



**Testimony of Caroline Fredrickson, Director
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The American Civil Liberties Union (ACLU) would like to thank the United States Sentencing Commission for this opportunity to help the Commission formulate recommendations to Congress regarding changes in federal sentencing law. Today, we commend the Commission for its past extensive efforts calling on Congress to amend statutes creating the unjust disparity between crack and powder cocaine sentencing. We wholeheartedly agree with this body's 2004 conclusion that "[r]evising the crack cocaine thresholds" would do more to reduce the sentencing gap "than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system."¹ Moreover, we commend the Commission for the 2007 retroactive amendments making the Guidelines more consistent with statutory mandatory minimums, and creating eligibility for approximately 19,500 prisoners to be properly re-sentenced in accordance with the law. We hope that this body will continue to champion and recommend change—specifically, we urge the Commission to remind Congress of the continued, urgent need to amend a sentencing scheme which unjustifiably metes out disparately harsh punishments to African Americans in violation of basic fairness.

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, it is of utmost concern to our organization that Congress address the federal cocaine sentencing policies threatening the due process and equal protections rights of all people. Our organization's core mission is also implicated by the damage this policy does to the rights of freedom of association and freedom from disproportionate punishment. Accordingly, the ACLU has been deeply involved in advocacy and litigation regarding race and drug policy issues.

For more than a decade the ACLU has challenged the punitive drug policies which have resulted in widespread violations of constitutional and human rights and unprecedented levels of incarceration. In 1993, the ACLU assisted in convening the first national symposium that examined the disparity in sentencing between crack and powder cocaine, entitled *Racial Bias in Cocaine Laws*. The conclusion 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. The ACLU authored a comprehensive report examining the impact of drug policy on families and the inequities of the crack/powder sentencing disparity at the twentieth anniversary of the Anti-Drug Abuse Act of 1986². We also testified before the Subcommittee on Crime and Drugs of the Senate Committee on the Judiciary in 2008 at a hearing entitled "Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity."³

In addition to our advocacy before Congress, prior to the adoption of the 2007 guideline adjustments for crack cocaine offenses, in 2002 the ACLU urged the Commission to amend the guidelines to provide justice for offenders serving sentences even longer than those imposed by

¹ U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 132 (2004).

² See DEBORAH J. VAGINS AND JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (2006), available at <http://www.aclu.org/drugpolicy/sentencing/27181pub20061026.html>.

³ Available at: http://www.aclu.org/images/asset_upload_file4_34081.pdf

the mandatory minimum. We also testified before the Commission on cocaine sentencing policy⁴ and submitted a letter in 2007 in response to the Commission's request for public comments.⁵

In addition, the ACLU has litigated against the crack/powder disparity—most notably submitting an amicus brief in *Kimbrough v. United States*, 128 S.Ct. 558 (2007).⁶ In *Kimbrough*, the Court found that the crack/powder disparity was rendered advisory by the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Kimbrough* permits judges to consider—and act on their disagreement with—the 100-to-1 disparity in determining whether a sentence within the Guidelines is greater than necessary to serve the statutorily prescribed objectives of sentencing. In its opinion, the Court examined three problems with the disparity that this body had previously identified and articulated in its reports to Congress. First, the ratio is based on “assumptions about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.”⁷ Second, “the disparity is inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low-level dealers.”⁸ And third, the disparity “fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race.” *Id.* (internal quotation omitted). A sentencing judge's discretion to depart from the ratio is even permitted in “a mine-run case”, wrote the Court.⁹ Thus, with the Supreme Court's blessing, sentencing judges are no longer bound by the 100-to-1 ratio. This discretion represents a momentous step towards dismantling the unjust cocaine sentencing scheme.

We are encouraged by the Supreme Court's holding in *Kimbrough*. We are also encouraged by the growing chorus of diverse voices—federal judges¹⁰, prosecutors¹¹, then-

⁴ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission*, (Nov. 14, 2006) (Written statement of Jesselyn McCurdy, ACLU Legislative Counsel), available at <http://www.aclu.org/crimjustice/gen/27357leg20061114.html>.

⁵ Available at: http://www.aclu.org/images/asset_upload_file802_29055.pdf

⁶ The ACLU also submitted amicus briefs in the Second, Third, and Eighth Circuits arguing that sentencing courts can depart from the Sentencing Guidelines based on their conclusion that the Guidelines overstate the seriousness of crack relative to powder cocaine offenses. *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006); *United States v. Ricks*, 494 F.3d 394 (3d Cir. 2007); *United State v. Spears*, 533 F.3d 715 (8th Cir. 2008). In addition, the ACLU is currently representing Ronald Ross in his appeal to the Fifth Circuit, arguing that counsel must be appointed for indigent criminal defendants who seek re-sentencing following the retroactive Guideline change reducing the recommended sentence for crack offenses where a statute invites the defendant and the government to introduce post-sentencing facts that bear on defendant's period of incarceration. (Fifth Cir. Dkt No. 08-10691)

⁷ *Id.* at 568 (internal quotation omitted).

⁸ *Id.*

⁹ *Id.* at 575.

¹⁰ *National War on Drugs Symposium, Panel II: Social Justice & the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html>; Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), in 10 FED. SENT'G RPTR. 195 (No. 4, Jan./Feb. 1998).

¹¹ 67 How Judges are Properly Implementing The Supreme Court's Decision in *United States v. Booker*: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary, 109th Cong. 68 (2006) (statement of Judge Paul G. Cassell, Chairman, Committee on Criminal Law, Judicial Conference of the United States), available at

President Bush¹², President Obama, the Department of Justice¹³—that have echoed this Commission’s disapproval of the crack/powder disparity. We hope that the Commission will again recommend congressional action to address this serious problem. To that end, we summarize below the background and history of crack/powder disparity. We address four areas which demand the abandonment of this arbitrary sentencing scheme: 1) racial disparities and the deterioration of African American communities; 2) the unfounded perceptions of violence and crack use; 3) the myth of crack’s chemical effects; and 4) the failure to focus on high-level drug traffickers. In addition, we identify increasing political support for the elimination of the disparity, highlighting the recent Statement of Assistant Attorney General for the Criminal Division Lanny Breuer to the Senate Committee on the Judiciary Subcommittee on Crime and Drugs, stating the Department of Justice’s support for eliminating the disparity. Finally, we urge this body to support Representative Jackson-Lee’s (D-TX) Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, H.R. 265.

BACKGROUND AND HISTORY

Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime between 1984 and 1990.¹⁴ 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-to-1 sentencing disparity between powder and crack cocaine. Members of Congress intended the triggering amounts of crack to punish “major” and “serious” drug traffickers.¹⁵ However, the Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or just five (5) grams of crack (the weight of two pennies) would be sentenced to at least five (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.

<http://www.uscourts.gov/testimony/Cassell031606.pdf#search=%22paul%20g%20cassell%20%22mandatory%20minimum%22>.

¹² MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 83 (2006) (citing interview with Candy Crowley, CNN, Jan. 18, 2001).

¹³ <http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>

¹⁴ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 9 (1991) [hereinafter USSC MANDATORY MINIMUM REPORT], at 5.

¹⁵ H.R. REP. NO. 99-845, at 16-17 (1986). The Subcommittee defined the two categories of traffickers as: major – “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities” and serious – “the managers of the retail level traffic, the person who is filling the bag of heroin, packaging crack cocaine into vials. . . and doing so in substantial street quantities.” *Id.*

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 1988.¹⁶ The 1988 Act created a five (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.

RACIAL DISPARITIES AND THE DETERIORATION OF AFRICAN AMERICAN COMMUNITIES

In the twenty years that have passed since the Anti-Drug Abuse Act of 1986 was enacted,¹⁷ 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-to-1 sentencing disparity between crack and powder cocaine. Accordingly, this body has urged Congress multiple times to reconsider the statutory penalties for crack cocaine. Judges, commentators, federal prosecutors, medical professionals, and other experts have all concurred with this assessment.

Racial Disparities

One of the most egregious problems with the current 100-to-1 drug quantity ratio is that it promotes unwarranted disparities based on race.¹⁸ Because of its relatively low cost, crack cocaine is more accessible for poor Americans, many of whom are African Americans. Conversely, powder cocaine is much more expensive and tends to be used by more affluent white Americans. Nationwide statistics compiled by USSC reveal that African Americans are more likely to be convicted of crack cocaine offenses, while whites are more likely to be convicted of powder cocaine offenses.¹⁹ Thus, the sentencing disparities punishing crack cocaine offenses more harshly than powder cocaine offenses unjustly and disproportionately penalize African American defendants as compared to white defendants.

Increasing the disparity is the fact that whites are disproportionately less likely to be prosecuted for drug offenses in the first place; when prosecuted, they are more likely to be acquitted; and even if convicted, they are much less likely to be sent to prison.²⁰ Recent data indicates that African Americans make up 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.²¹ Specifically with regard to crack, in fiscal year 2006, more than 80%

¹⁶ Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

¹⁷ 5 Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (2000)).

¹⁸ See U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102-103 (2002) [hereinafter 2002 USSC REPORT].

¹⁹ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 156, 161 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006).

²⁰ Gabriel J. Chin, Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. GENDER RACE & JUST. 253, 266 (2002).

²¹ Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

of the defendants sentenced for crack offenses were African American,²² despite the fact that in 2005 only 24% of crack users were African American and 72% of crack users were white or Hispanic.²³

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.²⁴ 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.²⁵ 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.²⁶ The fact that African American defendants received mandatory minimum sentences more often than white defendants who were also eligible for mandatory minimum sentences, further supports the racially discriminatory impact of these penalties.

Over the last 20 years, federal and state drug laws and policies have also had a devastating impact on women, especially women of color. In 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men.²⁷ 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.²⁸ Mandatory sentencing laws prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity such as domestic violence and financial dependency. Sentencing policies, particularly the mandatory

²² U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 34 (2006).

²³ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 2005 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES, Table 1.43a (2006) : *see also* Clarence Page, *Legacy Hijacked, 20 Years Later*, THE WASHINGTON TIMES, June 24, 2006, *available at* <http://198.65.148.234/commentary/20060623-085057-3629r.htm>.

²⁴ U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING, Figure J, at 91 (2003).

²⁵ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994, Table 6.11, at 85 (1998); BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).

²⁶ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).

²⁷ ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 1 (2005), *available at* <http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf> [hereinafter CAUGHT IN THE NET] (citing BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, (30th ed. 2002)).

²⁸ *Id.* at 17 (citing SUSAN BOYD, FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY 208-09 (2004)).

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.²⁹

Deterioration of Communities

Department of Justice officials have, in the past, attempted to justify the crack/powder sentencing disparities before this body by arguing that crack has been uniquely responsible for the deterioration of communities. Studies of the neighborhoods where crack was visible in the 1980s indicate, however, that the economic conditions were “hopeless” – declining employment, reduced social services, and out-migration of successful community members.³⁰ This economic and social deterioration made possible the new market forces needed for crack. It is too simple to say this drug *caused* the deterioration of communities, increased prostitution, or higher rates of victimization without examining the lack of economic and educational opportunities already missing in some of these predominately African American communities.

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. 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.³¹ In 2000 there were approximately 791,600 African American men in prisons and jails. That same year, there were 603,032 African American men enrolled in higher education.³² 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 have harmed the African American family.³³

These racial disparities are even more troubling considering the devastating impact that the nation’s drug policy and mandatory minimums have on the African American family. Indeed, it is the punitive measures themselves that contribute to the deterioration of communities.³⁴ The effects of mandatory minimums not only contribute to these disproportionately high

²⁹ *Id.* at 4.

³⁰ Michael Agar, *The Story of Crack: Towards a Theory of Illicit Drug Trends*, 11 ADDICTION RESEARCH AND THEORY, No. 1, 2003, at 25.

³¹ Drug Policy Alliance, *Race and the Drug War*, <http://drugpolicy.org/communities/race/index.cfm?printpage=1>; B.S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS: A LONGITUDINAL STUDY OF FEDERAL SENTENCE IMPOSED 20 (1992).

³² JUSTICE POLICY INSTITUTE, CELLBLOCKS OR CLASSROOMS?: THE FUNDING OF HIGHER EDUCATION AND CORRECTIONS AND ITS IMPACT ON AFRICAN AMERICAN MEN 10 (2002), available at <http://www.justicepolicy.org/coc1/corc.htm>.

³³ See Common Sense for Drug Policy, *Drug War Facts: Race, Prison, and the Drug Laws*, <http://www.drugwarfacts.org/racepris.htm>; see also Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, 53 AMERICAN PSYCHOLOGIST, No. 7, July

1998, at 716 (stating that at the beginning of the 1990s, the United States had more African American men between the ages of 20 and 29 in the criminal justice system than in college).

³⁴ See generally, E. Michelle Tupper, Note, Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family, 12 GEO. J. ON POVERTY L. & POL’Y 325, 336 (2005).

incarceration rates, but also separate fathers from families, separate mothers with sentences for minor possession crimes from their children, leave children behind in an overwhelmed 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.³⁵ For example, one of every 14 African American children has a parent locked up in prison or jail today,³⁶ and African American children are 9 times more likely to have a parent incarcerated than white children.³⁷ In terms of financial effects, incarcerated black parents significantly reduce the aggregate income of African American families, further preventing many African American children from rising above the gross poverty they face.³⁸ Incarceration on such a massive scale leads to more unemployed and unemployable parents, more poverty, and more deterioration of communities.

Exacerbating the problem, the damaging impact of incarceration continues after a family member's release from prison. 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.³⁹ 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.⁴⁰ 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 the entire community.

The ACLU is concerned that the desire to appear “tough on crime” has substituted for sound policymaking – policymaking that should, by contrast, be focused on equity and appropriate alternatives to incarceration. In addition to diverting funds from social programs, harsh mandatory minimums and prison expansion have imposed a particular social cost on African American families. The best way to respond to the drug problem may not be to lock up thousands of young African Americans by over-punishing crack in relation to powder, but rather consider fairness in sentencing and building structures to help families – job training, drug treatment, housing, adequate health care, better schools, welfare reform, and sufficient family

³⁵ See generally, Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances:” Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255 (2004); CAUGHT IN THE NET, *supra*, at 47-55.

³⁶ See also Marc Mauer, Race, Drugs Laws & Criminal Justice, from Symposium: U.S. Drug Laws: The New Jim Crow?, 10 TEMP. POL. & CIV. RTS. L. REV. 321, 324 (2001).

³⁷ CAUGHT IN THE NET, *supra*, at 49.

³⁸ Note, Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders, 113 HARV. L. REV. 1485, 1490 (2000).

³⁹ HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 8 (1998); see also Mauer, *supra*, at 324.

⁴⁰ THE SENTENCING PROJECT, DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM 6 (2001).

support.⁴¹ Countries that do provide such services to their poorest members suffer less crime and drug abuse than does the United States.⁴²

UNFOUNDED PERCEPTIONS OF VIOLENCE AND CRACK USE

The 100-to-1 drug quantity ratio was designed in part to account for certain harmful conduct believed to be associated to a greater degree with crack cocaine offenses than with powder cocaine offenses. In particular, crack was said to cause particularly violent behavior in those who used the drug. In 1988, a study of homicides in New York City found that in all of the 414 homicide cases that year, there were only 3 homicides associated with behavior caused by using crack and in 2 of those cases the crack user was the victim.⁴³ The study also found that 85% of all crack-related deaths resulted from the nature of the illegal drug market and not from the actual use of the drug.⁴⁴ This violence occurred between dealers or between dealers and users in an illegal drug market that is inherently violent, regardless of what drug is being bought or sold. When crack began to permeate cities across the country in the mid to late 1980s, much of the violence was associated with the territorial disputes between low-level street corner drug dealers.⁴⁵ Therefore, most violence associated with crack is the result of being part of an illegal market, similar to violence associated in trafficking of other drugs.⁴⁶

According to Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research at Carnegie Mellon University, any violence associated with the crack trade could be attributable to the venue of the market (open-air, street crack markets compared to closed powder markets) or to the dispute resolution culture of the communities in which the market is located.⁴⁷ The assertion that crack physiologically causes violence has not been found to be true, and the violence that was once associated with the intense competition of a new drug market has abated.⁴⁸ Differences that might appear between cocaine and crack markets, Blumstein concludes, has nothing to do with the difference between the drugs themselves.

Sociologist Katherine Beckett reached a similar conclusion in her recent study of arrest practices in Seattle.⁴⁹ In her study she examined the popular explanations for higher arrest rates for African Americans involved in the crack market – explanations which include the idea that

⁴¹ David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L. J. 2547, 2569-70 (1995).

⁴² *Id.* at 2570 (citing ELLIOTT CURRIE, *RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE* 166, 180 (1993)).

⁴³ Paul J. Goldstein et al., *Crack and Homicides in New York City: A Case Study in the Epidemiology of Violence, in CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE* 118 (Craig Reinerman & Harry G. Levine eds., 1997).

⁴⁴ *Id.* at 119-120.

⁴⁵ *Id.*

⁴⁶ *Id.* at 120.

⁴⁷ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission* (Nov. 14, 2006) (Written statement of Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research, Carnegie Mellon University, at 6).

⁴⁸ *See id.*

⁴⁹ *RACE TO INCARCERATE, supra*, at 165 (citing Katherine Beckett, "Race and Law Enforcement in Seattle," May 3, 2004).

the targeting of outdoor markets is a priority of law enforcement and that crack is more associated with violence than other drugs.⁵⁰ In 2005, Beckett found, however, that while only 33% of outdoor serious drug transactions (also including heroin, methamphetamine, and powder), involved crack, 75% of all arrests were for crack.⁵¹ Moreover, the study found that crack was also much less associated with violence than the other drugs; crack arrests were only 10% as likely as heroin arrests to involve guns.⁵² Beckett concluded that racial bias on the part of the Seattle Police – and not the myths mentioned above - explained the disproportionate arrest rates of African Americans for cocaine sales.⁵³

Certainly, recent data confirms that significantly less trafficking-related violence is associated with crack than Congress previously assumed. For example, in 2000 1) 64.8% of overall crack offenses did not involve weapons with regard to any participant; 2) 74.5% of crack offenders had no personal weapons involvement; and 3) only 2.3% of crack offenders actively used a weapon.⁵⁴ In 2006, available statistics in crack offenses stayed relatively constant – 74% of drug offenders had no weapons involvement.⁵⁵ Moreover, in 2000, death, resulting from violence rather than drug use itself, occurred at the exact same rate, 3.4%, for both forms of cocaine.⁵⁶

the drug's mandatory minimum.⁵⁷ The practical effect of this sentencing disparity is that a crack offender is held responsible for conduct in which he or she did not engage or is penalized for the same conduct twice. The false correlation of crack cocaine to violent crime further contributed to the unjust disparity. Congress believed that crack cocaine itself directly correlated to increased violence by users and sellers at higher rates than powder cocaine.⁵⁸ Congress' response to this now discredited assumption was to increase penalties for all users and sellers of crack, regardless of whether they actually engaged in any violence.⁵⁹

In 2002, Dr. Blumstein testified that it would be more rational to use sentencing enhancements to punish individuals who use violence, regardless of the drug type, rather than to base sentencing disparities on the chemical itself. Such enhancements should also account for an offender's role in the distribution hierarchy. Blumstein saw no reason why there should be any difference in sentencing guidelines between crack cocaine and powder cocaine offenses.⁶⁰ He also noted that the 100-to-1 drug quantity disparity suggests racial discrimination.⁶¹

⁵⁰ *Id.* at 165-66.

⁵¹ *Id.* at 166.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 2002 USSC REPORT, *supra*, at 54, 100, Table 17.

⁵⁵ U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 39 (2006).

⁵⁶ 2002 USSC REPORT, *supra*, at 57.

⁵⁷ *Id.* at 7.

⁵⁸ *Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission* (Nov. 14, 2006) (Written statement of Ryan S. King, Policy Analyst, The Sentencing Project, at 6).

⁵⁹ *Id.*

⁶⁰ 2002 USSC REPORT, *supra*, at E-4.

⁶¹ *Id.*

The federal sentencing scheme already provides two alternative means for increasing sentences for weapons possession in drug trafficking offenses. Federal drug offenders with weapons may either be statutorily convicted under 18 U.S.C. § 924(c) (possession of a firearm in relation to a drug trafficking offense), or alternatively they may be subjected to application of the weapons enhancement in the drug trafficking guidelines.⁶² Thus, the mandatory minimum sentences implemented by the Anti-Drug Abuse Act of 1986 sweep far too broadly by treating all crack cocaine offenders as if their offenses involved weapons or violence, even though the evidence demonstrates that most crack cocaine offenses have not.

THE MYTH OF CRACK'S CHEMICAL EFFECTS

Despite many of the misconceptions at the time of the 1986 Act, numerous 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 are the same regardless of form.⁶³ In 1996, the Journal of the American Medical Association published a study that found that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.⁶⁴ The study concluded that the propensity for dependence varied by the method of use, amount used and frequency, not by the form of the drug.⁶⁵ 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.⁶⁶

In both 2002 and 2006, the Commission had hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine.⁶⁷ Among those experts was Dr. Glen Hanson, then Acting Director of the National Institute on Drug Abuse, who, in 2002, testified before the Commission stating that in terms of pharmacological effects, crack cocaine is no more harmful than powder cocaine. He noted that although cocaine in any form produces the same effects, the onset, intensity, and duration of its effects are related directly to the method of use and how rapidly cocaine enters the brain.⁶⁸

In addition, research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure.⁶⁹ The media stories that appeared in the late 1980s of crack-addicted mothers giving birth to “crack babies” are now considered greatly exaggerated.⁷⁰ In many cases, the mothers are low income and use various

⁶² *Id.* at 55.

⁶³ *Id.* at Appendix E, E-1–E-6.

⁶⁴ D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth of Reality?*, 279 JOURNAL OF THE AMERICAN MEDICAL ASSN., No. 19, Nov. 1996, at 1580.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 2002 USSC REPORT, *supra*, at Appendix E, E-1–E-6; Public Hearing on Cocaine Sentencing Policy Before the U.S. Sentencing Commission, (Nov. 14, 2006).

⁶⁸ 2002 USSC REPORT, *supra*, at E-3.

⁶⁹ *Id.* at 94.

⁷⁰ See also *Crack in Context: America's Latest Drug Demon*, in CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE 4 (Craig Reinerman & Harry G. Levine eds., 1997).

drugs, both of which are factors that affect a child's development. In 2002, 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.⁷¹ According to Dr. Chasnoff, the studies found that a child's home environment is the single most influential factor in determining whether a child will be healthy.⁷² In fact, the children of drug-abusing mothers who develop poorly, may be suffering from a combination of factors that often correlate with this environment, including poor nutrition, smoking, and lack of prenatal care.⁷³

FAILURE TO FOCUS ON HIGH LEVEL TRAFFICKERS

Finally, the federal law's goal of targeting high-level drug traffickers has failed. Congress made explicit 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 in the vast majority of crack cases to offenders who are low-level participants in the drug trade.

Indeed, if Congress wanted to send a message by enacting mandatory minimums that the Department of Justice should be more focused on high-level cocaine traffickers, Congress missed the mark. Instead of targeting large-scale traffickers, the law established low-level drug quantities to trigger lengthy mandatory minimum prison terms.⁷⁴ This Commission has reported that only 15% of federal cocaine traffickers can be classified as high-level, while 73% of crack defendants have low-level involvement in drug activity, such as street level dealers, couriers, or lookouts.⁷⁵ And because the mandatory minimums prohibit judges from considering the many reasons women are involved in or remain silent about a partner or family member's drug activity, we have seen the emergence of the "girlfriend problem" – women who are low-level participants in the drug trade, but subject to the same or harsher sentences as the major dealers in a drug organization.⁷⁶

INCREASING SUPPORT FOR ELIMINATING THE DISPARITY

The ranks of those opposed to the current federal cocaine sentencing law are rapidly swelling. There are increasing numbers of voices in favor of eliminating the disparity on the federal bench, in the prosecutor's office, on Capitol Hill, in the Oval Office, and—most recently—in the Department of Justice.

U.S. District Judge Robert Sweet for the Southern District of New York has argued that the administration of mandatory minimums in crack cases "has resulted in Jim Crow justice,"

⁷¹ 2002 USSC REPORT, *supra*, at E-4.

⁷² *Id.*

⁷³ RACE TO INCARCERATE, *supra*, at 171.

⁷⁴ Eric E. Sterling & Julie Stewart, *Undo This Legacy of Len Bias' Death*, THE WASHINGTON POST, June 24, 2006, at A21.

⁷⁵ *Id.*; see also 2002 USSC REPORT, *supra*, at 38, 99.

⁷⁶ See generally CAUGHT IN THE NET, *supra*, at 4.

noting the 100-to-1 disparity between crack and powder cocaine.⁷⁷ Similarly, former prosecutor and U.S. District Judge Cassell for the District of Utah has condemned the sentencing disparity between crack and powder cocaine, contending that “apparent inequality in the sentencing guidelines produces actual injustice to the crack-cocaine defendant.”⁷⁸ Moreover, in 1997, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that “[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both mandatory minimum statutes and the guidelines, can not be justified and results in sentences that are unjust and do not serve society’s interest.”⁷⁹ In the 109th Congress, legislation to ameliorate the crack/powder disparity was sponsored by Rep. Rangel (D-NY)⁸⁰, Senator Sessions (R-AL)⁸¹, and Rep. Bartlett (R-MD)⁸². In the 110th Congress, such legislation was introduced by then-Senator Biden (D-DE)⁸³, Senator Hatch (R-UT)⁸⁴, Senator Kennedy (D-MA)⁸⁵, Senator Sessions (R-AL)⁸⁶, Rep. Jackson-Lee (D-TX)⁸⁷, Rep. Shays (R-CT)⁸⁸, Rep. Rangel (D-NY)⁸⁹, Rep. Scott (D-VA)⁹⁰, and Rep. Bartlett (R-MD)⁹¹. In the 111th Congress, five bills dealing with the disparity have been introduced thus far. Discussed below, the ACLU urges this body to recommend that Congress pass Rep. Jackson-Lee’s (D-TX) legislation, H.R. 265, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, co-sponsored by 36 House members. In addition, both President Bush⁹² and President Obama have expressed their disapproval of current cocaine sentencing law.

Most recently, the Department of Justice has lent its support to eliminating the crack-powder disparity. On April 29, 2009, Lanny A. Breuer testified before the Senate Committee on the Judiciary Subcommittee on Crime and Drugs, in a hearing entitled “Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity.”⁹³ In this statement, Breuer

⁷⁷ *National War on Drugs Symposium, Panel II: Social Justice & the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html>.

⁷⁸ *How Judges are Properly Implementing The Supreme Court’s Decision in United States v. Booker: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary*, 109th Cong. 68 (2006) (statement of Judge Paul G. Cassell, Chairman, Committee on Criminal Law, Judicial Conference of the United States), *available at* <http://www.uscourts.gov/testimony/Cassell031606.pdf#search=%22paul%20g%20cassell%20%22mandatory%20minimum%22>.

⁷⁹ Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), *in* 10 FED. SENT’G RPTR. 195 (No. 4, Jan./Feb. 1998).

⁸⁰ H.R. 2456, the Crack Cocaine Equitable Sentencing Act of 2005.

⁸¹ S. 3725, the Drug Sentencing Reform Act of 2006.

⁸² H.R. 48, the Powder-Crack Cocaine Penalty Equalization Act of 2005.

⁸³ S. 1711 Drug Sentencing Reform & Kingpin Trafficking Act of 2007.

⁸⁴ S. 1685, the Fairness in Drug Sentencing Act of 2007.

⁸⁵ *Id.*

⁸⁶ S. 1383, the Drug Sentencing Reform Act of 2007.

⁸⁷ H.R. 4545, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007.

⁸⁸ *Id.*

⁸⁹ H.R. 460, the Crack Equitable Sentencing Act of 2007.

⁹⁰ H.R. 5035, Fairness in Cocaine Sentencing Act of 2008.

⁹¹ H.R. 79, the Powder-Crack Cocaine Penalty Equalization Act of 2007.

⁹² MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 83 (2006) (citing interview with Candy Crowley, CNN, Jan. 18, 2001).

⁹³ Full text available at: <http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf>

declared that the Obama Administration is fully committed to sentencing laws that do not result in racial and ethnic disparities, that are fair, and that are perceived as fair. Breuer insisted that the perception of unfairness in the criminal justice system cannot continue, and that changing this perception will strengthen the efficacy of law enforcement and improve public safety. Moreover, he recommended that the best way to start changing this perception of unfairness is by eliminating the crack-powder disparity. Citing studies by the National Institute on Drug Abuse, Breuer explained that research over the last twenty years has shown that crack and powder cocaine do not have inherently different effects. He commended the Sentencing Commission for its work over the last 15 years creating the definitive compilation of all data on federal cocaine sentencing policy and its racial disparities. In closing, Breuer urged Congress to completely eliminate the sentencing disparity between crack and powder cocaine, and he pledged that a working group overseen by the Deputy Attorney General will formulate a new federal cocaine sentencing policy and submit recommendations and proposed legislation to Congress and the President.

RECOMMENDATION

The ACLU commends the Commission for re-examining the Anti-Drug Abuse Act of 1986 and the harmful consequences of this legislation. Although there are more white crack cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in the targeting of inner-city communities of color. This has caused the overwhelming number of prosecutions to be directed against African Americans, and because of the sentencing disparities, these African Americans are disproportionately given longer sentences than powder users. The sentences for low-level drug crimes are wasteful in terms of both tax dollars and human lives, and have had devastating collateral consequences for African American men, women, and families. Changing these policies would dramatically help African American families by removing the harsh penalties that currently disproportionately affect them and severely limit their opportunities.

This body has made clear that it “firmly and unanimously” believes the 100-to-1 ratio to be unjustified.⁹⁴ We agree, and urge the Commission to recommend that Congress pass Rep. Jackson-Lee’s (D-TX) Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009 as a first step to undoing this injustice. Rep. Jackson-Lee’s bill will address the ACLU’s objections to the current cocaine sentencing scheme by:

- Eliminating the 100-to-1 ratio;
- Eliminating mandatory minimums for simple cocaine possession of less than 50 grams;
- Mandating the review of sentencing enhancements for aggravating factors, and recommending the provision of enhancements for offenses that involve dangerous weapons or violence and/or a defendant’s leadership role;
- Recommending consideration of mitigating roles in the Sentencing Guidelines and directing the Guidelines be reformulated to comply with new mandatory sentences;

⁹⁴ *Id.* at 91-92.

- Establishing a grant program to provide drug treatment and rehabilitative services within prisons, jails, and juvenile facilities, authorizing \$10 million for each fiscal year from 2009-2110; and
- Authorizing \$5 million for each of the fiscal years of 2009-2010 to establish grants to develop demonstration programs finding best practices for treating substances abusers within correctional facilities.

Thank you once again for re-visiting this very important policy matter, and for inviting the ACLU to participate in the Commission's work.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Fredrickson', with a long horizontal flourish extending to the right.

Caroline Fredrickson
Director
ACLU Washington Legislative Office