deterrence of criminal activity. Additionally, a sentencing regime dependent upon upward departures is likely to result in wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

Given the concerns discussed above, we suggest that the Commission's present proposal for merging section 2N2.1 into section 2F1.1 be coupled with an amendment of section 2F1.1(b)(1) and a new Application Note to section 2F1.1. The proposed new language should give instructions consistent with the Ninth Circuit's approach in *Cambra*, and, more generally, with the principle that subverting the regulatory process by defrauding authorities causes a *per se* "loss" to the public that can fairly be approximated for purposes of section 2F1.1(b)(1) by resultant gain. In addition, the new language should recognize that a minimum guideline increase is needed for every case where a regulatory scheme protects the public health or safety.

The following language is an example of how appropriate guidance could be formulated:

Amend section 2F1.1(b)(1) to provide at the end thereof:

In cases in which fraud on regulatory authorities is the gravamen of the fraud, as opposed to cases of more conventional consumer fraud involving direct economic loss to identifiable victims, "loss," for purposes of subsection (b)(1), should be measured by the gross amount received or expected from the enterprise facilitated by the fraud. Where the regulatory scheme violated protects the public health or safety, an increase under this subsection shall be no less than 4 levels.

Add an Application Note to section 2F1.1 to provide:

In pervasively regulated areas, regulatory authorities protect the public's interest in safe, effective and reliable products and services. For purposes of subsection 2F1.1(b)(1), an example of fraud on regulatory authorities would be making false or misleading statements in a matter within the jurisdiction of the Food and Drug Administration in order to secure or maintain regulatory approval, to divert the attention of investigators from areas of noncompliance, or otherwise to facilitate the distribution or use of nonconforming products. Another example would be taking affirmative steps to evade detection in the first instance, such as dealing exclusively or primarily in cash, operating at clandestine business premises, assuming fictitious names, and adopting other measures of stealth.

The above suggestion is, of course, preliminary and may depend upon further action by the Commission in the area of guideline simplification and our own further consideration of these issues. It represents one option for addressing the problems discussed above, but the Department will continue to address these issues as the broader question of possible revision of the fraud guideline is considered. In addition, there may be a need for further refinement to address those relatively few food and drug offenses that are prosecuted as misdemeanors -- that is, where a specific intent to defraud or mislead is not required for conviction. *See, e.g., United States v. Park*, 421 U.S. 658, 672-73 (1975); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

Child Sex Offenses

Amendment 1

The Commission has published proposed amendments for comment in response to the recently enacted "Sex Crimes Against Children Prevention Act of 1995." In general, we believe that the proposed amendments are responsive to the statutory directives.

Amendment 1 addresses section 2 of the Act, which directs the Commission to increase the base offense level for offenses under sections 2251 and 2252 of title 18, United States Code (producing or advertising child pornography and trafficking, receiving, or possessing child pornography) by at least two levels. The Commission proposes increasing the offense level under section 2G2.1 (for producing child pornography and related offenses) from level 25 to 27, 28, or 29. Amendment 1 also proposes increasing the offense level under section 2G2.2 (for trafficking in or receiving child pornography and related offenses) from level 15 to 17, 18, or 19; and the offense level under section 2G2.4 (for possessing child pornography) from level 13 to 15, 16, or 17.

While a two-level increase would comply with the statutory directive, there may be cases where a greater increase is needed. We urge the Commission to pay special attention to offenses involving the distribution of child pornography for other than pecuniary purposes and the production of child pornography. In this regard, the results of the study required by section 6 of the Sex Crimes Against Children Prevention Act should be instructive.

Amendment 1 also implements section 3 of the Act, which directs the Commission to increase the offense level by at least two levels for advertising, trafficking in, receiving, or possessing child pornography if a computer was used to transmit the notice or advertisement or to transport or ship the visual depiction. The amendment would provide an enhancement of two,

three, or four levels for offenses sentenced under sections 2G2.2 and 2G2.4. The use of computers to distribute child pornography has enabled violators to reach a large audience instantaneously and has made the offenses more difficult to detect. The results of the Commission's study should be instructive as to whether more than a two-level increase in the applicable offense levels is appropriate.

The Commission has invited comment as to whether section 2G2.1 should be amended to add an enhancement for the use of a computer to solicit the participation of minors in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of section 2251(c)(1)(B). While the Sex Crimes Against Children Prevention Act directed the Commission to provide at least a two-level increase for offenses involving the computer advertising of child pornography in violation of section 2251(c)(1)(A), it did not direct the Commission to provide an enhancement for computer advertising to solicit minors for the purpose of producing child pornography in violation of section 2251(c)(1)(B). We believe that the use of computers for soliciting minors in violation of this latter provision is equally worthy of an increased sentence.

However, to provide an increase under the current guideline structure would mean that computer advertising to solicit minors for the purpose of producing child pornography would have a higher offense level than actually producing the child pornography. *See* §2G2.1. Such a result would produce disproportionality in sentencing in our view. An increase applicable both to the production of child pornography, which may be called for independently, and the use of computers to solicit minors would remedy this proportionality problem. However, the sentences produced by this scheme would be trumped by the 10-year statutory maximum in too many cases, particularly in light of the four-level increase applicable to offenses involving children under 12 years of age. Thus, we urge the Commission in studying sentences relating to the sexual exploitation of children to consider whether the ten-year statutory maximum (15 years with a five-year mandatory minimum for repeat offenders) for violations of section 2251 is adequate. This section provides the same penalties as offenses involving the distribution and receipt of child pornography under section 2252 -- offenses that may be less serious than the production of child pornography.

Finally, the Commission has invited comment on whether the guidelines applicable to the sexual exploitation of minors should be amended to indicate that an upward departure may be warranted if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense. We favor substantially increased sentences for repeat offenders, particularly in light of the statutory increase for repeat offenders and its limitation to prior federal offenses. However,

we do not believe that commentary inviting departures is sufficient or that it will contribute toward the goal of reducing unwarranted sentencing disparity. The Commission should study repeat child pornography and child sex offenses and should provide a guideline enhancement that at least meets the degree of increase mandated by statute but that would also apply to repeat offenders whose prior offenses violated State law. It is our view that the need for incapacitation and deterrence is particularly great regarding repeat offenders in the area of child pornography and child sex offenses and that the guidelines should provide a significant increase in the sentence.

Amendment 2

Amendment 2 responds to the directive in section 4 of the Sex Crimes Against Children Prevention Act. It directs the Commission to provide at least a three-level increase for offenses under section 2423(a) of title 18, United States Code, which prohibits the interstate transportation of a minor with the intent that the minor engage in prostitution or criminal sexual activity. The Commission has presented two options. The first raises the base offense level under section 2G1.2 from level 16 to 19, 20, or 21. The second accomplishes this goal but combines section 2G1.2 with section 2G1.1, which addresses transportation for the purposes of prostitution or prohibited sexual conduct generally.

Although Option 2 has some advantages, we question whether it is wise to promulgate a major revision of sections 2G1.1 and 2G1.2 before the Commission can evaluate the study required by section 6 of the Act in conjunction with its simplification project. We are concerned that the many cross-references in section 2G1.2, which would be incorporated into the combined guideline, may be confusing. In particular, we question to what extent sentences under section 2G1.2 are imposed in keeping with these cross-references. Thus, we would recommend simply complying with the statutory directive regarding offenses under section 2423(a) and determining as part of the guidelines simplification project whether consolidation of the two guidelines is advisable.

We would be pleased to provide further assistance to the Commission regarding these and other areas of the guidelines.

Sincerely,

Mary Frances Harkenrider

Mary Frances Harkenrider
Counsel to the
Assistant Attorney General

[13]

025-96

National Grocers Association

March 6, 1996

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information

RE: **Proposed Revisions of Sentencing Guidelines for United States Courts; Food and Drug Offenses, 61 Fed. Reg. 79 (Jan. 2, 1996)**

Dear Sir/Madam:

These comments are submitted on behalf of the National Grocers Association (N.G.A.), representing the retail and wholesale grocers who comprise the independent sector of the food distribution industry. This industry segment accounts for nearly one-half of all food store sales in the United States. N.G.A. members are especially opposed to the United States Sentencing Commission's proposal on food and drug offenses published in the January 22, 1996, Federal Register, because the present sentencing guidelines for the Federal Food, Drug and Cosmetic Act (FFDCA), Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) violations are more than adequate.

The Commission's proposal will have unfair and serious negative consequences for the executives and employees of retail and wholesale food distribution companies, as well as the business entities themselves. Rather than sentencing individuals convicted of violating the FFDCA, the FMIA, and the PPIA under the current food and drug Guideline, §2N2.1, the Commission proposes that persons convicted of misdemeanors under the statutes should be sentenced under the fraud Guideline §2F1.1. The increased "fraud" sentencing standard would apply to defendants who did not engage in fraudulent conduct. The Commission's proposal is a substantial deviation from the present standard that grants federal judges the discretion to impose lesser sentences for violations that are merely negligent or inadvertent.

The current Guideline §2F1.1 provides for the application of strong fraud sentencing standards when fraudulent conduct is involved. It is unfair to apply the fraud standard to nonfraudulent conduct. N.G.A. strongly opposes its application in food and drug cases where fraud is not a factor. The effect of the Commission's proposal would be to eliminate judicial discretion by imposing §2F1.1 jail sentences and excessive fines for misdemeanor offenses. There is no record or data that justifies the Commission's proposed change.

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[1327]

Under §2F1.1, the Commission would permit an allowance to be made for increased penalties in cases involving conscious or reckless risk of bodily injury. The proposal does not indicate that judges would be allowed any of their present appropriate discretion to issue lower or reduced sentences where negligence or inadvertent violations occur. Under current provision §2N2.1, the judge may have the discretion to impose penalties ranging from several hundred dollars to $5,000 for such violations, but under §2F1.1 those penalties against individuals are most likely to require fines of anywhere from $5,000 to $100,000. In addition, whereas probation may have been granted under §2N2.1, §2F1.1 would require actual incarceration of at least one year. Business entities are now subject to monetary penalties at the judge's discretion under §2N2.1, but under §2F1.1 those money penalties imposed would begin in the hundreds of thousands of dollars. This clearly illustrates the unfairness of imposing the fraud standard in all food and drug law violation cases. Judges should be permitted the flexibility to impose monetary penalties and jail sentences in their discretion, both up and down.

In conclusion, N.G.A. strongly believes that the sentencing guidelines under §2N2.1 should remain in effect. This will allow judges sentencing discretion in food and drug law cases where mere negligence, and not intentional or fraudulent conduct, exists. N.G.A. urges the Commission to eliminate the proposed change in sentencing provisions for food and drug offenses from any recommendation that is submitted to Congress. The current sentencing guidelines contained in §2N2.1 and §2F1.1 provide sufficient deterrence and judicial guidance regarding food and drug offenses.

The National Grocers Association appreciates the opportunity to provide the views of its members on this most important issue and would be pleased to provide any additional information that the Commission may require in its further consideration.

Sincerely,

Thomas F. Wenning

Thomas F. Wenning
Senior Vice President and
General Counsel

TFW/sh

NAWGA
National-American Wholesale Grocers' Association

IFDA
International Foodservice Distributors Association

THE Food Distributors Association
Educational Services • Government Relations

026-96

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March 6, 1996

HAND DELIVERED

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Information

Re: Proposed Amendment To Sentencing Guideline On Food and Drug Offenses

Dear Sir or Madam:

This comment is submitted by the National-American Wholesale Grocers' Association and its foodservice partner organization, the International Foodservice Distributors Association (NAWGA/IFDA) in response to the United States Sentencing Commission's (Commission) January 2, 1996 Federal Register notice proposing to eliminate the current "regulatory" Guideline that is applicable to offenses committed under the Federal Food, Drug, and Cosmetic Act (FFDCA), the Federal Meat Inspection Act (FMIA), and the Poultry Products Inspection Act (PPIA). United States Sentencing Commission, Guidelines Manual, § 2N2.1 (Nov. 1995). See 61 Fed. Reg. 79, 83 (1996) (hereinafter "the Proposal").

NAWGA/IFDA is an international trade association comprised of food distribution companies which primarily supply and service independent grocers and foodservice operations throughout the U.S. and Canada. NAWGA/IFDA member companies supply food and related products to independent supermarkets, convenience stores, restaurants, hotels, schools, hospitals, and military bases. Our 300 member companies operate more than 1,200 distribution centers and employ more than 350,000 people. NAWGA members supply 56% of the groceries sold in the U.S.; IFDA members annually sell $33 billion in food and related products. Because members of NAWGA/IFDA are regulated under the FFDCA, the FMIA, and the PPIA, statutes authorizing criminal penalties for regulatory offenses, NAWGA has a keen interest in the Commission's January 2 Proposal.

201 Park Washington Court, Falls Church, VA 22046-4521 1-703-532-9400 FAX: 1-703-538-[illegible]

[1347]

NAWGA/IFDA strongly opposes the Proposal to delete USSG § 2N2.1. If the Proposal is adopted, all persons convicted of violating the FFDCA, the FMIA, or the PPIA would be sentenced under the "fraud" guideline (USSG § 2F1.1) even if the defendant is not charged with fraudulent conduct. In addition, the Proposal would, for the first time, establish a guideline for corporations and other organizations convicted of "strict liability" offenses under the above federal food safety statutes.[1/] Without benefit of any prior input from the industry groups most affected, the Proposal proposes to dramatically increase the likelihood of unjustified jail sentences and massive fines on individuals and corporations convicted of misdemeanor "strict liability" offenses. Although NAWGA/IFDA supports, and will continue to support, strict sentences against individuals and corporations convicted of felony food offenses where fraudulent conduct is established, similar stiff sentences for misdemeanor "strict liability" food offenses are simply not warranted.

A. THE PROPOSAL'S IMPACT ON NAWGA/IFDA MEMBERS

The Proposal will potentially have serious and unwarranted ramifications for NAWGA/IFDA's members and their executives and employees. NAWGA/IFDA's members are primarily regulated under the FFDCA, the FMIA, the PPIA and their implementing regulations. These statutes provide requirements intended to ensure that food is wholesome and safe and prepared, packed, and held in sanitary conditions. These mandates, if violated, subject the offending persons to a variety of regulatory and judicial sanctions. The most extreme of these sanctions is a criminal prosecution.

The FDCA establishes industry-wide safety and quality standards for all foods except meat and poultry. See 21 U.S.C. § 301 et. seq. The United States Food and Drug Administration (FDA) has the regulatory authority to implement and enforce the requirements of the FFDCA. As a means of promoting food safety, the FDA requires that all foods subject to the FFDCA be manufactured in compliance with current good manufacturing practices (CGMPs). The CGMPs establish controls for all aspects of food manufacturing, including production and process controls, storage and distribution controls, and sanitation controls. 21 C.F.R. Part 110.

The FMIA and PPIA sets safety and quality standards for meat and poultry products. See 21 U.S.C. §§ 601 et. seq. (FMIA); 21 U.S.C. § 451 et. seq. (PPIA). The United States Department of Agriculture (USDA) has regulatory oversight over the production and distribution of these products. In the case of processing operations, USDA fulfills its obligation by conducting

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[1] Currently, such organizations are fined by federal judges outside the confines of the Federal Sentencing Guidelines.

daily inspections at the plants. 21 U.S.C. §§ 603 - 608 (FMIA), 21 U.S.C. § 455 (PPIA). Although wholesaler's and distributors are generally exempt from daily inspection, they are required to properly label all food products and hold and distribute all food products under sanitary conditions. See 21 U.S.C. §§ 601(m)(4), (n), and 610 (FMIA); 21 U.S.C. §§ 453(g)(4), (h), and 458 (PPIA).

The failure to comply with any of the above requirements may lead to an FDA or an USDA determination that a food product is adulterated or misbranded in violation of the FFDCA, the FMIA, or the PPIA. Any person who manufactures and distributes an adulterated or misbranded product may be subject to criminal penalties. 21 U.S.C. §§ 331 and 333(a) (FFDCA); 21 U.S.C. § 610 and 676(a) (FMIA); 21 U.S.C. §§ 458 and 461(a) (PPIA). As in the case of sanitation violations, a food product may be found to be adulterated or misbranded even though it is wholesome and safe.

Wholesalers and distributors and their officials may be held criminally liable despite the fact that they had no intention to violate the FFDCA, the FMIA, or the PPIA, or even knew these statutes were being violated. Defendants have been criminally charged under the "strict liability" doctrine set forth in United States v. Park, 421 U.S. 658 (1975), which upheld the authority of FDA to obtain a conviction against a corporate officer or organization without having to prove that the defendant had any mens rea.

The Park case demonstrates how the sometimes technical requirements of federal food safety statutes have lead to criminal prosecutions. In Park John Park (whose conviction was upheld in the case), had consulted with legal counsel upon hearing that his food company's Baltimore warehouse had sanitation problems. Mr. Park, who lived and worked in Philadelphia, was assured that the person who controlled that facility was investigating the situation and that the matter was apparently under control. However, the FDA subsequently brought charges against Mr. Park alleging that food had become adulterated because of the insanitary conditions. The Supreme Court upheld Mr. Park's conviction even though Mr. Park did not order the FFDCA violations or even know they were occurring. The Court found that Mr. Parks could be convicted because, as President, he had the power to prevent the violations from occurring. The Court stated that he had a positive duty to implement measures to ensure that his company did not violate the law. If those measures were inadequate, he could be criminally prosecuted.[2/]

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[2] The government has also brought misdemeanor "strict liability" criminal prosecutions against low level employees of large companies. See United States v. General Nutrition, Inc., 638 F. Supp. 556 (W.D.N.Y. 1986) (misdemeanor criminal prosecution properly initiated under FFDCA against a store clerk at a retail outlet who made promotional statements about products sold at the

It is easy to realize that the type of prosecution brought in the Park case bears no resemblance to a fraud case where FDA or USDA allege that someone violates a federal food safety statute with the intent to defraud or mislead the government, a customer, or a consumer. See 21 U.S.C. § 333(a)(2) (FFDCA); 21 U.S.C. § 676(a) (FMIA); 21 U.S.C. § 461(a) (PPIA). In the former type of case, FDA and USDA prosecute people with no allegation that the person intended to violate the FFDCA, the FMIA, or the PPIA, or even knew about the violation. In the latter case, FDA and USDA charge a person with a crime based on traditional mens rea where the defendant knew that he was participating in illegal conduct.

NAWGA/IFDA is not proposing that misdemeanor (strict liability) cases under the food safety statutes are never warranted.[3/] However, we fail to understand the logic of having persons convicted under these statutes' misdemeanor provisions sentenced the same way as persons who have violated the law with the specific intent of defrauding someone.

Although there are thousands of companies in the food wholesaler and distributor industry, there have been remarkably few criminal prosecutions brought against such companies or their officials. Nevertheless, NAWGA/IFDA is quite concerned about the potential impact on its members if the proposal is adopted. FDA is committed to vigorous enforcement of the strict liability criminal provisions of the FFDCA. For instance, in 1990 FDA stated that the deterrent power of misdemeanor strict liability violations could not be underestimated. NAWGA/IFDA has no quarrel with that proposition. However, NAWGA/IFDA strongly believes that the punishment for these violations should be commensurate with the violation. A person or company should not receive felony sanctions for strict liability violations.

If the Commission's Proposal is adopted, sentencing judges will almost certainly be compelled to impose a term of imprisonment for misdemeanor "strict liability" food offenses, particularly in cases where a large volume of product is implicated. This is due to the fact that the "fraud" guideline sets a sentence according to the "loss" to the victims. Further, the proposal will establish a guideline for a fine to be imposed on corporations and other organizations in regulatory (non-fraud) cases. Consequently, courts will be obligated to increase fines they impose on corporations and other organizations in the food wholesaler and distributor industry.

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store).

[3] Under the FMIA or the PPIA, it is a felony to distribute or sell adulterated product, even if there is no intent to adulterate or knowledge that the product is indeed adulterated. 21 U.S.C. § 676(a) (FMIA); 21 U.S.C. § 461(a) (PPIA)

Such stiff punishments, for non mens rea criminal conduct, would have a severe impact on food wholesalers and distributors and their officials. A jail sentence would be devastating for a corporate executive or official with a respectable career, family, and a previously untarnished background. Moreover, as many food wholesalers and distributors are small businesses, massive fines would be crippling.

B. THE PROPOSAL LACKS A VALID BASIS

In support of the Proposal, the Commission referenced a two-year study conducted by the Commission's Food and Drug Working Group (Working Group). See 61 Fed. Reg. 83 (1996). However, this Working Group did not propose to eliminate USSG § 2N2.1. Moreover, despite conducting a study of cases sentenced under USSG § 2N2.1, the Working Group never identified even one case in which a judge, a prosecutor, a defense attorney, or a defendant complained that the sentence imposed under USSG § 2N2.1 was inappropriate.[4/]

In addition to the Working Group's study, NAWGA/IFDA is unaware of any case in which anyone sentenced under USSG § 2N2.1, the sentencing court, or even the government displayed dissatisfaction with the sentence imposed. In sum, all empirical evidence strongly suggests that USSG § 2N2.1 is working quite well.

NAWGA/IFDA recognizes, and has no quarrel with, the Commission's laudatory goal to simplify the Sentencing Guidelines. See 60 Fed. Reg. 49,316 (Sept. 22, 1995). However, a desire to simplify the Guidelines does not justify a rush to delete USSG § 2N2.1. Nor should a desire to simplify the Guidelines form a basis to fit "strict liability" misdemeanor criminal cases into a Guideline that was promulgated to deal with fraud.

NAWGA/IFDA believes that the Commission's stated goal to simplify the Guidelines would be furthered by maintaining and possibly expanding USSG § 2N2.1. There are "strict liability" prosecutions commenced under statutes other than those now explicitly implicated by USSG § 2N2.1.[5/] The Commission might want to republish its Proposal to expand USSG § 2N2.1

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[4] In fact, the Working Group stated that "the issue remains whether [§ 2N2.1] as currently drafted provides for adequate fines. . . ." United States Sentencing Commission Food and Drug Working Group Final Report at 19 (Feb. 1995).

[5] See United States v. Luv N' Care International, Inc., 897 F. Supp. 941 (W.D. La. 1995) (prosecution initiated under the Federal Hazardous Substances Act, a statute as to which the Commission has not established a Guideline).

to cover other regulatory statutes, including those statutes that are not now covered by an existing Guideline. Alternatively, the Commission might consider a new Guideline that would cover all regulatory violations where fraud is not involved.

C. THE PROPOSAL IS CONTRARY TO THE PURPOSE OF THE GUIDELINES

The Commission has received a statutory mandate to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). In that regard, Congress intended the Commission to periodically review judicial decisions and revise the Guidelines when sentencing disparities are found to exist. See Braxton v. U.S., 500 U.S. 344, 348 (1991); Neal v. U.S., 116 S. Ct. 763, 766 (1996) ("Congress intended the Commission's rulemaking to respond to judicial decisions in developing a coherent sentencing regime"). NAWGA/IFDA is unaware of any study or finding suggesting that unwarranted sentencing disparities occur under USSG § 2N2.1. In fact, most courts have invariably imposed low fines on FDA and USDA regulated organizations, to permit the entities to spend their money on remedial measures.

Further, the Proposal seems wholly inconsistent with the Commission's General Application Principles. See USSG Ch. 1, Pt. A § 4(f), which sets forth guiding principles for the Commissions's promulgation of guidelines concerning regulatory offenses. It states that a typical guideline for a so-called "regulatory offense" will provide a low base offense level. Nevertheless, under the Proposal, persons convicted of regulatory violations under the food laws would be sentenced according to the monetary loss incurred by "victims." NAWGA/IFDA sees no reason why the Commission should depart from its General Application Principles by deleting USSG § 2N2.1 until the Commission examines whether "loss" should be a relevant sentencing factor in all regulatory offenses.

Application of USSG 2F1.1, rather than USSG § 2N2.1, to misdemeanor food offenses would simply be inequitable. One of the primary purposes of the Guidelines is to preserve proportionality in sentencing. See Neal v. U.S., 116 S. Ct. at 767. See also, Mistretta v. U.S., 488 U.S. 361, 374 (1989); United States Sentencing Commission, Guidelines Manual at 2 (Nov. 1994) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"). Accordingly, the Commission was directed to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

As explained above, many prosecutions brought against officials and corporations regulated by FDA and USDA involve only technical violations of the food safety statutes and do not present a true risk of harm to the public or the consumer. Accordingly, under USSG § 2N2.1, courts have traditionally imposed no jail sentences for such "non-serious" crimes. However, applying the "fraud" guideline to misdemeanor food offenses will certainly increase the potential for incarceration, possibly reaching jail sentences at the statutory maximum. Certainly, Congress did not intend the Commission to mandate stiff sentences on relatively minor criminal offenses.

D. THE PROPOSAL IS INCONSISTENT WITH OTHER ANALOGOUS GUIDELINES

If the Proposal is adopted, it will establish, for the first time, a guideline for fines to be imposed on corporations and other organizations convicted of strict liability food offenses. As such, the Proposal is inconsistent with the Commissions's treatment of other similar regulatory guidelines.

Like USSG § 2N2.1, the Commission has promulgated regulatory offense guidelines for individuals convicted for environmental crimes. See USSG § 2Q. The USSG § 2Q Guidelines encompass misdemeanor offenses, and in some cases, strict liability environmental offenses. See e.g., 33 U.S.C. § 411 (sentenced under USSG § 2Q1.3). There are close parallels between the FFDCA, the FMIA, the PPIA and the environmental statutes in terms of their purposes, effects, deterrent value, and statutory structure. A careful analysis should be conducted comparing how the federal food safety statutes do and do not compare to the environmental laws. Where similar, it is reasonable to suggest that the Sentencing Commission treat similarly the two categories of cases.

However, the Commission has not proposed to include environmental cases involving fraud under the fraud guideline, USSG § 2F1.1.[6] Nor has the Commission promulgated

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[6] Indeed, in United States v. Carpenter's Goldfish Farm, 998 F.2d 692 (9th Cir. 1993), the Ninth Circuit vacated a sentence in an environmental case. The defendant had committed two offenses that were subject to sentencing. One of the offenses was properly subject to USSG § 2F1.1 because fraud and deceit was involved. However, the other offense (a strict liability environmental crime) was not covered by any Guideline. The Court vacated the sentence because the district court had imposed sentence for the strict liability offense by employing the Guideline applicable to felony environmental offenses. This case reinforces NAWGA/IFDA's position that regulatory strict

organizational guidelines for environmental offenses. NAWGA/IFDA believes that the Commission should defer any modification to USSG § 2N2.1 until the Commission has studied the extent to which FFDCA, FMIA, and PPIA cases should be sentenced under the same basic principles as environmental cases. The Commission has not asserted any ground to treat strict liability food offenses different than strict liability environmental offenses. As both types of offenses closely parallel each other, so too should their respective guidelines.

E. CONSULTATION WITH OUTSIDE GROUPS IS ESSENTIAL

In promulgating or revising guidelines, the Commission is required to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system." 28 U.S.C. § 994(o). The Commission's Proposal was apparently not preceded by any dialogue with the industry (or their legal representatives), academicians, public interest groups, or other organizations which have a wealth of knowledge in this area. The limited comment period to respond to the Proposal is simply inadequate for this purpose.

With respect to environmental offenses, the Commission has met its "consultation" obligations by forming an advisory working group composed of government officials, law professors, lawyers in private practice, in-house corporate lawyers, and others. See e.g., 58 Fed. Reg. 65,764 (1993) (Commission established independent working group to promulgate organizational guidelines for environmental offenses). Similarly, NAWGA/IFDA submits that the Commission should form an advisory working group consisting of individuals from the government, defense bar, business community, and academia who specialize in matters relating to the FDA and USDA. Such members would provide valuable, first-hand input regarding the adequacy of regulatory guideline USSG § 2N2.1.

F. CONCLUSION

For all the reasons discussed above, NAWGA/IFDA urges the Sentencing Commission to refrain from adopting the Proposal, insofar as it would delete USSG § 2N2.1. Further, NAWGA/IFDA believes the Sentencing Commission should establish an advisory working group, partly composed of members of the affected industry, to ensure that misdemeanor FFDCA, FMIA, and PPIA offenses are sentenced fairly under either USSG § 2N2.1 or a new guideline that would apply to all regulatory misdemeanor offenses. NAWGA/IFDA stands ready and willing

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liability misdemeanor offenses must be accorded different sentencing status than more serious felony charges. The case also demonstrates the need to have a general regulatory Guideline that will cover regulatory offenses that are not now subject to the Sentencing Guidelines.

to participate in that working group or to provide any further assistance to the Commission that it can.

We appreciate this opportunity to present our views.

Sincerely yours,

John R Block BTS.

John R. Block
President

JRB:mhc

[142]

021-96

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Malcolm C. Young
Executive Director

Marc Mauer
Assistant Director

6 March 1996

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Attention: Public Information

To the Commission:

On behalf of The Sentencing Project, an independent non-profit organization which supports sentencing reform, including decreased reliance upon incarceration and greater use of more effective alternative approaches to the problem of crime, I am pleased to submit this comment on the United States Sentencing Commission's proposed amendments to Chapter Two, Part D (Offenses Involving Drugs), specifically cocaine offenses.

In our view, the Commission took the correct position on the crack/powder cocaine issue in its Special Report to Congress, Cocaine and Federal Sentencing Policy (February 1995). I would add, for the record, what we have stated in public many times: the Commission's Special Report is one of the more carefully researched and principled documents on sentencing policy to have been produced by a government agency in recent years. It is a resource document that will withstand scrutiny in years to come. Moreover, it is clearly written and readable. We refer the press and criminal justice researchers to it often, and we make use of it with public audiences. With deep regret we observed its rejection by Congress and the executive, searching hard for evidence that those rejections were in some modest way based upon research data or empirical evidence which supported a different approach than that adopted by the Commission.

The fact that the Commission's recommendations were rejected does not preclude the Commission from adhering to its principled approach in recognizing and addressing the disparity between sentencing of crack and powder cocaine offenders in the federal courts. We encourage it to do so.

As the Commission knows, the disparity between sentencing for crack and powder cocaine offenders is one of several contributors to the over-representation of African-

Americans in the criminal justice system. Our report, "Young Black Americans and the Criminal Justice System: Five Years Later" documents that one in three young black males was under some form of criminal justice control, compared to one in four in 1989, and compared to one in fifteen white males in the same age group. We reported an increase of more than 800% for women incarcerated in state prison on drug offenses between 1986 and 1991, and, using the Commission's own data, the increasingly harsh impact of cocaine sentencing laws upon this same population. Other contributing factors to over-representation of African Americans in the criminal justice system which we cited include: patterns of arrests by police; increased arrests for some offenses; selective prosecution policies; and, overall lengthier sentences for drug offenders.

I am pleased to attach a copy of our report, which coincidentally was published in October 1995, just before Congress and the President rejected the recommendations set forth in the Commission's Special Report, as further documentation of the magnitude of the racial disparity problem in criminal justice.

While clearly there is no single solution or response to racial disparities, the Commission's Special Report was the first step by a major policy-making agency to take a stand and to propose a solution to a problem that affects --and is understood-- by many African Americans. The Commission's actions had a symbolic and leadership value that is perhaps better understood by those outside Congress and government than by those within. The problems the Commission described and attempted to remedy at the federal level are not going to go away. For these reasons we hope that the Commission will continue to address racial disparity and other issues of fundamental fairness in the same principled manner that it demonstrated with its Special Report. The integrity of the criminal justice system remains at stake.

Given that the Commission must now make a new set of recommendations, we would urge that the following be considered during its hearings and deliberations so that the issue of racial disparity is addressed as effectively as is possible under the circumstances:

1) If the sentences imposed for trafficking in a quantity of crack cocaine must "exceed the sentence imposed for trafficking in a like quantity of powder cocaine," the drug quantity ratio should reflect the de minimis difference in harm reported by the Commission. Most commentators suggest a difference not exceeding 5%, as opposed to the current 100%.

2) We recognize that Congress suggested several enhancements to punishments for crack cocaine, some are already provided for in the federal guidelines. We hope the Commission will carefully consider the extent to which the guidelines, as written, satisfy Congress's suggestions, and trust that the Commission will avoid

duplicating enhancement provisions within the guidelines. Moreover, we would respectfully submit that, since the enhancing provisions are included in the sentencing scheme, the base penalties for crack cocaine can be lowered. The enhancements provided for in the guidelines, and any that the Commission might add, will allow courts to impose longer sentences when the facts merit, eliminating any need for greater penalties for the base offense.

3) Congress's recommendations seem to have dealt mostly with enhancements and factors pertaining to longer sentences. We would urge consideration of factors which should pertain to lower sentences. Some of these would help offset some concerns about the racial impact of the crack/powder cocaine sentencing differential. Factors which should pertain to lower sentences include:

   A) the offender played a minor or subordinate role in the offense;

   B) the offender was intimidated by other actors in the crime or by economic dependency, a history of abuse, or by implied or actual threats to those dependent upon the offender. This factor would be particularly applicable to youths and women,1/ but could equally apply to males, when appropriate, based on the facts;

   C) the offender is a substance abuser or dependent person for whom treatment resources appropriate to the dependency have been essentially unavailable, for reasons beyond the offender's direct control. This factor would simply avoid penalizing the poor and inner-city minorities for whom meaningful drug treatment resources were virtually unavailable; and

   D) the offender is a substance abuser or dependent person for reasons related to the offender's prior victimization from violent crimes or abuse, or history of trauma, post-traumatic stress disorders, or stress resulting from violence in his or her community. These factors help explain substance abuse and involvement in drug trafficking among some minority and inner-city offenders, notably women, unable to escape intolerable living

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1/ Myrna Raeder, "Gender and Sentencing: Single Moms, Battered Women, and Other Sex-based Anomalies in the Gender-free World of the Federal Sentencing Guidelines," 20 Pepperdine Law Review No. 3 (1993).

conditions.2/ They certainly are as relevant to questions of intent as are the enhancing factors proposed by Congress.

Thank you for this opportunity to comment on the Commission's proposed amendments. Please feel free to contact me if we can provide additional information.

Sincerely,

Malcolm C. Young

phg
Enc.

2/ Mindy T. Fullilove and Robert Fullilove, "Violence, Trauma and Post-Traumatic Stress Disorder Among Women Drug Users," Vol. 6 Journal of Traumatic Stress No. 4 (1993); Angela Browne and Mary Harvey, "Mental Health Consequences of Interpersonal and Family Violence," Report of the Council on Scientific Affairs, American Medical Association (June 1993).

Young Black Americans and the Criminal Justice System: Five Years Later

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October 1995

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YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER

OVERVIEW

In 1990, The Sentencing Project released a report that documented that almost one in four (23%) African American males in the age group 20-29 was under some form of criminal justice supervision -- in prison or jail, on probation or parole.[1] That report received extensive national attention and helped to generate much dialogue and activity on the part of policymakers, community organizations, and criminal justice professionals.

Despite these efforts, many of the factors contributing to the high rates of criminal justice control for African American males remain unchanged or have worsened during the succeeding five years. Public policies ostensibly designed to control crime and drug abuse have in many respects contributed to the growing racial disparity in the criminal justice system while having little impact on the problems they were aimed to address.

The key findings of this report, as seen in Tables 1-7, are the following:

- Almost one in three (32.2%) young black men in the age group 20-29 is under criminal justice supervision on any given day -- in prison or jail, on probation or parole.

- The cost of criminal justice control for these 827,440 young African American males is about $6 billion a year.

- In recent years, African American women have experienced the greatest increase in criminal justice supervision of all demographic groups, with their rate of criminal justice supervision rising by 78% from 1989-94.

- Drug policies constitute the single most significant factor contributing to the rise in criminal justice populations in recent years, with the number of incarcerated drug offenders having risen by 510% from 1983 to 1993. The number of Black (non-Hispanic) women incarcerated in state prisons for drug offenses increased more than eight-fold -- 828% -- from 1986 to 1991.

- While African American arrest rates for violent crime -- 45% of arrests nationally -- are disproportionate to their share of the population, this proportion has not changed significantly for twenty years. For drug offenses, though, the African American proportion of arrests increased from 24% in 1980 to 39% in 1993, well above the African American proportion of drug users nationally.

- African Americans and Hispanics constitute almost 90% of offenders sentenced to state prison for drug possession.

The criminal justice control rates documented in this report should prove even more disturbing than those revealed five years ago. Combined with the potential impact of current social and criminal justice policies, they attest to the gravity of the crisis facing the African American community.

The current high rates of criminal justice control are also likely to worsen considerably over the next several years. In addition to the steady twenty-year increase in criminal justice populations, the impact of current "get tough" policies in particular suggests continuing increases in criminal justice control rates and increasing racially disparate impacts.

CRIMINAL JUSTICE CONTROL RATES IN THE 1990s

Our 1990 report documented shockingly high rates of criminal justice control for young African American males in particular. We find that many of the contributing factors to these high rates endure or have worsened in the intervening years. As a result, they have failed to slow the increasing rate of criminal justice control for young black males and they have contributed to a dramatic rise in the number of black women in the criminal justice system. These factors include:

- The continuing overall growth of the criminal justice system;
- The continuing disproportionate impact of the "war on drugs" on minority populations;
- The new wave of "get tough" sentencing policies and their potential impact on criminal justice populations;
- The continuing difficult circumstances of life for many young people living in low-income urban areas in particular.

1994 Criminal Justice Control Rates

The data below represent estimates of the numbers of persons in each demographic group under criminal justice control -- in prison or jail, or on probation or parole -- on a given day in 1994.[2]

• As seen in Table 1, as of 1994, 30.2% of African American males in the age group 20-29 were under criminal justice control -- prison, jail, probation, or parole -- on any given day. This represented an increase of 31% from the figures of 1989.

Table 1

1994 CRIMINAL JUSTICE CONTROL RATES

Population Group 20-29	State & Federal Prisons	Jails	Probation	Parole	TOTAL	Criminal Justice Control Rate
MALES						
White	180,915	110,585	640,956	136,620	1,069,076	6.7%
Black	211,205	95,114	351,368	130,005	787,692	30.2%
Hispanic	81,391	41,641	138,703	56,412	318,147	12.3%
FEMALES						
White	9,875	11,872	177,360	15,802	214,909	1.4%
Black	12,138	10,876	96,481	14,921	134,416	4.8%
Hispanic	3,537	4,171	36,099	6,137	49,944	2.2%

These data all examine criminal justice control rates on any given day. If we were able to examine the flow of people through the criminal justice system over the course of a year or ten-year period, the rates would obviously be much higher. Other researchers have attempted to calculate these rates. A 1987 study by Robert Tillman found that 2/3 of black males in California had been arrested between the ages of 18 and 29, double the rate for white males.[3]

These figures only reflect arrest rates through the early 1980s, well before the dramatic rise in drug arrests and criminal justice populations overall. More recently, researchers at Northwestern University have estimated that it is possible that 1/3 - 2/3 of the 100,000 poorest black male three-year olds of today will eventually end up in prison.[4]

1995 Criminal Justice Control Rate for African American Males

• Using the annual rate of increase for criminal justice populations overall from 1989 to 1994 as a basis, we have calculated the estimated rate of control of young black males for 1995 as well. As seen in Table 2, these estimates suggest that almost one in three young black men is now under criminal justice supervision on any given day. Based on average costs for various components of the criminal justice system, we estimate that the cost of criminal justice control for these 827,440 males is about $6 billion a year.

Table 2

AFRICAN AMERICAN MALE CONTROL RATES
(Ages 20-29)

Year	Number	Control Rate
1989	609,690	23.0%
1994	787,692	30.2%
1995	827,440	32.2%

Changes in Criminal Justice Control Rates, 1989-1994

• As seen below, the largest increase of the demographic groups studied in this period is for black women whose numbers increased from 78,417 in 1989 to 134,416 by 1994 and whose rate of criminal justice control increased by 78% during this period. We believe that much of this increase is due to the impact of the "war on drugs," a subject which is discussed later in this report.

Table 3

CHANGES IN CRIMINAL JUSTICE CONTROL RATES: 1989-1994 (Ages 20-29)

Population Group	1989 Control Rate	1994 Control Rate	% Increase
Males			
White	6.2%	6.7%	8%
Black	23.0%	30.2%	31%
Hispanic	10.4%	12.3%	18%
Females			
White	1.0%	1.4%	40%
Black	2.7%	4.8%	78%
Hispanic	1.8%	2.2%	18%

Changes in Hispanic Incarceration

• Because of the difficulties in obtaining accurate data on Hispanics (see "Methodology"), we cannot be certain of the extent by which this population increased within the criminal justice system. Data on imprisonment rates for Hispanics (see Table 4) indicate that the proportion of Hispanic inmates in state and federal prisons has doubled since 1980.

Table 4

HISPANIC INMATES (ALL AGES)
IN STATE AND FEDERAL PRISONS

Year	Number of Inmates	Percent of Total Inmate Population
1980	25,200	7.7%
1985	54,700	10.9%
1990	103,100	13.6%
1993	138,700	14.3%

THE OVERREPRESENTATION OF YOUNG BLACK MALES IN THE CRIMINAL JUSTICE SYSTEM

We have documented the dramatically high rates of criminal justice control for young black men. In many respects it would be quite surprising if these rates were not high, given the social and economic circumstances and crime rates in their communities.

The growth of the criminal justice system in the past twenty years has coincided with a host of economic disruptions and changes in social policy that have had profound effects on income distribution, employment and family structure. Since the 1970s, many urban areas have witnessed the decline of manufacturing, the expansion of low-wage service industries and the loss of a significant part of the middle class tax base. Real wages have declined for most Americans during this period, with a widening of the gap between rich and poor beginning in the 1980s. For black male high school dropouts in their twenties, annual earnings fell by a full 50 percent from 1973 to 1989.[5] Social service benefits such as mental health services and other supports have generally declined while the social problems that they address have been exacerbated.

The impact of these changes on the African American community has resulted from the intersection of race and class effects. Since African Americans are disproportionately represented in low-income urban communities, the effects of these social ills are intensified. As Douglas Massey and Nancy Denton have illustrated, the persistence of housing segregation exacerbates the difficult life circumstances of these communities, contributing to extremely high rates of unemployment, poor schooling, and high crime rates.[6]

Over the years many researchers have examined the extent to which racial disparity within the criminal justice system can be explained by higher crime rates among blacks or other relevant factors. Historically, there can be little doubt about the prominent role played by race in criminal justice processing, given the history of lynching in the South, the development of chain gangs, and the well-documented racial patterns involved in the imposition of the death penalty.

More recently, though, researchers have found that the evidence on these issues is mixed. While some studies have documented specific cases of racially unwarranted outcomes, much research has concluded that, with one significant exception, race plays a relatively minor role in sentencing and incarceration. Michael Tonry's review, for example, concludes that "for nearly a decade there has been a near consensus among scholars and policy analysts that most of the black punishment disproportions result not from racial bias or discrimination within the system but from patterns of black offending and of blacks' criminal records."[7] Similarly, Alfred Blumstein's research has concluded that 76 percent of the racial disparity in prison populations is explained by higher rates of offending among blacks for serious offenses.[8]

But both authors find, as Tonry indicates, that "Drug law enforcement is the conspicuous exception. Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs." [9] Blumstein concludes that for drug offenses, fully half of the racial disproportions in prison are not explained by higher arrest rates.

While scholars will continue to study the relative influence of race within the criminal justice system, several key issues should not go unaddressed in explaining these disparities. First, as noted above, it is difficult to isolate the relative influence of race and class in public policy and decisionmaking. That is, to the extent that African Americans are overrepresented in the criminal justice system, to what degree is this a function of their being disproportionately low-income?

In its comprehensive examination of the problem of violence, the National Research Council reviewed existing studies of homicide victimization and class.[10] The Council found that among low-income populations blacks had much higher rates of homicide victimization than whites but that among higher income groups, there was essentially no difference. The Council suggests that the more concentrated effects of inner-city poverty may contribute to a more serious breakdown of family and community support than in other low-income neighborhoods.

Studies of sentencing practices reveal that the current offense and the offender's prior record are the most significant factors determining a prison sentence. But if low-income youth are more subject to police scrutiny and have fewer counseling and treatment resources available to them than middle class adolescents, their youthful criminal activities will more likely result in a criminal record that will affect their chances of going to prison later on.

The most prominent example of the intersection of race and class in criminal justice processing, of course, is the O.J. Simpson case. Regardless of where one stands on his guilt or innocence, what is clear is that a wealthy and famous African American was able to assemble a very formidable defense. This is contrasted with the typical scene in almost every courthouse in cities across the country, where young African American and Hispanic males are daily processed through the justice system with very limited resources devoted to their cases.

Comparing sentencing policies in the U.S. with those of other nations sheds light on this issue as well. Although it is difficult to make comparisons across cultures, a number of studies have concluded that American sentencing policies tend to be harsher than those of many European nations, particularly regarding the length of sentence imposed for various crimes.[11] Given the relatively greater homogeneity of many European countries, one can ask whether policymakers and the public in these nations are less willing to lock up their fellow citizens for long periods of time since they view their societies as more cohesive.

IMPACT OF THE "WAR ON DRUGS"

While debate will continue on the degree to which the criminal justice system overall contributes to racial disparities, there is increasing evidence that the set of policies and practices contained within the phrase "war on drugs" has been an unmitigated disaster for young blacks and other minorities. Whether or not these policies were consciously or unconsciously designed to incarcerate more minorities is a question that may be debated. In essence, though, what we have seen are policy choices that have not only failed to reduce the scale of the problem but have seriously eroded the life prospects of the primary targets of those policies. The main elements of these policies have been the following:

Increased arrests

Arrest policies beginning in the 1980s have disproportionately affected African Americans and other minorities: first, through greatly increased numbers of drug arrests, and second, through an increased rate of minority drug arrests. Drug arrests increased dramatically in the 1980s, rising from 471,000 in 1980 to 1,247,000 by 1989.[12] As the number of arrests grew, so did the proportion of African Americans, from 24% of all drug arrests in 1980 to 39% by 1993.[13]

Some persons would contend that African Americans are arrested in larger numbers because of their higher rates of drug use and sales. There are no reliable data on the overall composition of drug sellers in the total population, but we have reasonably good data available on drug possession through the annual household surveys of the National Institute on Drug Abuse (NIDA). Their most recent survey reveals that African Americans comprise 13% of monthly drug users, compared to the 1993 arrest proportion of 39%. Even if we only consider arrests for drug possession, which should be reflective of drug use, African Americans still constitute 34.7% of such arrests. Although the NIDA surveys have some limitations,[14] the degree of disparity between drug use and drug possession arrests is of such magnitude that it clearly points to disproportionate arrest practices.

A recent analysis by James Lynch and William Sabol points to additional significant racial effects of law enforcement practices.[15] Lynch and Sabol analyzed data on incarceration rates, race, and class during the period 1979-91. They identified inmates as either being "underclass" or "non-underclass" (working class or middle class) based on educational levels, employment history, and income. They concluded that the most significant increase in incarceration rates was for working class black drug offenders, whose rates increased six-fold from 1.5 per 1,000 in 1979 to match that of underclass blacks at 9 per 1,000 in 1991. The trends for whites, on the other hand, were just the opposite, with the underclass drug incarceration rate being double that of the non-underclass by 1991.

Lynch and Sabol suggest several factors that may explain these trends. The "spillover" effect of residential racial segregation, along with law enforcement targeting of black neighborhoods, may sweep more non-underclass blacks into the criminal justice system than is the case in the more stratified white housing patterns. They conclude that:

[1567]

All of the processes described above lead to the same result, an increased targeting of black working and middle class areas for discretionary drug enforcement and ultimately increased incarceration for drug offenses. The immunity that working and middle class status used to bring in the black community (and still does among whites) may have been lost. While the processes that produced these outcomes may not have been racially motivated in intent, they have resulted in racially disparate outcomes.

Prosecution policies

Aggravating the racial disparities in arrest patterns are decisions made by prosecutors which can increase the severity of the impact of drug policies on minorities. A recent survey of prosecutions for crack cocaine offenses conducted by the Los Angeles Times revealed that not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since 1986, despite the fact that whites comprise a majority of crack users.[16] During the same period, though, hundreds of white crack traffickers were prosecuted in state courts. While federal prosecutors contend that they target high level traffickers, the Times analysis found that many African Americans charged in federal court were low-level dealers or accomplices in the drug trade.

The consequences of this prosecutorial discretion are quite serious since federal mandatory sentencing laws require five- and ten-year minimums even for first offenders. The study found that whites charged with crack offenses and prosecuted in California state courts received sentences as much as eight years less than in the federal courts.

Sentencing policies

Compounding the higher arrest rates for drug offenses have been changes in sentencing policies that have also disproportionately affected African Americans. The advent of a renewed generation of mandatory minimum sentencing statutes, now in place in all states and the federal system, has led to dramatic increases in the number of incarcerated drug offenders.

The impact of these policies can be seen in several ways. First, the risk of incarceration per drug arrest increased more than 400% from 19 per 100,000 in 1980 to 104 per 100,000 by 1992, far greater than for any other offense during that period.[17] As seen below, this has led to a 510% increase in the number of incarcerated drug offenders between 1983 and 1993, with one out of four inmates now serving time or awaiting trial for a drug offense.

Table 5

DRUG OFFENDERS IN PRISON AND JAIL - 1983 AND 1993

	Total # Inmates		% Drug Offenders		# Drug Offenders	
	1983	1993	1983	1993	1983	1993
Jail	223,552	459,804	9.3%	23.0%	20,790	105,755
Federal Prison	31,926	89,586	27.6%	60.8%	8,812	54,468
State Prison	405,322	859,295	7.0%	22.5%	28,373	193,341
Total	**660,800**	**1,408,685**	**8.8%**	**25.1%**	**57,975**	**353,564**

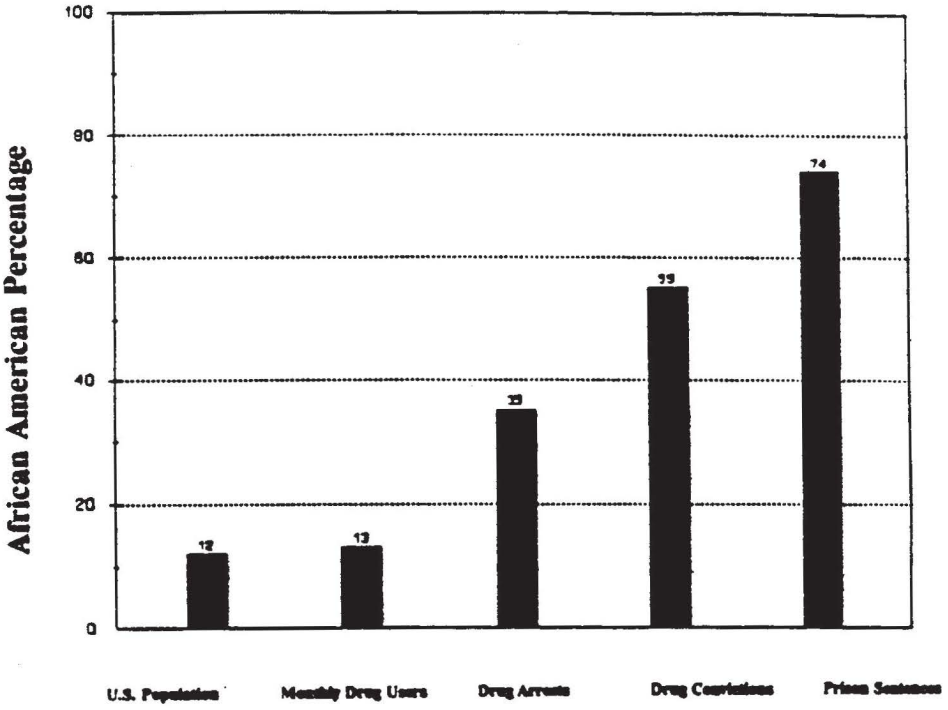
The full impact of these policies has yet to be seen, since many of the mandatory sentences only began to be applied in large numbers in the late 1980s. In state prison systems, therefore, while average time served in prison has not changed appreciably in recent years, we can expect it to rise in the years ahead due to the impact of mandatory sentencing and other harsh policies.

In the federal system, the impact of these changes is already being felt, with the average time served by drug offenders increasing 50% from 22 months in 1986 to 33 months by 1992. Compounding this has been the much-discussed disparity in sentencing between crack cocaine and powder cocaine, whereby those persons convicted of crack possession receive a mandatory prison term of five years by possessing only one-hundredth of the quantity of cocaine as those charged with powder cocaine possession. Fourteen states also have statutes that distinguish between crack and powder cocaine in sentencing.[18] The U.S. Sentencing Commission found that blacks accounted for 84.5% of federal crack possession convictions in 1993, while comprising 38% of those who report using crack in the past year.[19] The Sentencing Commission has also calculated that a person convicted of trafficking in five grams of crack with a maximum retail value of $750 will receive the same sentence as an offender charged with selling 500 grams of powder cocaine retailing for $50,000.[20]

The cumulative impact of arrest and sentencing policies on African Americans can be seen in Figure 1 below. For drug arrests, convictions, and prison sentences, we only look at drug possession, and not trafficking, since this offense should presumably be more highly correlated with drug use.

Figure 1

AFRICAN AMERICANS AND DRUG POSSESSION



Criminal Justice Response to Drug Use

Note: Data are for 1992 or 1993 depending on the most recent available figures

[1597]

Looking at minorities overall, we find that African-Americans and Hispanics represented almost 90% of all sentences to state prison for drug possession offenses in 1992, the most recent year for which data are available. While we have no available data regarding other factors which often correlate with a higher likelihood of incarceration, particularly prior criminal record, the findings displayed here are of such magnitude that they raise serious questions about the racial implications of current drug policies.

Table 6

SENTENCES TO STATE PRISON FOR DRUG POSSESSION, 1992

Racial/Ethnic Group	% of Total Drug Sentences
African-American	73.7%
Hispanic[21]	16.0%
Total African-American and Hispanic	**89.7%**

In summing up the rationale and impact of prevailing drug policies, Professor Michael Tonry states:

> All that is left is politics. The War on Drugs and the set of harsh crime control policies in which it was enmeshed were undertaken to achieve political, not policy, objectives. It is the adoption for political purposes of policies with foreseeable disparate impacts, the use of disadvantaged black Americans as means to achieving politicians' electoral ends, that must in the end be justified. It cannot.[22]

MEDIA IMAGES, CRIME RATES AND VIOLENCE

In recent years, a succession of media images and racially divisive political campaigns have created public images of a violent young African American male community. One need only turn on the 11 o'clock news in almost any urban area to witness that day's evidence of young black men engaging in murder and mayhem. To what extent is this image justified? An examination of crime rates and criminal justice populations shows that the issue is more complex than it might appear on the evening news.

First, as is true for other racial and ethnic groups, the typical African American male in the criminal justice system is not a violent offender. Combining the four components of the criminal justice system -- prison, jail, probation, and parole -- we find that about 3/4 of all offenders under supervision have been convicted of a non-violent offense.[23] (While these data apply to offenders of all races, it is unlikely that the black proportions differ substantially). Media interest in portraying violent and sensational crimes clearly contributes to the lack of understanding on this issue.

When we look at violent crime, we find that African American males are identified as the perpetrators and are arrested in numbers disproportionate to their makeup in the overall population. For 1993, African Americans (both male and female) constituted 45.7% of all arrests for violent crime.[24] While clearly disturbing and very disproportionate to the overall percentage of blacks in the population, it is nonetheless clear that the majority of arrestees for violent offenses are white.

Further, the proportion of overall violent crime attributed to African Americans has not changed appreciably over time, but has fluctuated within a narrow range of 44-47% of all violent crime for the past twenty years. What has changed in recent years is the age composition of those males engaged in violent crime, particularly with a substantial and disturbing increase in the murder rate of young black men since the mid-1980s. The murder rate for 14-17 year-old black males, for example, has risen from 32 per 100,000 in 1984 to 111.8 per 100,000 in 1991.[25]

Thus, the image on the evening news, while indicative of some disturbing trends, is highly misleading in its overall impact. In recent years, we have seen some of the far-reaching impact that media images can have on public policy. In its comprehensive report on crack cocaine, the United States Sentencing Commission described how the adoption of harsh federal sentencing policies for crack followed upon the intense media attention devoted to the death of basketball star Len Bias in 1986 from cocaine intoxication.[26] While it was widely reported at the time that Bias had probably died of "free-basing" cocaine, it was not until a year later that Bias's drug supplier revealed that Bias and other players had snorted powder cocaine on the night of Bias's death. By that time, the crack cocaine laws were fully in place.

WHO ARE THE AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM?

As we have seen, increasingly larger numbers of African American males have come under criminal justice supervision as a result of drug offenses. Despite the national concern about drugs, the nature of the drug distribution process and the individuals involved in it remain poorly understood.

Several recent studies provide insight into the lives of young men who become involved in the drug trade. A 1990 study by Peter Reuter and colleagues at RAND examined the criminal histories and demographic characteristics of groups of young black males arrested for drug distribution in Washington, D.C., representing the overwhelming majority of persons arrested for that offense.[27] The researchers documented the vast extent to which drug dealing has become a source of income for this group, with fully one-sixth of the black males born in 1967 having an arrest for drug distribution by the age of 20, and projections of one-quarter having an arrest by the age of 29. Somewhat surprisingly, though, the study found that about two-thirds of the offenders had been employed at the time of arrest, primarily at low-wage jobs with a median income of $800 a month. Thus, drug dealing became a type of "moonlighting" for some of these young men, with the daily sellers achieving median earnings of $2000 a month in drug sales.

Similarly, Samuel Myers, Jr. has examined the potential for increasing legitimate wages earned by drug sellers as a means of reducing criminal activity.[28] Analyzing data from inmate surveys, Myers found that whites incarcerated for drug dealing had significantly higher legal wages than blacks relative to their illegal earnings. He concludes that "the dominant factor contributing to drug selling, especially among black males, is unattractive labor market opportunities."[29]

Finally, research by John Hagedorn on African American and Latino gangs and drug dealing in Milwaukee has found great variation both in the extent to which gang members were involved in drug dealing and in their orientation toward conventional lifestyles.[30] While a small proportion of gang members were committed to drug dealing as a career, the majority "were not firmly committed to the drug economy." The main characteristics that they shared were: (1) working regularly at legitimate jobs, with occasional drug dealing, (2) conventional aspirations toward economic security; and (3) conventional ethical beliefs about the immorality of drug dealing, even while justifying their drug sales as necessary for survival.[31]

The findings of these studies enlighten us about the potential effectiveness of various responses to drug dealing. The RAND researchers found that despite the actual and perceived risks of drug dealing in Washington -- the chances of arrest or physical harm being significant -- "such risks failed to deter substantial numbers of young males from participating in the trade."[32] They speculate that the prospects of immediate rewards combined with adolescents' lesser concern for physical harm and/or their future prospects

combined to make drug selling very appealing. They conclude that "The prospects for raising actual and perceived risks enough to make for markedly more deterrence through heavier enforcement against sellers do not appear promising."[33] Noting that many drug sellers are also users and therefore feel compelled to sell drugs to support their addiction, they suggest that reducing demand is critical if the rewards of the legitimate labor market are to be viewed as attractive.

Hagedorn asks whether current drug policies are actually producing criminogenic effects, by reducing the prospects of these young gang members for productive employment and life experiences, since the "key to their future lies in building social capital that comes from steady employment and a supportive relationship, without the constant threat of incarceration."[34] He concludes that:

> Long and mandatory prison terms for use and intent to sell cocaine lump those who are committed to the drug economy with those who are using or are selling in order to survive. Our prisons are filled disproportionately with minority drug offenders ... who in essence are being punished for the "crime" of not accepting poverty or of being addicted to cocaine. Our data suggest that jobs, more accessible drug treatment, alternative sentences, or even decriminalization of nonviolent drug offenses would be better approaches than the iron fist of the war on drugs.[35]

IMPACT OF HIGH RATES OF CONTROL ON THE AFRICAN-AMERICAN COMMUNITY

The high rate of incarceration of African American males raises concerns about its impact not only on the individuals who are incarcerated, but on their communities, as well.[36] As increasing numbers of young black men are arrested and incarcerated, their life prospects are seriously diminished. Their possibilities for gainful employment are reduced, thereby making them less attractive as marriage partners and unable to provide for children they father. This in turn contributes to the deepening of poverty in low-income communities.

The large scale rates of incarceration may contribute to the destruction of the community fabric in other ways as well. As prison becomes a common experience for young males, its stigmatizing effect is diminished. Further, gang or crime group affiliations on the outside may be reinforced within the prison only to emerge stronger as the individuals are released back to the community. With so few males in underclass communities having stable ties to the labor market, the ubiquitous ex-offenders and gang members may become the community's role models.

The cumulative impact of these high rates of incarceration has been to postpone the time at which large numbers of African American males start careers and families. While we should not ignore the fact that these men have committed crimes that led to their imprisonment, current crime control policies may actually be increasing the severity of the problem, particularly when other options for responding to crime exist.

INCREASING CRIMINAL JUSTICE CONTROL RATES FOR WOMEN

While we have seen that criminal justice control rates for young black men are shockingly high and increasing, from 1989 to 1994 young African-American women experienced the greatest increase in criminal justice control of all demographic groups studied. The 78% increase in criminal justice control rates for black women was more than double the increase for black men and for white women, and more than nine times the increase for white men.

What is causing this dramatic increase in the numbers of young black women under criminal justice control? Although research on women of color in the criminal justice system is limited, existing data and research suggest it is the combination of race and sex effects that is at the root of the trends which appear in our data. For example, while the number of blacks and Hispanics in prison is growing at an alarming rate, the rate of increase for women is even greater. Between 1980 and 1992 the female prison population increased 276%, compared to 163% for men. Unlike men of color, women of color thus belong to two groups that are experiencing particularly dramatic growth in their contact with the criminal justice system.

The key factor behind this explosion in the women's prison population is the war on drugs. We see this taking place at several levels.

Arrests

The majority of female arrests are for drug offenses and crimes committed to support a drug habit, particularly theft and prostitution.[37] According to Drug Use Forecasting (DUF) data, more than half of women arrestees test positive for drugs; in some cities, more than three-fourths.[38] From 1982 to 1991, the number of women arrested for drug offenses increased by 89%, compared with an increase of 51% for men during the same period.[39]

Incarceration

By 1991, one in three women in state prisons was incarcerated for a drug offense – up from 1 in 8 in 1986 and 1 in 10 in 1979.[40] By comparison one out of five men in prison in 1991 was a drug offender. The Bureau of Justice Statistics has reported that drug offenders represented 55% of the national increase in women prisoners from 1986 to 1991.[41] Trends in women's commitment to prison for drug offenses can be even more dramatic at the state level. In New York, in 1982, 67 women were committed to prison for drug offenses. By 1993, the figure had increased by 1863% to 1,315. In California, the state with the largest number of women prisoners, 37.8% of women prisoners in 1993 were drug offenders compared to 23.8% of men.[42] Nationwide, the number of women in state prisons for drug offenses increased 433% between 1986 and 1991 compared to a 283% increase for men (see Table 7).

Sentencing

Overall, female prisoners have shorter maximum sentences than men. While it is often assumed that women benefit from chivalrous or lenient treatment by sentencing judges,

recent research and available data suggest that shorter sentences for women are in fact a result of gender differences in the offenses for which they are incarcerated, criminal histories and crime roles.[43] On average, women incarcerated in state prisons in 1991 had fewer previous convictions than men, and their record of past convictions was generally less violent. Women are more likely than men to be in prison for drug and property offenses, and less likely than men to be incarcerated for violent offenses.[44]

While the question of bias for or against women in sentencing is often assumed to be made irrelevant by mandatory sentencing and sentencing guidelines systems which reduce or eliminate judicial discretion, some scholars have found such "gender-neutral" sentencing models may actually place women at a distinct and unfair disadvantage with respect to gender-specific characteristics, experiences and roles. Myrna Raeder's analysis of federal mandatory minimums, for example, concludes that these policies do not allow for the court's consideration of key issues regarding the role of women, including the role of single mothers in particular in caring for children; the minor and subordinate roles women play in many crimes, including drug conspiracies; the abusive/coercive environments in which many women play these roles; and the lower recidivism rates for women.[45]

Raeder's conclusion is supported by a 1994 Department of Justice study on low-level drug offenders in federal prisons. The study found that women were over-represented among "low-level" drug offenders who were non-violent, had minimal or no prior criminal history, and were not principal figures in criminal organizations or activities, but who nevertheless received sentences similar to "high-level" drug offenders under the mandatory sentencing policies.[46]

Examining data on sentence length for federal prisoners for 1988 and 1989, Raeder found that the number of women with sentences of more than one year rose at twice the rate of men and that women with sentences of less than a year rose at nearly five times the rate of men. Raeder suggests that women who would have received straight probation prior to the enactment of the federal mandatory minimums were being sentenced to serve time in prison, and those who would have been previously incarcerated now faced longer sentences.[47]

<u>African American Women and The War on Drugs</u>

Looking at the criminal justice data that are available by gender and race/ethnicity a picture emerges of individuals who are doubly disadvantaged. Nationally, between 1980 and 1992 the number of black females in state or federal prisons grew 278% while the numbers of black males grew 186%; overall the inmate population increased by 168% during this period.

An enormous increase in the numbers of black women incarcerated for drug offenses is the primary factor causing this trend. Our analysis of Justice Department data shows that between 1986 and 1991, the number of black non-Hispanic women in state prisons for drug offenses nationwide increased more than eight-fold in this five-year period, from 667 to

6,193. This 828% increase was nearly double the increase for black non-Hispanic males and more than triple the increase for white non-Hispanic females. (See Table 7).

Table 7

STATE PRISONERS INCARCERATED FOR DRUG OFFENSES BY RACE/ETHNIC ORIGIN AND SEX 1986 AND 1991

	1986		1991		% Increase	
	Male	Female	Male	Female	Male	Female
White non-Hispanic	12,868	969	26,452	3,300	106%	241%
Black non-Hispanic	13,974	667	73,932	6,193	429%	828%
Hispanic	8,484	664	35,965	2,843	324%	328%
Other	604	70	1,323	297	119%	324%
Total	**35,930**	**2,370**	**137,672**	**12,633**	**283%**	**433%**

As we have seen, prosecutions for crack cocaine offenses have had a disproportionate impact on African-Americans. The harsher treatment of crack cocaine offenders may also be having a significant impact on young black women in particular since there are indications that women are more likely to use crack[48] and are more likely to be involved in crack distribution relative to other drugs.[49]

U.S. Sentencing Commission data show that in fiscal year 1994 black women represented 82% of all women sentenced for crack offenses (trafficking and possession). Of black women sentenced for drug offenses overall, half were sentenced for a crack offense compared to 5% of all Hispanic women drug offenders and 7% of all white women.[50]

Urban Social and Economic Decline and its Impact upon Women

The social and economic decay in many inner-city communities has contributed to the rise of African American women under criminal justice control both in ways that resemble these processes for men and in ways that are substantially different. Both black men and black women, for example, have become increasingly involved in drug crime as legitimate economic opportunities have narrowed and underground drug economies have expanded.

The relationship between community decline and increased substance abuse, though, may be particularly strong for women. For example, several measures show that women in contact with the criminal justice system -- the majority of whom come from distressed communities -- are more likely than men to use drugs, to use more serious drugs more frequently and to be under the influence of drugs at the time of their arrest.[51] Research showing alarming levels of violence in such communities[52]; a high rate of violent victimization among women drug users and incarcerated women[53]; and significant associations between violent victimization (including sexual abuse), post-traumatic stress disorders and substance abuse among women,[54] further suggest that many women in inner-cities are caught in a progressively tightening web with imprisonment as the likely outcome of their drug addiction.

Recent studies of black women crack users by Mindy Fullilove and her colleagues at the Columbia University School of Public Health describe a complex pattern whereby users initiate crack use to relieve the symptoms of depression or trauma associated with victimization, become traumatized by their efforts to secure it (often involving dangerous and degrading sex in exchange for drugs), and then relieve the new trauma by seeking additional occasions to obtain the drug. Since these efforts all too frequently provide added opportunities for trauma, the cycle is re-initiated.[55]

Lack of Access to Treatment

Problems caused by the limited availability of drug treatment programs and facilities, particularly for low-income individuals, are also compounded for women. Overall, while women make up 33% of the addicted population, only 20.6% of treatment resources are used for women.[56] A 1991 Bureau of Justice Assistance report indicates that women arrestees (interviewed at 4 DUF sites) have had limited treatment experience. Nearly three-fourths (71%) had never been in treatment for substance abuse, and only 4% were in treatment at the time of their arrest.[57]

Several studies have also shown that most treatment programs are based on male models and do not meet the special needs of women, such as accommodation for children. Also, few programs address the multiple problems of women in contact with the criminal justice system -- women who are apt to be indigent, undereducated, cut off from social networks such as family and community institutions, and who suffer disproportionately from histories of family violence, incest, rape and mental illness.[58] Although a number of treatment programs have been established specifically for women in the past decade, there are still serious gaps in meeting these needs.[59]

The lack of appropriate or accessible drug treatment for women may also play a role in rendering women vulnerable to re-incarceration. A recent study of women felons in Hawaii revealed that half were in prison after having returned there for violations of parole for positive drug tests.[60] Another study of a randomly-selected sample of 294 women in prison in California in 1993 found that 40% of the women were probation or parole violators. Only 13% of the women reported no prior drug use.[61]

Women, Children, and the Criminal Justice System: Is There a Better Way?

While more research is needed to determine how race and gender bias may have contributed to the rise in the number of women of color under criminal justice control, it seems clear that the war on drugs has succeeded only in criminalizing women already suffering under extreme socio-economic and psychological stress. The consequences of continuing on this path are dire -- not only for the women involved but for future generations. The multiple negative effects of parental arrest and incarceration on children, particularly if that parent is the primary caretaker, are well-documented, and include traumatic stress, loss of self-confidence, aggression, withdrawal, depression, gang activity, and interpersonal violence.[62] As more and more inner-city children lose not only their fathers but their mothers, most often the primary caretakers, to the criminal justice system, their own risks for future involvement in crime and incarceration increase dramatically.

In recent testimony before the U.S. Senate Judiciary Committee, Elaine Lord, the warden of New York State's maximum security prison for women, suggests a very different course:

> We need to be more honest with ourselves that the vast majority of women receiving prison sentences are not the business operatives of the drug networks. The glass ceiling seems to operate for women whether we are talking about legitimate or illegitimate business. They (women) are very small cogs in a very large system, not the organizers or backers of illegal drug empires. This, coupled with a growing mood among the American public reportedly concerned about early intervention for troubled kids and more drug treatment in preference to more prisons, should give us the opening we need to look at better and more cost-effective ways of dealing with women offenders.[63]

PROJECTIONS FOR THE FUTURE

The criminal justice system has experienced unprecedented growth for more than twenty years. Since 1973, the number of inmates in prisons and jails nationally has quadrupled, and the United States is now second in the world only to Russia in its rate of incarceration.[64] Probation and parole populations have increased dramatically as well, rising by 173% in the period 1980-94.

These dramatic increases, along with the fiscal and human costs entailed, might make one think that the end of this cycle might be in sight. A look at recent policy changes, though, shows that, if anything, these problems may be exacerbated in coming years.

In recent years, the federal government and many states have adopted a variety of harsh sentencing policies. Among the most prominent of these have been the "Three Strikes and You're Out" policies, adopted by the federal system and fourteen states. These laws generally provide for a sentence of life without parole upon a third conviction for a violent felony.

While it is too early to assess the full consequences of these laws, it is already clear that there will be a broad variation in their impact on prison populations. In Washington state, for example, the first state to adopt such a policy in 1993, fewer than two dozen offenders were sentenced under its provisions during the first year of implementation.

In California, though, the law has already had a substantial impact on courts, jails and prisons during its first year of operation. The California law, the broadest of any state, requires a sentence of 25 years to life for an offender with two prior violent felony convictions who commits any third subsequent felony. Thus, in the well-publicized case of Jerry Williams, his third "strike" for stealing a slice of pizza from children at a boardwalk brought the same sentence as would a rape or armed robbery. The California Legislative Analyst's Office has estimated that the state prison population will rise from 125,000 in 1994 to 211,000 by 1999, largely as a result of the "Three Strikes" law.[65]

Other policy changes are expected to have similarly large impacts. In Virginia, for example, parole has been abolished and violent offenders are now expected to serve up to 500% more time in prison than in the past. The combined impact of this policy along with other changes is projected to almost double the prison population from 27,000 in 1995 to 51,000 by 2005.[66]

A 1995 survey of corrections officials by Corrections Compendium confirmed this anticipated rise in the prison population. State corrections officials estimated that their 1994 inmate populations would rise 51% by the year 2000.[67]

The rise in prison populations is likely to be exacerbated as well by the impact of federal crime legislation passed by Congress in 1994 and another bill proposed in 1995. Under the

prison funding provisions of these bills, "Truth in Sentencing" grants will be made available to states that enact sentencing policies that require violent offenders to serve 85% of their sentence before release. Currently, violent offenders serve an average of 48% of their sentence.[68] One analysis of the 1995 legislation estimated that for every dollar states receive under the six-year funding cycle of the bill, they would spend $2-7 due to higher costs of incarceration.[69]

An additional sobering factor that does not portend well for controlling the growth of the criminal justice system regards the demographics of crime. Since young males are responsible for a disproportionate amount of crime, the age distribution of the population has a significant effect on overall crime rates. Over the course of the next decade, the number of 15-19 year olds in the population will increase by 25%; for Hispanics, there will be a 47% rise in this group.[70] Unless we see substantial changes both in criminal justice and social policy, we can anticipate increases in crime generated by the rise in the numbers of young males.

Disturbing as these anticipated increases appear, even more so is the potential impact on African American and Hispanic communities. A number of factors suggest that the rise in criminal justice populations may affect minority communities even more so than the population as a whole. For example, the initial impact of the "Three Strikes" law in California appears to be having a disproportionate impact on African Americans. An analysis of the first six months experience with the law in Los Angeles County found that African Americans constituted 57% of the third "strike" cases charged, compared to 31% of all felony cases.[71]

As we have also seen, the impact of the "war on drugs" has fallen disproportionately on low-income African Americans. To the extent that current policies remain in place, change in these disparities in the coming years is unlikely.

RECOMMENDATIONS

Addressing the racial disparities in the criminal justice system documented in this report requires both a political will and a comprehensive strategy. Unfortunately, it is far from clear that the political will to do so exists to any significant extent in the current climate. Unless these disparities are confronted, high crime rates will continue, the urban economy will decay further, and social divisions will deepen.

Although much of the necessary response to these problems is obviously within the realm of family, community, and the economy, we do not address them here because this report is primarily concerned with the ways in which the criminal justice system affects the racial disparities we have highlighted. Our recommendations for public policy in this area are as follows:

1. Drug Policies.

As we have demonstrated, drug policies of the past decade have been the single most significant factor contributing to the rise in criminal justice control rates for African Americans. In order to reverse this trend and to have a more significant impact on drug abuse, national policy should reflect the following:

A. Revise national spending priorities. Since the mid-1980s, both Republican and Democratic administrations have directed about two-thirds of federal drug funding toward law enforcement and only one-third toward prevention and treatment. The lack of available treatment has been documented by the Department of Health and Human Services which reports that of the 2.4 million drug users who could benefit from treatment, 1 million can not have access to treatment each year.[72]

Despite candidate Clinton's pledge to support increased treatment efforts, the Administration's requests to increase substantially treatment for hard core addicts received little support in Congress. These policies continue even as comprehensive studies document the positive results of drug treatment. A 1994 study by RAND researchers, for example, found that treatment is seven times more cost-effective in reducing cocaine consumption than supply-control programs. The study calculated that increasing cocaine treatment funding in the $13 billion federal budget from $1 billion to $4 billion would provide enough funding to treat all heavy users once each year (vs. 30% at present), and cause a one-third reduction in annual cocaine consumption.[73]

Another study conducted for the state of California provides the most comprehensive cost-benefit examination to date on the effectiveness of substance abuse treatment. Looking at all treatment programs in the state, researchers concluded that every dollar spent on treatment resulted in $7 in savings on reduced crime and health care costs.[74]

Given what is known about the effectiveness of treatment when compared to law enforcement and interdiction efforts, it is imperative to begin to reverse these funding