing. Janine Geske, who served at the time as an elected circuit court judge in Milwaukee, recalls hearing a great deal of frustration from community groups over drug-related crime. These groups saw firsthand the adverse effects of drug houses, such as increased muggings in the neighborhood, and worked to draw police attention to the problem. Even when the police took action, however, group members were often disappointed to see the dealers out on bail shortly after arrest and ultimately receiving probationary sentences. Frustrated by such seeming impunity, many Wisconsinites demanded tougher penalties.

When the legislature scheduled a public hearing on the special-session bill, only one hour was initially set aside for public comment, but the length grew to nearly five hours due to the unexpectedly large number of people who turned out to voice their opinions, mostly in favor of stiffer sentences.

In any event, whatever their actual necessity, the complexity and ambition of the special session reforms were beyond doubt. Among other things, they required schools to adopt disciplinary policies for drug violations by students, regulated the use of electronic communication devices on school premises, required juvenile courts to impose additional penalties in drug cases, made it easier for the government to seize the property of drug offenders, criminalized the use or possession of drug paraphernalia, criminalized the attempted possession of drugs, criminalized the use of a juvenile for drug distribution, established a drug court in Milwaukee County, authorized the adoption of ordinances by local government imposing civil penalties for marijuana possession, and facilitated the use of electronic surveillance against drug suspects.

In the sentencing area, the special session added new layers to the weight-based severity scheme, introducing enhanced penalty ranges for higher-volume distributors. These reforms were in line with the calls for tougher sentences for “drug kingpins,” which had been the principal focus of the legislators who requested the special session. The special session also created a new sentence enhancement for the use of public transit as part of a drug distribution offense.

But the special session’s most important sentencing reform was directed specifically to the perceived menace of crack. Previously, Wisconsin law had

recognized no difference between the powder and crack forms of cocaine. Now, however—once again following the federal lead—Wisconsin adopted much tougher penalties for crack. If the 1986 law had moved cocaine from the severity level of marijuana to nearly that of heroin, the 1990 law then moved crack well beyond even heroin. Indeed, as indicated in the table on this page, for any given level of crack, a person might need 20 to 40 times as much powder to trigger the same statutory minimum prison term. Although this was not as sharp a disparity as the federal system’s infamous 100:1 ratio, it nonetheless signaled dramatically different attitudes toward the two forms of cocaine. Also noteworthy was the absence of any triggering quantity for the one-year minimum—distributing any amount of crack, no matter how small, would bring at least one year behind bars.

Yet, amid all of this toughening, the 1990 drug-sentencing law included one notable softening provision, as Sen. Lynn Adelman continued his tenacious resistance to mandatory minimums. After the bill passed the Assembly, a conference committee was formed to make modifications necessary to secure approval in the Senate. Adelman sat on the committee, as did his colleague Gary George, the powerful African-American Democrat from Milwaukee who shared some of Adelman’s reservations about tough-on-crime legislation. At Adelman’s behest, George had a safety valve added to the bill:

“Any minimum sentence under this chapter is a presumptive minimum sentence. . . . [T]he court may impose a sentence that is less than the presumptive minimum sentence or may place the person on probation only if it finds that the best interests of the

community will be served and the public will not be harmed and if it places its reasons on the record.” Thus modified, the bill passed the Senate unanimously and the Assembly 89–9. The presumptive minimum provision seemed to attract little attention, and it is unclear whether many of the legislators who voted for the 1990 law were even aware of this brief, last-minute addition to a long bill. ■

Triggering weight of drugs for statutory minimums, 1990 law

DRUG	1 YEAR	3 YEARS	5 YEARS	10 YEARS
Crack cocaine	>0g	>3g	>10g	>40 g
Powder cocaine	>25g	>100g	>400g	>800g
Heroin	>10g	>50g	>200g	>400g