

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL SIX

A View from Academics

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY

WITNESSES AND BIOS

PANEL SIX: ACADEMICS

Dr. Alfred Blumstein
Carnegie-Mellon University

Dr. Bruce Johnson
Institute for Special Populations Research

Dr. Peter Reuter
University of Maryland

ALFRED BLUMSTEIN

ALFRED BLUMSTEIN is a University Professor and the J. Erik Jonsson Professor of Urban Systems and Operations Research and former Dean (from 1986 to 1993) at the H. John Heinz III School of Public Policy and Management of Carnegie Mellon University. He is also director of the National Consortium on Violence Research (NCOVR), funded by a five-year, \$12 million grant from the National Science Foundation.

He has had extensive experience in both research and policy with the criminal justice system since serving the President's Commission on Law Enforcement and Administration of Justice in 1966-67 as Director of its Task Force on Science and Technology.

Dr. Blumstein was a member of the National Academy of Sciences Committee on Research on Law Enforcement and the Administration of Justice from its founding in 1975 until 1986. He served as Chairman of that committee between 1979 and 1984, and has chaired the committee's panels on Research on Deterrent and Incapacitative Effects, on Sentencing Research, and on Research on Criminal Careers. He was a member of the Academy's Commission on Behavioral and Social Sciences and Education from 1994-2000. In 1998, he was elected to membership in the National Academy of Engineering.

On the policy side, Dr. Blumstein served from 1979 to 1990 as Chairman of the Pennsylvania Commission on Crime and Delinquency, the state's criminal justice planning agency. He served on the Pennsylvania Commission on Sentencing from 1986-96.

His degrees from Cornell University include a Bachelor of Engineering Physics and a Ph.D. in Operations Research. He was awarded an honorary degree of Doctor of Laws by the John Jay College of Criminal Justice of the City University of New York.

He was President of the Operations Research Society of America (ORSA) in 1977-78, he was awarded its Kimball Medal "for service to the profession and the society" in 1985, and its President's Award in 1993 "for service to society." He was president of the Institute of Management Sciences (TIMS) in 1987-88 and was President of the Institute for Operations Research and the Management Sciences (INFORMS) in 1996. He is a Fellow of the American Association for the Advancement of Science (AAAS).

Dr. Blumstein is a Fellow of the American Society of Criminology, was the 1987 recipient of the Society's Sutherland Award for "contributions to research," and was the president of the Society in 1991-92. At the 1998 meeting of the ASC, he was presented with the Wolfgang Award for Distinguished Achievement in Criminology.

His research over the past twenty years has covered many aspects of criminal-justice phenomena and policy, including crime measurement, criminal careers, sentencing, deterrence and incapacitation, prison populations, demographic trends, juvenile violence, and drug-enforcement policy.

Dr. Bruce Johnson

Institute for Special Populations Research

Bruce D. Johnson, PhD (PhD 1971 Columbia University) is one of the nation's authorities on the criminality and illicit sales of drugs in the street economy and among arrestees and minority populations. He directs the Institute for Special Populations Research (ISPR) at NDRI, the nation's largest nonprofit research organization focused upon drug use/abuse. The ISPR conducts about 10 federally-funded research grants annually on a wide range of topics. His research and training activities involve the use of advanced qualitative and quantitative methodologies to study drug use/abuse. He has been affiliated with the National Institute of Justice's Arrestee Drug Abuse Monitoring program since its inception in 1987. He is a professional researcher with five books and over 125 articles based upon findings emerging from over 20 different federally funded research projects supported by NIDA, NIJ, Center for Substance Abuse Treatment, and the Robert Wood Johnson Foundation. He also directs the Behavioral Sciences Training in Drug Abuse Research, the nation's largest pre- and postdoctoral training program in the U.S. - about half of whom are from minority backgrounds. Current research efforts include drug abuse patterns, treatment experiences, and drug markets among arrestees and criminals; the impact of police initiatives upon criminal behavior; delineate the role of drugs and violence in drug-using households; investigate marijuana/blunts subcultures and markets; estimate the number of hard drug users and operatives in low income communities plus document the lifestyles and consequences of such involvement; assess the diffusion of new policies to provide syringes/needles through pharmacies and office based dispensing of buprenorphine upon heroin user lifestyles; and document the value of new drug and HIV detection technologies. Previous major research initiatives include: examination of marijuana user subcultures, the criminality and economic behaviors of heroin users, impact of crack use and sales upon criminality, and the reliability of self-reports of illicit drug use.

Biography: Peter Reuter

Peter Reuter is Professor in the School of Public Policy and in the Department of Criminology at the University of Maryland. From 1999 to 2004 he was editor of the *Journal of Policy Analysis and Management*. He is Director of the newly formed Center on the Economics of Crime and Justice Policy at the University and also Senior Economist at RAND.

From 1981 to 1993 he was a Senior Economist in the Washington office of the RAND Corporation. He founded and directed RAND's Drug Policy Research Center from 1989-1993; the Center is a multi-disciplinary research program begun in 1989 with funding from a number of foundations. His early research focused on the organization of illegal markets and resulted in the publication of *Disorganized Crime: The Economics of the Visible Hand* (MIT Press, 1983), which won the Leslie Wilkins award as most outstanding book of the year in criminology and criminal justice. Since 1985 most of his research has dealt with alternative approaches to controlling drug problems, both in the United States and Western Europe. His other books are (with Robert MacCoun) *Drug War Heresies: Learning from Other Places, Times and Vices* (Cambridge University Press, 2001) and (with Edwin Truman) *Chasing Dirty Money: The Fight Against Money Laundering* (Institute for International Economics, 2004). His recent papers have appeared in *Addiction*, *Journal of Quantitative Criminology*, *American Journal of Public Health*, *Journal of Policy Analysis and Management* and *Science*. He is currently directing a project on global heroin markets.

Dr. Reuter was a member of the National Research Council Committee on Law and Justice from 1997-2002 and of the Office of National Drug Control Policy's Committee on Data, Research and Evaluation from 1996-2003. He served on the Institute of Medicine Committee on the Federal Regulation of Methadone (1992-1994) and the IOM panel on Assessing the Scientific Base for Reducing Tobacco-Related Harm (2000) and on the NRC Committee on Improve Research and Information on Firearms. The Attorney General appointed him as one of five non-governmental members of the Interagency Task Force on Methamphetamine in 1997. He has testified frequently before Congress and has addressed senior policy audiences in many countries, including Australia, Chile, Colombia and Great Britain. He has served as a consultant to numerous government agencies (including GAO, ONDCP, NIJ, SAMHSA) and to foreign organizations including the European Monitoring Center on Drugs and Drug Abuse, United Nations Drug Control Program and the British Department of Health. Dr. Reuter received his PhD in Economics from Yale.

Questions for written submission

Dr Blumstein

1. Is the recently reported increase in violence in the United States related to drug trafficking? Is it related to cocaine trafficking generally, and, if so specifically to crack cocaine or powder cocaine?
2. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, use or associated criminal conduct for or use of, either crack or powder cocaine? If so, what are they?
3. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
4. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Testimony of

Alfred Blumstein

H. John Heinz III School of Public Policy and Management

National Consortium on Violence Research (NCOVR)

Carnegie Mellon University

before the

United States Sentencing Commission

on

Sentencing Guidelines for Crack and Powder Cocaine

November 14, 2006

Judge Hinojosa and Members of the Commission:

Thank you for inviting me to testify on this important issue. I am honored by the opportunity to appear before you today as you consider the various issues involved in the important question of sentencing guidelines for drugs. I testified at the hearings held by this commission on these issues on February 21, 2002. I have appended my testimony at that hearing to this testimony, because many of the points made there are still applicable. Also, as a follow-up to that testimony, I published an article entitled "The Notorious 100:1 Crack: Powder Disparity" in the *Federal Sentencing Reporter* (16:1, October 2003) and that article is also appended. Also, as requested, I am enclosing a short biographical summary.

As background to my own involvement in this issue, I have engaged in a variety of criminological research since my involvement as Director of Science and Technology for the President's Commission on Law Enforcement and Administration of Justice in 1966. I have been involved in practical policy matters as a member of the Pennsylvania Sentencing Commission for ten years between 1987 and 1997, and I served for over eleven years from 1979 to 1990 as the chairman of the Pennsylvania Commission on Crime and Delinquency, the state's criminal justice planning agency, which manages Federal criminal justice funds in Pennsylvania.

In my testimony, I would like to address the following issues: the origins of the crack powder disparity, trends in violent behavior, the problems associated with the crack: powder disparity, and more general concerns about mandatory minimum sentences. I have indicated in bold my specific responses to the four questions you raised.

The Origins of the Crack: Powder Disparity

An important theme of my earlier testimony was that it might have been understandable that Congress, in passing the Federal Anti-Drug Abuse Act of 1986, was engaging in a typical legislative act of passion in response to the violence that then

characterized crack markets. Crack was a new version of cocaine that made its “pleasures” accessible to a much larger population that could not afford the minimum quantity of powder, and so that new market saw many vigorous entrants competing in one of the principal modes of competition in illicit markets – through violence. The Congress must have thought it could deter that violence by imposing a mandatory minimum sentence of five years for possession of 5 grams of crack, while the same mandatory minimum would apply to possession of 500 grams of powder cocaine – the notorious 100:1 ratio. It is very doubtful that that punishment had any great deterrent effect – after all, the participants in the market faced far more extreme punishment from their competitors than from the criminal justice system. But the simple maturation and stabilization of the market did have an important effect in reducing the level of violence in the crack markets. But also, since crack was typically sold in street markets, sellers there are inherently vulnerable to street robbers, and so must carry weapons for self-defense since they cannot call the police for help.

Trends in Violence

The levels of violence associated with crack markets increased appreciably between 1985 and 1993 – about a 25% increase in homicide and robbery. See Figure 1 for a graph of trends in robbery and homicide). All of that increase was attributable to young people – under 25, but mostly under 20 - with handguns. See Figure 2 for an indication of the growth of the use of handguns in homicide, especially the quintupling since 1985 of handgun homicides by juveniles). That growth was largely a result of the recruitment of young people into crack markets in response to the growing demand for that drug and especially as replacements for the large number of older sellers who were sent off to prison. (Figure 3 indicates the growth in the juvenile drug arrest rate, especially after 1985, several years after crack became a popular drug.) That growth in the incarceration rate for drug crimes – an increase of a factor of 10 between 1980 and 2000 – was not likely to have averted many drug transactions because the resilient drug market recruited these young people as replacements.

Events since that time have led to a significant reduction in violence. From 1993 to 2000, there was a reduction of over 40% in both homicide and robbery. A major contributor to that drop was the decline in the demand for crack by new users. That contributed to the reduction of the crack street markets and led to the dismissal of the young sellers that had previously been recruited. Fortunately, there was a robust economy that could absorb them. While the demand for cocaine in both its forms, crack and powder, continued, we have seen a significant reduction in the violence associated with these markets because the persistent demand was much more by longer-term users than by new users, and that demand could be more readily met personally rather than by the violence-prone street markets.

Since 2000, the level of violence in the United States has been impressively low, rather stable at less than 6 homicides per 100,000 population and under 150 robberies per 100,000, levels that had not been seen since the 1960s. This does not mean that all cities shared in this same level, but that the national aggregate rate was flat. Some individual cities went up, some went down, some went up and down, and others went down and up.

The largest deviation from this flat trend occurred in 2005 when robbery rates went up by 2.9% and homicide rates went up by 2.5%. Even then, most cities were quite flat, but the homicide increase was driven by a limited number of cities that had relatively large increases. These include Birmingham, AL (up by 76%), St. Louis (up by 51%), Kansas City, MO (up by 42%), and Cleveland (up by 38%). **(In response to your Question #1 re recent increase in violence)** As far as I have been able to discern these trends have very little to do with either crack or cocaine trafficking. Rather, the situation is more complex and very similar to the situation described in Elijah Anderson's book, *Code of the Street*. He finds that some poor neighborhoods are characterized by large numbers of "decent people" and a smaller number of "street people". The street people have a very low threshold of insult and are willing to take extreme measures to avenge such insult. Apparently that has always been the case, but until the 1980s, the weapons of retaliation were largely fists and knives. Beginning in the 1980s with the advent of crack markets, those neighborhoods were suddenly filled with guns and the guns appear

never to have left. During the crime and drug period, police were rather aggressive in taking those guns from those who had no right to carry them. What we have seen lately is the reemergence of guns in the hands of the "street people", who can often be major contributors to the rise in violence where it occurs.

(In response to your Question #2 re changes since 2002) The period since 2002 has been impressively stable. In many ways, as indicated earlier, violence rates have been quite stable. I did obtain some data on gun involvement from Amy Baron-Evans of Federal Defenders. They indicate an impressive stability in weapon involvement in powder markets, and some increase of about 25% in crack markets since 2002.

(In response to your Question #3 re changes in cocaine sentencing policy) My sense is that there have been no appreciable changes in federal cocaine sentencing policy, particularly in reviewing the latest sourcebook. The dominant observation has been the striking stability, and the degree to which that stability has continued to serve people who deal in crack with no particular rationale for that distinction. Thus, this continuing stability should provide some indication of the continuing inappropriateness of the 100:1 crack-powder sentencing disparity.

Problems Associated with the Crack: Cocaine Disparity

(In response to your Question 4 re relative harms of crack and powder cocaine) My understanding is that crack and powder cocaine are inherently similar as drugs and in their effects on the user, and so that there is no meaningful difference in their relative harms, and so that there should be no difference in the punishment associated with these two chemically and biologically similar products.

Furthermore, because of the difference in the penalties imposed, and in light of the similarity of their effects, it is too easy to interpret the rationale for punishing them differently appears to derive from the important differences in the race of the people marketing the two drugs. Crack is marketed predominantly by African-Americans

(82.8%) and powder predominantly by whites and Hispanics (69.7%)¹. Thus, any difference in the punishment associated with the two drugs could readily be interpreted as displaying an intention to discriminate based on race – albeit subtly – because there would be no reasonable basis for choosing punishments on the basis of the effects of the drugs.

As indicated earlier, the initial intent in introducing the difference in the Federal Anti-Drug Abuse Act of 1986 was understandable as a typical political response - become more punitive - to the violence associated with the introduction of the highly marketable crack version of cocaine. But that violence was associated with the intense competition associated with the new drug market. That competitive violence has certainly abated, and any difference that might appear between cocaine and crack markets has nothing to do with the difference between the drugs themselves. Those differences could be attributable to differences in the venue of the market (e.g., street crack markets compared to closed powder markets) or to the dispute-resolution culture of the communities in which the market is located.

One of the attractive features of sentencing guidelines is that they provide ample opportunity for augmenting a basic guideline with additional points for aggravating features of the basic crime. Thus, there could be additional points for carrying a gun and still more points for using it. That opportunity precludes the need to respond differently to the different drugs in drug-offense guidelines. I believe this is particularly important in the crack -- powder comparison, because of the concern associated with the interpretation of the difference as racially discriminatory

Mandatory minimum sentences.

One of the important lessons that should have been learned from the 20 years of experience with the Federal Anti-Drug Abuse Act of 1986 is the general

¹ Here, for simplicity, I have averaged the very close rates in the pre- and post-Booker periods from 2005 *Sourcebook of Federal Sentencing Statistics* of the United States Sentencing Commission

inappropriateness of legislating mandatory minimum sentences. Typically, these mandatory sentences are imposed in response to a particularly serious breach (typically a sentence to probation that is seen as excessively lenient or possibly a lenient sentence to a particularly serious criminal act), but that response is made to apply to a wide variety of situations that are far less serious than the event that triggered the mandatory provision.

Such sentences are almost always enacted as an act of passion by a legislative body to address an immediate problem of concern. In many cases, even that act is inappropriate, but it draws on the very limited repertoire of responses available to legislatures when confronted with an immediate public concern. This act serves the legislature by abating the public's anxiety, even when that abatement is unwarranted because it is unlikely to truly remedy the problem of concern. Over time, however, as the immediate problem diminishes in importance and is replaced by other immediate problems, the passionate solution remains on the books and can become increasingly inappropriate. That is certainly the case in the crack – powder disparity, but that lesson readily generalizes to any other mandatory minimum sentence enacted. It would be so much more appropriate when the legislative body felt compelled to enact some mandatory minimum sentence to accompany it with a "sunset" provision that dropped the mandatory minimum sentence after five years. Of course, if the statute were still seen as appropriate following an assessment, it could be then be reenacted rather than letting it expire.

Even more valuable would be passage of a new law that declared all mandatory minimum sentences sunsetted within five years, still providing the opportunity for the Congress to rethink all of them at a time that is much less frantic than the time when they were enacted. I would hope that the Sentencing Commission would encourage the Congress to adopt such policies.

Fig. 1. Trends in UCR Murder and Robbery Rates

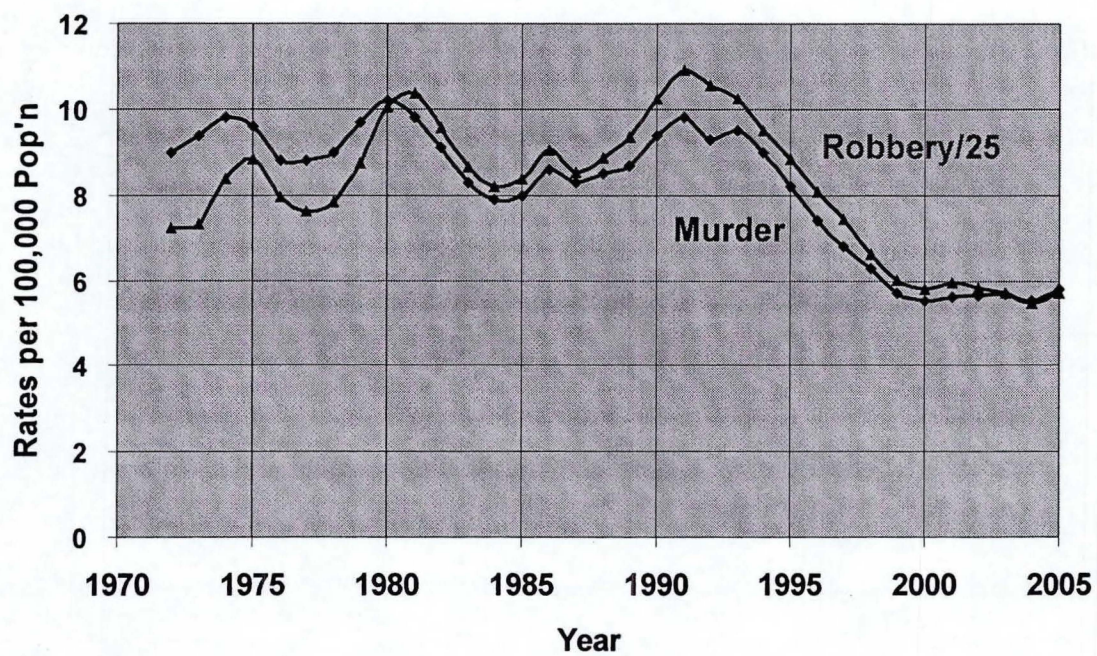


Fig. 2. Use of Handguns in Murders by 3 Age Groups - Indexed (1985=100)

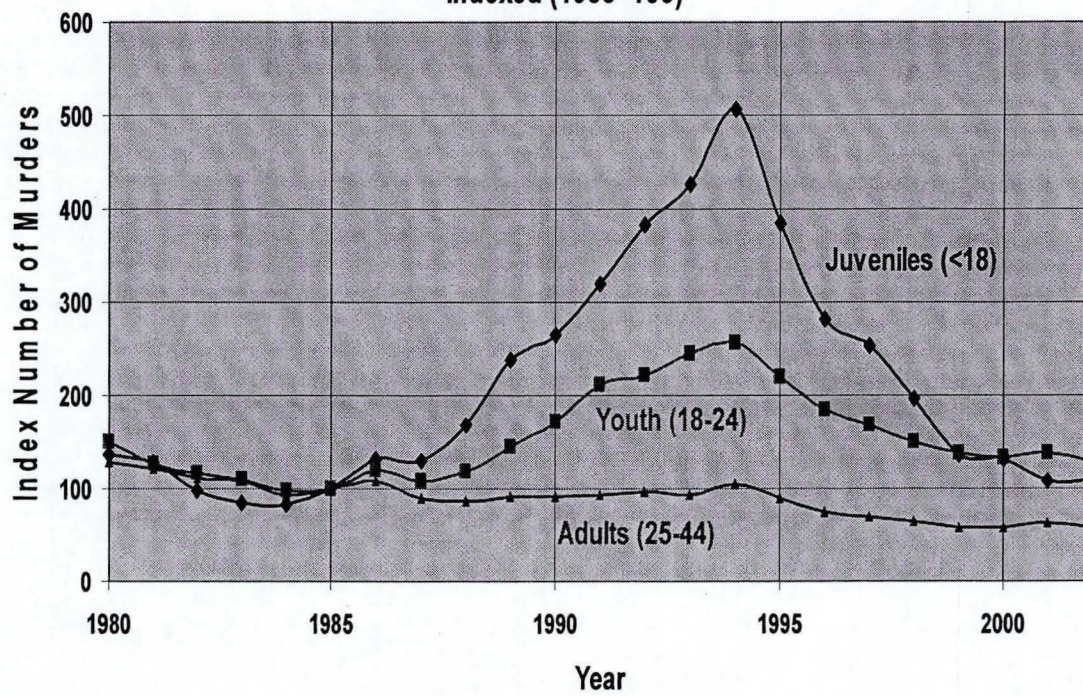
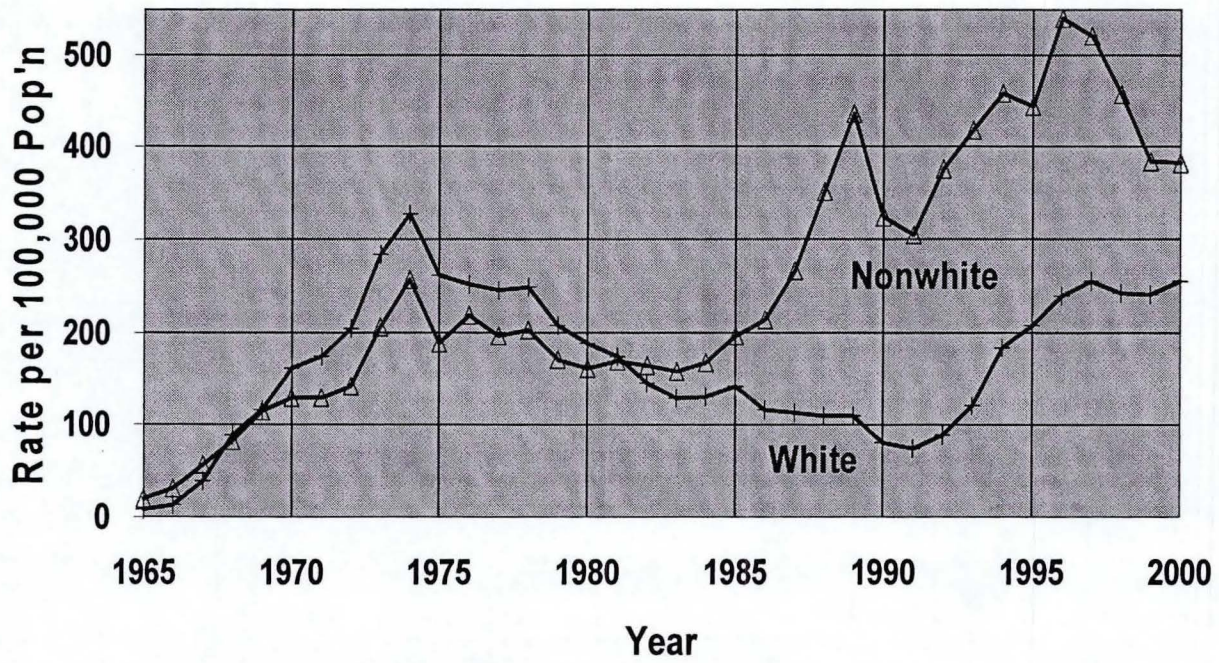


Fig. 3. Drug Arrest Rate - Juveniles



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Sentencing Guidelines for Crack and Powder Cocaine

February 21, 2002

Abstract

In my testimony, I focus on the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Because crack markets are operated predominantly by blacks, this difference conveys a strong sense of racial discrimination and is a profound challenge to the legitimacy of the criminal justice system. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs, I discuss why those differences may have occurred as a result of the nature of the markets much more than as a result of any pharmacological differences between the drugs. The evolution of the crack markets has resulted in a significantly lower level of violence today than that which characterized their early years. Also, it seems much more rational to use sentencing enhancements to punish those individuals who use violence regardless of the drug they are dealing with than to base the sentencing difference on the chemical itself. Similarly, enhancements should be considered to account for an offender's role in the distribution hierarchy. If that were done, then Federal crack offenders would be treated even more leniently than powder-cocaine offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder. If the Commission feels it necessary to create a difference even in the presence of an appropriate array of enhancements, then it should negotiate for the smallest difference that would be accepted.

So many of these problems derive from the constraints put on sentencing policies by the passions that are reflected in mandatory-minimum sentences. I would hope that the Commission could capitalize on the growing national enlightenment on drug policy (e.g., Proposition 36 in California mandating treatment instead of incarceration) to urge the Congress to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to enthusiastic cheers throughout the nation's judiciary.

Testimony of Alfred Blumstein

Judge Murphy and Members of the Commission:

Thank you for inviting me. I am honored by the opportunity to appear before you today as you consider the various issues involved in the important question of sentencing guidelines for drugs.

As background to my own involvement in this issue, I have engaged in a variety of criminological research since my involvement as Director of Science and Technology for the President's Commission on Law Enforcement and Administration of Justice in 1966. I have been involved in practical policy matters as a member of the Pennsylvania Sentencing Commission for ten years between 1987 and 1997, and I served as the chairman for over eleven years of the Pennsylvania Commission on Crime and Delinquency, the state's criminal justice planning agency, which manages Federal criminal justice funds in Pennsylvania. Attached to my testimony is a short biographical statement for your information.

Some Background on Sentencing and the Drug Problem

I began to think hard about sentencing policy when I chaired a National Academy of Sciences Panel on Sentencing Research, which recommended the development of sentencing guidelines¹. I thought particularly hard about sentencing for drug offenses in my Presidential Address² to the American Society of Criminology in 1992 when I came to recognize that prisons were filling up with drug offenders in the mid-1980s (see Figure 1 for a clear indication of this growth)³, but that growth was not likely to have much effect on drug markets because the resilient drug markets were quite able to recruit new sellers to replace those sent to prison and even those deterred from drug selling because of the draconian sentences being imposed. As a result, drug transactions would continue to respond to the articulated demand, and the number averted through incarceration would be negligibly small as long as the demand persists.

It was only subsequently that I came to appreciate that the massive incarceration was not only ineffective, but was seriously counter-productive. The young people recruited as replacements in the crack markets were primarily African-American youth drawn from inner-city areas who had little opportunity in the legitimate economy at the time. This recruitment is indicated in Figure 2, which displays the ratio of arrests of non-whites compared to those of whites; here, we see that the ratio for adults began to climb in the early 1980s, whereas that for juveniles didn't begin to climb until 1985 (as the prisons were filling with the older sellers) and reached a peak of four times that of whites from 1989 until 1992, and then began a sharp decline as the demand for crack by new users dried up in the early 1990s⁴. Since these were street markets, these youths had to carry handguns to protect themselves against street robbers, and these young folks were far more volatile with their guns than the older people they replaced. Not only were these replacements a violence problem, but because of the tight networking among young people (remember the sneakers epidemics of the 1970s), we saw a major diffusion of handguns from these recruits to their friends, and on out into the larger community⁵. That was the major factor contributing to the rise of violence that began in about 1985, reached a peak in 1993, and has been declining since. The entire rise in homicide from 1985 to 1993 was attributable to young people with handguns⁶.

The Infamous Crack-Powder Disparity

With this background, I would like to address what I consider the most blatant embarrassment of the current guidelines and sentencing statutes – the 100:1 disparity between the 5 grams of crack and the 500 grams of powder warranting a 5-year mandatory-minimum sentence. Because crack is dealt primarily by blacks (85% of Federal crack offenders are black), whereas powder cocaine is dealt with primarily by whites (18%) and Hispanics (48%) (data from DB, Figure 27)⁷. This disparity associated with race is so extreme and is far more egregious than the relatively minor differences in

stops claimed to be racial profiling (differences in the order of factors of two to five, nowhere near 100). The vigorous challenges against racial profiling have been widely responded to in most quarters.

The 100:1 disparity is widely seen as blatant proof of racial discrimination by the criminal justice system⁸, and thereby contributes in important ways to serious challenge to the legitimacy of that system. It is crying for careful reconsideration, at a minimum because of the powerful symbolic import of that difference. That reconsideration should focus on issues of culpability of people arrested for drug offenses, their level in the distribution hierarchy (particularly the degree to which they are the “king-pins” against whom the rhetoric surrounding severe sentences are almost always focused), and especially the societal harm associated with their involvement

Societal Harm and Violence

The first and probably most important basis for reconsideration relates to the issue of societal harm, specifically the violence associated with the marketing of crack, especially at the time the Congress introduced the original 100:1 disparity. But, as with all illegal drugs, that difference in violence is far less associated with the pharmacological nature of crack and its behavioral effects than with the nature of its market. We have to understand that market, both in its initial years and how it has changed in recent years.

Crack came on the scene in the early 1980s as an important technological innovation that made the “pleasures” of cocaine available to a stratum of society that could afford a hit-at-a-time purchase of crack but did not have the capital to buy powder in its minimum available quantities. That innovation started initially in the coasts, particularly New York City and Los Angeles, and worked its way into the center of the country⁹. As with any innovation that significantly expands the size of the market, there was vigorous competition for a share of that growing market. However, as with all illegal markets that are denied access to civil dispute-resolution mechanisms, that competition often shows itself in the use of violence against competitors.

Also, the means and locus of distribution contributed to the growth of violence. First, the aggressive marketing of crack, particularly to the new customers, typically took place in street markets, typically in the poorest neighborhoods of the city, neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.

Finally, the phenomenon discussed in the Background section became a major factor in the late 1980s and early 1990s: recruitment of young people as replacements for the crack dealers sent to prison, arming of these volatile individuals, and diffusion of guns to their friends, and resort to the traditional mode of teen-age dispute resolution – fighting – but with much more lethal consequences because of the nature of the weapons that had suddenly appeared.

Recent Developments in Violence

Thus, for all these reasons, we saw considerably more violence associated with crack during its early years, and that difference may well have provided the rationale behind the disparity in the mandatory minimums. But that situation has changed considerably. The nation’s violence rates are now well down, lower than they have been for over 35 years. The rates of violence by young people are down to or below the level they started at in 1985. The crack markets have matured with the absence of new users, and so there is no longer a need for the young participants (see the decline after 1993 in Figure 2), it is much easier to sell to established customers, sellers’ market shares have largely stabilized, and police have been effective in getting the guns out of the hands of the kids

Taking Account of Differences in Violence in Different Drug Markets

Thus, while there may still be somewhat more violence associated with crack markets, it seems to make little sense to associate the penalty with the chemical composition of the drug. It seems so much more appropriate to associate the penalty with the violent behavior itself. Thus, the Commission's proposal to provide sentencing enhancements for gun carrying – and especially for gun use – seems to carry out that concern with a principle that is so much more appropriate than associating it with the drug involved.

Role of Offenders in the Distribution Network

The principle of culpability would seem to apply much more strongly to those high in the distribution hierarchy and whose distribution scope is national as opposed to local. The Drug Briefing provides some striking data reflecting on this issue. Fully two-thirds of the Federal crack offenders are street-level dealers compared to 29% of the powder cocaine offenders (Figure 12). Also, the street-level dealers for both crack and powder are the functionaries with by far the lowest median quantity of drugs in their possession (Figure 18). Furthermore, the crack offenses are predominantly confined within a city or neighborhood (75% are neighborhood or local compared to 37% for powder cocaine). Thus, based on this consideration alone, the sanction for powder should be higher than for crack. But, as with violence, any such distinctions should be based on the role and behavior of the individual offender through sentencing enhancements rather than through the chemistry of the drug.

Mandatory Minimums

The fundamental principle underlying the creation of sentencing commissions is that they provide a means for giving careful deliberation to the level of sentence that is most appropriate for a particular class of offense and offender broadly defined, and that they provide enough slack to the individual judge dealing with a particular case to address those relevant factors not incorporated in the guidelines. Indeed, many state legislatures created their sentencing commissions in the 1980s as a blocking action against the then faddish mandatory minimums. In their calmer moments, they realized the inappropriateness of the political passions that so often drive sentencing decisions by a legislative body. This can happen after a particularly heinous crime has captured the headlines. It can also happen when the public becomes sufficiently concerned about some crime problem that it demands the political system “do something”; if there is nothing obvious to do, then the legislature can always resort to passing a mandatory-minimum sentencing law. Regardless of whether it does any good in addressing the crime problem, it has indeed seemed to work in at least temporarily satiating the public's demands. This has certainly been the case with the drug mandates. When the early two-year mandates didn't work, then they were cranked up to five years, and then to ten years, never with any clear or careful assessment of what good – or harm in terms of the replacements recruited – they did.

I think it is fair to say that the political passions that fueled the passage of many mandates – especially in the drug area – have cooled considerably. This is reflected in the passage in California of Proposition 36 calling for community treatment in preference to incarceration for drug offenders. Similar moves are under way in a number of other states. The pressure to make such changes results from a combination of fiscal problems faced by the states and a growing recognition of the ineffectiveness – often pure futility – of the often-draconian mandatory-minimum sentencing laws. I have for a long time advocated sunseting mandatory-minimum sentencing laws because I have been skeptical that legislatures would be willing to risk being labeled “soft on crime” by repealing any of them. At least, with sunseting, the law would have to be reconsidered after some period of time, and the ineffective ones left to disappear quietly in the absence of a strong reason to extend them.

I believe the time may well have come for the Commission to urge to Congress to at least sunset its mandatory drug laws to enable the Commission to emerge with a careful and rational structure in a deliberative way.

Summary

In these few pages, I have tried to highlight the concern about the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs, I have discussed why those differences may have occurred as a result of the nature of the markets much more than as a result of any pharmacological differences between the drugs. The evolution of the crack markets has significantly lowered the level of violence that characterized their early years. Also, it seems much more rational to use sentencing enhancements to punish those who use violence regardless of the drug they are dealing with than to base the sentencing difference on the chemical itself. Similarly, enhancements should be considered to account for an offender's role in the distribution hierarchy. If that were done, it becomes apparent that Federal powder cocaine offenders should fare even worse than crack offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder. If the Commission feels it necessary to create a difference even when an appropriate set of enhancements is in place, then it should negotiate for the smallest difference that would be accepted.

So many of these problems derive from the constraints put on sentencing policies by the passions reflected in mandatory-minimum sentences. I would hope that the Commission could capitalize on the growing national enlightenment on drug policy to urge the Congress to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to vigorous cheering throughout the nation's judiciary.

Notes

¹ See Blumstein, Alfred, Jacqueline Cohen, Susan Martin, and Michael Tonry (eds.), *Research on Sentencing: The Search for Reform* (2 volumes) (1983). Report of the National Academy of Sciences Panel on Research on Sentencing, National Academy Press, Washington, D.C.

² See Blumstein, Alfred "Making Rationality Relevant - The American Society of Criminology Presidential Address" (1993), *Criminology*, Vol. 31, No. 1, pp. 1-16.

³ Figure 1 is taken from Blumstein, Alfred, and Allen J. Beck, "Population Growth in U.S. Prisons, 1980-1996" (1999) in *Prisons*, vol. 26 of *Crime and Justice*, (Michael Tonry and Joan Petersilia, eds.), University of Chicago Press, Chicago, IL, pp. 17-61. It depicts the growth of incarceration rate by crime type in state prisons, a ten-fold increase from 1980 to 1986. Drug offenders comprise over 20 percent of state prisoners and over 60 percent of Federal prisoners.

⁴ See Johnson, Bruce, Andrew Golub, and Eloise Dunlap, "The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York", Chapter 5 in Blumstein, Alfred, and Joel Wallman (eds.), *The Crime Drop in America*, (2000), Cambridge University Press, Cambridge, England.

⁵ These issues were introduced in Blumstein, Alfred, "Youth Violence, Guns, and the Illicit-Drug Industry" (1995) *Journal of Criminal Law and Criminology* Volume 86, No. 4, pp 10-36.

⁶ These issues are developed in Blumstein and Wallman, *op cit.*, See especially Chapter 2, "Disaggregating the Violence Trends"

⁷ Data from the Drug Briefing (hereafter referred to as DB), January, 2002, prepared by the staff of the Sentencing Commission, available on the Commission's Web site.

⁸ It is important to recognize that the 100:1 disparity is not necessarily reflected in empirical reality of sentences imposed. DB (Figure 3) shows that Federal crack offenders get sentences that are only about 50% higher than cocaine offenders. But those sentences are complex aggregates of cases that differ in many ways, and it is difficult to discern how the sentences of comparable offenders would compare.

⁹ See Cork, Daniel, Examining space-time interaction in city-level homicide data: Crack markets and the diffusion of guns among youth. *Journal of Quantitative Criminology* (December 1999) 15(4): 379-406.

The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance

I. Introduction

No other feature of the Federal Sentencing Guidelines has been viewed more critically than the 100:1 crack-powder cocaine disparity built into the guidelines because of the requirement in the Federal Anti-Drug Abuse Act of 1986. The disparity is particularly distressing because crack defendants are primarily black and powder defendants are primarily white and Hispanic, so the differential treatment can too easily be seen as a manifestation of racial discrimination. Thus, there have been efforts in many quarters to call attention to this concern and to drastically diminish or eliminate this disparity.

It is important to understand the context of the drug market situation during 1986 when the Act was passed. It was a time of considerable expansion in the marketing of a technological innovation—crack, that made the “pleasures” of cocaine available at a much lower price per hit than previous products. That led to a major growth in demand and activity in inner-city street markets. Competition among sellers in these markets was marked by violent turf battles rather than advertising campaigns. At the same time, there was major effort directed at incarcerating the sellers, which encouraged the resilient markets to recruit replacements. Often, these replacements were juveniles, and since sellers in street markets had to carry handguns to protect themselves against robbers, handgun violence among juveniles increased sharply. This raised widespread concern in the political arena to “do something” about the problem of increasing seriousness. Understandably, the Congress did what it knows best how to do—raise the sanction level when it doesn’t have any other demonstrably effective approach. That didn’t necessarily solve the problem, but it did alleviate the pressure to “do something.”

In 2003, seventeen years after passage of the Act, the situation of crack and crack markets has changed considerably. The demand for crack by new users has declined appreciably, the activity in street markets has correspondingly declined since the older, addicted users can be served privately, and the level of violence associated with crack has diminished. Also, some of the preconceptions about the pharmacological effects of

crack on its users and especially on “crack babies” born to crack-using mothers have been shown to be misconceived and not markedly different from powder cocaine, and appreciably less serious to the fetus than alcohol.

Thus, when the situation that gave rise to the initial disparity has changed, that warrants reconsideration of the disparity. In this paper, I would like to examine some of the situations that prevailed in the mid-1980s and examine how they have changed in 2003, and perhaps that re-examination will lead to a willingness to reconsider the disparity. An important part of that re-examination involves consideration of the empirical facts regarding the growth of incarceration, especially for drug crimes; the changes in the rates of violence from the time when the legislation was originally passed, the peak in 1993, and today; and especially the degree to which the growth of violence was an unintended consequence of the growth in incarceration for drug crimes. One cannot intelligently address these issues without examining the data that bear on them.

II. Some Background Data on Violence and Drug Markets

In the mid-1980s, prisons were filling up with drug offenders. Figure 1 provides a clear indication of this growth,¹ with the incarceration rate for drug offenses increasing by a factor of 10 from 1980 to 1996. In my Presidential Address² to the American Society of Criminology in 1992, I argued that that growth was not likely to have much effect on drug markets because the resilient drug markets were quite able to recruit new sellers to replace those sent to prison and even those deterred from drug selling because of the draconian sentences being imposed. As a result, drug transactions would continue to respond to the articulated demand, and so the number of transactions averted through incarceration would be negligibly small as long as the demand persists.

It was only subsequently that I came to appreciate that the massive incarceration was not only ineffective, but was seriously counter-productive. The young people recruited as replacements in the crack markets were primarily African-American youth drawn from inner-city areas who had little opportunity in the legitimate



ALFRED BLUMSTEIN

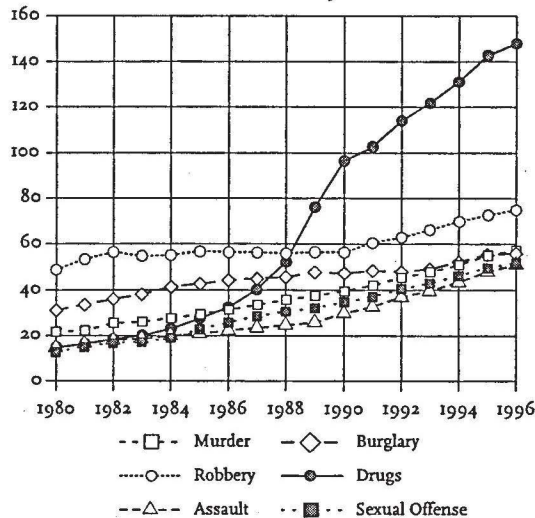
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University

Among his many other honors and obligations, Professor Blumstein, a frequent author on criminal justice topics, is the former Dean of the Heinz School and the former President of the American Society of Criminology.

This paper is an extension of testimony delivered to the United States Sentencing Commission on February 21, 2002.

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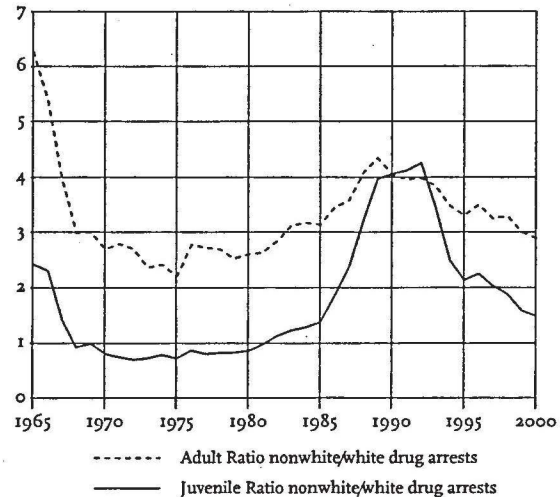
Figure 1
Total Prison Population per 100,000
Adult Residents by Year



economy at the time. This recruitment is indicated in Figure 2, which displays the ratio of drug arrests of nonwhites compared to those of whites; here, we see that the ratio for adults began to climb in the early 1980s, whereas that for juveniles didn't begin to climb until 1985 (as the prisons were filling with the older sellers) and reached a peak of four times that of whites from 1989 until 1992, and then began a sharp decline as the demand for crack by new users dried up in the mid-1990s.⁷ Since the youths were recruited primarily for street markets, they had to carry handguns to protect themselves against street robbers. One characteristic of these young folks was that they were far more volatile in their use of guns than the older people they replaced. Not only were these replacements a violence problem, but because of the tight networking among young people (remember the sneakers epidemics of the 1970s), their carrying guns gave rise to a major diffusion of handguns from these drug-market recruits to their friends, and on out into the larger community.⁸ The data bearing on that diffusion process was documented by Daniel Cork,⁹ who showed that a sharp rise in arrests of juveniles for drug offenses was followed by a sharp rise in arrests of juveniles for homicide, but with a one- to three-year lag. That diffusion of handguns was the major factor contributing to the rise of violence that began in about 1985, reached a peak in 1993, and has been declining since.

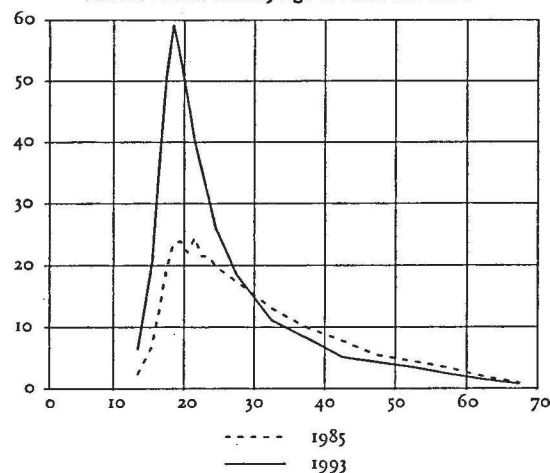
One of the important features of the rise in homicide from 1985 to 1993 was the narrow population group that contributed to it. For young people, that rise was considerable. This shift is reflected in the data presented in Figure 3, the classic age-crime curve. The figure depicts the age-specific arrest rate (arrests at each age divided by the population of that age) for homicide. The lower curve depicts the pattern for 1985, which was

Figure 2
Ratio of Nonwhite to White Arrests for Drugs:
Adults and Juveniles



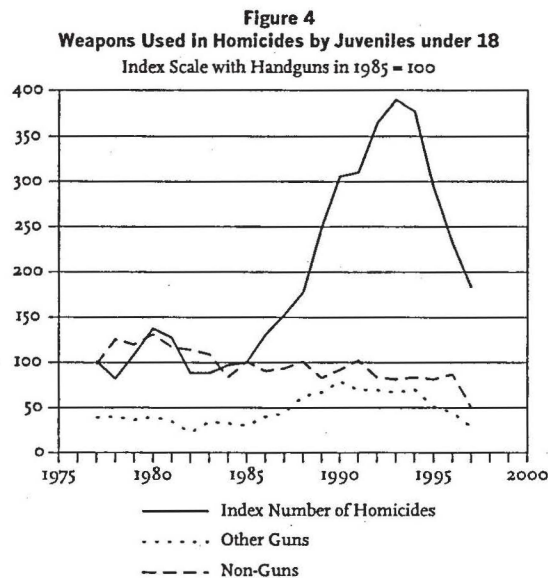
typical of the previous fifteen years, and the upper curve shows how much that had changed by 1993, when homicide rates reached their peak.⁶ Comparison of the two curves clearly shows that the entire growth was attributable to young people under 25. Indeed, the 1993 curve is seen to be *below* the 1985 curve for all the ages above 30. Thus, over this period, when the national homicide rate increased by about 25 percent, the increase among the young people was sufficiently great that it overcame the decrease among the older people.

Figure 3
Murder Arrest Rate by Age in 1985 and 1993



Another important feature of the young people's increase was the form of weaponry involved. The data in Figure 4 were drawn from homicide-incident reports compiled in the FBI's Supplementary Homicide Reports (SHR). The figure indicates the dramatic growth in the use of handguns by juveniles in homi-

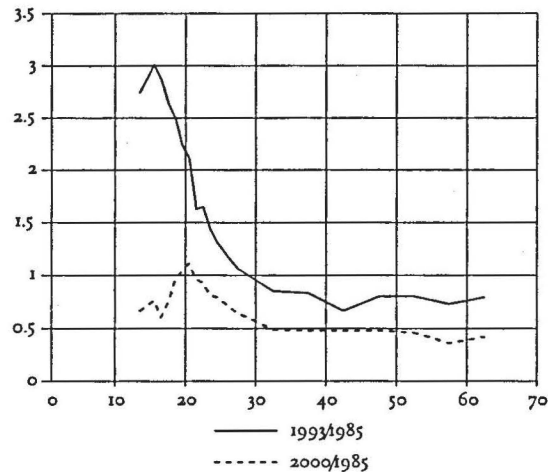
cides.⁷ The figure presents the index, with the use of handguns in 1985 set at 100, so all other values on the chart are relative to that index. This shows that juveniles used handguns in almost four times as many homicides in 1993 as they did in 1985. Over that time, there was a decrease in homicides with means other than guns and somewhat of an increase in homicides with long guns, but those changes were much smaller than the dramatic changes in handgun homicides.



The current situation is very close to a complete restoration of the situation that prevailed in 1985. The data presented in Figure 5 depict the ratio of the age-specific homicide arrest rates compared to 1985. The upper curve is based on rates in 1993 (the peak year) compared to the rates in 1985. This graph is the ratio of the two age-crime curves presented in Figure 3. These data highlight the fact that homicide arrests for 15-year-olds tripled between 1985 and 1993, and that the rate more than doubled for all ages of 20 and under. We also note here that the ratio for all ages over 30 is about 0.8, so that the arrest rate for those ages has dropped about 20 percent below the rates that prevailed in 1985, an observation consistent with the observation noted in the age-crime curve.

The lower curve of Figure 5 presents the ratio of the homicide arrest rate by age in 2000 compared to 1985. The striking observation here is that the major rise of young people's rates that happened by 1993 was largely undone by 2000, and that the rates of homicide by these young people are now back to or below the rates that prevailed in 1985 for all ages.⁸ The reasons for the recovery by 2000 involve a mixture of factors: the reduction in demand for crack by new users, thereby diminishing the role of and need for street markets, the diminished need for young people in the market, the availability of a robust economy that could absorb those

Figure 5
Ratio of Arrest Rates for Murder by Age
in 1993 and 2000 Compared to 1985



who might otherwise be in the market, aggressive policing targeted at young people's guns, and the deterrent effect on gun-carrying of that aggressiveness. All of these factors led to a de-escalation of carrying after 1993 that mirrored the escalation that began in about 1985. That de-escalation is reflected in the steady decline of the number of juvenile handgun homicides in Figure 4⁹ after the 1993 peak.

III. The Crack-Powder Disparity

This background of a dramatically changing violence environment, especially involving young people, associated with the rapid growth of crack markets in the 1980s provides some indication of the level of public anxiety—and hence the political panic in which the crack-powder distinction was enacted in the Federal Anti-Drug Abuse Act of 1986. That act introduced the 100:1 disparity between the 5 grams of crack and the 500 grams of powder requiring a 5-year mandatory-minimum sentence. The feature that makes this distinction particularly troublesome is the fact that crack is dealt primarily by blacks (85% of federal crack offenders are black), whereas powder cocaine is dealt primarily by whites (18%) and Hispanics (51%).¹⁰

The 100:1 disparity is widely seen as a blatant demonstration of racial discrimination by the criminal justice system.¹¹ Similar concerns surround racial profiling in police stops and racial disproportionality in prison, but in neither of these kinds of situations is the disparity so explicitly built into the law. Also, the racial difference in the outcomes could have legitimate explanations for the disproportionate consequences they produce: disparate police stops could possibly be explained by racial differences in the involvement in the offenses being checked for.¹² The vigorous challenges against racial profiling have been widely responded to in most quarters. The racial disproportionality in prison could be associated with differential involvement in the

crimes leading to prison." Thus, the crack-powder disparity contributes in an especially powerful way to a serious challenge to the legitimacy of that system.

This disparity is crying for careful reconsideration, at a minimum because of the powerful symbolic import of the difference. That reconsideration should focus on issues of culpability of people arrested for drug offenses, their role in the distribution hierarchy (particularly the degree to which they are the "king-pins" against whom the rhetoric surrounding severe sentences is almost always focused), and especially the societal harm associated with their involvement. The disparity would be seen as far more legitimate if these were the considerations involved rather than minor chemical differences in the substances involved.

A. Societal Harm and Violence

The first and probably most important basis for reconsideration relates to the issue of societal harm, specifically the violence associated with the marketing of crack, especially at the time the Congress introduced the original 100:1 disparity. But, as with all illegal drugs, that difference in violence is far less associated with the pharmacological nature of crack and its behavioral effects than with the nature of its markets. We have to understand that market, both in its initial years and how it has changed in recent years.

Crack came on the scene in the early 1980s as an important technological innovation that made cocaine pharmacology available to a stratum of society that could afford a hit-at-a-time purchase of crack but did not have the capital to buy powder in its minimum available quantities. That innovation started initially in the coasts, particularly New York City and Los Angeles, and worked its way into the center of the country.⁴ As with any innovation that significantly expands the size of the market, there was vigorous competition for a share of that growing market. However, as with all illegal markets that are denied access to civil dispute-resolution mechanisms, that competition often shows itself in the use of violence against competitors.

Also, the means and locus of distribution contributed to the growth of violence. First, the aggressive marketing of crack, particularly to the new customers, typically took place in street markets, most often located in the poorest neighborhoods of the city, neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.

Finally, the dynamics of the market's response to the

massive incarceration of drug violators became a major factor in the late 1980s and early 1990s: recruitment of young people as replacements for the crack dealers sent to prison, arming of these volatile individuals, and diffusion of guns to their friends, and resort to the traditional mode of teen-age dispute resolution—fighting—but with much more lethal consequences because of the nature of the weapons that had suddenly appeared.

Thus, for all these reasons, we saw considerably more violence associated with crack during its early years, and that difference may well have provided the rationale behind the disparity in the mandatory minimums. But that situation has changed considerably. The nation's violence rates are now well down, lower than they have been for over 35 years. As shown in Figure 5, the rates of violence by young people are down to or below the level they started at in 1985. The crack markets have matured with the decline in the number of new users, and so there is no longer a need for the young participants (see the rapid decline in drug arrests of non-white juveniles after 1993 in Figure 2). It is much easier to sell to established customers, sellers' market shares have largely stabilized, and police have been effective in getting the guns out of the hands of the kids.

In particular, the US Sentencing Commission's report demonstrates the low level of violence currently associated with the marketing of either drug, and shows the negligible difference between them. No weapons were involved in 82 percent of the powder cases and in 75 percent of the crack cases, and there was no bodily injury in 91 percent of the powder cases and in 88 percent of the crack cases. Death occurred at the same level (3.4 percent) in both sets of cases.⁵ Thus, these data show that the crack cases do have somewhat more involvement of weapons and more bodily injury, but these differences are very small, and certainly less than enough to warrant major discrepancy in treatment based on the drug involved.

While there may still be slightly more violence associated with crack markets, it seems to make little sense to associate the penalty with the chemical composition of the drug. It seems so much more appropriate to associate the penalty with the violent behavior itself. Thus, the Commission's proposal to provide sentencing enhancements for gun carrying—and especially for gun use—seems to carry out that concern with a principle that is so much more appropriate than associating it with the drug involved.

B. Role of Offenders in the Distribution Network

The principle of culpability should apply much more strongly to those high in the distribution hierarchy and whose distribution scope is national as opposed to local. In this context, there are important differences in the roles in the drug markets that are played by Federal

crack defendants. The US Sentencing Commission reports that 67 percent of the crack cases in 2000 involved street-level dealers, but only 29 percent of the powder dealers. On the other hand, 31 percent of the powder cases involved mules, but only 2 percent of the crack cases.¹⁶ Thus, 69 percent of the crack cases were clearly low-level defendants, whereas 59 percent of the powder cases were low level. For these two low-level functions, however, crack defendants' sentences were twice as long as the powder defendants'.

The geographic scope of activities by the crack dealers reflects their predominant low-level function: 75 percent of the Federal crack cases involved sales in a neighborhood or city, whereas only 37 percent of the powder cases were that confined. In contrast, the powder cases covered larger units, and 33 percent involved international transactions.¹⁷ Thus, based on these role considerations alone, the sanction for powder should be appreciably higher than for crack. But, as with violence, any such distinctions should be based on the role and behavior of the individual offender through sentencing enhancements rather than through the chemistry of the drug.

III. Mandatory-Minimum Sentencing Laws

The mandatory-minimum sentencing laws being considered here were representative of the widespread practice of legislatures during the late 1970s and 1980s to demonstrate their toughness on issues that concerned the public. In many cases, these political acts were taken with little regard to the benefits that might be derived, and with even less regard to the unintended consequences that might result. Indeed, one of the motivations underlying the creation of sentencing commissions was to provide an institutional arrangement that would give careful deliberation to the level of sentence that is most appropriate for a particular class of offense and offender broadly defined, to provide a coherent structure that reflects the seriousness of the offense and the offender, and that would provide enough flexibility for the individual judge dealing with a particular case to address those relevant factors not incorporated in the guidelines. Indeed, a number of the state legislatures created their sentencing commissions in the 1980s as a blocking action against the then faddish mandatory minimums.¹⁸ In their calmer moments, they realized the inappropriateness of the political passions that so often drive sentencing decisions by a legislative body. This can happen after a particularly heinous crime has captured the headlines. It can also happen when the public becomes sufficiently concerned about some crime problem that it demands some action by the political system; if there is nothing obvious to do, then the legislature can always resort to passing a mandatory-minimum sentencing law. Regardless of whether it does any good in addressing the crime problem, it has indeed seemed to work in at

least temporarily satiating the public's demands. This has certainly been the case with the drug mandatories. When the early two-year mandatories didn't work, then they were cranked up to five years, and then to ten years, never with any clear or careful assessment of what good—or harm in terms of the replacements recruited—they did.

It does appear that the political passions that fueled the passage of many mandatories—especially in the drug area—have cooled considerably. This is reflected in the passage in California of Proposition 36 calling for community treatment in preference to incarceration for drug offenders. Similar moves are under way in a number of other states. The pressure to make such changes results from a combination of fiscal problems faced by the states and a growing recognition of the ineffectiveness—often pure futility—of the often-draconian mandatory-minimum sentencing laws. I have for a long time advocated sunseting mandatory-minimum sentencing laws because I have been skeptical that legislatures would be willing to risk being labeled “soft on crime” by repealing them.¹⁹ At least, with sunseting, the law would have to be reconsidered after some period of time, and the ineffective ones left to disappear quietly in the absence of a strong reason to extend them. It is encouraging to note that Michigan has repealed its mandatory-minimum laws,²⁰ and that a number of states are similarly considering a move to a more rational and coherent approach to sentencing policy.

IV. Summary

I have tried here to highlight the concern about the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs in 1986 at the time of original passage of the Act, it is important that the advocates of retaining the disparity recognize that those differences occurred as a result of the nature of the markets at the time much more than as a result of any pharmacological differences between the drugs. Data from the late 1980s and early 1990s clearly showed the growth of violence, but data after the 1993 peak show that the recent evolution of the crack markets has significantly lowered the level of violence that characterized their early years. The data clearly show that there is currently very little difference between the violence associated with crack and that associated with powder. Also, it seems much more rational to use sentencing enhancements to punish those who use violence regardless of the drug they are dealing than to base the sentencing difference on the chemical itself. Similarly, enhancements should account for an offender's role in the distribution hierarchy. If that were done, it becomes apparent that federal powder cocaine offenders should

fare even worse than crack offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder.

The United States Sentencing Commission has proposed raising the crack level from 5 grams to "at least" 25 grams, thus reducing the disparity from 100:1 down to 20:1.¹ Thus, while it is clearly a move in the right direction, this shift is less than a major concession to reasonableness. Perhaps the sanctions for crack and powder might be equalized at some future time, using enhancements for whatever operational differences might remain. That would be an important step in diminishing the widespread concern of racial discrimination in the criminal justice system.

I would also hope that the Congress would capitalize on the growing national enlightenment on drug policy to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to widespread appreciation by all those concerned with developing more rational sentencing policy.

Notes

- ¹ Figure 1 is taken from Blumstein, Alfred, and Allen J. Beck, "Population Growth in U.S. Prisons, 1980-1996" (1999) in *Prisons*, vol. 26 of *Crime and Justice*, (Michael Tonry and Joan Petersilia, eds.), University of Chicago Press, Chicago, IL, pp. 17-61. It depicts the growth of incarceration rate by crime type in state prisons, a ten-fold increase from 1980 to 1986. Drug offenders comprise over 20 percent of state prisoners and over 60 percent of Federal prisoners.
- ² See Blumstein, Alfred "Making Rationality Relevant—The American Society of Criminology Presidential Address" (1993), *Criminology*, Vol 31, No. 1, pp. 1-16.
- ³ See Johnson, Bruce, Andrew Golub, and Eloise Dunlap, "The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York," Chapter 5 in Blumstein, Alfred, and Joel Wallman (eds.), *The Crime Drop in America*, (2000), Cambridge University Press, Cambridge, England.
- ⁴ These issues were introduced in Blumstein, Alfred, "Youth Violence, Guns, and the Illicit-Drug Industry" (1995) *Journal of Criminal Law and Criminology* Volume 86, No. 4, pp. 10-36.
- ⁵ See Cork, Daniel, "Examining space-time interaction in city-level homicide data: crack markets and the diffusion of guns among youth." (1999) *J Quantitative Criminology* 15(4): 379-406.
- ⁶ The data for the age-crime curve are drawn from arrest data in the FBI's Uniform Crime Reports (for the numerator) and

age-specific population from Census data (for the denominator).

- ⁷ These issues are developed in Blumstein and Wallman, *op cit.*, See especially Chapter 2, "Disaggregating the Violence Trends"
- ⁸ The rates for the ages over 30 have continued to decline, and are now about half what they were in 1985.
- ⁹ These issues are discussed in detail in Blumstein and Wallman, *supra* note 3, and summarized in Chapter 1 of the book
- ¹⁰ Data from United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* May 2002, at 63, Table 3.
- ¹¹ It is important to recognize that the 100:1 disparity is not necessarily reflected in empirical reality of sentences imposed. The US Sentencing Commission report (*supra*, note 10 at 35, Figure 3) shows that Federal crack offenders have recently been getting sentences that are about 50% higher than cocaine offenders. But those sentences are complex aggregates of cases that differ in many ways, and it is difficult to discern how the sentences of comparable offenders would compare. Indeed, there are certainly indications that crack offenders tend to have much lower roles in the market—predominantly street dealers.
- ¹² See especially the papers, Fagan, Jeffrey, "Law, Social Science, and Racial Profiling" pp.103-129 and Ayres, Ian "Outcome Tests of Racial disparities in Police Practices" pp.131-142 in *Justice Research and Policy* 4 (Fall 2002), Special Issue on Police Data Collection
- ¹³ For some discussion of this issue, see Blumstein, Alfred, "On the Racial Disproportionality of United States' Prison Populations" (1972), *Journal of Criminal Law and Criminology* 73 (3) and "Racial Disproportionality of U.S. Prison Populations Revisited" (1993), *University of Colorado Law Review*, (64) 3, pp. 743-760.
- ¹⁴ See Cork, *supra* note 5.
- ¹⁵ US Sentencing Commission report *supra* note 10 at 54-56, Tables 17 and 19
- ¹⁶ *Id.* at 39, Figure 6
- ¹⁷ *Id.* at 41-43, Figures 7 and 8.
- ¹⁸ I personally know that an important motivation in introducing the legislation creating Pennsylvania's sentencing commission (the second commission created, following Minnesota's) was an attempt to pre-empt a variety of mandatory-minimum bills that were then pending.
- ¹⁹ See, for example, Blumstein, Alfred, "Prisons" at 418 in James Q. Wilson and Joan Petersilia, eds., *Crime* (1995) ICS Press: San Francisco
- ²⁰ See "Michigan to Drop Minimum Sentence Rules for Drug Crimes", *New York Times*, December 2, 2002.
- ²¹ That ratio is consistent with a proposal made earlier by Senators Hatch and Sessions. Unlike the Commission proposal, the Hatch and Sessions approach would include a decrease in the amount of powder cocaine needed to trigger the mandatory penalty and a smaller increase in the amount of crack needed to trigger the mandatory.

Questions for written submission

Dr Bruce Johnson

1. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer or wholesaler, a street level dealer etc. In what -quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
2. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
3. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should the specific difference be, and what is the justification for that specific difference?

**WRITTEN TESTIMONY TO THE U.S. SENTENCING COMMISSION ON FEDERAL
COCAINE/CRACK SENTENCING PRACTICES.**

BY BRUCE D. JOHNSON, PHD., DIRECTOR,

**INSTITUTE FOR SPECIAL POPULATIONS RESEARCH,
NATIONAL DEVELOPMENT AND RESEARCH INSTITUTES.
71 West 23rd St. New York, NY 10010 johnsonb@ndri.org
November 8, 2006**

ORAL REMARKS

Thank you for this opportunity to present some important findings about crack and cocaine powder usage and their distribution. More details about the samples and findings are provided in the written paper.

My oral presentation will focus mainly upon changing trends of crack and cocaine powder usage among arrestees in Manhattan—based upon data derived from analysis of the Arrestee Drug Abuse Monitoring Program (ADAM).

The central changes occurred since 1980. Important cohort shifts have occurred, especially among African-American males arrested for a wide range of crimes.

In the early 1980s, cocaine powder, free basing, and especially crack (after 1985) became the preferred drug of abuse among youthful (and older) African-American males involved with illicit drugs. (Johnson et al. 1990).

This crack epidemic “peaked” between 1987-1989 in NYC when about 70% of all NYC arrestees were detected as cocaine positive by urinalysis for use of either powder or crack cocaine (Johnson, Golub, Dunlap 2006a).

This occurred as legislation focused on crack resulted in the Anti-Drug Abuse Act of 1986 which imposed the 100 to 1 sentencing disparity between crack and cocaine for a 5 year mandatory minimum sentence.

Figure 1 shows the trends in urinalysis (“detected cocaine/crack user”) and self-reports of the use of crack and cocaine powder among Manhattan arrestees.

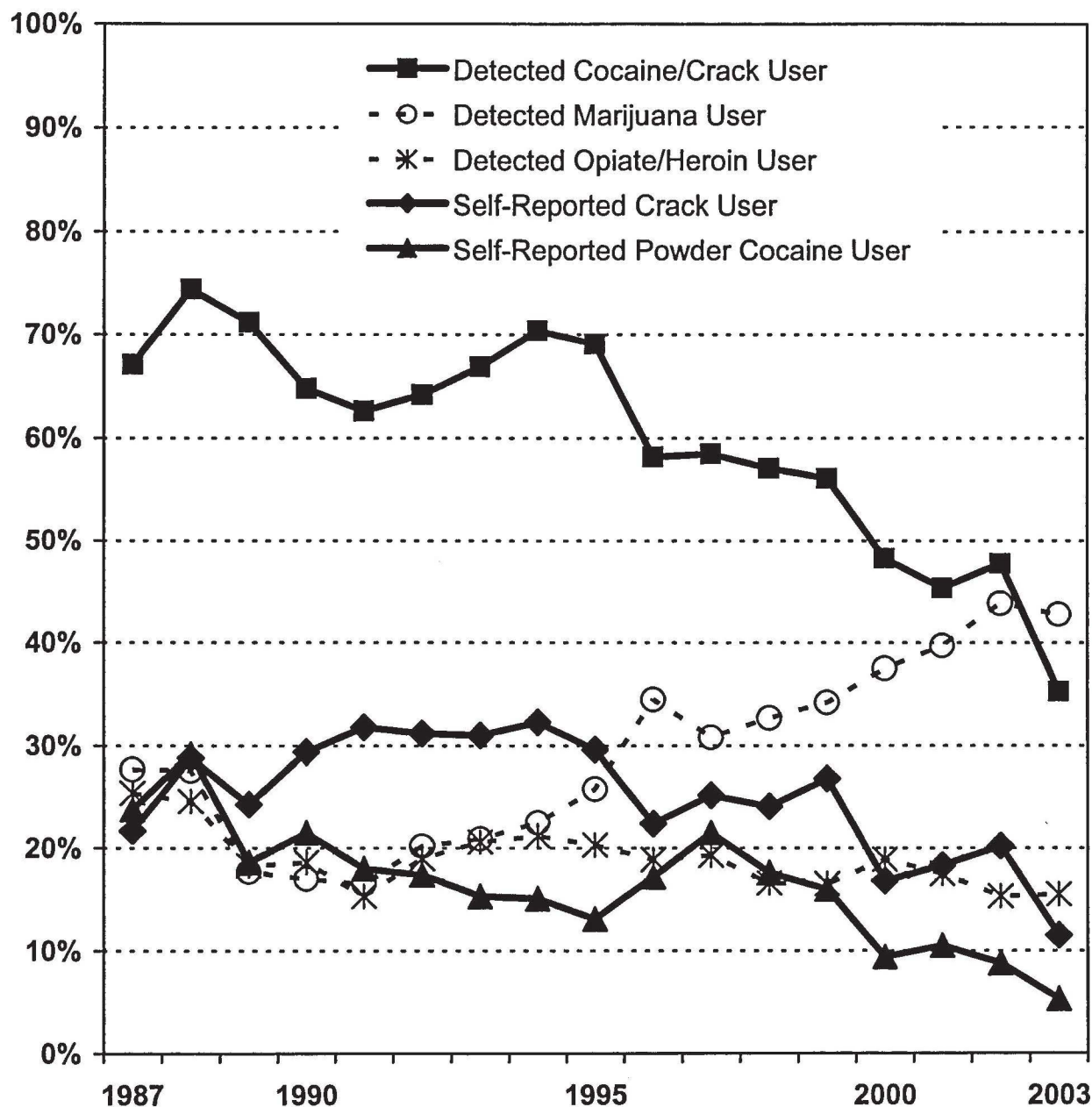


Figure 1. Variation over Time in Detected Cocaine/Crack Use and Self-Reports of Past 72-Hour Use of Crack and Powder Cocaine among ADAM-Manhattan Arrestees 1987-2003

There has been a substantial decline in detected cocaine/crack use (from about two-thirds in 1987-1995 to about two-fifths in 2000-2003). The overall rates of self-reported use were naturally lower due to non-disclosure. Even so, the declines in self-reports of past-72-hour use of crack and cocaine powder over time mirrored the decline in overall detected use.

Subsequent analyses indicate that these changes are primarily the result of the changing mix of birth cohorts among ethnic groups among NYC arrestees. These differences are birth cohort related; actual age at interview is not important. Details are provided in written testimony.

Among each cohort born 1945-69 (what we call the heroin injection and crack generations), detected cocaine/crack use peaked near 80% or above in 1994 or 1995. The rate declined moderately to between 60-70% through 2002.

By 2000-2003, these cohorts (ages 35 and older in 2003) comprised a diminishing proportion of the arrestee pool in New York City.

The rate of detected cocaine/crack use and self-reported crack use among subsequent cohorts was much lower. The 1970-74 cohort peaked at 50% in 1995. The 1975-79 cohort peaked at 30% in 2002. The 1980+ cohorts peaked at 20% in 2002.

These proportions did not show a steady decline after 1995, rather they fluctuated from year to year (see Table 2 in written comments).

Marijuana, especially in the form of blunts (wrapped in a cigar shell), has become the primary drug of misuse/abuse among African-American and Hispanic males (and females). (Johnson, Golub, Dunlap 2006a).

Ethnic Variation in Crack/Cocaine Use in New York City

Black arrestees were more likely (66%) to be detected as recent cocaine/crack users than their white counterparts (54%).

Higher proportions of Black arrestees (31%) self-reported crack use than their white (22%) or Hispanic (19%) counterparts (Table 1 below).

White arrestees (23%) were more likely to self-report cocaine powder use than Hispanic (17%) and Black (15%) arrestees.

Moreover, important ethnic variation among different birth cohorts is evident (See figures 2-4 in written testimony).

Among BLACK arrestees born 1945-69, the rate of detected cocaine/crack use remained high (72-83%) 1987 through 2003. The rate of use was much lower (38%) among the 1970+ cohort in 1987-1990 and has declined to 21% by 2000-03. Further, many younger Black males in NYC report avoiding crack and cocaine use—preferring blunts (marijuana) instead.

Among HISPANIC arrestees born 1945-69, the rate of detected cocaine/crack was high in 1987-90 (70-72%) and declined to as low as 52% by 2000-03. The rate of use was much lower (37%) among the 1970+ cohort in 1987-1990 and declined to 28% by 2000-03.

Among WHITE arrestees born 1955-69, the rate of detected cocaine/crack was high in 1987-99 (63-70%) and then dropped to 53% in 2000-03. The rate of crack/cocaine use among white arrestees was much lower (38-41%) among the cohort born after 1970—but still higher than among their same age Black and Hispanic counterparts.

Limited harms associated with crack use in all generations.

With the exception of crack distribution (see below), crack users from all ethnicities and generations appear to limit their criminal activities so as to bring about limited harm to others. Only a small minority of crack users in NYC carries guns or use weapons in the 2000s, engage in aggravated assault on others, or otherwise harm ordinary passersby. In short, violence is relatively rare among current crack/cocaine users. (Johnson, Golub, Dunlap 2006; Johnson, Dunlap, Tourigny 2000).

Apparently as they have grown older than 35, the heroin and crack generations (born 1945-69) (Golub and Johnson 1994ab) appear to be relatively successful at avoiding arrest (their numbers among arrestees are declining)—even though they continue to be most likely to be detected as crack/cocaine users (over 50%). An analysis of their criminal arrest charges has not been completed as yet.

Even among the younger generation (born after 1970), their detected crack/cocaine use seems to be relatively unrelated to various forms of violence or harms to ordinary passersby.

Crack and cocaine sales and distribution

Probably the primary (and more serious) offense involves the retail sale and/or low-level distribution roles of crack and sometimes cocaine powder.

Of special note, the retail sales of cocaine powder appears to occur mainly in private settings, and mainly involve the more conventional (with legal jobs/incomes, and household) consumers of cocaine powder, and who typically avoid crack use and markets. (Davis et al 2003, 2004).

Most low level drug distributors and sellers added crack to their product line in the 1990s, and crack sales became a very common offense. Good information is not available about the quantities they possessed or sold (Johnson et al 1994).

Especially among the older generations (born 1945-69) of crack consumers, retail sales and low-level support roles appear common, especially among women (Davis et al 2005). Mostly such distribution supports own crack consumption.

Among the younger generation (born after 1970) that prefers and mainly uses marijuana as blunts, patterns of distribution are mixed. Many blunt users will not engage in crack/cocaine sales. Yet, an important minority of blunt users is recruited into roles that support street-level sales of crack (retail seller, lookout, holder) where the probability of arrest is significant. Earnings from crack sales work may be spent to purchase marijuana for use as blunts (rather than self-use of crack). (Johnson, Golub, Dunlap 2006; Johnson, Dunlap, Tourigny 2000).

Most crack sellers or distributors live at poverty levels or below. Very few are able to establish households and maintain a working class standard of living—without also receive income transfers or “living off” someone else (usually a parent or sexual partner). (Davis et al 2004).

Any “deterrence effect” of the 100 to 1 ratio in federal sentencing guidelines is nearly impossible to document. Crack sellers/distributors rarely mention awareness of it, nor do they report changing their business activities due to its existence.

Arrest patterns

The average crack distributor likely does not know with precision how much he possesses, but often believes it to be under 5 grams. Repeat purchases of “bundles” of vials or bags (each valued at \$10) containing crack, may exceed 5 grams, however.

Although the number of persons arrested for crack possession and sales in NYC has diminished somewhat during the 1990s and 2000s, many persons are arrested for felony controlled substance possession (about 60,000 annually) and sale (about 20,000 annually) in NYC in 2001-03. (Johnson et al 2006c: 30). Note: the number and proportions arrested for crack or cocaine powder is not available to the public, although crack arrests probably constitute a majority of controlled substance sale arrests.

Yet, very few NYC arrestees face “federal indictment and prosecution” and so face possible mandatory minimum sentences.

Rather, the vast majority of NYC arrestees are prosecuted and sentenced under NY State penal law where cocaine powder and crack are treated equal to powder cocaine, and a mandatory minimum sentence is not required.

Persons arrested for crack possession and sale are frequently required to plead guilty to a felony charge, but are then referred to various alternative to incarceration programs (e.g. residential treatment programs, bootcamps, drug courts, probation, etc.), so that probably only about half of crack arrestees in NYC actually serve a sentence in prison. [Little is known about the outcomes of cocaine powder cases.]

Crack to cocaine powder ratio—some empirical data.

Among the NYC arrestees, 26% self-report crack use in the past 72 hours while 17% self-report cocaine powder use (Table 1 below). This suggests a 1.5 to 1 ratio (e.g. 26%/17%) in self-reported use. (Note: a sizable proportion report both crack and cocaine powder in the 72 hour window.)

Recent studies have documented that almost 90% of ADAM arrestees whose urine specimens tested positive for cocaine, also had detectable metabolites for crack.[1] Among arrestees, this suggests that a “disparity” ratio would be 9 for crack vs. 1 for cocaine powder.

Both a 2 to 1 or 10 to 1 ratio in sentencing guidelines would be more appropriate given this empirical data than the current 100 to 1.

Crack and cocaine powder in other cities

A previously published article (Golub and Johnson 1997) documents substantial variation in cocaine use among arrestees at several ADAM sites (Golub et al 2005ab). While the youthful generation (ages 18-20) was less likely to be detected as cocaine positive than all arrestees in most ADAM sites, important differences in trend lines and variability in cocaine use was evident at every site.

Note that this analysis is now very dated (a decade old), 8 additional years of ADAM data (1997-2003) are available, and differentiation by (self-reported) crack and cocaine powder use is possible. Modest funding could provide more detailed analysis of crack and cocaine powder use patterns and trends in approximately 15 major cities nationwide. Additional analysis of the ADAM data set would be able to address many questions about crack and cocaine use. This data set is especially relevant to the sentencing commission since an arrest for crack or cocaine powder at the local level is a major way that many cases enter (or subsequently get transferred) to the federal system.

A recent but unpublished doctoral thesis (Sevigny 2006) analyzed data from the inmate survey of those incarcerated in federal prisons in 1997. The impact of the 100 to 1 cocaine to crack ratio is documented in many different ways. One of the most important findings is that if the sentencing practices were set the same for crack (at 500 grams) as for cocaine powder:

“blacks account for 60% of the crack and powder cocaine offenders combined, but would benefit from 90% of the averted prison years. To put this in perspective, the estimated number of black prison years averted were crack and powder cocaine sentenced equally represents more than 4000 individual five-year sentences, compared to approximately 150 for whites and 300 for Hispanics.” (Sevigny 2006: 138).

[1] When cocaine freebase is heated/burned, this pyrolysis of crack creates additional byproducts that are both inhaled with the crack dose and are detectable in urine samples. These metabolites--anhydroecgonine methyl ester (AEME) and ecgonidine (ECD)—were detected in 88% of cocaine positive specimens. The overall prevalence of detected crack use (28%) occurred among a sample of 1,666 males and 661 females from 6 ADAM sites (Denver, Houston, Los Angeles, New Orleans, Phoenix, Portland) in 1998. African-Americans were about twice (35%) as likely as whites (18%) [with Hispanics (25%) intermediate] to be positive for crack metabolites. (Riley et al 2001). Crack metabolites were detected in 92% of sweat patches worn by street recruited samples in New York (Liberty et al 2003).

EXTENDED INFORMATION SUPPORTING VERBAL REMARKS

Andrew Golub and Bruce D. Johnson
National Development and Research Institutes

Notes in support of Testimony to the Sentencing Commission
November 8, 2006

METHODOLOGY OF ARRESTEE DRUG ABUSE MONITORING (ADAM)

The authors have employed analysis of data from the ADAM-Manhattan data for many publications (several citations are given below). The ADAM data collected 1987-2003 was rapidly analyzed to examine cocaine powder and crack use among arrestees, particularly those born since 1955.[2] This section briefly describes the ADAM program, discusses issues associated with combining the data across survey years, describes calculations and analytic procedures used in this study and presents the demographic characteristics of the sample.

Starting in 2000, the ADAM public-use data files include post-sampling stratification weights for adult male arrestees to account for differential probability of sampling associated with time of arrest and booking facility (Hunt & Rhodes 2001). For this analysis, we used logistic regression to control for variation in non-participation in each year since 2000 (separately by gender) associated with age, race/ethnicity and arrest charge; for example, the sample weights for older males arrestees in 2000 were increased to account for their higher rate of non-participation. Sample weights were further adjusted so that female arrestees accounted for 20% in each year except 2002 and 2003 in which years there were less than 50 females interviewed accounting for 4% of all arrestees.

Starting in 2000, ADAM asked separate questions about race and ethnicity. For this analysis, black-Hispanics were coded as black. White-Hispanics and other Hispanics were coded as Hispanic.

Table 1
Variation in Detected Cocaine/Crack Use among ADAM-Manhattan Arrestees 1987-2003
by Birth Cohort and Race/Ethnicity

Birth Cohort	Detected Cocaine/Crack Use (Urinalysis)	Percent Crack (self-report of past-72-hour use)	Powder Cocaine (self-report of past-72-hour use)
Pre-1945	52.0	20.1	17.6
1945-54	73.0	31.4	24.3
1955-59	76.8	34.4	21.9
1960-64	74.5	33.2	18.6
1965-69	66.9	29.1	16.9
1970-74	41.3	14.0	10.2
1975-79	21.3	5.6	6.0
1980+	13.0	2.4	2.3
Race/Ethnicity			
Black	66.6	31.1	15.3
Hispanic	54.0	18.7	17.3
White	56.3	21.7	22.6
Other	31.6	10.3	10.5
Total	60.9	25.8	16.8

Detected cocaine/crack use was most common among heroin injection (born 1945-54) and crack generations (born 1955-69) and not among the more recent marijuana/blunts generation (born 1970 and later).

Members of the crack generation (born 1955-69) were much more likely to self-report past 72-hour use of crack than powder cocaine. Among those reporting use of either drug, powder cocaine use was more common among the heroin injection and marijuana/blunts generation than among the crack generation.

Black arrestees were more likely to be detected as recent cocaine/crack users than their white counterparts. Black arrestees that reported use of crack or powder cocaine were more likely to report crack use than their white counterparts.

Hispanic arrestees were LESS likely to be detected as recent cocaine/crack users than their white counterparts. Hispanic arrestees that reported use of crack or powder cocaine were more likely to report crack use than their white counterparts but much less likely than their black counterparts.

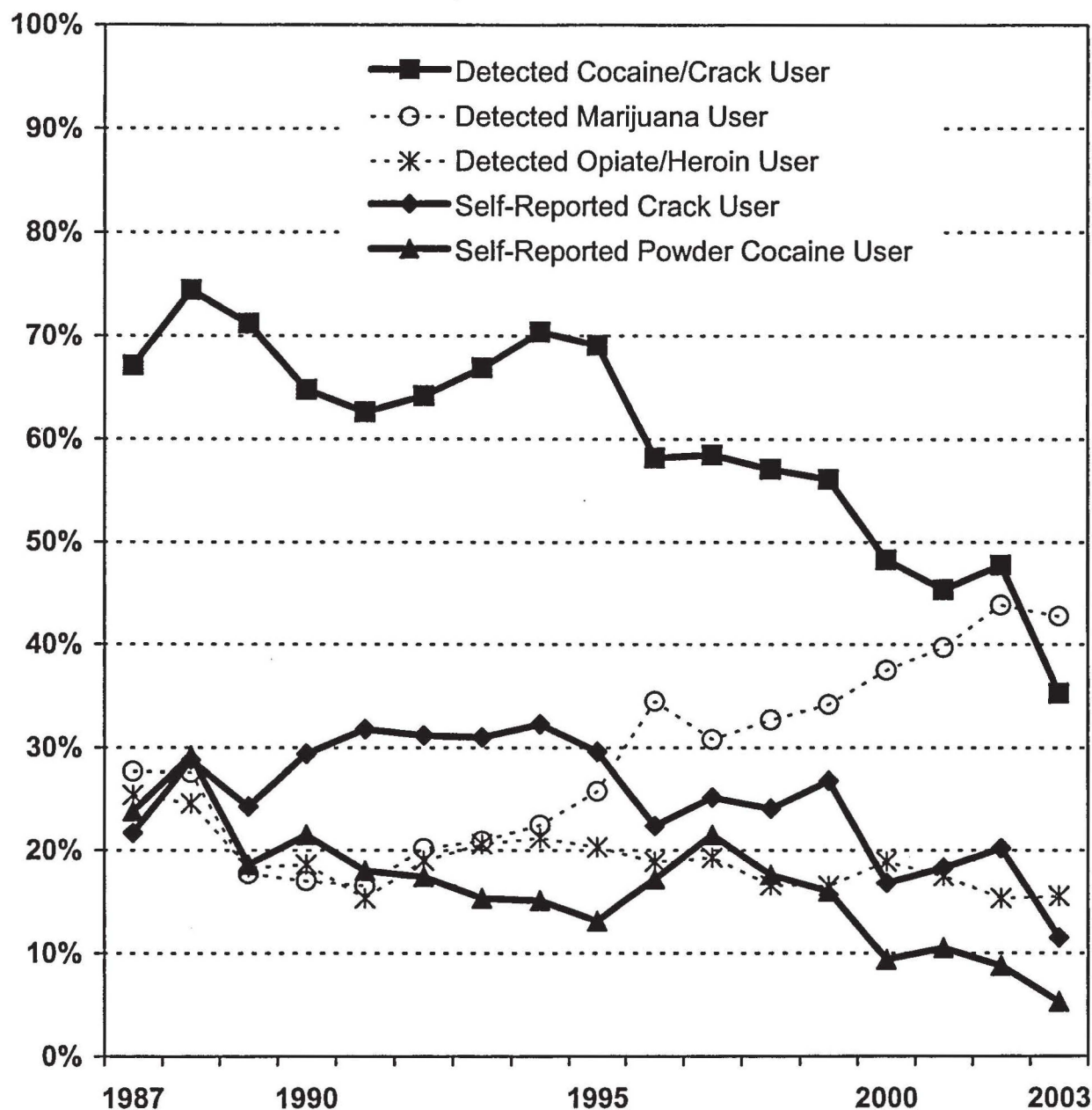


Figure 1. Variation over Time in Detected Cocaine/Crack Use and Self-Reports of Past 72-Hour Use of Crack and Powder Cocaine among ADAM-Manhattan Arrestees 1987-2003

There has been a substantial decline in detected cocaine/crack use as well as self-reports of past-72-hour use of crack and cocaine powder over time. However, subsequent tables indicate that this change is primarily the result of the changing mix of birth cohorts (the later marijuana/blunt generation comprising more of the arrest population) and not due to a decline in crack use among the members of older birth cohorts still sustaining arrests into the late 1990s and early 2000s.

Table 2
Variation in Detected Cocaine/Crack Use among ADAM-Manhattan Arrestees
by Birth Cohort over Time (age-period-cohort analysis)

Birth Cohort	Percent Detected as Recent Cocaine/Crack Users by Interview Year																	Total
	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	
1945-54	--	76.8	74.2	77.4	68.6	72.3	72.3	82.4	78.9	68.7	68.6	76.8	76.5	67.0	--	--	--	73.0
1955-59	--	81.4	81.1	75.9	77.5	77.8	81.6	82.7	83.8	73.2	72.2	75.7	67.8	65.7	--	75.3	--	76.8
1960-64	76.5	81.9	74.9	76.9	73.1	77.8	75.3	78.5	80.3	70.4	72.1	73.2	73.2	66.1	63.0	72.5	--	74.5
1965-69	66.1	72.8	73.8	61.5	62.5	66.1	69.4	79.9	71.9	63.4	62.2	68.1	58.8	70.6	63.6	65.7	--	66.9
1970-74	--	--	44.0	29.7	35.5	30.7	41.4	44.9	50.0	37.6	42.3	42.4	43.5	45.2	--	45.4	--	41.3
1975-79			--	--	--	--	--	--	18.4	23.0	22.7	25.7	27.3	19.7	11.9	29.6	16.4	21.2
1980+								--	--	--	--	--	--	7.5	10.2	19.8	12.7	13.1
Total	67.5	74.3	71.2	64.8	62.2	64.1	66.9	70.4	69.1	58.2	58.5	57.1	56.0	48.3	45.4	47.7	35.3	60.9

Birth Cohort	Percent Self-Reported Past 72-Hour Crack Use by Interview Year																	Total
	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	
1945-54	--	24.4	25.0	34.0	33.9	38.5	35.0	38.2	29.5	31.5	33.1	32.6	40.7	23.0	--	--	--	31.4
1955-59	--	30.9	28.5	33.5	42.4	39.3	39.6	38.5	34.8	26.2	37.5	39.3	32.3	30.5	--	38.6	--	34.5
1960-64	27.6	34.7	29.5	37.4	39.1	41.9	36.7	35.4	38.7	26.3	30.2	28.2	32.5	28.1	29.7	26.4	--	33.3
1965-69	26.3	31.8	23.4	30.2	31.4	31.6	33.1	39.2	29.5	28.0	25.3	28.7	29.1	23.7	27.1	36.7	--	29.2
1970-74	--	--	9.2	10.1	15.6	8.3	12.9	19.5	18.9	12.3	13.2	17.4	22.8	9.1	--	19.4	--	14.0
1975-79			--	--	--	--	--	--	9.8	3.4	5.9	8.3	8.2	5.0	2.1	8.5	4.1	5.6
1980+								--	--	--	--	--	--	1.4	1.6	4.1	1.8	2.3
Total	21.9	28.7	24.3	29.4	31.6	31.3	31.0	32.3	29.6	22.4	25.2	24.1	26.9	16.8	18.3	20.1	11.5	25.8

-- Entries based on fewer than 100 cases were repressed. There were no years in which the pre-1945 cohort met this minimum level.

Among each cohort born 1945-69 (heroin injection and crack generations), detected cocaine/crack use peaked near 80% or above in 1994 or 1995. The rate declined moderately to between 60-70% through 2002. By 2003, these cohorts comprised a much smaller proportion of the arrest population.

The rate of detected cocaine/crack use among subsequent cohorts was much lower. The 1970-74 cohort peaked at 50% in 1995. The 1975-79 cohort peaked at 30% in 2002. The 1980+ cohorts peaked at 20% in 2002. These rates did not show a steady decline after 1995, rather they fluctuated from year to year.

Self-reported crack use followed a similar pattern, albeit at lower percentages.

Entries in Figures 2a through 4b based on fewer than 100 cases were repressed.

Among BLACK arrestees born 1945-69, the rate of detected cocaine/crack use remained high (72-83%) 1987 through 2003. The rate of use was much lower (38%) among the 1970+ cohort in 1987-1990 and declined to 21% by 2000-03.

Among HISPANIC arrestees born 1945-69, the rate of detected cocaine/crack was high in 1987-90 (70-72%) and declined to as low as 52% by 2000-03. The rate of use was much lower (37%) among the 1970+ cohort in 1987-1990 and declined to 28% by 2000-03.

Among WHITE arrestees born 1955-69, the rate of detected cocaine/crack was high in 1987-99 (63-70%) and then dropped to 53% in 2000-03. The rate of use was much lower (38-41%) among the 1970+ cohort.

ENDNOTE

[2] The ADAM program was terminated at the end of 2003 due to lack of funding. This analysis of crack and cocaine powder closely parallels a published analysis of trends in heroin use and injection among ADAM arrestees in NYC (Golub and Johnson 2005; Johnson and Golub 2002). See that article for additional details about the ADAM methodology and limitations (also Golub and Johnson 2002). Cocaine metabolites can be detected in urine specimens for only about 3 days following ingestion (Riley et al. 2001). Only about half of arrestees whose urine is positive for cocaine (or heroin) self-report the use of either crack or cocaine powder (Golub et al 2003, 2005ab).

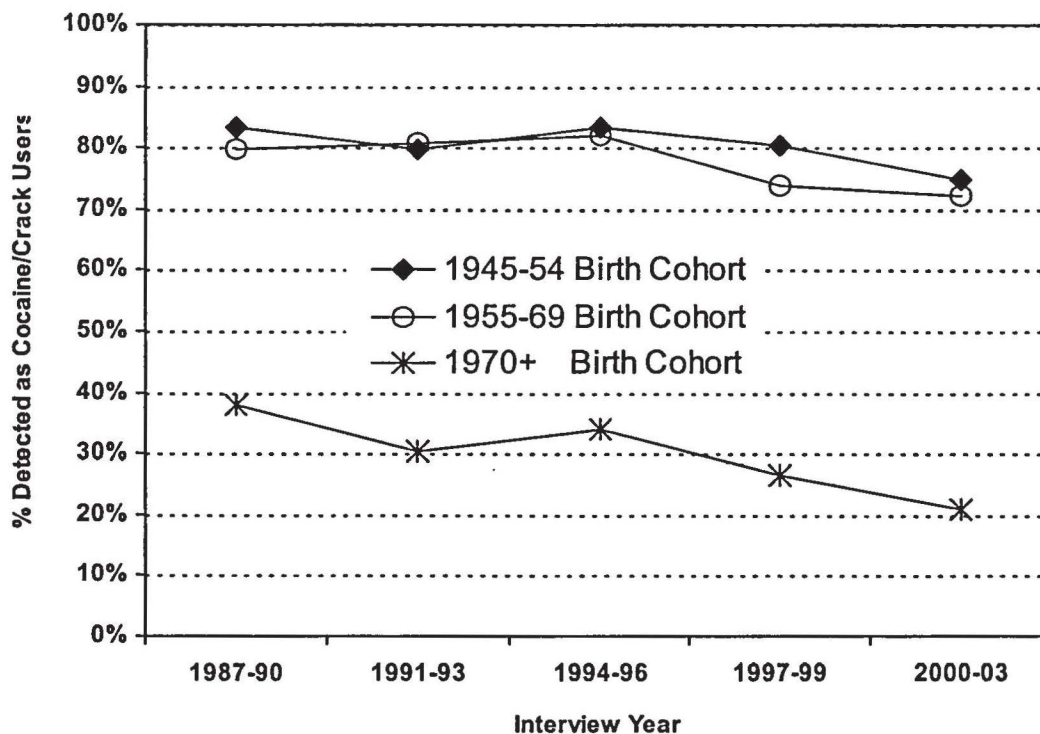


Figure 2a. Prevalence of Detected Cocaine/Crack Use among BLACK Arrestees, ADAM-Manhattan 1987-2003

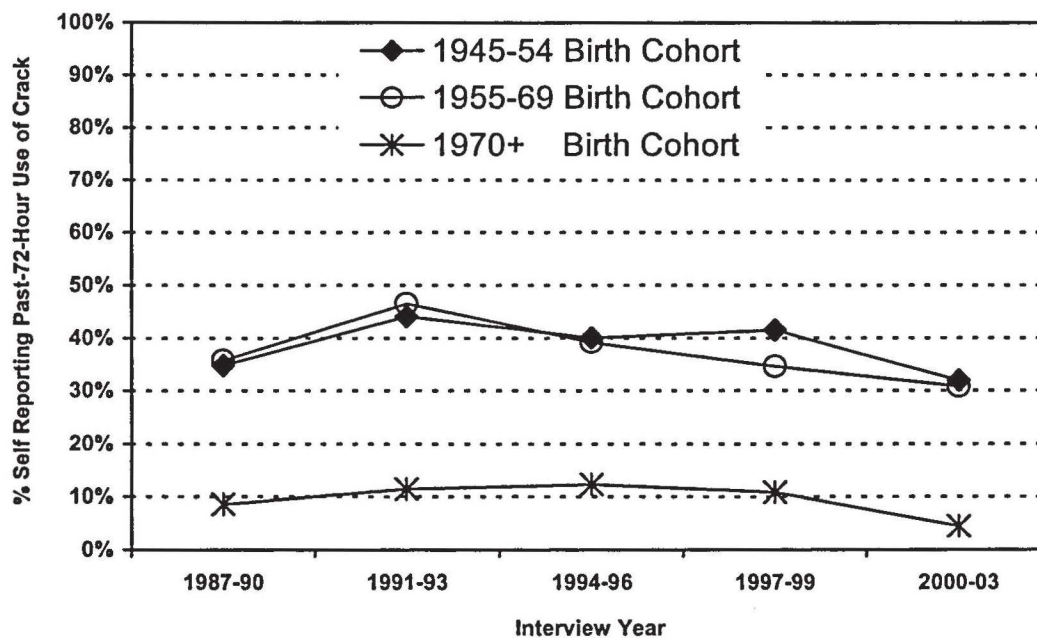


Figure 2b. Prevalence of Self-Reported Past-72-Hour Crack Use among BLACK Arrestees, ADAM-Manhattan 1987-2003

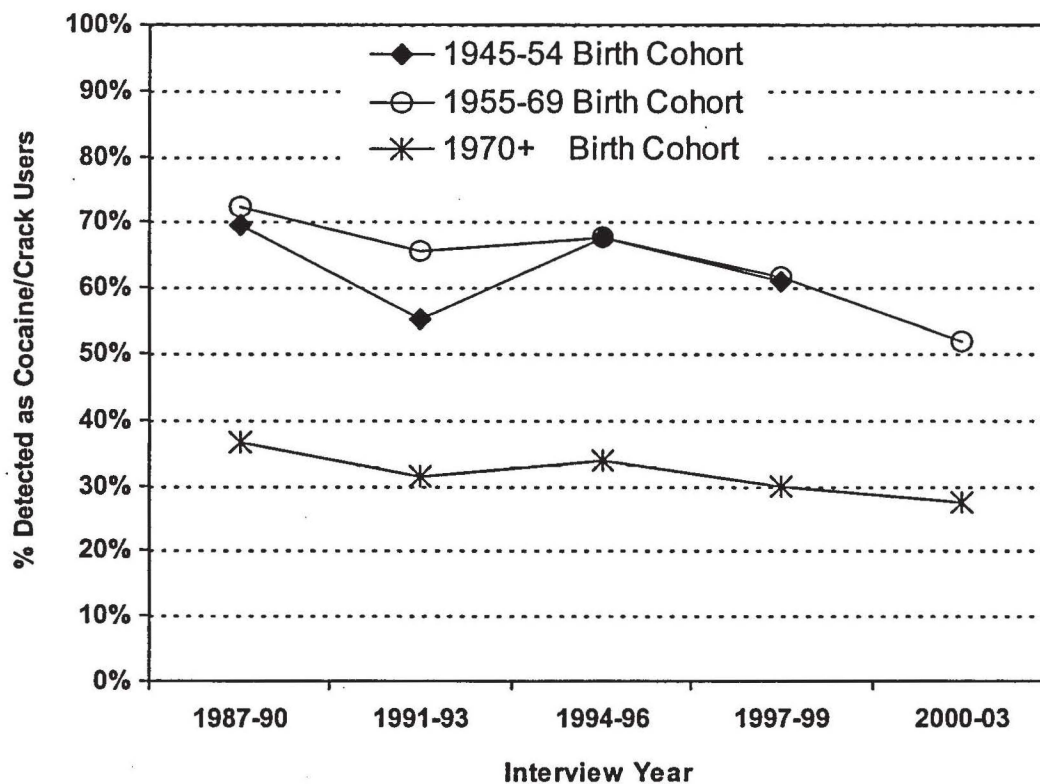


Figure 3a. Prevalence of Detected Cocaine/Crack Use among HISPANIC Arrestees, ADAM-Manhattan 1987-2003

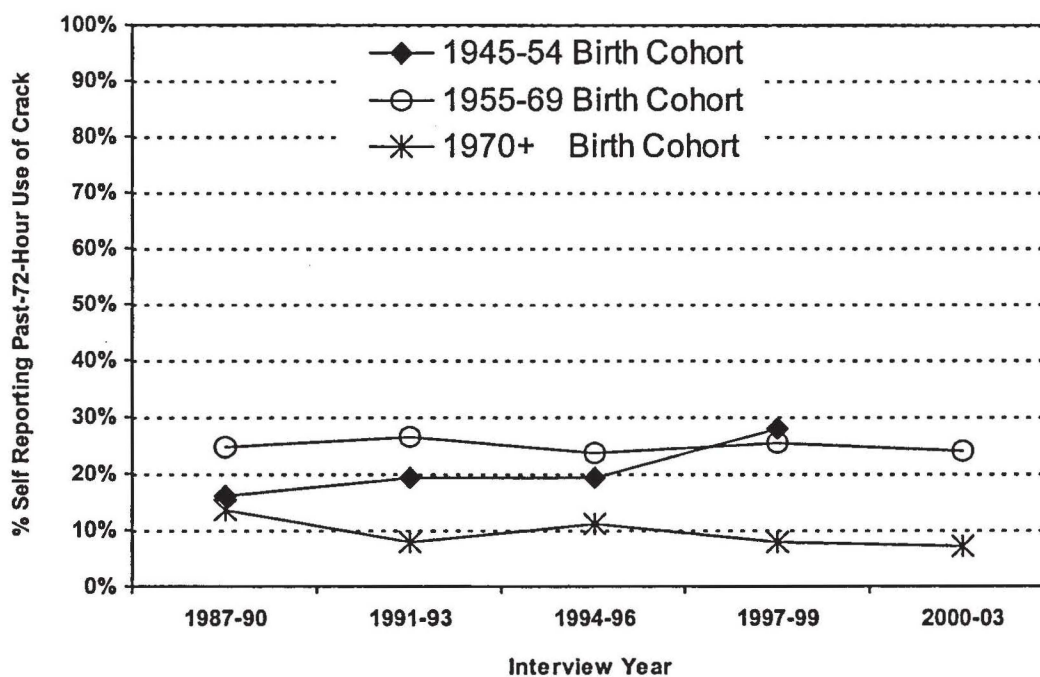


Figure 3b. Prevalence of Self-Reported Past-72-Hour Crack Use among HISPANIC Arrestees, ADAM-Manhattan 1987-2003

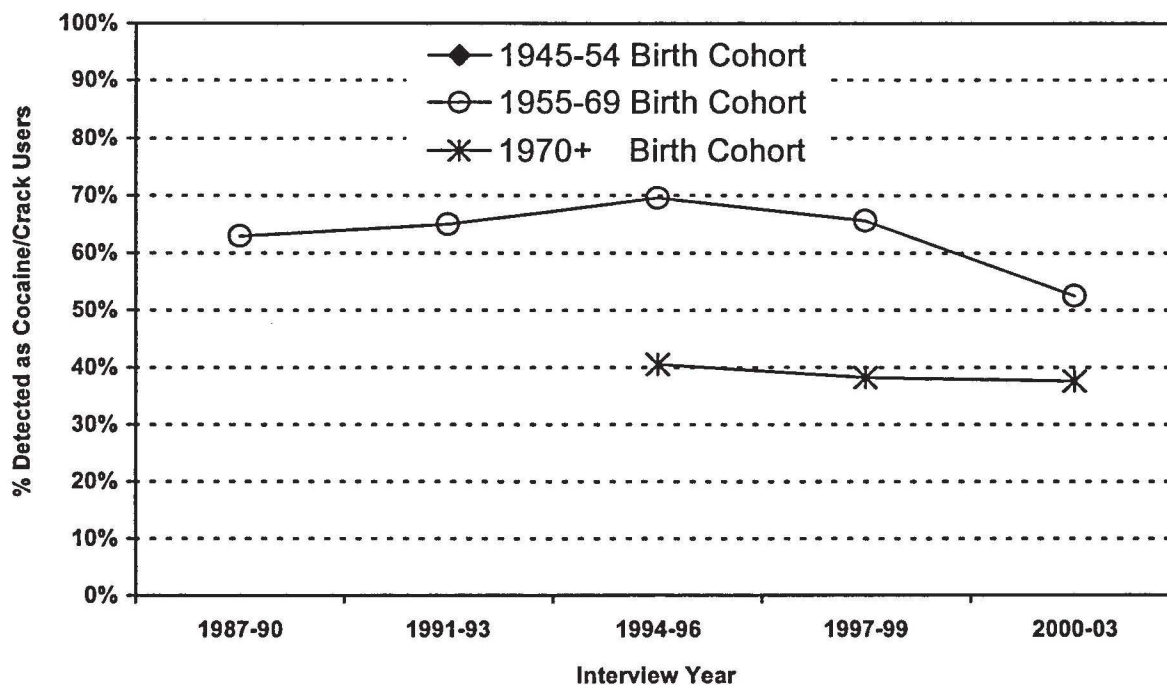


Figure 4a. Prevalence of Detected Cocaine/Crack Use among WHITE Arrestees, ADAM-Manhattan 1987-2003

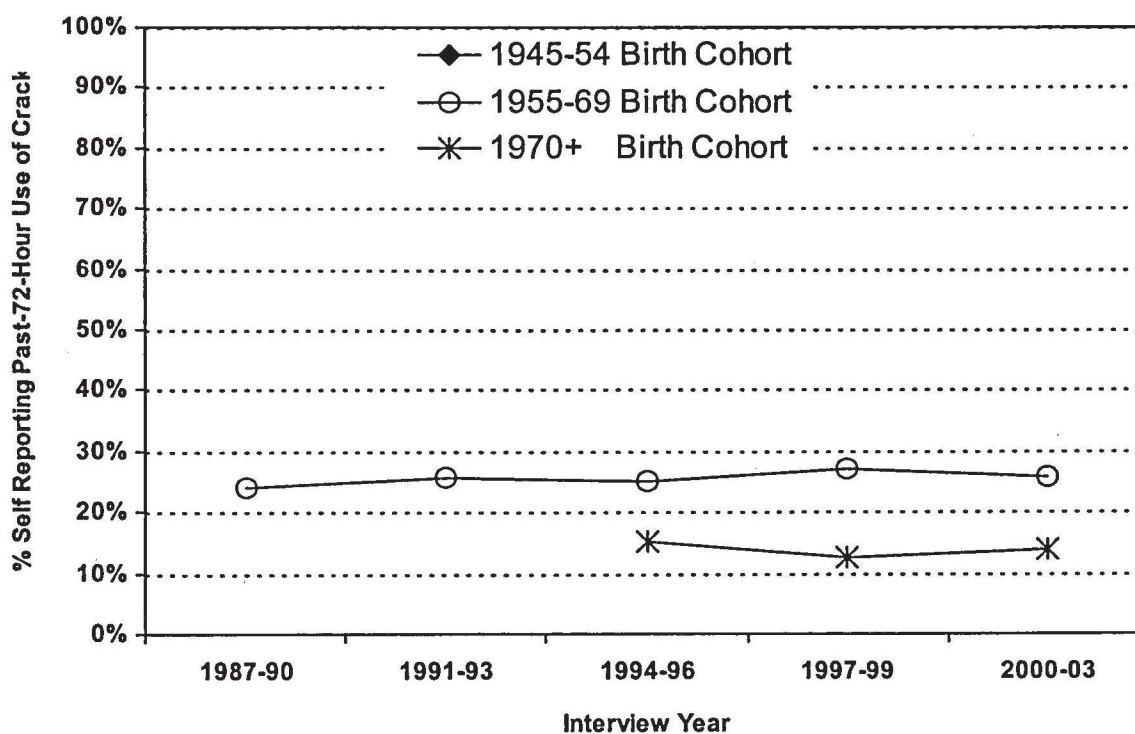


Figure 4b. Prevalence of Self-Reported Past-72-Hour Crack Use among WHITE Arrestees, ADAM-Manhattan 1987-2003

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Testimony to the US Sentencing Commission on the disparity between crack and powder cocaine sentences

Jonathan Caulkins*
Peter Reuter**

Summary

The social consequences associated with a drug are determined in part by the characteristics of the user population. If crack cocaine appeals to a population that has lower self-control and more capacity for violence as compared to the population that uses cocaine powder, then any inherent differences in harms between the two forms of the drug will be exacerbated. Should sentencing decisions “control” for user characteristics or should they reflect simply the harm that is caused, without such controls? I believe that given changes over time in who uses a drug, there is a strong argument for controlling for user differences in deciding on sentencing levels.

Testimony

We have been asked to address the question of the appropriate statutory penalties for powder cocaine and crack. Given the limited time available, we will consider just one aspect, namely whether those differences in social damage that are the consequence of differences in who uses the drug should be controlled for in making this decision. That is should the focus be on what might be regarded as the inherent properties of the drug or the contingent differences (i.e. those associated with its actual use) in the harms associated with each drug? We believe that the inherent properties should guide sentencing decisions.

The basic motivation for the federal sentencing disparity between powder cocaine and crack cocaine is that crack cocaine is perceived to be much more dangerous. In assessing the meaningfulness in making this distinction legally between the two forms of cocaine it is useful to consider the same issues for other substances.

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** Professor, School of Public Policy and Department of Criminology, University of Maryland; and Co-Director Drug Policy Research Center, RAND

Alcohol provides a useful parallel. Younger males consumer much more of their alcohol in the form of beer than do older females; the latter are more likely to consume wine or spirits. For young males, alcohol generates a great deal of violent crime; for older females alcohol leads to adverse health and family consequences but not much violence against weaker victims. Analysis might show that on average beer produces more violent crime per litre of ethanol but one would hardly claim that beer was itself more criminogenic. That association with crime is simply a consequence of preferences among groups that differ in their propensity for certain kinds of acts. If young males preferred fortified wines, then fortified wines would appear to be more criminogenic.

Consider trying to apply the same logic of differentiation by form to other illegal drugs. Injected heroin is more harmful for users and society than is smoked or snorted heroin, because it carries a greater risk of overdose and because it promotes transmission of blood-borne diseases. Should we have legislation enforcing substantially different penalties on injected as opposed to smoked or snorted heroin? It seems almost silly to even ask the question because heroin is heroin and the relatively “safe” heroin a user is about to snort can very easily be converted into “more dangerous” injectable heroin just by dissolving it in water.

However, the same can be said of the two forms of cocaine. Relatively safe powder cocaine can very easily be converted into “more dangerous” crack cocaine just by dissolving it along with baking soda and boiling. Indeed, that is where all crack in America comes from. It is converted from powder cocaine primarily at lower market levels and at a cost that is trivially compared to the value of the cocaine itself. There is no such thing as crack cultivation by South America or Colombian crack cartels. So the same atoms that merit only a modest sentence when part of a wholesale dealer’s one pound bag of powder cocaine can elicit a 5-year mandatory minimum sentence several layers further *down* the distribution chain when a they are part of a low-level seller’s 5 gram stash of crack.

There are two reasons we impose different sentences for powder cocaine and crack cocaine even though we do not do so for injectable heroin vs. snortable heroin. One is an accident of chemistry; the other is the misattribution of causality to an observed correlation.

The accident of chemistry is that dissolving and heating induces a minor chemical change, not just a phase change as in the heroin example. That chemical change is minor, not affecting at all the part of the molecule that is pharmacologically active, but it matters because “powder cocaine” (more accurately cocaine alkaloid) vaporizes at a relatively high temperature, so most of it decomposes when heated. In contrast, the base form can more readily be vaporized and hence “smoked”, which facilitates taking the drug via a route of administration that has a faster and more intense time profile of absorption and delivery to the brain.

Route of administration matters to the user, and one generally expects faster and shorter acting routes of administration to be more reinforcing, in psychologists’ sense of the term. However, the rapid course of action is not primarily what motivates a desire for differential sentencing. Smoking nicotine and injecting powder (alkaloid) cocaine are also very fast acting.

Rather, it is more crack’s *association* with violence and birth of drug-addicted infants that drove fear of crack and the resulting differences in sentence severity between powder cocaine and crack cocaine. I use the term “association” intentionally because it is just that. There is nothing intrinsic about crack cocaine being the base not the alkaloid form of the molecule that made its retail markets so violent in the 1980s or that made it any more harmful in utero.

As compared to powder cocaine, crack is much more heavily used by poor, African-American males than by other groups. That demography is not reflected in the National Survey on Drug Use and Health or in Monitoring the Future; neither of these surveys describes the population of heavy users who account for the bulk of quantity consumed

and the resulting harms. It is instead a reasonable summary of what is known from studies of Emergency Department and Medical Examiner admissions¹ the population in treatment² and urinalysis and interviews of arrestees ADAM³. All of these data are vulnerable to bias. For example, it is open use of drugs in poor neighborhood that is most likely to lead to arrest; thus ADAM is not a random sample of drug users but describes drug use among the arrested population. The treatment system includes many who enter as a consequence of criminal justice referral, so it suffers from the same bias. Low income users are more likely than others to go to an Emergency Department as the result of unexpected consequences of drug use; they are more likely also to die as a result of adverse effects because they are in poorer health. Nonetheless there is a great deal of consistency in these indicators and there is little evidence of substantial white or Asian middle-class crack dependence or abuse.

The violence associated with crack has declined over time. In the mid-1980s crack was used primarily by the young. Now, because rates of initiation/escalation into frequent use have been lower for a long time, the population of users has aged. For example in 2004 among treatment admissions for which smoked cocaine is the primary drug of abuse, two thirds of admissions were age 35 or older, a much higher figure than for powder cocaine. Violence, even among crack users, is likely to be a young man's game. Studies of crack in 2005 will surely find much less violence associated with the drug than did the studies of 1985. Relationships between any specific drug and behaviors such as crime and violence are subject to change over the course of a drug epidemic.

Implications for Sentencing

Assuming that this analysis is correct, what are its consequences for sentencing policy, specifically for the appropriate relationship between penalties for comparable quantities of crack cocaine and powder cocaine? On the one hand, the reality is that crack cocaine

¹ These data are gathered in the Drug Abuse Warning Network (DAWN) system

² Treatment data are gathered in the Treatment Episode Data System (TEDS)

³ The Arrestee Drug Abuse Monitoring system, which operated in various forms from 1989 to 2004, when it was terminated for budgetary reasons.

has historically been associated with high levels of violence, regardless of whether that is primarily the drug itself or the interaction between the drug and the population. Some might argue that crack is more dangerous precisely because it is attractive to those for whom stimulants engender particularly harmful behavior, young poorly educated males in high crime neighborhoods. Perhaps in a classless society, crack would not have much worse consequences than powder cocaine, but we do not live in such a society and do not anticipate doing so in the foreseeable future. If the goal of sentencing is part retributive, then it can be argued that selling crack cocaine has resulted in greater harm to society than selling cocaine powder and thus longer sentences are appropriate.

The arguments also have to weigh the instrumental value of long sentences. Illegality certainly raises prices and reduces use. However, there is in general depressingly little evidence that increasing sentence lengths reduces drug use either by raising prices or reducing availability. Others will address these issues in detail but I want to note briefly that the one published paper on the effects of increased incarceration for cocaine offenses⁴ found that the tripling of incarceration between 1986 and 1997 only raised price by between 5% and 15%, a modest accomplishment given the financial and human costs associated with that incarceration.

On the other hand there are social and racial consequences of ignoring this interaction. To do so results in heavier sentences for drugs that are used by populations that are disproportionately young, low income, minority males. As this Commission well knows, the result of the disparity in the sentences for the two forms of cocaine is to produce a tragic disproportion in the share of crack prison time served by African-Americans; the disproportion is high even when compared to that for prison sentences generally. There are many sources of injustice for African-Americans in contemporary society which are difficult to deal with. This is one that can be ameliorated by policy. If the crack-powder disparity is reduced from 100 to 10, the sense of injustice will be ameliorated while still recognizing that crack is a more dangerous drug.

⁴ Kuziemko, I. and S. Levitt (2004) "An Empirical Analysis of Imprisoning Drug Offenders" *J. Public Economics* 9-10 pp.2043-2066

For us the decisive factor is that the contingent relationship changes over time. Use of very dangerous drugs in this country have shown epidemic patterns. The drug is popular in the early phase when its positive effects are conspicuous and the adverse effects are still not well understood. As the dangers of a drug become more prominent there can be a sharp fall in initiation rates. That has been the pattern in the U.S. for cocaine, crack and heroin. Each drug has been associated with an aging cohort of users. That reduces the level of violence associated with the drug over time. A sentencing structure that ignores this fact and is based solely on the damage inflicted during the early stages will become increasingly arbitrary.

November 14, 2006

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL SEVEN

A View From Community Interest Groups

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY

WITNESSES AND BIOS

PANEL SEVEN: COMMUNITY INTERESTS

Julie Stewart

Families Against Mandatory Minimums

Jesselyn McCurdy

American Civil Liberties Union

Hilary Shelton

NAACP

Julie Stewart

Families Against Mandatory Minimums

When Julie Stewart formed Families Against Mandatory Minimums (FAMM) in 1991, it was because the issue touched her personally. Her brother, a nonviolent, first-time drug offender was sentenced to five years in a federal prison for growing marijuana. Julie had never heard of mandatory minimum sentencing laws but soon learned that they were the reason the judge was forced to hand down a five-year sentence. Outraged that the judge no longer had the discretion to make the punishment fit the crime, Julie started an organization to promote fairer sentencing laws.

Since 1991, FAMM has worked to challenge the inflexible and excessive penalties of mandatory minimum sentencing and to promote rational policies that give judges discretion to distinguish between defendants and to ensure that the punishment fits the defendant's role in the crime. Throughout the years, FAMM's work has directly contributed to fairer sentences for over 45,000 drug defendants nationwide and paved the way for the current shift away from mandatory sentencing policies. Among FAMM's successful legislative reforms were changes to federal LSD and marijuana sentencing policies, restoration of judicial discretion in certain federal drug cases, and the introduction of parole for nonviolent Michigan drug prisoners formerly serving life sentences. These changes occurred with the help of FAMM's 36,000 members.

Julie has received the Thomas Szasz Award for Outstanding Contributions to the Cause of Civil Liberties, the Champion of Justice Award from the National Association of Criminal Defense Attorneys, and she was one of 20 people to receive a Ford Foundation Leadership for a Changing World Award in 2002. In April 2006, Julie received the Citizen Activist Award from the Los Angeles-based Gleitsman Foundation. The award annually recognizes individuals who have challenged social justice problems in the United States.

Julie was raised in Pullman, Washington and attended Mills College in Oakland, California, where she graduated summa cum laude with a B.A. in International Relations. She moved to Washington, D.C. in 1988 where she worked at the Cato Institute for three years as director of public affairs before starting FAMM in 1991.

Jesselyn McCurdy

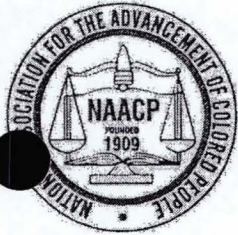
American Civil Liberties Union

Jesselyn McCurdy is a Legislative Counsel in the Washington Legislative Office of the American Civil Liberties Union (ACLU) and is responsible for defending civil liberties in Congress and in the Executive Branch in the area of criminal justice. As Legislative Counsel, Ms. McCurdy covers various criminal justice issues, including racial profiling, federal sentencing, capital punishment, prisoners' rights and drug policy.

Prior to joining the ACLU staff, Ms. McCurdy was the Co-Director of the Children's Defense Fund's (CDF) Education and Youth Development Division. In this position, she co-chaired the Washington-based Juvenile Justice and Delinquency Prevention (JJDP) Coalition a consortium of over 80 national non-profit organizations and coordinated the lobbying efforts of the coalition. In her first few years at CDF, Ms. McCurdy was the Program Coordinator for CDF's Black Community Crusade for Children's (BCCC) Juvenile and Family Court Judges' Leadership Council (JLC).

Before working with CDF, Ms. McCurdy was the Assistant Section Director of the American Bar Association's Section of Individual Rights and Responsibilities, where she worked on civil and human rights projects and civil rights and liberties issues. After graduating from law school, she became a staff attorney for the American Prosecutors Research Institute (APRI), the research, training and program affiliate of the National District Attorney's Association (NDAA).

Ms. McCurdy received a BA in Journalism and Political Science from Rutgers University and her JD from Catholic University of America, Columbus School of Law.



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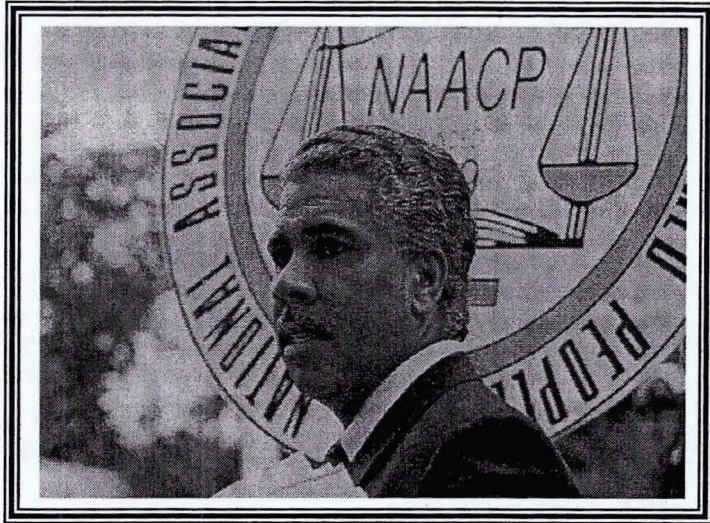
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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HILARY O. SHELTON Director, NAACP Washington Bureau

Hilary O. Shelton, presently serves as *Director to the NAACP's Washington Bureau*. The Washington Bureau is the Federal legislative and national public policy division of the over 500,000-member, 2,200-membership unit, national civil rights organization.

In this capacity, Hilary is responsible for advocating the federal public policy issue agenda of the oldest, largest, and most widely recognized civil rights organization in the United States to the U.S. Government. Hilary's government affairs portfolio includes crucial issues such as affirmative action, equal employment protection, access to quality education, stopping gun violence, ending racial profiling, abolition of the death penalty, access to comprehensive healthcare, voting rights protection, federal sentencing reform and a host of civil rights enforcement, expansion and protection issues.



Prior to serving as director to the NAACP Washington Bureau, Hilary served in the position of *Federal Liaison/Assistant Director* to the Government Affairs Department of *The College Fund/UNCF*, also known as *The United Negro College Fund* in Washington, D.C. In this capacity, Hilary worked with Senate and House Members of the U.S. Congress, Federal Agencies and Departments, college and university presidents and faculty members, as well as the White House and various government agencies to secure the survival, growth and educational programming excellence of the 40 private historically black colleges and universities throughout the United States.

Prior to working for The College Fund/UNCF, Hilary served as the *Federal Policy Program Director* to the 8.5 million-member *United Methodist Churches'* social justice advocacy agency, *The General Board of Church & Society*. In this capacity, Hilary

advocated for the national and international United Methodist Churches' public policy agenda affecting a wide range of civil rights and civil liberties issues including preserving equal opportunity programs such as affirmative action, securing equal high quality public education for all Americans, guaranteeing greater access to higher education and strengthening our nation's historically Black colleges and universities, abolition of the death penalty, reforming the criminal justice system, voting rights protection and expansion, gun control and a host of other social justice policy concerns.

Hilary serves on a number of national boards of directors including, The Leadership Conference on Civil Rights, The Center for Democratic Renewal, the Coalition to Stop Gun Violence, and the Congressional Black Caucus Institute among many others.

Playing an integral role in the crafting and final passage of such crucial federal legislation as the Civil Rights Act of 1991, Hilary was also instrumental in ushering through to passage, The Civil Rights Restoration Act, The Violence Against Women Act, The Hate Crimes Statistics Act, The Native American Free Exercise of Religion Act, The National Voter Registration Act, The National Assault Weapons Ban, The Brady Handgun Law, Reauthorization of the Voting Rights Act, the Help America Vote Act and many other crucial laws and policy measures affecting the quality of our lives and equality in our society.

Hilary has humbly received a number of awards and recognitions for his unwavering dedication to the mission and goals of the NAACP. Among the many awards to which he is most grateful for receiving, Mr. Shelton is the proud recipient of the *National NAACP Medgar W. Evers Award for Excellence*, the highest honor bestowed upon a national professional staff member of the NAACP for Outstanding Service, Sincere Dedication and Commitment to the Mission of the NAACP, as well as the *Congressional Black Caucus' Chairman's Award In Recognition and Appreciation for Dedication, Leadership and Commitment to Advancing the Cause of Civil Rights for All Americans*.

Born in St. Louis, Missouri, to a family of 6 brothers and sisters, Hilary holds degrees in political science, communications, and legal studies from Howard University in Washington, D.C., the University of Missouri in St. Louis, and Northeastern University in Boston, Massachusetts, respectively.

Hilary presently lives in Washington, D.C., with his wife, Paula Young Shelton and their three sons, masters Caleb Wesley, Aaron Joshua, and Noah Ottis Young Shelton.

Questions for written submission

Community Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
2. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

**Testimony of
Julie Stewart
President
Families Against Mandatory Minimums
Before the United States Sentencing Commission's
Public Hearing on Cocaine and Sentencing Policy
November 1, 2006, Washington D.C.**

“Revising the crack cocaine thresholds would . . . dramatically improve the fairness of the federal sentencing system.”¹

I am Julie Stewart, the President of Families Against Mandatory Minimums (FAMM). I founded FAMM in 1991, convinced that if we showed the human face of sentencing to the American people, policy makers would be moved to eliminate mandatory minimums and other harsh sentencing practices. Today we are a national nonprofit, nonpartisan organization whose mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. FAMM works every day for one basic goal: that the punishment meted out by our nation's judicial system fit the crime.

Too frequently it does not, and the crack cocaine penalty structure is the poster child for the failures of federal sentencing policy.

I have appeared before the Commission nearly every year since 1992 to talk about sentencing fairness, and FAMM has weighed in each time the Commission has asked for our input about the crack cocaine penalties. Our views on this subject are well known.² I used to be so encouraged each time I participated in hearings like this, read the resulting reports and recommendations, heard from the Commissioners and staff, and believed that somehow, by being right and having the experts to prove it, crack penalties would change. I could not imagine that all these many years later, we would have achieved so little after trying so hard.

As I read your invitation to testify and reviewed the questions you posed, I thought: “What’s old is new again.” I was reminded as I prepared my testimony about how much good work has already gone into answering the core questions you are struggling with. Three previous inquiries, reaching back to 1995 produced research and findings from diverse fields. You have heard from psychologists, criminologists, law enforcement personnel, pharmacologists, treatment providers, defense and prosecuting attorneys, prisoners’ families, and interest groups such as ours. For the most part they do

¹ U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing* 132 (2004)

² U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 210 (1995) (summary of FAMM comments); U.S. Sentencing Commission, *Public Hearing Transcript and Testimony* (March 23, 2000); U.S. Sentencing Commission, *Transcript of Public Hearing*, 112-137 (Feb. 26, 2002)

not support the current penalty structure.³ Your reports, most recently the 2002 Report to Congress: Cocaine and Federal Sentencing Policy, exhaustively detail their findings and in all your reports you have reached the same conclusion: "the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine."⁴

We have often expressed frustration with the Commission about what Frank Bowman terms the "upward ratchet"⁵ effect; sentencing amendments that result almost uniformly in longer terms of imprisonment. Only very rarely does the Commission amend the guidelines to make sentences shorter. In this one area, however, we applaud your genuine efforts to document the inherent injustice in the crack cocaine penalty structure and seek to change it. The data and reports you have produced are for the most part superb and the answers to many of the questions you pose us can be found in their pages.

The documentation could not be more complete. That opposition to the unbalanced penalty structure for crack cocaine is widespread is unsurprising; your work has done so much to demonstrate that the penalty structure is unconscionable, unsupportable and its demise is years overdue.

And yet, year after year, the Commission and all of us who struggle to dismantle the crack penalty structure, have failed. We have failed because ultimately, amending the crack guideline rests in the hands of Congress. The Sentencing Reform Act of 1984 provided that amendments sent by the Commission would become law unless disapproved by an Act of Congress.⁶ In 1995 the Commission proposed to raise the crack penalty triggers to correspond with those for powder cocaine. Congress exercised its §994(p) option and disapproved the amendment.⁷ In that Act, Congress directed the Commission to report on the crack cocaine penalty and address a series of considerations. The ensuing research resulted in the April 1997 report to Congress that included recommendations in lieu of a proposed amendment.⁸ That report and the one from 2002 were met by a deafening silence on the Hill.

And that leads me to the one question you pose that I think generates a meaningfully new answer: "Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?" Yes, in our opinion, one key impediment to a just crack cocaine guideline fell last week, when Republicans lost their majorities in both houses of Congress.

³ I attach an appendix to this testimony, detailing just some examples of the excellent research and testimony provided to the Commission or otherwise published. It is a small sample of the massive and widespread effort to refute the founding mythology of crack cocaine.

⁴ U.S. Sentencing Commission, *Fifteen Years of Guideline Sentencing* 132 (2004).

⁵ See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005).

⁶ 28 U.S.C. § 994(p).

⁷ See Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

⁸ See Special Report to the Congress: Cocaine and Federal Sentencing Policy - April 29, 1997.

A non-partisan organization, FAMM works with lawmakers on both sides of the aisle to promote sentencing reform. We are not naïve enough to think that a Congress controlled by Democrats is the panacea for a broken sentencing system. We do believe, however, that there is a fresh opportunity to develop bi-partisan support on the Hill for a new look at one of the most broken penalty structures. And we think the Commission is best suited to lead off with a proposed guideline.

We believe the former Congress would most certainly have opposed any change to the crack sentencing structure. I expect you would agree. Evidence for this is found in the House Judiciary Committee's reaction to the other new development that emerged since the 2002 report: the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Faced with the remedial part of the opinion, which breathed new life into the SRA's premiere mandate of parsimony, the powerful Chairman of that committee responded with H.R. 1528, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*. The legislation, which purported to penalize a host of drug-related offenses with dozens of new mandatory minimum sentences, also had language quietly tucked in the back that would have eliminated virtually all below guideline sentences and eviscerated the advisory nature of the Guidelines.

Once the word was out, the bill ignited a firestorm of opposition. We organized bi-partisan delegations and we went to the Hill to meet with key Republicans on the House Judiciary Committee to tell them why they needed to preserve judicial discretion. And, given the power structure in that committee, it had to be Republicans who would stop Chairman Sensenbrenner from moving the bill, and they did.

But the backlash to *Booker* did not end there. The committee and its Crime, Terrorism and Homeland Security Committee became a breeding ground for bills containing new crimes and new mandatory minimums. For example, a harsh anti-gang measure, H.R. 1279, the Gang Deterrence and Community Protection Act of 2005, was introduced that created many new federal crimes and of course new mandatory minimums. I overheard the judiciary counsel to its sponsor, Rep. Randy Forbes (R-Va.), say that he had to include mandatory minimums in the bill precisely because the Guidelines were no longer mandatory.

The 109th was a very tough Congress and no place for sentencing reform. Even though most of the bills containing harsh new sentencing provisions never made it, an amendment to change the crack cocaine penalty would never have survived.

But today, it might have a chance. The new leaders of the House and Senate Judiciary Committees oppose mandatory minimum sentences. You have built an impressive battery of evidence to support an amendment. And I believe you could gain bi-partisan support for amending the crack penalty. Republican members of the House Judiciary Committee like Rep. Jeff Flake (R-Az.) and Rep. Bob Inglis (R-S.C.), who stood up on the floor during the debate to say that he was going to vote against H.R. 1279 because he could no longer support mandatory minimums, could be allies in this effort.

If your amendment promised genuine relief and an end to the unconscionable results produced by the current penalty structure, you would not be alone going to the Hill. Given the right amendment, you could be joined by many of the groups that have written and testified and conducted research and come to Commission meetings and sat through congressional debates year after year.

We endorse the recommendations put forward by the Federal Public and Community Defenders:

- Equalize guideline penalties for crack and powder cocaine at the powder cocaine level.
- Recommend to Congress do the same.
- Refrain from adding new enhancements because existing enhancements and statutory penalties can be applied if indicated.
- Recommend that Congress repeal the mandatory minimum for simple possession of crack.

This year could be the year the commission reverses the ratchet.

Thank you for considering our views.

Appendix

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U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*. (April 1997).

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Questions for written submission

Community Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
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If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Panel 7

**Supplemental Questions for Jesselyn McCurdy, Legislative Counsel
American Civil Liberties Union
November 14, 2006**

- 1) What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
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If a difference exists, should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Summary of Testimony of Jesselyn McCurdy, Legislative Counsel
American Civil Liberties Union
November 14, 2006

Ms. McCurdy ("ACLU") states three issues of concern regarding the crack/powder cocaine ratio: 1) the 100:1 ratio disparity in federal cocaine sentencing has a racially discriminatory impact and has had a devastating impact on communities of color; 2) it created many myths associated with crack cocaine without facts to support the myths; and 3) it does not reflect the original intent of Congress to focus on high-level drug traffickers.

ACLU provides statistical data that supports that the vast majority of offenders sentenced under the harsh federal crack cocaine Hispanics and African-Americans. ACLU notes that the collateral consequences of the nation's drug policies, racially targeted prosecutions, mandatory minimums, and crack sentencing disparities have had a devastating effect on African American men, women, and families. ACLU further states that the effects of mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps, and access to public housing.

ACLU asserts that the rapid increase in the use of crack between 1984 and 1986 created many myths about the effects of the drug in popular culture. These myths were often used to justify treating crack cocaine differently from powder cocaine under federal law. One example given of such myths was crack was said to cause especially violent behavior, destroy the maternal instinct leading to the abandonment of children, be a unique danger to developing fetuses, and cause a generation of so-called "crack babies" that would plague the nation's cities for their lifetimes. ACLU also states that crack cocaine was thought to be so much more addictive than powder cocaine that it was "instantly" addicting. In the twenty years since the enactment of the 1986 law, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100:1 ratio.

Finally ACLU states that the current sentencing structure does not target high-level drug traffickers as originally intended by Congress. According to ACLU, instead of targeting large-scale traffickers in order to cut off the supply of drugs coming into the country, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms. ACLU cites the Commission 2002 report which states that only 15% of federal cocaine traffickers can be classified as high-level, while over 70% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.

ACLU recommends equalizing the crack/powder cocaine ratio and eliminating mandatory minimums.

**Testimony of Jesselyn McCurdy, Legislative Counsel
American Civil Liberties Union
Washington National Office
United States Sentencing Commission Hearing
On Cocaine and Sentencing Policy
November 14, 2006**

The American Civil Liberties Union (ACLU) would like to thank the United States Sentencing Commission for this opportunity to testify on cocaine sentencing policy and federal sentences for cocaine trafficking. The ACLU is a nonpartisan organization with hundreds of thousands of activists and members with 53 affiliates nationwide. Our mission is to protect the Constitution and particularly the Bill of Rights. Thus, the disparity that exists in federal law between crack and powder cocaine sentencing continues to concern our organization due to the implications of this policy on due process and equal protection rights of all people. Equally important to our core mission are the rights of freedom of association and freedom from disproportionate punishment, which are also at risk under this sentencing regime.

The ACLU has been deeply involved in advocacy regarding race and drug policy issues for more than a decade. The ACLU assisted in convening the first national symposium in 1993 that examined the disparity in sentencing between crack and powder cocaine, which was entitled "Racial Bias in Cocaine Laws." The conclusion more than 10 years ago of the representatives from the civil rights, criminal justice, and religious organizations that participated in the Symposium was that the mandatory minimum penalties for crack cocaine are not medically, scientifically or socially justifiable and result in a racially biased national drug policy. In 2002, we urged the Commission to amend the crack guidelines to equalize crack and powder cocaine sentences at the current level for powder cocaine. Four years later, we continue to urge the Commission to support amendments to federal law that would equalize crack and powder cocaine sentences at the current level of sentences for powder cocaine.

Background and History

In June 1986, the country was shocked by the death of University of Maryland basketball star Len Bias in the midst of crack cocaine's emergence in the drug culture. Three days after being drafted by the Boston Celtics, Bias, who was African American, died of a drug and alcohol overdose. Many in the media and public assumed that Bias died of a crack overdose. Congress quickly passed the 1986 Anti-Drug Abuse Act motivated by Bias' death and in large part by the notion that the infiltration of crack cocaine was devastating America's inner cities. Although it was later revealed that Bias actually died of a powder cocaine overdose, by the time the truth about Bias' death was discovered, Congress had already passed the harsh discriminatory crack cocaine law.

Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime between 1984 and 1990. The most notorious mandatory minimum law enacted by Congress was the penalty relating to crack cocaine, passed as a part of the Anti-Drug Abuse Act of 1986. The little legislative history that exists suggests that members of Congress believed that crack was more addictive than powder cocaine, that it caused crime, that it caused psychosis and death, that young people were particularly prone to becoming addicted to it, and that crack's low cost and ease of manufacture would lead to even more widespread use of it. Acting upon these beliefs, Congress decided to punish use of crack more severely than use of powder cocaine.

On October 27, 1986, the Anti-Drug Abuse Act of 1986 was signed into law establishing the mandatory minimum sentences for federal drug trafficking crimes and creating a 100:1 sentencing disparity between powder and crack cocaine. Members of Congress intended the triggering amounts of crack to punish “major” and “serious” drug traffickers. However, the Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or just 5 grams of crack (the weight of two pennies) would be sentenced to at least 5 years imprisonment, without regard to any mitigating factors. The Act also provided that those individuals convicted of crimes involving 5000 grams of powder cocaine and 50 grams of crack (the weight of a candy bar) be sentenced to 10 years imprisonment.

Two years later, drug-related crimes were still on the rise. In response, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988. The 1988 Act created a 5-year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine. The maximum penalty for simple possession of any amount of powder cocaine or any other drug remained at no more than 1 year in prison.

The 100 to 1 Disparity in Federal Cocaine Sentencing Has a Racially Discriminatory Impact and has had a Devastating Impact on Communities of Color

Data on the racial disparity in the application of mandatory minimum sentences for crack cocaine is particularly disturbing. African Americans comprise the vast majority of those convicted of crack cocaine offenses, while the majority of those convicted for powder cocaine offenses are white. This is true, despite the fact that whites and Hispanics form the majority of crack users. For example, in 2003, whites constituted 7.8% and African Americans constituted more than 80% of the defendants sentenced under the harsh federal crack cocaine laws, while more than 66% of crack cocaine users in the United States are white or Hispanic. Due in large part to the sentencing disparity based on the form of the drug, African Americans serve substantially more time in prison for drug offenses than do whites. The average sentence for a crack cocaine offense in 2003, which was 123 months, was 3.5 years longer than the average sentence of 81 months for an offense involving the powder form of the drug. Also due in large part to mandatory minimum sentences for drug offenses, from 1994 to 2003, the difference between the average time African American offenders served in prison increased by 77%, compared to an increase of 28% for white drug offenders. African Americans now serve virtually as much time in prison for a drug offense at 58.7 months, as whites do for a violent offense at 61.7 months. The fact that African American defendants received the mandatory sentences more often than white defendants who were eligible for a mandatory minimum sentence, further supports the racially discriminatory impact of mandatory minimum penalties.

Over the last 20 years, federal and state drug laws and policies have also had a devastating impact on women. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men. The growing number of women

who are incarcerated disproportionately impacts African American and Hispanic women. African American women's incarceration rates for all crimes, largely driven by drug convictions, increased by 800% from 1986, compared to an increase of 400% for women of all races for the same period. Sentencing policies, particularly the mandatory minimum for low-level crack offenses, subject women who are low-level participants to the same or harsher sentences as the major dealers in a drug organization.

The collateral consequences of the nation's drug policies, racially targeted prosecutions, mandatory minimums, and crack sentencing disparities have had a devastating effect on African American men, women, and families. Recent data indicates that African Americans make up only 15% of the country's drug users, yet they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher. As law enforcement focused its efforts on crack offenses, especially those committed by African Americans, a dramatic shift occurred in the overall incarceration trends for African Americans, relative to the rest of the nation, transforming federal prisons into institutions increasingly dedicated to the African American community.

The effects of mandatory minimums not only contribute to these disproportionately high incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in the child welfare system, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving social services such as welfare, food stamps, and access to public housing. For example, in 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were only 603,032 African American men enrolled in higher education. The fact that there are more African American men under the jurisdiction of the penal system than in college has led scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.

One of every 14 African American children has a parent locked up in prison or jail today, and African American children are 9 times more likely to have a parent incarcerated than white children. Moreover, approximately 1.4 million African American males – 13% of all adult African American men – are disfranchised because of felony convictions. This represents 33% of the total disfranchised population and a rate of disfranchisement that is 7 times the national average. In addition, as a result of federal welfare legislation in 1996, there is a lifetime prohibition on the receipt of welfare for anyone convicted of a drug felony, unless a state chooses to opt out of this provision. The effect of mandatory minimums for a felony conviction, especially in the instance of simple possession or for very low-level involvement with crack cocaine, can be devastating, not just for the accused, but also for their entire family.

Dispelling the Myths Associated with Crack Cocaine with Facts

The rapid increase in the use of crack between 1984 and 1986 created many myths about the effects of the drug in popular culture. These myths were often used to justify treating crack cocaine differently from powder cocaine under federal law. For example, crack was said to cause especially violent behavior, destroy the maternal instinct leading to the abandonment of children, be a unique danger to developing fetuses, and cause a generation of so-called "crack babies" that would plague the nation's cities for their lifetimes. It was also thought to be so much more addictive than powder cocaine that it was "instantly" addicting.

In the twenty years since the enactment of the 1986 law, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100:1 ratio. In 1996, a study published by the Journal of American Medical Association (JAMA) found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.

For instance, crack was thought to be a unique danger to developing fetuses and destroy the maternal instinct causing children to be abandoned by their mothers. During the Sentencing Commission hearings that were held prior to the release of the commission's 2002 report on Cocaine and Federal Sentencing Policy, several witnesses testified to the fact that so-called myth of "crack babies" who were thought to suffer from more pronounced developmental difficulties by their in-utero exposure to the drug was not based in science. Dr. Ira J. Chasnoff, President of the Children's Research Triangle, testified before the Sentencing Commission that since the composition and effects of crack and powder cocaine are the same on the mother, the changes in the fetal brain are the same whether the mother used crack cocaine or powder cocaine.

In addition, Dr. Deborah Frank, Professor of Pediatrics at Boston University School of Medicine, in her 10-year study of the developmental and behavioral outcomes of children exposed to powder and crack cocaine in the womb, found that "the biologic thumbprints of exposure to these substances" are identical. Dr. Frank added that small but identifiable effects of prenatal exposure to powder or crack cocaine are prevalent in certain newborns' development, but they are very similar to the effects associated with prenatal tobacco exposure, such as low birth weight, height, or head circumference.

Crack was also said to cause particularly violent behavior in those who use the drug. However, in the 2002 report on Cocaine and Federal Sentencing Policy, the Commission includes data that indicates that significantly less trafficking-related violence is associated with crack than was previously assumed. For example, in 2000: 1) 64.8% of overall crack offenses did not involve the use of a weapon by any participant in the crime; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.3% of crack offenders actively used a weapon. Although by 2005 there was an increase in the percentage of crack cases that involved weapons (before the Booker decision 30.7% and after 27.8%), the assertion that crack physiologically causes violence

has not been found to be true. Most violence associated with crack results from the nature of the illegal market for the drug and is similar to violence associated in trafficking of other drugs.

Another of the pervasive myths about crack was that it was thought to be so much more addictive than powder cocaine that it was “instantly” addicting. Crack cocaine and powder cocaine are basically the same drug, prepared differently. The 1996 JAMA study found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack. The study also concluded that the propensity for dependence varied by the method of ingestion, amount used and frequency, not by the form of the drug. Smoking crack or injecting powder cocaine brings about the most intense effects of cocaine. Regardless of whether a person smokes crack or uses powder cocaine, each form of the drug can be addictive. The study also indicated that people who are incarcerated for the sale or possession of cocaine, whether powder or crack, are better served by drug treatment than imprisonment.

Federal Cocaine Sentencing Should Reflect The Original Legislative Intent Of Congress And Focus On High-Level Drug Traffickers

Indeed, if the message Congress wanted to send by enacting mandatory minimums was that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers in order to cut off the supply of drugs coming into the country, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms. The commission 2002 report states that only 15% of federal cocaine traffickers can be classified as high-level, while over 70% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.

Harsh mandatory minimum sentences for crack cocaine have not stemmed the trafficking of cocaine into the United States, but have instead caused an increase in the purity of the drug and the risk it poses to the health of users. The purity of drugs affects the price and supply of drugs that are imported into the country. The Office of National Drug Control Policy below best explains how purity and price are related to reducing the supply of drugs.

“The policies and programs of the *National Drug Control Strategy* are guided by the fundamental insight that the illegal drug trade is a market, and both users and traffickers are affected by market dynamics. By disrupting this market, the US Government seeks to undermine the ability of drug suppliers to meet, expand, and profit from drug demand. When drug supply does not fully meet drug demand, changes in drug price and purity support prevention efforts by making initiation to drug use more difficult. They also contribute to treatment efforts by eroding the abilities of users to sustain their habits.” *National Drug Control Strategy*, Office of National Drug Control Policy, The White House, February 2006, page 17.

One indication that the National Drug Control Strategy has not made progress in cutting off the supply of drugs coming into this country is the fact that the purity of cocaine has increased, but the price of the drug has declined in recent years. In the context of a business model, declining prices and higher quality products are what one would commonly expect from most legitimate products (i.e. televisions, computers and cell phones), but not from illegal cocaine trade. According to ONDCP, for cocaine from 1981 to 1996 the retail price declined dramatically and then rose slightly through 2000. However, the purity or quality of cocaine sold on the streets is twice that of the early 1980s, although somewhat lower than the late 1980s. As a result there is more cocaine available on the street at a lower price. This is a clear indication that the thrust of this country's drug control policy has not properly focused on prosecuting high-level traffickers in order to reduce the flow of drugs coming into the country.

In the 1995 Commission report on Cocaine and Federal Sentencing Policy, the Drug Enforcement Agency (DEA) explained that powder cocaine is typically imported into the United States in shipments "exceeding 25 kilograms and at times reaching thousands of kilograms." These shipments are generally distributed to various port cities across the country. In the 2002, the commission found the **median** quantity of drugs that importers and high-level dealers were convicted of trafficking consisted of 2962 grams of crack cocaine and 16,000 grams of powder cocaine. Even though the DEA recognizes that importers ship well over 25 kilograms at a time into the country, the discussion about what constitutes a high-level crack cocaine trafficker should at the very least start at the median level of approximately 3000 grams. We should also look to the 2002 report to begin a dialogue about the appropriate drug quantity levels for other participants in the drug trade. The 2002 report cited statistics from 2000 for median drug quantities in crack cocaine case for organizers (509g), managers (253g) and street level dealers (52g).

Increasing Support in Congress for Changing the 100 to 1 Crack Cocaine Disparity

Several members of 109th Congress introduced legislation addressing the 100 to 1 disparity between federal crack and powder cocaine sentences. Rep. Charles Rangel's (D-NY) H.R. 2456, the Crack Cocaine Equitable Sentencing Act of 2005, equalizes the drug quantity ratio at the current level of powder cocaine and eliminates the mandatory minimum for simple possession. S. 3725, the Drug Sentencing Reform Act of 2006, sponsored by Senator Jeff Sessions (R-AL) would reduce the drug quantity ratio to a 20:1 disparity by increasing the trigger level for crack and decreasing the trigger quantity amount for powder cocaine as well as change the mandatory sentence for simple possession to one year. In addition, Rep. Roscoe Bartlett (R-MD) introduced legislation that would equalize trigger quantities of crack and powder cocaine at the current 5-gram level of crack.

The ACLU strongly opposes any measures that would lower the amount of powder cocaine required to trigger a mandatory minimum. Powder cocaine sentences are already severe and increasing the number of people incarcerated for possessing small amounts of cocaine is not the answer to the problem. Additionally, any measures that

decrease the amount of powder cocaine would disproportionately impact minority communities because of the disparate prosecution of powder cocaine offenses. In 2000, 17.8% of all powder cocaine defendants were white, 30.5% were black and 50.8% were Hispanics. The mandatory sentences for crack cocaine and the disparity with powder cocaine sentences have created a legacy that must come to an end.

Conclusion and Recommendations

October 2006 marked the twentieth anniversary of the enactment of 1986 Anti-Drug Abuse Act. In the twenty years since its passage, many of the myths surrounding crack cocaine have been dispelled, as it has become clear that there is no scientific or penological justification for the 100:1 sentencing disparity ratio. This sentencing disparity has resulted in unwarranted disparities based on race. Nationwide statistics compiled by the Sentencing Commission reveal that African Americans are more likely to be convicted of crack cocaine offenses, while Hispanics and whites are more likely to be convicted of powder cocaine offenses. In addition, many of the assumptions used in determining the 100:1 ratio have been proven wrong by recent data. Scientific and medical experts have determined that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine – the effects on users is the same regardless of form. Finally, Congress made it explicitly clear that in passing the current mandatory minimum penalties for crack cocaine, it intended to target “serious” and “major” drug traffickers. The opposite has proved true: mandatory penalties for crack cocaine offenses apply most often to offenders who are low-level participants in the drug trade.

For these reasons, the ACLU urges the Commission to recommend amending the federal penalties for trafficking, distributing and possessing crack cocaine by implementing the following recommendations:

- **The quantities of crack cocaine that trigger federal prosecution and sentencing must be equalized with and increased to the current levels of powder cocaine.**
- **Federal prosecutions must be properly focused on the high-level traffickers of both crack and powder cocaine.**
- **In order for judges to exercise appropriate discretion and consider mitigating factors in sentencing, mandatory minimums for crack and powder offenses must be eliminated, including the mandatory minimum for simple possession.**

Thank you for taking our views into consideration.

Questions for written submission

Community Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
2. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Panel 7

**Supplemental Questions for Hilary Shelton, President
NAACP
November 14, 2006**

- 1) According to your testimony, the devastating effect on our communities and that these laws continue to be maintained show, at the very least, a callous disregard for our people and our communities. Is this impact primarily with regard to how the penalties affect the offender? Could you explain how the drug use or distribution impacts those within your community who do not participate in the drug activity, but live in the communities where the drug activity occurs?
- 2) In your opinion, does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
- 3) According to your testimony, several medical authorities have found that crack cocaine is no more addictive than powder cocaine. To your knowledge, have there been any more recent studies conducted or relevant articles published since 2002 that continue to maintain this position? If so, explain.

**Summary of Testimony from Hilary O. Shelton, Director
NAACP
November 14, 2006**

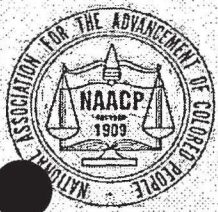
Mr. Shelton ("NAACP") states that despite the fact that cocaine use is roughly equal among the different populations of our nation, the vast majority of offenders who are tried, convicted and sentenced under federal crack cocaine mandatory minimum sentences are African Americans. He asserts that because the law governing federal crack cocaine offenders has remained unaltered, so has the discriminatory impact. In support of this position, the NAACP references the Commission's 2002 report "Cocaine and Federal Sentencing Policy" which noted that nearly 85% of men and women convicted of federal crack cocaine offenses were African American. NAACP noted that the statistic remain the same as recent as 2005, citing the Commission's 2005 Datafile, USSCFY05.

NAACP states that low-income African Americans, especially, continue to be severely penalized at much greater rates than white Americans for drug use, and that the policy of the federal government is having a devastating effect on their communities. NAACP further states that these laws continue to reflect a callous disregard for the people of the African-American communities.

NAACP states that it would be unfair to say that nothing has changed in the last five years. NAACP recognizes that on-going research into crack and powder cocaine has further eroded the myths that crack cocaine is more addictive than powder cocaine, that crack cocaine users are, because of their choice in drug use, more violent than powder cocaine users, or that the prolonged presence of crack cocaine in our communities has led to maternity wards full of "crack babies." NAACP further notes that certain medical authorities have found that crack cocaine is no more addictive than powder cocaine.

NAACP acknowledged that illegal drug traffic devastates our communities, and indeed communities across the nation, the debilitating affects of crack cocaine on African Americans has proven to come not only from the use of the drug, but also from the resulting unjust federal sentencing policy.

Finally, NAACP strongly advocates against increasing the penalties for powder cocaine so that they are more in line with those of crack cocaine. NAACP believes that this proposal does not take into consideration the more even-handed, informed and balanced approach that went into the development of powder cocaine sentencing ranges.



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**TESTIMONY OF HILARY O. SHELTON
DIRECTOR, NAACP WASHINGTON BUREAU
BEFORE THE US SENTENCING COMMISSION
ON COCAINE AND FEDERAL SENTENCING POLICY**

November 14, 2006

Good afternoon. My name is Hilary Shelton and I am the Director of the NAACP Washington Bureau. We are the public and federal policy branch of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely-recognized grassroots based civil rights organization. We currently have more than 2,200 units in every state of the Union, as well as Asia and Europe.

I welcome the opportunity to discuss our federal laws regarding crack cocaine prison sentencing ranges and mandatory sentences, and to highlight what we at the NAACP feel is a discriminatory, unfair and immoral policy.

Despite the fact that cocaine use is roughly equal among the different populations of our nation, the vast majority of offenders who are tried, convicted and sentenced under federal crack cocaine mandatory minimum sentences are African Americans. Our people, and our communities, continue to be disproportionately devastated by this law.

I was specifically asked by the Commission to discuss any changes that may have occurred in the last five years. Unfortunately, because the law governing federal crack cocaine offenders has remained the same, so has the horribly discriminatory impact of our government's policy. From the perspective of the NAACP, not much has changed since 2002.

Even in light of the 2005 US Supreme Court's *Booker* decision¹, which really only applies to cases in which the mandatory minimum does not apply or in which enhancements beyond the baseline sentence are under consideration² not much has changed when it comes to the demographics of those sentenced for possessing 5 grams or more of crack cocaine.

In its 2002 report "Cocaine and Federal Sentencing Policy", the US Sentencing Commission noted that nearly 85% of men and women convicted of federal crack cocaine offenses were African American³. For fiscal year 2005, the numbers are roughly the same: almost 83% of those convicted of federal cocaine offenses

¹ United States v. Booker, 125 S.Ct. 738 543 US 220 (2005)

² The Sentencing Project, "Sentencing with discretion: Crack Cocaine Sentencing After *Booker*"

³ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002.

are African American⁴, while according to the 2000 Census only 12.9% of the entire U.S. population is African American⁵.

Furthermore, the continued inequalities that occur as a result of federal policy toward crack cocaine have only exacerbated the Commission's assessment, in its 2002 report, that

...even the perception of racial disparity (is) problematic. Perceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system among those very groups that Congress intended would benefit from the heightened penalties for crack cocaine⁶.

Few people today argue that policy makers could have foreseen twenty years ago the vastly disparate impact the 1986 law would have on communities of color. Yet the facts that African Americans, and especially low-income African Americans, continue to be severely penalized at much greater rates than white Americans for drug use, and that the policy of the federal government is having a devastating effect on our communities and that these laws continue to be maintained show, at the very least, a callous disregard for our people and our communities.

And it is this disregard for the fate of our people and our community that continues to erode our confidence in our nation's criminal justice system. How can African Americans trust or respect policy makers who perpetuate a law that clearly has such a racially discriminatory impact? And, because it is only human nature to punish the messenger, the resulting mistrust, disrespect and anger that the African American community feels is also taken out on law enforcement representatives and the criminal justice system as well.

It would not be fair to say that nothing has changed in the last five years. On-going research into crack and powder cocaine has further eroded the myths that crack cocaine is more addictive than powder cocaine, that crack cocaine users are, because of their choice in drug use, more violent than powder cocaine users, or that the prolonged presence of crack cocaine in our communities has led to maternity wards full of "crack babies." It was these initial theories, which were widely held beliefs in 1986, which led to the dramatic disparity in the treatment of crack versus powder cocaine in federal law.

We have long known that crack and powder cocaine are pharmacologically indistinguishable. Several respected medical authorities have found that crack

⁴ United States Sentencing Commission, 2005 Datafile, USSCFY05.

⁵ United States Census, *The Black Population: 2000, Census 2000 Brief*, August 2001

⁶ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002.

cocaine is no more addictive than powder cocaine⁷. Furthermore, as this Commission concluded in its 2002 report, the violence that was often associated with crack cocaine is related to the nature of the drug trade and not to the effects of the drug itself⁸.

Finally, and perhaps most disturbing to the NAACP, was the myth that crack cocaine was responsible for thousands of innocent babies being born addicted to cocaine because their mothers had smoked crack cocaine during their pregnancies.

Although the myth of the "crack baby" has largely been debunked in medical and academic circles, it unfortunately persists in the minds of much of the American public. Furthermore, and perhaps more problematic for the NAACP, the image of the "crack baby" that comes to most Americans' minds is that of an African American infant, crying inconsolably in an incubator.

It is the myth of the crack baby that perhaps best reflects one of the reasons the NAACP would welcome an open, honest national debate on federal crack cocaine policies: we need to correct the image of crack cocaine – who uses it and what its impact is on our communities. We also need to change the law. Though illegal drug traffic devastates our communities, and indeed communities across the nation, the debilitating affects of crack cocaine on African Americans has proven to come not only from the use of the drug, but also from the resulting unjust federal sentencing policy.

Some argue that the answer would be to increase the penalties for powder cocaine so that they are more in line with those of crack cocaine. The NAACP rejects this proposal, however, as it does not take into consideration the more even-handed, informed and balanced approach that went into the development of powder cocaine sentencing ranges. And, as our more recent experiences have taught us, it would only fill even more prison cells with low-level offenders serving mandatory sentences which in turn would create an even larger drain on our nation's financial and human resources while undermining the trust and respectability needed by law enforcement officials to be effective in protecting our communities.

I should also state for the record that the NAACP is opposed to all mandatory minimum sentences, and that the proposal to increase the penalty for powder cocaine is yet another example of politicians trying to prove themselves "tough on crime" to the detriment of sound and effective policy.

⁷ Dorothy Hatsukami and Marian Fischman, "Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?" *Journal of the American Medical Association*, November 20, 1996 and the testimony of Charles Schuster before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002

⁸ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002.

The NAACP applauds the efforts of the US Sentencing Commission which has consistently sought to end the disparity between federal penalties for crack and powder cocaine, and cited the glaring racial inequities as one of the motivators behind its position. We further would like to applaud the efforts of Congressman Charles Rangel (NY) and other members of the Congressional Black Caucus who have tried, through legislation, to correct this inequity.

Finally, I would like to extend the appreciation of the NAACP, as well as my own gratitude and admiration, to some of my colleagues in this fight, among them the Sentencing Project, the ACLU, the Open Society Institute and others for all they have done to shed light on and correct this very real problem.

The bottom line is this: Until the racial inequalities in our nation's "War on Drugs" and other crime initiatives are addressed, communities of color across the nation will continue to distrust the American criminal justice system. The federal government's crack cocaine policy is one glaring example of how the American government has failed an entire segment of its population.

IMPORTANT NOTES

**PUBLIC HEARING ON COCAINE AND FEDERAL
SENTENCING POLICY**

TUESDAY, NOVEMBER 14, 2006

PANEL EIGHT

A View From Community Interest Groups

UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON COCAINE SENTENCING POLICY

WITNESSES AND BIOS

PANEL EIGHT: COMMUNITY INTERESTS

Ryan King

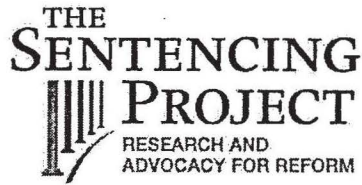
The Sentencing Project

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Ryan Scott King
Policy Analyst
The Sentencing Project

Ryan King's research specialization is the American criminal justice system, with a particular concentration on the radiating effects of sentencing and incarceration upon individuals, families and the community at large. His most recent work is an analysis of the national coverage of methamphetamine use by the American media. Past research has included an examination of marijuana arrests in the 1990s, a statistical profile of state prison inmates incarcerated on drug charges, and a study of the localized impact of felony disenfranchisement laws.

Areas of research interest include felony disenfranchisement, sentencing legislation, incarceration and crime rates, drug policy, and the nexus of class, race and incarceration. Research by Mr. King has appeared in *Criminology & Public Policy*, the *Harm Reduction Journal*, the *Federal Sentencing Reporter* and *SOULS: A Critical Journal of Black Politics, Culture, and Society*. Mr. King has also appeared in the *Associated Press*, *New York Times*, *Washington Post*, and *USA Today* as well as on local and national radio programs to discuss sentencing and corrections issues, including NPR's *The Tavis Smiley Show* and *Talk of the Nation*.

Mr. King holds a B.A. in Anthropology from the University of Pittsburgh, a M.A. in Criminal Justice from Monmouth University, and a M.S. in Justice, Law, & Society from American University.

Nkechi Taifa

Open Society Institute

Nkechi Taifa serves as Senior Policy Analyst for the Open Society Institute and Open Society Policy Center, focusing on issues of criminal and civil justice reform. She also convenes the Justice Roundtable, a broad network of advocacy groups advancing federal criminal justice policy in Washington. She served as an adjunct professor at Howard University School of Law for ten years, and as Founding Director of the Law School's Equal Justice Program. She has also served as legislative counsel for the American Civil Liberties Union Washington Office; policy counsel for the Women's Legal Defense Fund; staff attorney for the National Prison Project; and Network Organizer for the Washington Office on Africa. While in private practice, Nkechi represented indigent adult and juvenile clients, and specialized in employment discrimination law. As a catalyst in raising the visibility of issues involving unequal justice, she has testified, written, and spoken extensively on issues of civil/human rights, and criminal and civil justice reform. Nkechi serves on the boards of several public interest organizations, and has received numerous awards for her accomplishments in social justice. She received her Juris Doctorate from George Washington University Law School in 1984.

Angela Maria Arboleda
Associate Director, Criminal Justice Policy

Angela Arboleda is Associate Director for Criminal Justice Policy at the National Council of La Raza (NCLR) – the largest national Hispanic civil rights and advocacy organization in the U.S. Ms. Arboleda is responsible for civil rights and criminal justice policy analysis, advocacy activities, and research impacting Latinos in the United States.

In that capacity, Ms. Arboleda focuses on issues including juvenile justice, hate crimes, racial profiling, sentencing reform and reentry issues, police brutality, and civil rights discrimination by state, local, and federal law enforcement. She is also responsible for monitoring congressional activities and preparing policy papers, testimony, and legislative memoranda on federal legislation. Ms. Arboleda's publications include *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System* – the first book to ever focus on Latinos in the justice system. She represents NCLR in both mainstream and Spanish-language media.

Prior to her position at NCLR, Ms. Arboleda worked at the National Organization for Women (NOW), the Feminist Majority Foundation, and the Service Employees International Union (SEIU), where she was lead organizer for political and corporate campaigns, ballot initiatives, and political rallies.

Ms. Arboleda is a graduate of the Elliot School of International Affairs at The George Washington University.

Questions for written submission

Community Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
2. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Panel 8

**Supplemental Questions for Ryan S. King, Policy Analyst
The Sentencing Project
November 14, 2006**

- 1) What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer or wholesaler, a street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
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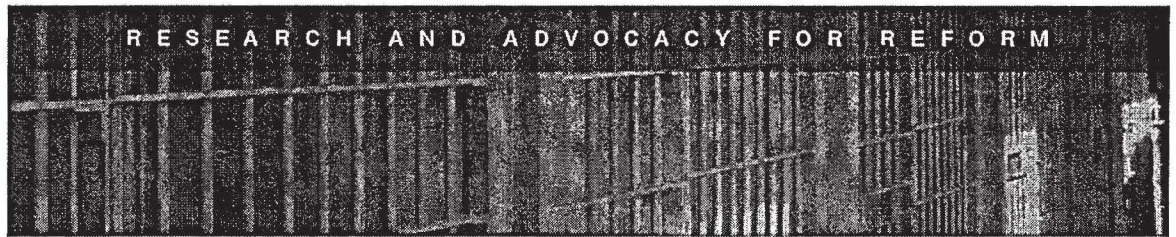
Testimony of Ryan S. King, Policy Analyst
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Mr. King ("SP") believes that federal cocaine sentencing laws inappropriately target low-level offenders. SP cited Senator Robert Byrd as describing the individuals who Congress intended to target with the mandatory minimums for cocaine to be ten years for the kingpins, the masterminds who are really running these operations, and five years for the middle-level dealers. Instead, SP states that the statute substitutes the weight of the drug as the sole determinant of the role of the defendant in the criminal enterprise. SP first notes that the pharmacological roots of crack and powder cocaine are identical. Second, SP notes that the weight-level necessary to warrant a 5-year mandatory sentence for crack cocaine is set so low that it is likely to impact low-level users.

SP also states that the 100:1 ratio makes inappropriate assumptions about crack cocaine markets. By treating crack cocaine more severely, Congress codified the unsubstantiated belief that all crack defendants manifest a tendency toward more serious criminal offending. SP believes that this 100:1 ratio unfairly penalizes some defendants for behavior in which they did not engage while "double counting" the punishment for other defendants.

Finally, SP states that the Commission should recommend that Congress amend the federal cocaine sentencing laws by raising the weight of crack cocaine necessary to trigger a 5-year and 10-year mandatory minimum to 500 grams and 5,000 grams respectively. To support its position, SP relies on its finding that the federal cocaine sentencing has failed to disrupt the drug market with respect to crack distribution. SP asserts that, contrary to the underlying theory of drug enforcement, increased pressure on market distribution patterns will result in a limiting of supply and a subsequent increase in demand and cost, the average price per gram of a purchase between 1 and 15 grams actually *fell* by 57% between 1986 and 2003. SP states that the federal cocaine sentencing structure, with its sole reliance on harsh sentencing and supply-side enforcement, has provided no noticeable impact on crack cocaine distribution or national consumption.

SP encourages the Commission to recommend to Congress that these laws are reformed in concert with a national drug abuse prevention model that directs resources to demand-reduction.



Testimony of Ryan S. King before the
United States Sentencing Commission
Federal Cocaine Sentencing Policy

November 14, 2006

Georgetown University Law Center,
Washington, D.C.

I am Ryan S. King, a Policy Analyst with The Sentencing Project, a criminal justice policy organization located in Washington, D.C. The Sentencing Project has been engaged in research and advocacy regarding federal cocaine policy for more than a decade and we welcome the opportunity to address the Commission today. We support the Commission's past work on this important and challenging issue and applaud its continued willingness to solicit public comment on any future considerations to amend the current sentencing structure.

The United States Sentencing Commission should recommend that Congress reform federal cocaine sentencing policy for four crucial reasons:

1. The current sentencing structure, with its reliance on quantity as the primary determinant for sentence length, is flawed by design and calibrated to target low-level crack cocaine users with 5-year mandatory minimum sentences.
2. The rationale that more severe crack cocaine penalties are necessary because of heightened correlations with more serious offenses amounts to either a "double counting" of offense characteristics in cases with a serious concurrent offense or an unwarranted sentence enhancement in the remainder of cases.
3. The current federal cocaine sentencing policy has failed to produce any appreciable impact on the crack cocaine market.
4. The national consensus regarding demand-reduction versus law enforcement has evolved over the last two decades to support a more treatment-oriented agenda.

1. Federal Cocaine Sentencing Laws Inappropriately Target Low-Level Offenders

In establishing the United States Sentencing Commission ("Commission") through the Sentencing Reform Act of 1984 ("SRA"), Congress called upon the agency to craft policies and practices in the federal criminal sentencing system that "[provide] just punishment for the offense," deter future criminal

activity, and offer rehabilitation.¹ These aims are framed by the caution that the length of sentence be “sufficient, but not greater than necessary” to achieve the aforementioned outcomes. This statutory language implies a degree of rationality and predictability in sentencing; ostensibly, bringing accrued institutional and practical knowledge to bear on the development and implementation of criminal sentences. One might say that the ultimate goal is for the proverbial “punishment to fit the crime.”

In the wake of the passage of the SRA, in which the Commission was charged with overhauling the federal sentencing system and devising a comprehensive set of guidelines, Congress responded to what it perceived as weaknesses in drug sentencing laws with the Anti-Drug Abuse Act of 1986 (“Act”). The Act was hastily passed in a climate of national fear about the spread of drug abuse and an increasingly politicized atmosphere in which commitment to fighting the dangers of drug abuse was measured by support for more punitive sentencing.

During the brief period of debate leading up to the passage of the Act, the legislative history indicates that lawmakers felt harsh mandatory minimum sentences were necessary to deter the proliferation of drug distribution networks and their associated criminality. Senator Robert Byrd described the individuals who Congress intended to target with the new mandatory minimums by stating that the 10-year mandatory minimum should apply to “the kingpins – the masterminds who are really running these operations,” while the 5-year mandatory minimum sentence should apply to “middle-level dealers.”² Unlike the federal sentencing guidelines established by the Commission, in which a range of offense and offender-specific characteristics are used to calculate a sentence, Congress imposed a much narrower and inflexible system. Instead of examining the body of evidence in a case in order to evaluate the sophistication of a defendant’s participation in a drug

¹ 18 U.S.C. § 3553(a) (2) (A-D).

² 132 Cong. Rec. 14,300 (1986) (statement of Sen. Robert Byrd).

enterprise, as is permissible under the guidelines, Congress simply substituted the weight of the drug as the sole determinant.

By using weight as the only indicator of the role played in the drug offense, Congress intended to establish generalized equivalencies across drug types by controlling for differences in the perceived severity of a substance's harm by adjusting the weight required to trigger the respective mandatory sentence. For example, 100 grams of heroin or 100 kilograms of marijuana merit a 5-year mandatory minimum sentence. Meanwhile, 5 grams of crack cocaine or 500 grams of powder cocaine warrant the same sentence, a 100:1 difference. Thus, the determination was made that an individual caught possessing these drug quantities could be assumed to be engaging in serious trafficking.

The differential cocaine penalty threshold has been particularly controversial for two reasons. First, crack and powder cocaine are manufactured from the same compound of origin. Thus, despite a substantial difference in the way in which the law views each drug, their pharmacological roots are identical. Secondly, and most germane to this discussion, the weight-level necessary to warrant a 5-year mandatory sentence for crack cocaine is set so low that it is likely to impact low-level users.

The legislative testimony makes it clear that mandatory sentences were designed to target drug sellers. This two-tiered structure of penalties was intended to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'"³ A "major trafficker" was defined as someone who operated a manufacturing or distribution network, while a "serious trafficker" was defined as someone who managed "retail level traffic" in "substantial street quantities."⁴

³ William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Arizona Law Review 1233, 1252 (1996).

⁴ Ibid.

Relying upon weight levels as a primary determinant to identify an individual as a major or serious trafficker has proven to be particularly problematic. While concluding that someone arrested with 100 kilograms of marijuana (220 pounds) must be engaged in a network that is distributing “substantial street quantities” of the drug is a reasonable position, that argument is less compelling when considering the quantity that triggers the 5-year sentence for crack cocaine. It is simply untenable to contend that 220 pounds, or even a fraction of that weight, is suitable for personal consumption. The same is true with the 500 gram (1.1 pounds) trigger for a powder cocaine offense. However, it is entirely plausible that someone possessing five grams of crack cocaine, the equivalent of slightly less than two packets of sugar, could be holding that quantity for personal consumption. It is estimated that five grams of crack cocaine translates into anywhere between ten and fifty doses.⁵ Meanwhile, the 500 grams of powder cocaine necessary to trigger the five-year mandatory penalty would yield between 2,500 and 5,000 doses.⁶ It is reasonable to consider that an individual might consume between 10 and 50 doses of crack cocaine over the course of a week, but not that anyone could consume 2,500 to 5,000 doses of powder cocaine.

In fact, this improper calibration of the weight threshold triggers has resulted in a disproportionate number of low-level offenders being convicted for crack cocaine offenses. In 2000, 73% of persons convicted for a crack cocaine offense were “street-level dealers” or of lesser culpability.⁷ Only 21% of defendants were described as importers, suppliers, or managers. Thus, only one in five defendants appears to meet the criteria of a “major” or “serious” trafficker. This is likely the result of a combination of factors, including the dynamics of crack cocaine markets, but there is little question that the low

⁵ *Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002. p. 17.

⁶ *Ibid.*

⁷ *Ibid.*, p. 39.

weight threshold is a contributing factor to the prosecution of so many street-level dealers and users.

The conflation of weight level with the seriousness of a defendant's role in a drug enterprise is a fundamental flaw in federal cocaine sentencing laws. The current weight thresholds present no equivalence across drug types in relation to the seriousness of the charged activity. While the link between weight and conduct for marijuana and powder cocaine is arguably reasonable, the crack cocaine weight trigger bears no resemblance to the seriousness of the conduct. The weight ratio for crack cocaine is calibrated so as to ensnare low-level offenders at the 5-year mandatory level. In addition, the reliance on a single factor to determine sentence exacerbates the aforementioned problems by exposing defendants who have played peripheral roles in the drug trade to sentences far out of proportion to their conduct and in spite of potentially mitigating evidence.

The Commission should recommend that Congress repeal the mandatory minimum sentences in Title 21 §841(b) (1) (A-B). If Congress is unwilling, then the Commission should recommend that Congress broaden the consideration of relevant conduct used as criteria for subjecting persons to such punishment so as to more accurately reflect a defendant's level of participation in a drug enterprise.

2. The 100:1 Ratio Makes Inappropriate Assumptions About Crack Cocaine Markets

The primary rationale for implementing a weight differential between powder and crack cocaine was the perception that there are tangible differences between the two substances. Senator Lawton Chiles remarked that "[s]uch treatment is absolutely essential because of the especially lethal characteristics of this form [crack] of cocaine."⁸ Among concerns about the

⁸ 132 Cong. Rec. 26,447 (1986) (statement of Sen. Lawton Chiles).

enhanced addictiveness of crack cocaine, the issue that perhaps played the most significant role in justifying the differential was its perceived correlation with more serious crimes.⁹ It was posited that crack cocaine markets were breeding grounds for violence, largely due to the unique contours of the drug's distribution model which lacked the hierarchical structure and associated order of powder cocaine or marijuana. This resulted in a higher concentration of lower-level sellers and it was theorized that violence was the inevitable result of the struggle for market share.

The fear that crack cocaine created a proclivity to engage in other serious criminal behavior led Congress to embed an assumption in favor of a defendant having committed a concurrent serious crime in the structure of the statutory penalty. By treating crack cocaine more severely, Congress codified the unsubstantiated (and subsequently refuted)¹⁰ belief that all crack defendants manifest a tendency toward more serious criminal offending. This prejudice creates a significant disparity in sentence length for persons convicted for crack cocaine offenses, and is problematic for two reasons.

First, for individuals who have not engaged in a lesser-included or more serious offense, the enhanced penalty scheme categorically subjects crack cocaine defendants to a punishment based on uncommitted behavior. Secondly, for persons who have been charged with a concurrent offense, the penalty differential "double counts" the charged conduct relative to a powder cocaine defendant. This is the result of the additional penalties that apply to related, charged conduct. For example, the 28% of crack cocaine

⁹ See *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, February 1995. pp. 118-119. (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs.")

¹⁰ See Paul J. Goldstein, Henry H. Brownstein, Patrick J. Ryan, and Patricia A. Bellucci, (1997), "Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence," in Craig Reinerman and Harry G. Levine, (Eds.), *Crack in America: Demon Drugs and Social Justice*, Berkeley, CA: University of California Press. pp. 113-130.

defendants for whom a weapon was involved in their offense already face a statutory enhancement for having a weapon present during the commission of a drug trafficking crime.¹¹ A first offense for having a weapon present carries a 5-year mandatory minimum, and if the weapon is brandished or discharged the mandatory sentence can increase to 7 or 10 years respectively. Additional penalties apply as well if the weapons-related conduct results in physical harm. Subsequent weapons offenses result in a 25-year mandatory minimum to be appended to the sentence for the drug charge. A crack cocaine defendant arrested with 5 grams of the substance and a holstered weapon could face about twice the time in prison due to the presumption of serious-related conduct that has already been factored into the drug mandatory. The practical outcome of the penalty differential is that crack cocaine defendants are required to either answer for conduct in which they did not engage, or face a penalty that takes into consideration the same conduct twice.

The penalty differential in federal cocaine sentencing law was based on unproven theories about the singular harms associated with crack cocaine that have subsequently been proven false in the two decades since the Act's passage. This 100:1 ratio unfairly penalizes some defendants for behavior in which they did not engage while "double counting" the punishment for other defendants. The Commission should recommend that Congress amend the federal cocaine sentencing laws by raising the weight of crack cocaine necessary to trigger a 5-year and 10-year mandatory minimum to 500 grams and 5,000 grams respectively.

3. Federal Cocaine Sentencing Has Failed to Disrupt Drug Markets

As stated in the SRA, the goal of a federal criminal sentence is to both punish as well as deter future criminal activity. For drug offenses, the results have not been encouraging in this regard. The number of regular crack cocaine

¹¹ 18 U.S.C. § 924 (c).

users has remained stable for the last two decades, while the number of annual new initiates during the 1990s also remained level.¹² Data from the Drug Enforcement Administration on the purchase price of crack cocaine demonstrates no noticeable effect of the strict sentencing model. Contrary to the underlying theory of drug enforcement, that increased pressure on market distribution patterns will result in a limiting of supply and a subsequent increase in demand and cost, the average price per gram of a purchase between 1 and 15 grams actually *fell* by 57% between 1986 and 2003.¹³ If law enforcement or stiffer sentences were effective in deterring market entry, it would be expected that supply would decline and prices would increase. However, the data indicate the opposite. The drop in prices suggests either an increase in supply or a decrease in demand. Considering the household drug survey responses, which demonstrate stability in the number of users and new initiates during this period, there is little support for the theory that reduced demand is driving down prices. Thus, the logical conclusion is that prices are declining due to increased market entry by suppliers and greater availability of the drug.

This pattern of decline is mirrored in pricing trends for powder cocaine, which experienced significant drops during the same period. The decline was generally steady for both substances, with discrete increases in 1990, 1995, and 2000. The fact that prices for powder cocaine, a substance lacking the same stiff penalty structure as crack cocaine, declined at the same rate is further evidence that the federal sentencing structure for cocaine has failed to disrupt the drug markets.

¹² Data available from the United States Department of Health, Substance Abuse and Mental Health Services Administration, online at: <http://oas.samhsa.gov/cocaine.htm>

¹³ Office of National Drug Control Policy (2004). *The Price and Purity of Illicit Drugs: 1981 Through the Second Quarter of 2003*. Washington, DC: Executive Office of the President (Publication Number NCJ 207768). p. 60. Crack cocaine prices show significant degrees of variability by year and location, but the average price is the best indicator available for national market prices.

The limited impact of law enforcement and severe sentences is endemic to efforts to curtail drug abuse through supply-side enforcement. Unlike other criminal activity, in which the incapacitation effect of incarceration can reduce the potential for future criminal activity during the period of imprisonment, drug markets are characterized by their elasticity and there is generally a strong replacement effect of former sellers lost to prison. Noted criminologist Alfred Blumstein observed, “. . . drug markets are inherently demand driven. As long as the demand is there, a supply network will emerge to satisfy that demand. While efforts to assault the supply-side may have some disruptive effects in the short term, the ultimate need is to reduce the demand in order to have an effect on drug abuse in society.”¹⁴

The federal cocaine sentencing structure, with its sole reliance on harsh sentencing and supply-side enforcement, has provided no noticeable impact on crack cocaine distribution or national consumption. The Commission should recommend to Congress that these laws are reformed in concert with a national drug abuse prevention model that directs resources to demand-reduction.

4. Evolving National Support for Treatment

The domestic atmosphere regarding treatment for drug offenders has shifted dramatically in the twenty years since the passage of the Act. In 1986, the national drug control strategy was almost exclusively focused on enforcement and interdiction, with treatment relegated to those individuals with the discretion and means to seek it privately. Beginning in 1989 with the first drug courts in the Miami-Dade (FL) area, the United States has experienced an evolution in thinking about how best to address drug abuse. As the initial results from the first drug court programs began to suggest the cost-effectiveness of treatment versus incarceration, support for demand-side

¹⁴ Alfred Blumstein, (1993), “Making Rationality Relevant – The American Society of Criminology 1992 Presidential Address,” *Criminology*, Vol. 31, (1), pp. 1-16.

reduction approaches increased. The positive reports on drug court diversion programs led to incentives via federal funding and a subsequent expansion of programs across the country.

Public discourse around diversion for drug offenders has continued to shift in favor of alternatives to incarceration, highlighted by landmark policy changes in Arizona in 1996 and California in 2000 as well as an ever-growing bipartisan roster of lawmakers and practitioners calling for reform. By 2006, more than half of the states had modified their drug laws. These developments include establishing diversion programs for certain categories of offenders, repealing some provisions of mandatory sentences, and increasing funding for treatment options. Admittedly most of these programs target low-level drug users; however, the success of Proposition 36 in California, which offers a more ambitious treatment-oriented model than other measures, indicates that the climate for reform continues to be fertile as the American public grows increasingly discontented with the supply-side approach to fighting drugs.

The federal cocaine sentencing laws stand in stark contrast to this momentum for reform. The structural emphasis on weight of the drug as the primary indicator of the involvement in the narcotics trade ensnares numerous low-level drug users in prison for long mandatory sentences. Whereas this approach may have been the standard by which drug abuse was addressed in the 1980s, the passage of time has rendered this strategy ineffective, at best, and counterproductive, at its worst. Although the Commission is not charged with helping establish or monitor this country's drug abuse prevention strategy, there are affirmative steps which it can take to bring our criminal sentencing in harmony with developments in other arenas. While it is beyond the Commission's purview to expand the availability of drug treatment options, it can take the important step of ensuring that low-level offenders are not subjected to harsh mandatory minimum sentences. In no section of the criminal code is this more necessary than the federal cocaine

structure, where the unreasonably low weight threshold for crack cocaine subjects many defendants who might benefit from treatment to harsh mandatory sentences.

Conclusions and Recommendations

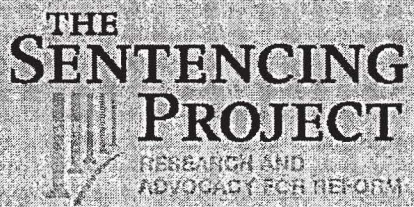
Federal cocaine sentencing policy is an antiquated relic of an era where the conversation about combating drug abuse was focused on enforcement and interdiction. In the twenty years since the passage of the Act, our understanding of the value of treatment and diversion and the costs of the “war on drugs” has become painfully clear. In addition, during that time, much of the underlying rationale for the implementation of a two-tiered and unequal penalty structure for cocaine offenses in the federal system has been refuted. Concerns about crack cocaine as a catalyst of related serious offending have proven to be false, and as a cruel twist, it has actually been empirically demonstrated that the role of the enforcement policy itself may have been far more damaging than any pharmacological effects of the drug.¹⁵

The differential penalty structure established in 1986 was premised on fear and misperception. The result was overly broad categories which applied punishment based solely on weight. The consequence was a law that was intended to target traffickers but has, in practice, impacted many low-level offenders and peripheral players in the drug trade by exposing them to harsh mandatory sentencing. The Commission would be doing a service to the citizens of the United States if it requests that Congress revisit the decisions of 1986 and apply a lens of analysis that benefits from two decades of accrued wisdom and knowledge about the consequences of a punitive sentencing model to address drug abuse. If they follow this path, the only rational approach is to raise the weight trigger of crack cocaine to a level commensurate with its original intent, to target serious and major traffickers.

¹⁵ Roland G. Fryer, Jr., Paul S. Heaton, Steven D. Levitt, and Kevin M. Murphy, (2005), *Measuring the Impact of Crack Cocaine*, Working Paper 11318, National Bureau of Economic Research.

In order to establish a fair and effective federal cocaine sentencing policy, we request that the Commission recommend the following:

- In light of twenty years of evidence demonstrating the ineffectiveness of mandatory minimums to achieve the primary goal of a reduction in criminal offending, the Commission should recommend that Congress repeal these laws and instruct judges to rely upon the guidelines as a means of calculating sentence.
- If Congress is unwilling to engage in a wholesale repeal of mandatory minimum sentencing, then the Commission should recommend that significant reform is taken with regard to federal cocaine policy.
 - First, as a result of its susceptibility to ensnaring low-level and peripheral actors and subjecting these defendants to harsh mandatory sentences, the practice of relying upon weight as the sole determinant of the sophistication of a defendant's participation in a drug enterprise should be discontinued.
 - Second, any system which includes mandatory minimum penalties for drug offenses should only apply these sanctions to defendants who meet a set of criteria used to determine role in the offense. In addition to the weight of the substance, other factors indicating the degree of involvement in the drug enterprise should be considered prior to exposing a defendant to a mandatory minimum penalty.
 - Finally, because the primary reasons justifying the unequal penalty structure in 1986 have been subsequently refuted, the 100:1 weight threshold differential between powder and crack cocaine should be repealed by raising the level of crack cocaine necessary to trigger a 5-year and 10-year mandatory sentence to 500 grams and 5,000 grams respectively.



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Ryan King's research specialization is the American criminal justice system, with a particular concentration on the radiating effects of sentencing and incarceration upon individuals, families and the community at large. His most recent work is an analysis of the national coverage of methamphetamine use by the American media. Past research has included an examination of marijuana arrests in the 1990s, a statistical profile of state prison inmates incarcerated on drug charges, and a study of the localized impact of felony disenfranchisement laws.

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Mr. King holds a B.A. in Anthropology from the University of Pittsburgh, a M.A. in Criminal Justice from Monmouth University, and a M.S. in Justice, Law, & Society from American University.

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3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

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Testimony

of

**Nkechi Taifa
Senior Policy Analyst
Open Society Policy Center**

and

**Convener
Justice Roundtable**

Re: Cocaine and Federal Sentencing Policy

**Before the
United States Sentencing Commission**

November 14, 2006

I. Introduction

Thank you for this opportunity to testify at the United States Sentencing Commission's public hearing on cocaine and federal sentencing policy. My name is Nkechi Taifa, and I currently serve as Senior Policy Analyst for the Open Society Policy Center and as convener of the Washington-based policy network, the Justice Roundtable. The Open Society Policy Center is a non-partisan organization that engages in policy advocacy on U.S. and international issues, including foreign operations, criminal justice reform, human rights, women's rights, and civil liberties.

I am testifying today on behalf of the Justice Roundtable, a broad network of organizations working on issues which span the criminal justice continuum of law enforcement, sentencing, prison, and reentry. The Roundtable's overarching mission is to promote fairness and equity in all aspects of the criminal justice system. We pursue this mission through education and advocacy to influence public policy, and through public and legislative discussion of criminal and civil justice reform issues. We applaud this Commission for making review of cocaine and federal sentencing policy a priority area of its work.

As background, I will examine selected Sentencing Commission proceedings relative to cocaine and federal sentencing policy. I will next acquaint this Commission with some of the ongoing campaign work of the Justice Roundtable to address the inequities of crack cocaine penalties. Turning to questions raised by this Commission, I will address those pertaining to violence and harm, dispelling concerns which often arise. Finally, I will conclude by encouraging this Commission to reinstate its original recommendation transmitted to Congress May 1, 1995 amending the sentencing

guidelines by equalizing the penalty triggers between crack and powder cocaine possession and distribution, and calling on Congress to harmonize the mandatory minimum crack statutes with the proposed guideline amendments.

II. Background

We are coming to the close of the twentieth anniversary year of the passage of the law mandating a disparate punishment structure for crack and powder cocaine offenses. In 1986 Congress enacted the Anti-Drug Abuse Act that differentiated between two forms of cocaine distribution – powder and crack – and singled out crack cocaine for dramatically harsher punishment. A five year mandatory minimum sentence is required for dealing in five grams of crack cocaine. It takes trafficking in 100 times as much powder cocaine – 500 grams – to trigger the same five year sentence. Fifty grams of crack cocaine yields a ten year sentence, whereas 5000 grams of powder cocaine yields the same sentence. Thus, in what has come to be known as the 100:1 ratio, it takes 100 times more powder cocaine than crack cocaine to trigger the harsh five and ten year mandatory minimum sentences, which have been anchored to the Sentencing Guidelines.

In 1988 Congress further distinguished crack cocaine from both powder cocaine and every other drug by creating a mandatory felony penalty of five years in prison for simple possession of five grams of crack cocaine. In 2002, 81.4% of those convicted of crack cocaine offenses in federal court were African American. Although there are larger numbers of documented White crack cocaine users, federal law enforcement and prosecutorial practices have resulted in the “war on drugs” being targeted at inner-city communities of color. This has caused an overwhelming number of arrests from these

communities, with Blacks disproportionately impacted by the facially neutral yet unreasonably harsh, crack penalties. It has been reported that the higher proportion of African Americans charged with crack offenses is the single most important difference accounting for longer sentences imposed on them, relative to other racial groups. Revising this one sentencing rule, this Commission has concluded, would do more to reduce the sentencing gap between Blacks and Whites than any other single policy change.

It is recognized that two decades ago, little was known about crack, other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analyses by this Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect.

In 1995 this Commission transmitted to Congress recommendations that would equalize the penalty triggers between crack and powder cocaine possession and distribution, at current powder cocaine triggers.¹ It is instructive to stress that the Commissioners unanimously agreed that the penalty triggers for simple possession of crack and powder cocaine should be equal. A majority of the Commissioners supported not differentiating the triggers for distribution as well. Indeed, the only dissenting Commissioner to provide an alternative ratio for distribution stated that a five-to-one ratio "may be a good starting point for analysis."² Although this Commission exhaustively

¹ 60 Fed. Reg. 25074, amend. No. 5 (proposed May 1, 1995).

² (This was the view of Commissioner Goldsmith, dissenting in part from the Commission's proposed amendment.) See Letter from Richard A. Conaboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995), in U.S. Sentencing Commission: Materials

researched and analyzed the issue of cocaine and federal sentencing policy “from every conceivable angle and for many, many, many months,” making “every effort to consider this critical matter in a thorough and professional manner,”³ the recommendations were summarily rejected by Congress.⁴ Congress rebuffed the wisdom of the body of experts it had directed to advise it on this issue by voting to “disapprove” of the Commission’s recommendations, sending the issue back to this Commission for further study.⁵ Indeed, out of over 500 recommendations submitted by this Commission to Congress since its inception, this represented the first time Congress disregarded the advice. Even more egregiously, Congress demanded that this Commission revise its recommendations so as to maintain sentences for crack cocaine trafficking that exceeded those for powder cocaine trafficking.⁶

In April 1997 this Commission, pursuant to that Congressional mandate, modified its 1995 call for complete elimination of the crack/powder disparity, recommending instead increasing from 5 grams the amount of crack needed to trigger a five year mandatory sentence to between 25 and 75 grams, and lowering from 500 grams the

Concerning Sentencing for Crack Cocaine Offenses, 57:0 CRIM L. RP. 2127 (1995); See also Powder Cocaine and Crack Cocaine Sentences, 1995: Hearings Before the Subcommittee on Crime of the House of Representatives’ Committee on the Judiciary, 104th Cong., 1st Sess. 1 (1995) (statement of J. Deanell Reece Tacha, U.S. Sentencing Commission), “the similarities between the majority and the dissent on this issue are much greater than our differences.” *Id.* Also, in the words of then Commission Chair Conaboy: “We have all worked very hard on this issue, and I want to stress first the Commission’s unanimity. We all agreed on the conclusions contained in our report to Congress as well as the facts that form the bases of the conclusions. And while we certainly differ on parts of our final specific recommendations, our differences are relatively small ... the Commissioners who dissented from our recommendations did not seriously discuss any ratio greater than 5-to-1.” *Id.* Statement of Richard P. Conaboy.

³ Conaboy Letter

⁴ CONG. REC. H10255-56 (daily ed. Oct. 18, 1995), H. Res. 237, 104th Cong.; CONG. REC. sec.14645-56 (daily ed. Sept. 29, 1995), S. 1254, 104th Cong.

⁵ See 141 CONG. REC. H10, 255-02, 281 (daily ed. Oct. 18, 1995). The House of Representatives voted 316-98 to disapprove of the Sentencing Commission’s recommendations. Although the Senate earlier voted to disapprove of the recommendations, there was no roll call vote in that chamber. See 141 CONG. REC. S14, 645-06, 782 (daily ed. Sept. 29, 1995).

⁶ See Pub.L.No. 104-38, 109 Stat. 334 (Oct. 30, 1995)

amount of powder cocaine needed to generate the same penalty to a level between 124 and 375 grams. In a concurring opinion, then Vice Chairman Michael Gelacak chided the modification, stating that “political compromise is a function best left to the Legislature.”⁷ It is noted, however, that this Commission unanimously reiterated its core 1995 finding that the 100-to-1 drug quantity ratio was not justified.

Although the Sentencing Commission was designed to insulate criminal sentencing from the exigencies of politics, this Commission was restrained from accomplishing its given task – the consideration of sentencing policies free from pressure. Then Commissioner Wayne Budd, in testimony before the House of Representatives, illustrated this tension as follows:

We have found that almost everybody in a position of political authority is reluctant to take a position on the issue. The reluctance is understandable. Even though almost everyone believes, in the carefully crafted words of the Justice Department, ‘that an adjustment in the current penalty structure may be appropriate,’ there is a pervasive fear that if you call for change that lowers a criminal sentence for anybody, let alone for a drug criminal, you will be excoriated about being ‘soft on crime’ or ‘sending the wrong message on crime.’ *But every once in a while, the proper public policy demands an adjustment and demands the leadership to push for change, because irrational and unfair sentencing policies also send a message.*⁸

This Commission again revisited the crack/powder issue with recommendations in its 2002 Report to Congress on Cocaine and Federal Sentencing Policy. At that time this Commission advocated increasing the five year mandatory minimum threshold quantity for crack cocaine offenses to at least 25 grams and the ten year threshold quantity to at least 250 grams, while maintaining the current mandatory minimum

⁷ Concurring Opinion of Vice Chairman Michael S. Gelacak at 1 in U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS; COCAINE AND FEDERAL SENTENCING POLICY (Apr. 1997).

⁸ Powder Cocaine and Crack Cocaine Sentences, 1995; Hearings Before the Subcommittee on Crime of the House of Representatives, Committee on the Judiciary, 104th Cong., 2d Sess. 1-2 (1995) (statement of Wayne A. Budd, U.S. Sentencing Commission) (emphasis added).

threshold quantities for powder cocaine offenses. This Commission also recommended that Congress provide direction for enhancements within the guideline structure that targets the most serious drug offenders.

Despite its 15 year review of guidelines sentencing where this Commission reported that revising this one sentencing rule would do more to reduce the sentencing gap between Blacks and Whites “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system,”⁹ and despite this Commission adhering to Congress’s mandate to maintain a difference in the penalty triggers, Congress has yet to address any of this Commission’s recommendations since 1995.

III. Justice Roundtable’s Campaign: “Time to Mend the ‘Crack’ in Justice”

On January 1, 2006 the Justice Roundtable launched a national campaign, “Time to Mend the ‘Crack’ in Justice” using the 20 year anniversary of the crack law’s passage as a catalyst to encourage public and legislative discussion of the issue. The campaign has featured Letters to Congress, Hill Briefings and Reports, creative “Show and Tell,” as well as advocacy before an international body. The Campaign’s rallying cry has been: “Twenty years of discriminatory crack cocaine sentencing is enough. The studies are completed. The research is compelling. The analysis is sound. Now is the time to mend this ‘crack’ in our system of justice.”

⁹ United States Sentencing Commission [USSC], *Fifteen Years of Guidelines Sentencing* (Nov. 2003), p. 132.

A. **Open Letters to Congress** – On February 16, 2006 over fifty organizations which participate in the Justice Roundtable delivered an Open Letter to Congress, citing their agreement with this Commission’s 1995 careful analysis that the present 100:1 quantity ratio is too great and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce insupportable racial disparity in sentencing.¹⁰ The groups stressed that justice necessitates that crack cocaine sentences have the same quantity triggers as those currently required for powder cocaine, concluding that aligning crack cocaine sentences with current powder cocaine sentences is the sound way to eliminate this unfair disparity.¹¹

On October 27, 2006, a group of religious leaders serving communities across the United States sent a letter to the Chairs and Ranking Members of the Senate and House

¹⁰ These groups included American Civil Liberties Union, American Friends Service Committee, Break the Chains, Brennan Center for Justice, Correctional Education Association, Families Against Mandatory Minimums, Global Rights, Criminal Justice Institute-Harvard Law School, Human Rights Watch, Interfaith Drug Policy Initiative, International Citizens United for the Rehabilitation of Errants, Justice Fellowship, Justice Policy Institute, Lawyers Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, Legal Action Center, National Alliance of Faith and Justice, National Association for the Advancement of Colored People, NAACP-Legal Defense and Educational Fund, National Association of Criminal Defense Lawyers, National Bar Association, National Black Alcoholism and Addictions Council, National Black Police Association, National Conference of Black Lawyers, National Conference of Black Political Scientists, National Congress of Black Women, National Council of La Raza, National Juvenile Justice Network, National Legal Aid and Defender Association, National Rainbow Coalition, All of Us or None, Nu Leadership Policy Group, Ohio Commission on African-American Males, Open Society Policy Center, Penal Reform International, Presbyterian Church (USA), Rebecca Project for Human Rights, Religious Action Center of Reform Judaism, the Sentencing Project, Unitarian Universalists for Drug Policy Reform, United Church of Christ Justice and Witness Ministries, General Board of Church and Society United Methodist Church, Washington Bar Association.

¹¹ See Open Letter to Congress “Time to Mend the ‘Crack’ in Justice,” February 16, 2006. This letter is appended to this Testimony. The Open Letter to Congress also stressed that reducing the quantity threshold for powder cocaine to that of crack cocaine is an option that was unanimously rejected by this Commission in 2002 as likely to exacerbate, rather than ameliorate, the problems with cocaine sentencing. Such an approach would not cause a shift in focus from bit players to drug “kingpins,” but would lead to dramatically increased levels of federal incarceration, furthering burdening the federal system at a great cost to taxpayers.

Judiciary Committees expressing their concern about the current mandatory minimum sentences for crack and powder cocaine.¹² An excerpt from that letter reads:

Many of our constituents and member congregations minister to those in prisons and assist with the successful reentry of people as they leave prison and return to their families and communities. These excessively long sentences for drug offenses – not to mention the sense of unfairness and despair that the disparity in sentence lengths create – often hinder the success of these important efforts by destroying the family connections, spiritual relationships, and hope that are so important to reclaiming their lives.

On October 27, 2006 a letter from 150 Professors of Criminology, Sociology and Law was delivered to the Senate and House Judiciary Leadership. This letter stressed that the crack law “was a major mistake.”

Simply put, the current mandatory minimums are undermining public safety by providing perverse incentives for federal law enforcement agencies to focus on minor offenders instead of major traffickers. This is opposite of what Congress intended.

Copies of these Open Letters to Congress are appended to this testimony.

B. Hill Briefings and Reports – On February 16, 2006 the Justice Roundtable, along with the Public Safety, Sentencing and Incarceration Reform Caucus of the House of Representatives hosted a Roundtable Discussion with experts from the Justice Roundtable on the injustice of crack cocaine sentencing, launching its “Time to Mend the ‘Crack’ in Justice” Campaign.

On October 27, 2006, two decades from the day President Ronald Reagan signed the Anti-Drug Abuse Act of 1986, the Justice Roundtable hosted a Senate Staff Briefing,

¹² Signee religious institutions include the Episcopal Church Office of Government Relations, Washington Office Presbyterian Church, United Methodist Church General Board of Church and Society, United Methodist Church General Commission on Religion and Race, The Aleph Institute, Disciples Center for Public Witness, Friends Committee on National Legislation, Justice Fellowship, Union for Reform Judaism, Unitarian Universalist Association of Congregations, Mennonite Central Committee, United Church of Christ Justice and Witness Ministries, International Citizens United for the Rehabilitation of Errants, National Alliance of Faith and Justice, Interfaith Drug Policy Initiative.

“The 20-Year Legacy of Crack and Powder Cocaine Sentencing.” During this briefing the Sentencing Project moderated a stellar panel which included representatives from the U.S. Sentencing Commission, Office of Senator Jeff Sessions, Criminal Justice Policy Foundation, and the American Civil Liberties Union. The diverse group of panelists engaged in frank discussion to an impressive, capacity-filled Senate meeting room.

Several organizations active in the Justice Roundtable’s campaign to heighten awareness of the need to fix the crack/powder disparity released reports this year. On January 12th, the Sentencing Project issued a report documenting developments in crack cocaine sentencing after *United States v. Booker*, “Sentencing With Discretion: Crack Cocaine Sentencing After Booker,” which documented developments in crack cases since the Supreme Court’s ruling striking down the mandatory application of the federal sentencing guidelines as unconstitutional. A key finding of the report was that federal judges continue to impose stiff prison sentences in crack cocaine cases despite deviations from the federal guidelines.

On May 18th the American Constitution Society’s Constitution in the 21st Century Project released an issue brief, “The ‘Crack’/Powder Disparity: Can the International Race Convention Provide a Basis for Relief?” by Nkechi Taifa. The paper details the racial impact of the disparity between mandatory minimum sentences for those convicted of crack and powder cocaine offenses, and examines international law as a means for addressing the impact.

On July 17th Eric Sterling, assistant counsel to the House Judiciary Committee (1979-1989) and President, Criminal Justice Policy Foundation, released “Getting Justice off its Junk Food Diet: Getting Tough on Cocaine Traffickers and Fixing the Racial

Disparity of Crack Prosecutions.” This white paper stresses that the proper federal anti-drug role must focus on the highest level traffickers, and that every federal case against a street-level or local trafficker – who could be investigated and prosecuted by state and local law enforcement agencies – is a distraction from the critical federal role and a waste of federal resources.

Marking the 20th anniversary of the Anti-Drug Abuse Act of 1986, the American Civil Liberties Union on October 26th released its report, “Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law,” detailing discriminatory efforts of the drug law that has devastated African American and low-income communities.

Each of these reports by Justice Roundtable participants is appended to this testimony.

C. “Candy Bar” Crack Cases – An important feature of the Justice Roundtable’s public education campaign has been to depict drug quantities with visual analogies. For example, five grams of crack cocaine, the equivalent weight of five packets of artificial sweetener or a couple of peanuts, yields a mandatory minimum sentence of five years in prison. Fifty grams of crack cocaine, comparable to the weight of an ordinary candy bar, mandates a ten year sentence. One third of all federal cocaine cases involve an average of 52 grams, while only 7 percent of federal cocaine cases are directed at high level traffickers.

For the past twenty years low level crack cocaine offenders selling sugar packet and candy bar size quantities of crack cocaine, have been punished far more severely than their wholesale drug suppliers who provided the powdered cocaine from which the crack is produced. Indeed, this Commission has reported that local street-level crack offenders

receive average sentences comparable to intrastate and interstate powder cocaine dealers, and both intra- and- interstate crack sellers receive average sentences longer than international powder cocaine traffickers.¹³ Results such as these are surely not what Congress intended to stem the tide of crack cocaine abuse.

To more vividly illustrate to legislators the minuscule drug quantities which yield such extreme sentences, Justice Roundtable representatives recently delivered candy bars, packets of artificial sweetener and peanuts to members of the House and Senate Judiciary Committees. This creative “show and tell” was designed to urge Congress to stop the senseless “junk food justice” which has resulted in the over-incarceration of nearly a generation of men and women of color convicted of low-level non-violent crack cocaine offenses.

D. Inter-American Commission on Human Rights -- On March 3, 2006, spurred by a petition from the Justice Roundtable and a supporting letter from the American Bar Association, the Inter-American Commission on Human Rights convened an historic hearing on the impact of mandatory minimum sentences in the federal criminal system of the United States.¹⁴ The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States, whose members are elected by the OAS General Assembly. One of its main functions is to address the complaints or petitions received from individuals, groups of individuals or organizations that allege human rights violations committed in OAS member countries. Its

¹³ U.S. SENTENCING COMM’N, 104TH Cong., 2ND SESS., SPECIAL REPORT TO CONGRESS; COCAINE AND FED. SENTENCING POL’Y (1995) AT 175-77 (Figures 10 & 11).

¹⁴ The March 3RD proceeding, during the Commission’s 124TH Period of Sessions, was heard by Commissioners Paulo Sergio Pinheiro, First Vice President and Rapporteur on the United States; Florentin Melendez, Second Vice President and Rapporteur on the rights of persons deprived of liberty; and Clare K. Roberts, Commissioner and Rapporteur against racial discrimination. The U.S. government was represented by the U.S. Department of State, which declined to make an official statement.

recommendations have led States to modify sentencing procedures, eliminate discriminatory laws, and strengthen protections of basic rights.

The Commission heard riveting testimony that mandatory minimums are applied in a discriminatory fashion and lead to increased arbitrariness in federal sentencing. Witnesses cited the 100-to-1 quantity ratio between crack and powder cocaine as the most flagrant example of how mandatory minimums have a racially discriminatory impact, as harsh sentences for crack cocaine convictions fall disproportionately on African Americans.

The illustrious panel included The Honorable Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and judge on the International Criminal Tribunal for the Former Yugoslavia (1999-2001), who testified on behalf of the American Bar Association (ABA), the world's largest voluntary professional organization. Judge Wald addressed ABA policy on mandatory minimum sentences, the weight of opinion within the U.S. judiciary, and her own personal observations on this issue. Professor Charles Ogletree, Founder and Executive Director of Harvard Law School's Charles Hamilton Houston Institute on Race and Justice, testified on behalf of the Justice Roundtable. His comments centered on the disparity between crack and powder cocaine as an egregious example of mandatory sentencing. Ms. Kemba Smith testified next. She was directly impacted by mandatory minimum sentencing, having been sentenced, at age 24, to nearly a quarter of a century for her minor role in a drug conspiracy. She served 6.5 years before being granted clemency in 2000. Finally, Attorney Gay McDougal, Executive Director of Global Rights and the first United Nations Independent Expert on Minority Issues, testified on the provisions of

international human rights law that are relevant to the impact of mandatory minimum sentencing laws in the United States.¹⁵

The Roundtable's witnesses told the Commission that mandatory minimum sentences are violations of protected human rights found in the American Declaration on the Rights and Duties of Man – specifically, the right to equal protection of the law, the right to a fair trial, and the right to judicial protection against violations of fundamental rights. The International Convention on the Elimination of All Forms of Racial Discrimination further elaborates on the provisions of the American Declaration and, as such, witnesses argued, should provide guidance to the Commission as well.¹⁶

Perhaps the most poignant part of the March 3rd proceedings were the closing words of Judge Wald, who concluded,

Unduly long and punitive sentences are counter-productive, and candidly many of our mandatory minimums approach the cruel and unusual level as compared to other countries as well as to our own past practices. On a personal note, let me say that on the Yugoslavia War Crimes Tribunal I was saddened to see that the sentences imposed on war crimes perpetrators responsible for the deaths and

¹⁵ The four witnesses were joined at the table by two expert resource persons – Marc Mauer, Executive Director of the Sentencing Project and Eric Sterling, President of the Criminal Justice Policy Foundation and former counsel to the House Judiciary Committee during the passage of the mandatory minimum sentencing laws.

¹⁶ In addition to oral witness testimony at the hearing, written statements were also submitted from three Members of Congress – Congressman Charles Rangel, Ranking Member of the House Ways and Means Committee; Congressman Robert “Bobby” Scott, Ranking Member of the House Crime Subcommittee; and Congresswoman Maxine Waters, member of the House Judiciary Committee. Written statements were also submitted by Wade Henderson, Executive Director of the Leadership Conference on Civil Rights, as well as a joint statement from Families Against Mandatory Minimums and the National Council of La Raza. Organizational signees to the Justice Roundtable’s historic petition for hearing and/or the Roundtable’s written testimony included the American Civil Liberties Union, the Sentencing Project, Criminal Justice Policy Foundation, Penal Reform International, Global Rights, Charles Hamilton Houston Institute for Race and Justice, International Citizens United for the Rehabilitation of Errants, Justice Policy Institute, Law Enforcement Against Prohibition, Lawyers’ Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, National Black Police Association, Human Rights Watch, U.S. Human Rights Network, National Council of La Raza, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, Drug Policy Alliance, Washington Bar Association, Break the Chains-Communities of Color and the War on Drugs, Interfaith Drug Policy Initiative, Unitarian Universalists for Drug Policy Reform, and the Open Society Policy Center.

suffering of hundreds of innocent civilians often did not come near those imposed in my own country for dealing in a few bags of illegal drugs. These are genuine human rights concerns that I believe merit your interest and attention.

IV. Response to Concerns of Violence and Harm

When one form of a drug can be rather easily converted to another form of the same drug and when that second form is punished at a quantity ratio 100 times greater than the original form, it would appear reasonable to require the existence of sufficient policy bases to support such a sentencing scheme ... [especially] when such an enhanced ratio for a particular form of a drug has a disproportionate effect on one segment of the population....¹⁷

Although two of the most cited concerns regarding crack cocaine relate to violence and harm, sufficient policy bases have never been raised to justify the 100:1 quantity ratio in punishment between the two methods of ingesting the same drug. This Commission has requested comment relative to these issues.

Although it is a common assumption that there is more violence associated with the use of crack than with the use of powder cocaine, there is no evidence that such violence is attributed to the pharmacological effects of smoking crack. Professor Paul Goldstein asserts that there are no valid and reliable sources of data for policymakers, in either the criminal justice or the health care systems, that adequately explain the relationship between violence and drugs.¹⁸ Media reports of violence, he contends, are unclear and misleading, with distinctions between drug use and drug trafficking often not made.¹⁹ Goldstein asserts that he has found little pharmacological violence attributed to

¹⁷ Special Report to Congress, at xii. (1995)

¹⁸ Professor Paul Goldstein teaches at the University of Illinois at Chicago, School of Public Health, and has authored studies probing the relationship between drugs and violence. He has studied drug-related violence in New York State and New York City, funded by the National Institute on Drug Abuse and the National Institute of Justice.

¹⁹ Paul J. Goldstein, Ph.D., School of Public Health, University of Illinois at Chicago, The Relationship Between Drugs and Urban Violence: Research and Prevention Issues 1 (1993).

either powder or crack cocaine; most of this violence is attributed to alcohol.²⁰ Similarly, Goldstein has found very little “user-trying-to-support-his-habit” economic violence. He found that almost all cocaine-related violence is found in the cocaine marketplace and system of distribution.

Goldstein’s findings provide evidence that certain common assumptions about drug-related violence are incorrect or exaggerated. For example, although it is commonly believed that violent, predatory acts by drug users to obtain money to purchase drugs are an important threat to public safety, Goldstein’s data indicates otherwise. He found that violence is most likely to occur with respect to the drug marketplace, and to involve others similarly situated. He also theorizes that police procedures substantially add to cocaine-related violence.²¹

This Commission has also cited analyses establishing that systemic violence is not limited to the crack cocaine market. A 1990 study compared crack and powder cocaine dealers and found that significant percentages of both powder and crack offenders regularly engaged in a range of violent activity associated with cocaine trafficking.²²

The use of crack cocaine has, without a doubt, been devastating to already distressed urban areas.²³ However, the deterioration of inner city neighborhoods and

²⁰ Goldstein believes that the figures often used in media for drug-related violence include alcohol-related violence, which is not made clear when the figures are used. He is also suspicious of police-reported “drug-related violence,” having found that police often target specific areas such that *any* crime therein committed is “drug-related.”

²¹ Professor Goldstein remarked: Intensified law enforcement efforts probably contributed to increased levels of violence. Street sweeps, neighborhood saturation, buy-bust operations, and the like lead to increased violence in a number of ways. For example, removing dealers from their established territory by arresting them leaves a vacuum that other dealers fight to fill. By the time these hostilities have ended, convicted dealers may have returned from prison and attempted to reassert their authority, resulting in a new round of violence.

²² Special Report to Congress, note 23 at 97 (citing *Drugs and Violence: Causes, Correlates and Consequences* 36 (M. De la Rosa, et al., eds., 1990))

²³ The majority in the Commission’s 1995 report stated:

communities is closely tied to the issue of social maladies and occurs whenever there is an influx of drugs into a community. To single out a particular drug among many that contribute to the deterioration of neighborhoods, and especially a specific form of that drug, for characterization of a harm as one hundred times greater than its pharmacological counterpart, is untenable.

Another issue often raised and highlighted for comment by this Commission is the difference in harms associated with the use/trafficking of crack versus powder cocaine. The Department of Justice and some Members of Congress in the past have argued for stiffer penalties for crack users because, they assert, crack is a more dangerous and harmful substance than powder cocaine, and the uniquely harmful nature of crack should be reflected in sentencing policy. Cocaine, however, in any form produces the same physiological and psychological effects. It is the onset, intensity, and duration of the effects which vary, and these variations are tied to the manner in which the drug is administered, as opposed to any distinctions in the chemical make-up of the drug. Indeed, pharmacologically, "cocaine is cocaine is cocaine, whether you take it intranasally, intravenously or smoked."²⁴ "Injecting powder cocaine is as dangerous as or more dangerous than smoking crack."²⁵ The term "crack baby" is now widely understood to be a misnomer, with research indicating that the negative effects of both

"We are aware that a host of social maladies have been attributed to the emergence of crack cocaine, such as urban decay or parental neglect among user groups. After careful consideration, the Commission majority concluded that increased penalties are not an appropriate response to many of these problems. We are unable to establish these social problems result from the drug itself rather than from the disadvantaged social and economic environment in which the drug is used. We note that these problems are not unique to crack cocaine, but are associated to some extent with abuse of any drug or alcohol.

Conaboy Letter.

²⁴ Hearings on Crack Cocaine Before U.S. Sentencing Commission, 103rd Cong., 1st Sess. 112 (1993) (statement of Dr. Charles Shuster).

²⁵ Letter from Richard A. Conaboy, Chairman, U.S. Sentencing Commission, to J. Orrin Hatch, Chairman, Senate Judiciary Committee (May 1, 1995).

prenatal crack and powder cocaine exposure are identical and significantly less severe than previously believed. The rate of HIV infection is nearly equal between crack smokers (due to risky sexual practices) and powder injectors (due to risky needle sharing).

However, even if crack were a more dangerous substance than powder cocaine, increased penalties should not be justified on that basis. Cocaine powder is easily transformed into crack.²⁶ Thus, to apply a stiffer penalty between cocaine which is sold directly as crack, and cocaine which is in powder form but which can be treated by the consumer and easily transformed into crack, is irrational. As this Commission has previously emphasized, “[I]n light of the fact that crack cocaine can easily be produced from powder cocaine, the form of cocaine is simply not a reasonable proxy for dangerousness associated with use.”²⁷

In sum, although families and communities have been ravaged by drugs, both have also been subjected to the devastations wrought by draconian crack sentences. We often lose sight of the fact that those impacted are real people with real lives. Hamedah Hasan, a mother of three, was pregnant with her youngest daughter when she began serving a 27-year sentence in 1993. A first-time offender convicted of a nonviolent crack cocaine conspiracy offense, when Hasan is released, her daughter will be a grown woman. Two decades of stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders, predominately

²⁶ “It takes 15 minutes to turn powder cocaine into crack cocaine – a box of baking soda, a pot of water, and a microwave or stove and you have crack cocaine.” Hearings on Crack Cocaine Before the U.S. Sentencing Commission, 103rd Cong., 2d Sess. (1993), at 32 (statement of Sgt. Brennan).

²⁷ Conaboy Letter, (statement of the Commission Majority).

African American and increasingly women, who are serving inordinately lengthy sentences at an enormous cost to taxpayers and society, with no appreciable impact on the drug trade.

V. Recommendation

This Commission should adopt a one-to-one quantity ratio at the current powder cocaine level for determining base sentences for powder and crack cocaine offenders. Offenders who differ in relevant ways will receive tougher sentences through existing sentencing guidelines which already establish longer and more severe penalties for those persons with greater criminal histories, career offenders, and armed career offenders. Because there may be other identifiable harms associated with some cocaine offenses that may not be adequately addressed within the guidelines, this Commission has previously proposed penalty enhancements for the use of firearms, juveniles, gangs, and drive-by shootings during drug offenses.

Such a penalty enhancement approach is rational, as it directly ties increased sentences to the severity of the offense, as opposed to sentences which paint every crack defendant with the same broad brush. Any fear expressed that pursuant to this approach, violent crack dealers will receive the same sentences as non-violent dealers of powder cocaine is unsubstantiated, and contradicted by this Commission's analysis. A Table compiled by the Commission estimating what the average sentences for powder and crack offenses would be under a one-to-one ratio revealed that despite equalization of the base sentences, many of those convicted of crack cocaine offenses will nevertheless serve

much longer prison terms than those convicted of powder cocaine offenses because of the enhancements for aggravating factors such as violence or weapons use.²⁸

VI. Conclusion

The twentieth anniversary of statutory and guideline cocaine penalties is the perfect time to revisit and finally correct the gross unfairness that has been the legacy of the 100:1 ratio. We applaud this hearing, and call for the restoration of this Commission's original 1995 recommendation that equalizes the quantity triggers between crack and powder cocaine and begins to place the focus of federal cocaine drug enforcement on major traffickers, where it should be. Let us not allow another anniversary to pass without rectifying this 20 year legacy of crack cocaine sentencing.

²⁸ See Conaboy Letter (Table 1, Estimated Average Sentences for Powder and Crack Cocaine Defendants with Various Drug Amounts (Oct. 1, 1993 through Sept. 30, 1994). The Commission emphasized:

"[E]qualizing the quantity ratio between crack and powder cocaine will not result in equal sentences for crack and powder cocaine offenders who differ in relevant ways. Commission analysis shows that, under the amended guidelines, crack offenders will receive sentences that is, on average, generally at least twice as long as powder cocaine offenders involved with the same amount of drug."

Questions for written submission

Community Organizations

1. What are the effects of cocaine distribution on the community? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) have a different effect on the communities in which it is distributed in terms of: levels of violent crime in the community; presence of other types of crime (for example, crime to support a drug habit); or disruption within the community?
2. What is the typical distribution pattern of cocaine? Does the form in which the drug is distributed (crack cocaine versus powder cocaine) result in different distribution patterns? What constitutes a high level dealer, a mid level dealer, wholesaler, street level dealer etc. In what quantity does each level typically deal, and specifically how do they distribute (e.g., hand to hand, "eight balls" etc.)? What is the typical price structure at each level, and what is the typical purity at each level?
3. Have there been any noticeable changes since 2002 in regard to trafficking patterns, weapon involvement, violence or risk of violence, or associated criminal conduct for, or use of either crack or powder cocaine? If so, what are they?
4. Have there been any changes since the Commission issued its 2002 report on federal cocaine sentencing policy that should be considered by the Commission?
5. From your perspective is there a difference in harms associated with the use/trafficking of crack versus powder cocaine:

If there is a difference, should trafficking in one form of the drug be punished more severely than trafficking in the other form of the drug?

If a difference exists but they should be punished identically? Please explain.

If a difference exists and they should be punished differently, what should that specific difference be, and what is the justification for that specific difference?

Supplemental Questions for Angela M. Arboleda
National Council of La Raza
November 14, 2006

- 1) According to your testimony, numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to blatant racial discrimination in the justice system, affecting mainly African Americans but increasingly Latinos as well. Is this impact primarily with regard to how the penalties affect the offender? Could you explain how the drug use or distribution impacts those within your community who do not participate in the drug activity, but live in the communities where the drug activity occurs?
- 2) In your testimony you recommend that DEA deter the importation of millions of tons of powder cocaine and prosecuting ring leaders with the fullest weight of the law and that the crack cocaine thresholds be raised. In your opinion, what impact would this change have on your community, if any?

Panel 7

Summary of Testimony for Angela M. Arboleda National Council of La Raza November 14, 2006

Ms. Arbodela ("NCLR") acknowledged that NCLR's activity on criminal justice issues has been relatively modest because of resource constraints, especially in light of other competing priorities, e.g., education, immigration, and economic mobility issues. NCLR relied on numerous reports from credible sources, over the past decade, that have documented severe racial and ethnic disparities against the Latino community in the criminal justice system.

NCLR believes the disproportionate number of Latino drug offenders appears to be the result of a combination of factors, but more particularly, racial profiling. NCLR notes that despite the fact that Latinos are no more likely than other groups to use illegal drugs, they are more likely to be arrested and charged with drug offenses and less likely to be released before trial. NCLR provided statistical data reflecting the percentage of the Latino community imprisoned as a result of the current sentencing policies regarding cocaine.

NCLR states that the costs of excessive incarceration to the groups affected, and the broader society—in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities—are extremely high.

Finally, NCLR commended the Commission's past efforts with its recommendations to Congress from 1995, 1997, and 2002, for the elimination of the threshold differential that exists between crack and powder sentences. NCLR makes a few recommendations of its own:

- 1) Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds;
- 2) Resist proposals that would lower the powder thresholds in order to achieve equalization between crack and powder.
- 3) Make more widely available alternative methods of punishment for low-level, non-violent drug offenders;
- 4) DEA agents and federal prosecutors should concentrate on solving the real problem—deterring the importation of millions of tons of powder cocaine—and prosecuting ring leaders with the fullest weight of law.



Testimony on
The Effect of the Drug Sentencing Guidelines
on the Latino Community

Presented by:

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Before the:
United States Sentencing Commission

November 14, 2006

I. INTRODUCTION

Chairman Hinojosa, Vice Chairs Castillo, Sessions, and Steers, and the other commissioners, on behalf of the National Council of La Raza (NCLR), I thank you for holding this hearing on an issue that is very important to the Latino¹ community in the United States. NCLR is the largest national Latino civil rights and advocacy organization in the U.S. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas – assets/investments, civil rights/immigration, education, employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families.

I appreciate the opportunity to testify in support of a thorough revision of the drug sentencing guidelines in the United States, particularly in light of the 20-year anniversary of the enactment of the Anti-Drug Abuse Act of 1986. First, this statement begins with a brief overview of NCLR's work on criminal justice issues. Second, I will highlight the disparate impact of existing drug laws on the Latino community. Finally, my testimony concludes with recommendations to promote drug sentencing policies and practices that are equitable for all Americans.

II. BACKGROUND

A. NCLR's Work on Criminal Justice Issues

Traditionally, NCLR activity on criminal justice issues has been relatively modest. This has not been attributable to any serious doubt that Latinos are adversely and disproportionately affected by the criminal justice system; rather, this limited focus in large part simply reflected resource constraints, especially in light of other competing priorities, e.g., education, immigration, and economic mobility issues. Moreover, the virtual absence of Hispanic data in this area meant that an enormous effort, and substantial resources, would have been required to conduct rigorous policy analysis and to build a case for criminal justice reform.

However, over the past decade, numerous reports from credible sources have documented severe racial and ethnic disparities in the criminal justice system. Many of those reports now include at least some Latino data, which almost uniformly substantiate patterns of discrimination against Hispanics at every stage of the system. As more evidence of such disparities is published, and as more Hispanic families are affected by growing incarceration rates, there appears to be greater Latino grassroots support for sentencing reform proposals to address such disparities. In response, in August 2000, the Executive Committee of the Board of Directors of the National Council of La Raza authorized the establishment of a new criminal justice policy project,

¹ The terms "Latino" and "Hispanic" are used interchangeably by the U.S. Census Bureau and throughout this document to identify persons of Mexican, Puerto Rican, Cuban, Central and South American, Dominican, and Spanish descent; they may be of any race.

charged with the task of working to reduce disparities in the criminal justice system. As a result, over the last six years NCLR has substantially increased its work on criminal and juvenile justice reform issues, including:

- Publishing a number of reports specific to Latinos in the justice system:
 - 1999, *The Mainstreaming of Hate*, a major report on hate crimes, racial profiling, and law enforcement abuse
 - 2000, contributed to the production of *Justice on Trial*, an important Leadership Conference on Civil Rights (LCCR) report on racial and ethnic disparities in the criminal justice system
 - 2002, *Latinos in the Federal Criminal Justice System*, a statistical brief documenting the status of Latinos in the federal criminal justice system
 - 2002, *Testimony on Drug Sentencing and its Effects on the Latino Community*, before the U.S. Sentencing Commission
 - 2003, *Latinos and the Texas Criminal Justice System*, a statistical brief documenting the status of Latinos in the Texas criminal justice system
 - 2004, *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*, the first book ever to examine the factors that contribute to the overrepresentation of Latinos in the criminal justice system
 - 2004, *District of Columbia Responses to Youth Violence: Impact on the Latino Community*, a major report that documents the possible negative effects that proposed policies would have on Latino children and families
 - 2005, *They All Come Home: Breaking the Cycle Between Prison and the Community*, a report which discusses programs and services designed to respond to the prisoner reentry crisis, offering strategies to successfully reintegrate former inmates into the community
 - 2006, *Testimony on the Disparate Impact of Federal Mandatory Minimums on Minority Communities in the United States*, submitted to the Inter-American Commission on Human Rights
- Advocating on Capitol Hill on behalf of Latinos concerning a number of issues ranging from racial profiling to sentencing reform, and from gang violence to reentry.
- Engaging in justice system reform at the state level in Texas, the District of Columbia, and most recently in Pennsylvania, Illinois, Washington, and Louisiana.

It is in this context that I appear before you today as the Commission reviews the current sentencing structure and its impact on Latinos and other minority communities.

B. Two Decades after the Anti-Drug Abuse Act of 1986

A lot has changed since the enactment of the Anti-Drug Abuse Act of 1986, including an exponential increase in the prison population,² primarily due to the increase in drug convictions;

² According to the Bureau of Justice Statistics reports, the prison population in 1986 was approximately 500,000 compared to 2.1 million in 2006.

a negligible difference currently in the average length of stay for a drug offense and a violent offense;³ high costs associated with the booming prison population; and the perceived and real crime rates in the U.S.

In short, the 1986 law intended to curb the “crack epidemic” by focusing on “major traffickers.” This resulted in the conviction of individuals found in possession of five grams of crack cocaine triggering a five-year mandatory minimum sentence, while it takes 500 grams of powder cocaine possession to trigger the same sentence. And while possession of 50 grams of crack cocaine triggers a ten-year mandatory minimum sentence, the law requires possession of 5,000 grams of powder cocaine to trigger the same sentence.

Numerous studies have documented that the 100:1 powder-crack sentencing ratio directly contributes to blatant racial discrimination in the justice system, affecting mainly African Americans but increasingly Latinos as well.⁴ Although the spirit of the law was to go after the “big ring leaders,” what we know now is that prisons are filled with low-level, mostly nonviolent drug offenders, many of whom turn in friends and family members to law enforcement in return for more lenient sentences. Furthermore, the drug use rates per capita among minorities and White Americans has consistently been remarkably similar over the years.⁵ However, government has done little to institute a real solution to drug addiction – specifically, treatment – despite the fact that substance abuse treatment is more effective and less costly than incarceration.⁶

III. DISPARATE IMPACT OF DRUG LAWS ON LATINOS

In 2000, Latinos constituted 12.5% of the population in the United States, according to the 2000 Census. Yet, according to the Sentencing Commission’s own data, Hispanics accounted for 43.4% of the total drug offenders that year; of those, 50.8% were convicted for possession or trafficking of powder cocaine, and 9% for crack cocaine. This is a significant increase from the 1992 figures which show that 39.8% of Hispanic drug offenders were convicted for possession or trafficking of powder cocaine, and 5.3% for crack cocaine.⁷

Contrary to popular belief and as stated above, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Whites. Instead, the disproportionate number of Latino drug offenders appears to be the result of a combination of

³ According to the *Compendium of Federal Justice Statistics, 2003*, the average length of stay for a violent offense was 97.2 months, while the average length of stay for a drug offense was 81.4 months.

⁴ According to the Sentencing Project, *Hispanic Prisoners in the United States*, the number of Hispanic in federal and state prisons rose by 219% from 1985 to 1995, with an average annual increase of 12.3%.

⁵ According to the Department of Health and Human Services, *2005 National Survey on Drug Use & Health*, illicit drug use associated with race/ethnicity in 2005 was as follows: American Indians or Alaska Natives, 12.8%; persons reporting two or more races, 12.2%; Blacks, 9.7%; Native Hawaiians or Other Pacific Islanders, 8.7%; Whites, 8.1%; Hispanics, 7.6%; and Asians, 3.1%.

⁶ Incarceration costs an average of \$25,000 per person per year, while treatment can cost as little as \$1,700 for outpatient non-methadone treatment. Walker, N., J. M. Senger, F. Villarruel, and A. Arboleda, *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*. Washington, DC: National Council of La Raza, 2004.

⁷ *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002, p. 63.

factors, beginning with the phenomenon now widely known as "racial profiling." NCLR's 1999 report, and a series of other studies, demonstrates that the Hispanic community is often targeted by law enforcement for drug offenses based on their ethnicity.

Furthermore, the evidence strongly suggests that, from the moment of arrest to the pretrial detention phase and the charging and plea bargain decisions of prosecutors, through the adjudication process, the determination of a sentence, and the availability of drug treatment, Latinos encounter a criminal justice system plagued with prejudice and discrimination. For example:

- **In 2003, Hispanics were arrested by the Drug Enforcement Agency (DEA) at a rate three times their proportion of the general population.** Hispanics constituted 43% of the arrests made by the DEA between October 2002 and September 2003, while they constituted 14% of the total U.S. population.⁸
- **Hispanic defendants were about three times less likely as non-Hispanic⁹ defendants to be released before trial.** In 2003, only 19% of Hispanics were released before trial, compared to 60% of non-Hispanics.¹⁰
- **Hispanic defendants had less extensive criminal histories than White defendants.** In 1996, 56.6% of Hispanic defendants, compared to 60.5% of White defendants, had been arrested on at least one prior occasion.¹¹
- **In 1999, Hispanic federal prison inmates arrested for drug offenses were less likely than either Blacks or Whites to have had a previous criminal conviction.** In 1999, while 70% of Black drug offenders and 60% of White drug offenders had previous convictions, only 35% of Hispanic drug offenders had a previous conviction.¹²
- **Hispanics accounted for approximately one in four of the federal inmate population in 1998.** Racial/ethnic data show that Hispanics accounted for 30.3% of federal inmates in 1998, a rate that is twice as high as this group's percentage of the population that year.¹³
- **Among defendants convicted of drug charges, Hispanics constituted close to half of those convicted in 2003.** Hispanic federal defendants were 43.5% of all those convicted for drug offenses, while non-Hispanics constituted 56.5% of those convicted for the same charges.¹⁴

⁸ *Compendium of Federal Justice Statistics, 2003*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, October 2005.

⁹ "Non-Hispanics" may be Black, White, or Asian individuals who are not of Hispanic descent.

¹⁰ *Ibid*

¹¹ *Federal Pretrial Release and Detention, 1996*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, February 1999.

¹² *Federal Drug Offenders, 1999 with Trends, 1984-99*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, August 2001.

¹³ *Correctional Populations in the United States, 1998*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, September 2002.

¹⁴ *Ibid*

- **Hispanic federal prison inmates in 1997 were the least likely of all racial/ethnic groups to receive any type of substance abuse treatment.** Only 36.4% of Hispanic federal prison inmates received any substance abuse treatment or program during 1997, while 53.7% of Whites and 48.4% of Blacks received some type of treatment or program to address their substance abuse dependency.¹⁵
- **Hispanic parolees were less likely than Blacks or Whites to violate parole by committing a new crime.** In 2003, Hispanic parolees constituted 9.2% of those whose parole was terminated for committing a new crime compared to Black parolees at 18.3% and White parolees at 11%.¹⁶

In sum, despite the fact that Latinos are no more likely than other groups to use illegal drugs, they are more likely to be arrested and charged with drug offenses and less likely to be released before trial. Once convicted, Latinos do not receive lighter sentences, even though the majority of Hispanic offenders have no criminal history. As a result, Hispanics are severely overrepresented in the federal prison system, particularly for drug offenses, and once in prison are the least likely to receive any substance abuse treatment. That these sobering statistics are largely the result of irregularities in drug enforcement is largely beyond dispute.

Thus, contrary to the popular stereotype, the overwhelming majority of incarcerated Latinos have been convicted of relatively minor nonviolent offenses, are first-time offenders, or both. Over the past decade, public opinion research reveals that a large majority of the public is prepared to support more rational sentences including substance abuse treatment for low-level drug offenders. The costs of excessive incarceration to the groups affected, and the broader American society – in terms of reduced current economic productivity, barriers to future employment, inhibited civic participation, and growing racial/ethnic societal inequalities – are extremely high. NCLR believes that this Commission can play a critical role in reducing unnecessary and excessive incarceration rates of Latinos in the U.S., as discussed in further detail below.

IV. RECOMMENDATIONS

NCLR commends the Commission's 1995, 1997, and 2002 recommendations to Congress which called for the elimination of the threshold differential that exists between crack and powder sentences. Given that crack is derived from powder cocaine, and that crack and powder cocaine have exactly the same physiological and pharmacological effects on the human brain,¹⁷ equalizing the ratio to 1:1 is the only fair solution to eradicating the disparity. Today, NCLR urges the U.S. Sentencing Commission to consider the following recommendations as the Commission prepares its report to Congress.

¹⁵ *Correctional Populations in the United States, 1997*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, November 2000.

¹⁶ *Ibid.*

¹⁷ Instead, it is the way by which the drug is consumed – ingesting, smoking, injecting, or snorting – which causes higher levels of addiction, which in turn calls for a greater demand for the drug. *Report to the Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission, May 2002.

1. **Substantially redress the crack-powder ratio disparity by raising the crack thresholds and maintaining the powder thresholds.** Over the past 20 years, it has been proven that the 100:1 powder-crack sentencing ratio has a negative impact mainly on African Americans but increasingly on Latinos as well. Therefore, NCLR calls for closing the gap between crack and powder sentences, so that five grams of crack triggers the same exact sentence as five grams of powder.
 - African American drug offenders have a 20% greater chance of being sentenced to prison than White drug offenders.¹⁸
 - The average sentence for a crack cocaine offense in 2003 (123 months) was three and a half years longer than for an offense involving the powder form of the drug (81 months). The average sentence for crack cocaine were also 27 months longer than for methamphetamine and 60 months longer than for heroin.¹⁹
2. **Resist proposals that would lower the powder thresholds in order to achieve equalization between crack and powder.** NCLR believes that the only proper way of equalizing the ratio is by raising the crack threshold, not by lowering the powder threshold. According to the Commission's data, reducing the powder threshold would have a disproportionate, negative impact on the Latino community. Achieving equalization by lowering the powder threshold might be perceived as reducing sentencing inequalities. In fact, it would have the perverse effect of not reducing high levels of incarceration of low-level, nonviolent African Americans while substantially increasing incarceration of low-level, nonviolent Latinos. In our judgment, the real-world, tangible harm produced by lowering the powder thresholds would far outweigh the abstract, symbolic value of reducing statutory sentencing ratios.
 - Lowering powder thresholds would increase average sentences by at least 14 months,²⁰ with the inevitable increase in incarceration rates.
3. **Make more widely available alternative methods of punishment for low-level, nonviolent drug offenders.** Under 18 USC Section 3553(a), penalties should not be more severe than necessary and should correspond to the culpability of the defendant. Where current law prevents judges from imposing just sentences for such offenders, the Commission should recommend that Congress enact appropriate reforms.
 - A study conducted for the White House's Office of National Drug Control Policy (ONDCP) found treatment to be 15 times more cost-effective than law enforcement at reducing cocaine abuse.²¹
 - A SAMHSA study found that treatment reduces drug sales by 78%, shoplifting by almost 82%, and assaults by 78%. Treatment decreases arrest of any crime by 64%. After only one year, use of welfare has been shown to decline by 10.7%, while employment increased by 18.7%.²²

¹⁸ *Fifteen Years of Guidelines Sentencing*. United States Sentencing Commission, November 2004.

¹⁹ *2003 Sourcebook of Federal Sentencing Statistics*. United States Sentencing Commission, 2005.

²⁰ *Drug Briefing*. United States Sentencing Commission, January 2002, Figure 26.

²¹ Rydell, C. Peter and Susan Everingham, *Controlling Cocaine*. Santa Monica, CA: The RAND Corporation, 1994. Prepared for the Office of National Drug Control Policy and the U.S. Army.

²² *National Treatment Improvement Evaluation Study*. Washington, DC: Center for Substance Abuse and Treatment, 1996.

4. DEA agents and federal prosecutors should concentrate on solving the real problem – deterring the importation of millions of tons of powder cocaine – and prosecuting ring leaders with the fullest weight of the law. Even at the current highest levels for crack (50 grams) and powder (5,000 grams) which trigger the maximum mandatory minimum sentence (ten years), it is a relatively insignificant measure to deter drug trafficking and promote community safety. These low-level actors are disposable given that they are easily replaceable. In the spirit of the 1986 law, the Act should be renewed by investing in training and resources and reserving prison beds for high-level kingpins. Prosecuting low-level crack and/or powder defendants who serve as a courier/mule, street dealer, or look-out does nothing to dismantle well-orchestrated drug rings, and little to protect our communities from drugs.

- Data from the U.S. Sentencing Commission show that 70% of the federal cocaine cases have been brought against the lowest-level offenders, and that only 7% have been brought against the highest-level dealers.²³
- In FY 2000, the average length of stay for the lowest-level crack offenders was approximately 104 months for a quantity averaging 52 grams, while the highest-level powder trafficker received an average sentence of 101 month for a quantity that averaged 16,000 grams.²⁴ It is difficult to justify the resources spent on investigation, prosecution, and incarceration of insignificant offenders, when the reality is that 52 grams of crack or 16,000 grams of powder are miniscule amounts in the greater scheme of the drug trade.
- Readjust the budget for ONDCP to reflect the “demand and supply” reduction of drugs. The basic theme has been that for every new dollar spent on demand reduction, two new dollars would be spent to curb supply. However, the trend over the past decade has been to split the budget cost down the middle at a 50-50 split between demand and supply. This has resulted in more resources funneled to domestic drug law enforcement rather than international drug interdiction.²⁵

In 1987, Carlos Lehder Rivas, one of the co-founders of the Medellin Cartel, also known as the “godfather” of cocaine trafficking, was accused of smuggling 3.3 tons of powder cocaine, constituting 80% of cocaine imports into the U.S. At the peak of Lehder’s leadership, a jet loaded with as much as 300 kilograms would arrive at his private airport at Norma’s Cay every hour of every day.

Although Lehder was convicted and sentenced to life plus 135 years for drug trafficking, distribution, and money laundering, none of his assets – estimated to be worth between \$2.5 and \$3 billion – were seized. In exchange for testimony against Manuel Noriega, Panama’s former dictator – in 1992 – the U.S. government reduced Lehder’s sentence to 55 years.

Fabio Ochoa Vazquez, a high-ranking member of the Medellin Cartel, was later accused of leading a smuggling operation of approximately 30 tons a month of powder cocaine into the U.S. between 1997 and 1999. He was indicted in 1999, extradited in 2001, and convicted in 2003 in the U.S. for trafficking, conspiracy, and distribution of powder cocaine. He was sentenced to 30 years in U.S. federal prison.

²³ Sterling, E. Eric, *Getting Justice Off Its “Junk Food Diet”*. Silver Spring, Maryland: Criminal Justice Policy Foundation, May 31, 2006.

²⁴ *Report to the Congress: Cocaine and Federal Sentencing Policy*. United States Sentencing Commission, May 2002.

²⁵ Office of National Drug Control Policy (ONDCP) available at: <http://www.whitehousedrugpolicy.gov/>.

NCLR urges that any new thresholds be scientifically and medically justified and correlated directly to the impact of penalties on both the defendant and the larger society. The current massive disparities in the criminal justice system and the resulting excessive rates of incarceration of racial and ethnic minorities offend the nation's commitment to the principle of equality under the law. For Latinos and other minorities, these policies constitute a major barrier to economic opportunity and civic participation; for the nation as a whole, they inhibit economic growth and social cohesion. Finally, they severely undermine the credibility of and confidence in the nation's entire system of criminal justice.

We urge the Commission to seize this unique opportunity simultaneously to narrow drug sentencing disparities and reduce incarceration of low-level, nonviolent offenders.