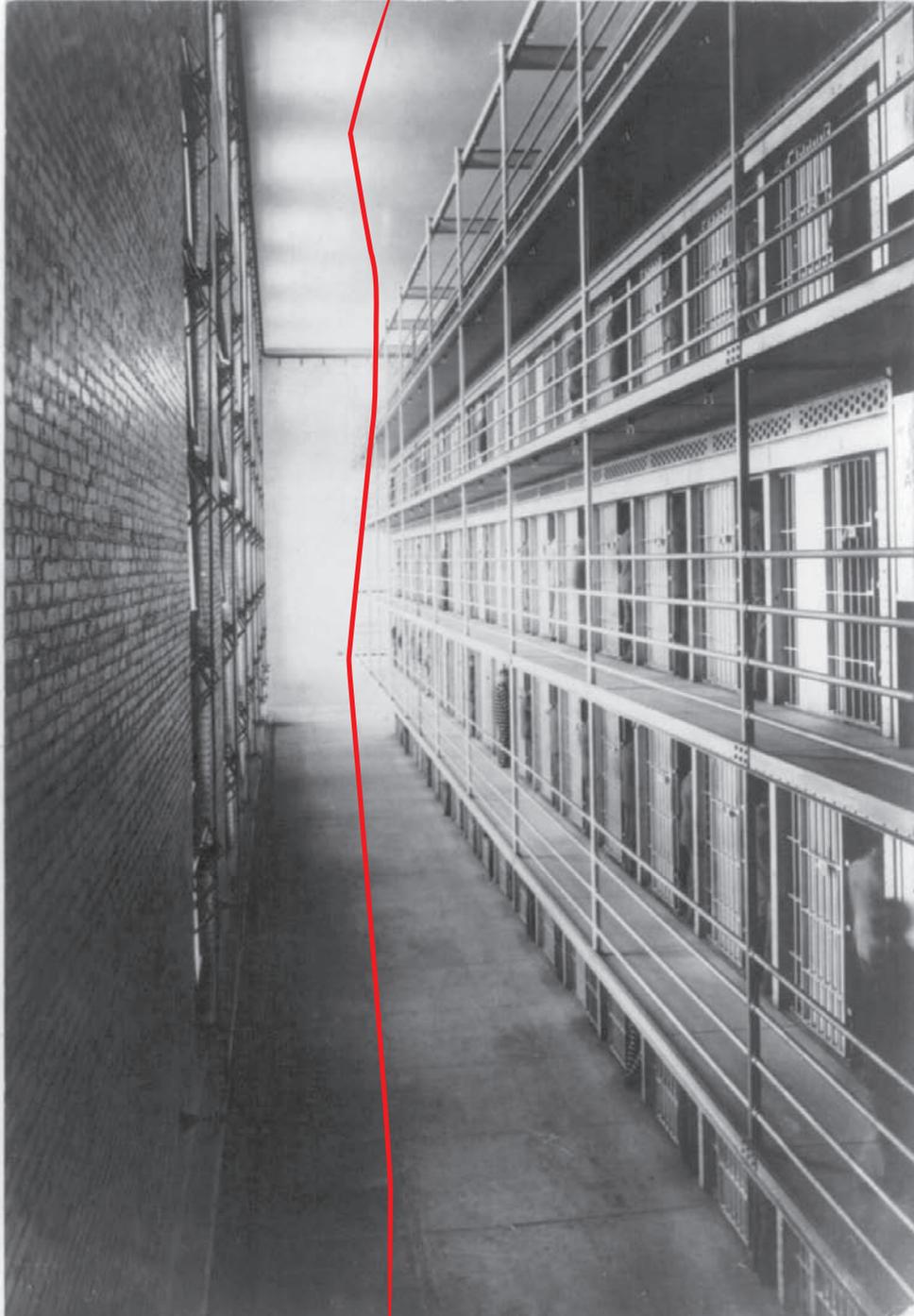


Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law





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AMERICAN CIVIL LIBERTIES UNION

Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law

PUBLISHED OCTOBER 2006

WRITTEN BY: Deborah J. Vagins, Policy Counsel for Civil Rights and Civil Liberties
Jesselyn McCurdy, Legislative Counsel

THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

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Caroline Fredrickson, Director, Washington Legislative Office



Washington Legislative Office
915 15th Street, NW
Washington, DC 20005

National Office
125 Broad Street, 18th Fl.
New York, NY 10004
(212) 549-2500
aclu.org

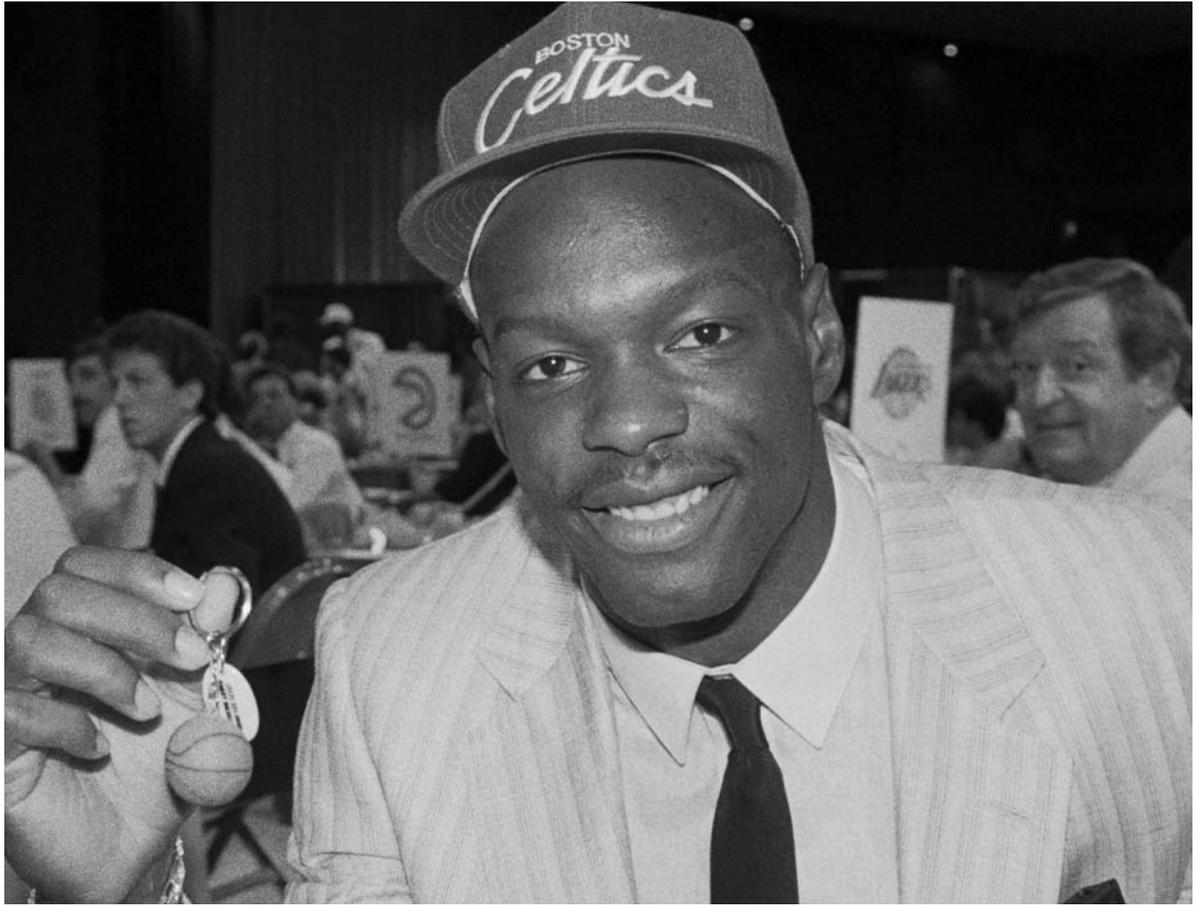


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TABLE OF CONTENTS

- i Executive Summary
- 1 Background and History
- 1 Congress' Response to Infiltration of Crack Cocaine into Inner City America
- 4 Dispelling the Myths Associated with Crack Cocaine with Facts
- 5 *Myth: Mothers Will Give Birth To Crack Babies*
- 5 *Myth: Crack Causes Violent Behavior*
- 5 *Myth: Crack is "Instantly" Addictive*
- 5 United States Sentencing Commission Reports and the Congressional Response to the Commission's Recommendations
- 6 Conclusion and Recommendations
- 8 Endnotes



Executive Summary

Twenty years ago, University of Maryland basketball star Len Bias died of a drug overdose just hours after the Boston Celtics picked him in the NBA draft. His death sparked a national media frenzy largely focused on the drug that was suspected, mistakenly, of killing him – crack cocaine.¹ A few weeks after Bias' death, Congress passed the Anti-Drug Abuse Act of 1986, establishing for the first time mandatory minimum sentences triggered by specific quantities of cocaine.² Congress also established much tougher sentences for crack cocaine offenses than for powder cocaine cases. For example, distribution of just 5 grams of crack carries a minimum 5-year federal prison sentence, while for powder cocaine, distribution of 500 grams – 100 times the amount of crack cocaine – carries the same sentence.³

October 2006 marks the twentieth anniversary of this law. 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 ratio. The United States Sentencing Commission, created by Congress in 1984 to develop fair federal sentencing guidelines, concluded that crack is not appreciably different from powder cocaine in either its chemical composition or the physical reactions of its users. Accordingly, on three separate occasions, the U.S. Sentencing Commission has urged Congress to reconsider the statutory penalties for crack cocaine. Judges, commentators, federal prosecutors, medical professionals, and other experts have all concurred with this assessment.

As this report discusses, this sentencing disparity is extremely arbitrary for several reasons. First, the current 100:1 drug quantity ratio promotes unwarranted disparities based on race.⁴ Because of its relative 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 the Sentencing Commission 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.⁵ Thus, the sentencing disparities punishing crack cocaine offenses more harshly than powder cocaine offenses unjustly and disproportionately penalize African American defendants for drug trafficking comparable to that of white defendants. Compounding the problem is the fact that whites are disproportionately less likely to be prosecuted for drug offenses in the first place; when prosecuted, are more likely to be acquitted; and even if convicted, are much less likely to be sent to prison.⁶ 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.⁷ Specifically with regard to crack, more than 80% of the defendants sentenced for crack offenses are African American, despite the fact that more than 66% of crack users are white or Hispanic.⁸

These racial disparities are even more troubling considering the devastating collateral consequences that the nation's drug policy and mandatory minimums have on African American men, women, and families. In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African

■ **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.**

Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher.⁹ In 2000, there were more African American men in prison and jails than there were in higher education, leading scholars to conclude that our crime policies are a major contributor to the disruption of the African American family.¹⁰ 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, create massive disfranchisement of those with felony convictions, and prohibit previously incarcerated people from receiving some social services for the betterment of their families.¹¹

Second, many of the assumptions used in determining the 100:1 ratio have been proven wrong by recent data. For example, despite many of the misconceptions at the time of Len Bias' death, 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 is the same regardless of form.¹² In addition, research indicates that the negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure.¹³ Other assumptions, such as the epidemic of crack use by youth, never materialized to the extent feared.¹⁴

Third, the law's goal of targeting high-level drug traffickers has failed. 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 example, data from the Sentencing Commission shows that 73% of crack defendants have only low-level involvement in drug activity, such as street-level dealers, couriers, or lookouts.¹⁵

Fourth, the 100:1 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. Recent data, however, 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 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.¹⁶ 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 have involved weapons or violence, even though the evidence demonstrates that most crack cocaine offenses have not.

At the twentieth anniversary of the enactment of the sentencing disparity between powder cocaine and crack cocaine, Congress must re-examine the Anti-Drug Abuse Act of 1986 and correct the harmful consequences of this legislation. The current sentencing scheme sweeps in too varied a group of defendants to have any meaningful effect on improving

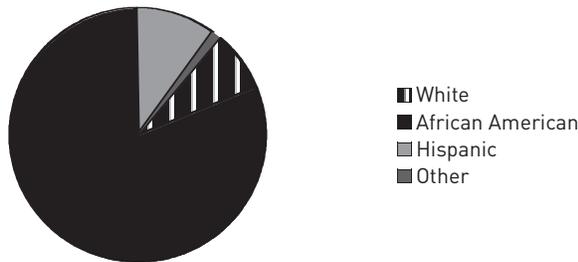
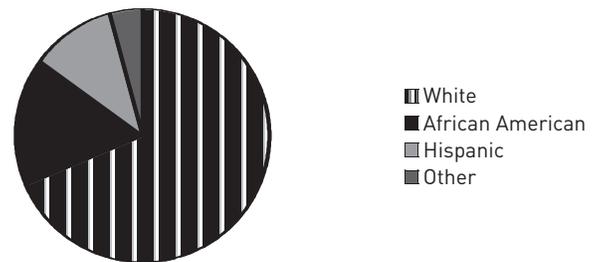
public safety. These sentences for low-level drug crimes are wasteful in terms of both tax dollars and human lives.

For these reasons, this report outlines the compelling justifications for changing the crack penalties and urges elected officials to implement 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.**
- **To the extent that the states have similar disparities in their laws, the states should also equalize differences in the drug quantity ratios between powder and crack cocaine at levels that properly focus on major drug dealers and not low-level participants.**

TABLE 1

In 2003, whites constituted 7.8% and African Americans constituted more than 80% of the defendants sentenced under the harsh federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.

2003 Federal Crack Cocaine Defendants**Crack Cocaine Users**

Source: U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING, Table 34 (2003), available at <http://www.uscc.gov/ANNRPT/2003/table34.pdf>.

Source: SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 2004 NATIONAL SURVEY ON DRUG USE AND HEALTH, POPULATION ESTIMATES 1995, Table 1.43a (2005), available at <http://www.oas.samhsa.gov/Nhsda/2k3tabs/Sect1peTabs1to66.htm#tab1.43a>.

Background and History

In the 1970s, observers of the American judicial system were increasingly concerned with the widespread disparity in sentencing. Judges, with very broad discretion, imposed widely varying sentences for the same offenses. The enactment of the Sentencing Reform Act of 1984 (SRA) was Congress' response to the growing inequality in federal sentences.¹⁷ The SRA's objectives were to increase certainty and fairness in the federal sentencing system and to reduce unwarranted disparity among defendants with similar records who were found guilty of similar crimes. The legislation created the U.S. Sentencing Commission, an independent expert panel given the responsibilities of producing federal sentencing guidelines and monitoring the application of the guidelines.¹⁸

Shortly after the passage of the SRA, Congress began to enact new mandatory minimum sentences.¹⁹ From 1984 to 1990, Congress passed a number of mandatory minimum penalties primarily aimed at drugs and violent crime.²⁰ Lawmakers argued that enacting mandatory penalties would deter crime by creating fixed and lengthy prison terms.²¹ Less than 10 years after passing many of the mandatory penalties, however, members of Congress familiar with criminal justice issues began to realize that these sentences were inconsistent with the objectives of the SRA.²²

The most infamous mandatory minimum law passed by Congress after the enactment of the SRA was the penalty relating to crack cocaine. Cocaine had long been illegal in America, and as later happened with crack, powder cocaine's prohibition had always carried a racial component.²³ Crack was a new method of packaging the drug, produced by heating a mixture of powder cocaine (cocaine hydrochloride), baking soda (sodium bicarbonate), and water. The chemical interaction between these ingredients creates what is commonly known as "crack" – a hard material similar to a rock.²⁴ Applying a hot flame will vaporize crack, and through smoking, cocaine vapor can be inhaled into the lungs and very quickly enter the bloodstream and go to the brain.

Between 1984 and 1985, crack began to appear in urban areas such as New York, Miami and Los Angeles. By 1986, crack was widely available in

large U.S. cities and relatively inexpensive. For \$50-\$100 a person could buy powder cocaine in gram or half gram quantities. For \$5-\$20, however, a person could buy a small vial of crack that included a few crack rocks. The availability of small quantities of crack cocaine at an inexpensive price revolutionized inner-city drug markets.²⁵ Along with the new drug market that crack created in urban America, came dramatic claims about the effects of the drug.

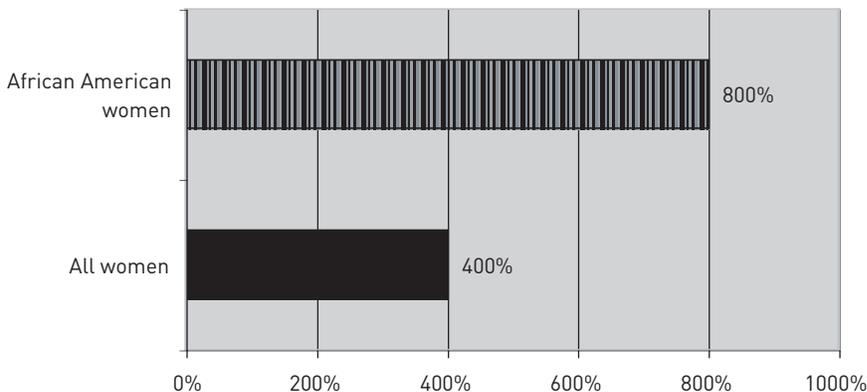
In June 1986, in the midst of crack cocaine's emergence in the drug culture, the country was shocked by the death of University of Maryland basketball star Len Bias. Three days after being drafted by the Boston Celtics, Bias, who was African American, died of a drug and alcohol overdose. Many in the media and public assumed that Bias died of a crack overdose.²⁶ Motivated by Bias' death and in large part by the notion that the infiltration of crack cocaine was devastating America's inner cities, Congress quickly passed the 1986 Anti-Drug Abuse Act. Based on the enormous fear of crack, many in Congress believed that the existing sentences for drug violations were inadequate to deal with the dangers of this new drug. Although it was later revealed that Bias actually died of a powder cocaine overdose,²⁷ by the time the truth about Bias' death was discovered, Congress had already passed the harsh discriminatory crack cocaine law.

Congress' Response to Infiltration of Crack Cocaine into Inner City America

In the 1980s, crack had "come to symbolize . . . the entire problem of illicit narcotics in America."²⁸ Members of Congress were concerned that crack opened the market to the poor and juveniles and that it might spread outward from urban areas. In 1986, Congress reacted to the perceived concerns of their constituents over illegal drug use and the death of Len Bias.²⁹ The heightened media attention devoted to crack and the approaching mid-term elections motivated Congress to act quickly. Setting aside the regular process,³⁰ Congress expedited the Anti-Drug Act of 1986 based on a belief that the nation was "under siege from crack."³¹

TABLE 2

Rate of Increase of Women Behind Bars Since 1986



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.

Source: ACLU ET AL., *CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES* 17 (2005), available at <http://www.fairlaws4families.org/final-caught-in-the-net-report.pdf> (citing SUSAN BOYD, *FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY* 208-09 (2004)).

Although Congress intended to combat the crack cocaine “epidemic” through this legislation,³² Congress did not provide a clear record of the need for the sentencing disparity between minor crack infractions and serious powder offenses. As a consequence of the Act’s expedited schedule, there was no committee report to document Congress’ intent in passing the Act or to analyze the legislation. Few hearings were held in the House on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio, which only lasted a few hours.³³ The abbreviated legislative history of the 1986 Act does not provide a single, consistently cited rationale for the crack-powder penalty structure.

During consideration of an earlier version of the bill, the House Judiciary Subcommittee on Crime issued a report determining that the mandatory minimum sentencing framework would ensure that the Department of Justice directed its “most intense focus” on “major traffickers” and “serious traffickers.”³⁴ After consulting with Drug Enforcement Agency agents and prosecutors, the Subcommittee set the high penalties for major traffickers at a level of 100 grams of crack to 5000 grams of powder cocaine – a 50:1 disparity.³⁵ As the Anti-Drug Act advanced through Congress, the Senate, citing the harmfulness of the drug, increased the penalty for crack.³⁶ Beyond showing that different ratios were considered, the legislative history does not explain why Congress rejected or accepted any one ratio in particular.³⁷ Such information is critical for purposes of developing a logical and fair policy regarding crack cocaine.

What little legislative history there is suggests that members of Congress believed that crack was more addictive than powder cocaine,³⁸ that it caused crime,³⁹ that it caused psychosis and death, that young people were particularly prone to becoming addicted to it,⁴⁰ 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 crack more severely than powder.

President Ronald Reagan signed the bill into law on October 27, 1986.⁴¹ The Anti-Drug Abuse Act of 1986⁴² established the mandatory minimum sentences for federal drug trafficking crimes and created a 100:1 sentencing disparity between powder and crack cocaine.⁴³ Members

intended the triggering amounts of crack to punish “major” and “serious” drug traffickers.⁴⁴ 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) were sentenced to at least 5 years imprisonment, without regard to any mitigating factors.⁴⁵ 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.⁴⁶

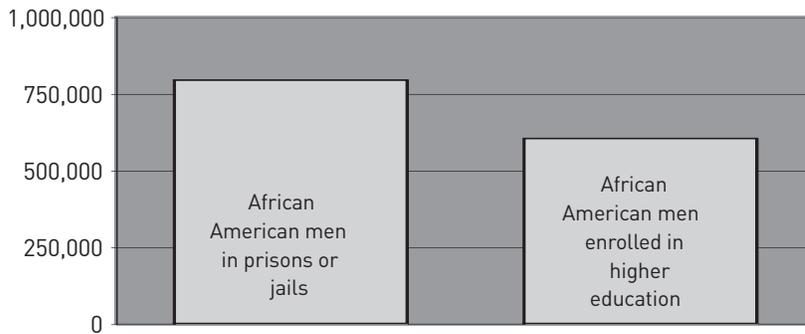
Two years later, drug-related crimes were still on the rise. In response, Congress intensified its war against crack cocaine by passing the Omnibus Anti-Drug Abuse Act of 1988.⁴⁷ The 1988 Act created a 5-year mandatory minimum and 20-year maximum sentence for simple possession of 5 grams or more of crack cocaine.⁴⁸ 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.

By 1990, however, Congress decided it needed more information on the impact of mandatory sentences, and directed the Sentencing Commission to study mandatory minimums and to report on their effects. In August 1991, the commission completed an in-depth study on mandatory minimums and concluded that non-whites were much more likely to receive mandatory minimum sentences and that they were being applied in a discriminatory manner.⁴⁹ The Federal Judicial Center reported that African Americans were more likely than whites to be sentenced to at least the minimum sentence in cases where a mandatory minimum prison term could be applied.⁵⁰ Although Congress had intended to reduce the disparities and arbitrariness of the federal sentencing system through mandatory minimums, the report concluded that this sentencing scheme actually contributed to these problems.

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.⁵¹ 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

TABLE 3

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.



Source: 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>.

Americans constituted more than 80% of the defendants sentenced under the harsh federal crack cocaine laws,⁵² despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.⁵³

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.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.⁵⁸ 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 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.⁵⁹

For example, a recent joint report on the impact of drug policies on women and families detailed the story of Kimberly McDowell.⁶⁰ Kimberly's mother was absent and her father was an alcoholic, leaving her and her

sister to be raised by a destitute aunt. Kimberly dropped out of school in 9th grade, and by 16 had two children. In order to support them she earned her G.E.D. and took retail and factory jobs. She married and had two more children. Later, a relative of one of Kimberly's friends was arrested for crack cocaine distribution. In order to receive a shorter sentence as part of a plea, he testified that Kimberly and 18 others were part of a crack cocaine drug conspiracy. Although Kimberly admitted knowing what her friends were doing, she denied that she participated in the conspiracy or that she prepared or distributed crack. Unaware that she would be held accountable for the sale of 80 grams of crack – the amount attributed to the entire conspiracy – she took a plea deal and was sentenced to 10.5 years in prison for conspiracy to distribute crack cocaine. Kimberly's husband was in jail for an unrelated issue, and Kimberly could find no family member to take care of her children when she went to prison. They are currently living with a friend, and Kimberly sends them the 23 cents per hour she earns from her prison job.⁶¹

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.⁶² 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.⁶³ 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

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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.⁶⁴ For example, 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.⁶⁵ 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.⁶⁶ One of every 14 African American children has a parent locked up in prison or jail today,⁶⁷ and African American children are 9 times more likely to have a parent incarcerated than white children.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.

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.⁷¹ The Sentencing Commission reports 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.⁷² Consider the following: A supplier sells 450 grams of powder cocaine to a middleman who cuts it and sells smaller ounce quantities of this powder to several street dealers. One of the street dealers mixes a small amount of this powder cocaine with baking soda, cooks it, and produces a 5.1 gram rock of crack. If the street dealer gets arrested and charged federally, he or she faces a mandatory minimum sentence of five years. Even if the drug supplier in this example were caught, he or she would not be subject to the same 5-year sentence as the street dealer since the supplier only had 450 grams of powder cocaine, not the 500 grams necessary to trigger the same sentence.⁷³

Even judges and those prosecuting these cases have stood up against mandatory minimums, arguing such penalties are arbitrary and excessive. For example, 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,” noting the 100:1 disparity between crack and powder cocaine.⁷⁴ Similarly, former prosecutor, U.S. District Judge Cassell for the District of Utah has condemned the legal disparity between crack and powder cocaine, contending that “apparent inequality in the sentencing guidelines produces actual injustice to the crack-cocaine defendant.”⁷⁵ Moreover, in 1997, 27 fed-

eral 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.”⁷⁶

In 2004, the Sentencing Commission said, “[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.”⁷⁷ There are similar policy concerns on the state level. While the federal 100:1 disparity between the two forms of cocaine remains the harshest in the nation, at least 16 states also have laws that create a disparity between crack cocaine and powder cocaine sentences.⁷⁸ For example, Arizona, New Hampshire, and Ohio have created sentencing disparities since 1995. Iowa has a 100:1 drug quantity ratio in its statute, although, unlike the federal law, Iowa’s law distinguishes between crack cocaine and powder cocaine statutory maximum penalties, not mandatory minimums.⁷⁹ Some states, however, have recently changed their disparities. For example, in 2005, Connecticut eliminated its 56.7:1 disparity between crack and powder cocaine.⁸⁰ In addition, since 1995, Nebraska, Louisiana, Wisconsin, and the District of Columbia have repealed sentencing disparities between crack and powder cocaine.

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 the law.

For example, crack was thought to be so much more addictive than powder cocaine that it was “instantly” addicting. It 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. Such dramatic claims were widely repeated in the news media. As a result of the enormous fear of crack, many in Congress said that the existing sentences for drug violations were inadequate to deal with the dangers of this new drug.

In the twenty years since the enactment of the 1986 Act, many of the myths associated with crack cocaine have been dispelled. 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.⁸¹ In addition, the media stories that appeared in the late 1980s of crack-addicted mothers giving birth to “crack babies” are now considered greatly exaggerated.⁸²

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Myth: Mothers Will Give Birth to “Crack Babies”

In the late 1980s, the media published a steady stream of stories about crack-addicted mothers giving birth to a generation of “crack babies.”⁸³ Smoking crack was thought to pose a unique danger to developing fetuses. These so-called “crack babies” were thought to suffer from more pronounced developmental difficulties by their in-utero exposure to the drug. Crack was also said to destroy the maternal instinct of women leading to the abandonment of children.

In many cases, the mothers are low income and use various 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.⁸⁴ 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.⁸⁵

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.⁸⁶ Compared to newborns exposed in-utero to heroin or methadone who exhibit symptoms of drug withdrawal, an infant exposed to crack or powder cocaine will be indistinguishable from other babies.⁸⁷ 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. Dr. Frank concluded that based on years of careful research, the term “crack baby” is a grotesque media stereotype not based on science.⁸⁸

Myth: Crack Causes Violent Behavior

Crack was also said to cause particularly violent behavior in those who use 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.⁸⁹ 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.⁹⁰ 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.⁹¹ These dealers would stake out their street corners and would not hesitate to defend their territory if rival dealers tried to take it over.

Recent data 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 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.⁹² The assertion that crack physiologically causes violence has not been found to be true. Most violence associated with crack is the result of being part of an illegal market, similar to violence associated in trafficking of other drugs.⁹³

Myth: Crack is “Instantly” Addictive

One 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. As discussed above, crack is formed by dissolving powder cocaine and treating it with an alkali such as baking soda. In 1996, JAMA 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.⁹⁴ 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.⁹⁵ 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.⁹⁶

In any form, cocaine is a potent stimulant of the central nervous system and both powder and crack produce the same types of physiological and psychotropic effects on the human brain.⁹⁷ Addiction to drugs, such as cocaine, is significantly affected by the manner in which the drug is ingested into the body. Thus, the faster cocaine reaches the bloodstream, the quicker the effects of the drug are felt on the user. Smoking crack or injecting powder cocaine brings about the most intense effects of cocaine.⁹⁸ While it is more common to smoke crack than inject powder, the idea is that these quick and direct methods of consumption lead to a quicker high, which leads some users to take more of the drug in order to sustain their high, which in turn could increase *the potential* of the user to become addicted.⁹⁹ Regardless of whether a person smokes crack or uses powder cocaine, each form of the drug can be addictive.

United States Sentencing Commission Reports and the Congressional Response to the Commission’s Recommendations

Based largely on the racial disparities and criticisms noted above, on three separate occasions, the bipartisan, independent U.S. Sentencing Commission has concluded that there is no basis for the 100:1 sentencing disparity. The Sentencing Commission has repeatedly recommended in its 1995, 1997, and 2002 reports that the crack quantity thresholds be revised upward.

■ 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.

In the 1990s, federal sentencing policy for cocaine and crack offenses came under extensive scrutiny for many of the reasons discussed above. These concerns led Congress in the Violent Crime Control and Law Enforcement Act of 1994 to direct the Sentencing Commission to submit a report and recommendations to Congress on cocaine sentences.¹⁰⁰ On February 28, 1995, the Sentencing Commission unanimously recommended that changes be made to the cocaine sentencing structure, including a reduction in the 100:1 ratio.¹⁰¹ On May 1, 1995, the Sentencing Commission submitted to Congress proposed legislation and amendments to its sentencing guidelines, which would have equalized the penalties between crack and powder cocaine possession and distribution at the level of powder cocaine, and provided sentencing enhancements for violence or other harms.¹⁰² Even with the proposed equalization of the minimum sentences, the commission emphasized that many of those convicted of crack cocaine offenses will nevertheless still serve longer prison sentences than those convicted of powder cocaine offenses because of the enhancement for aggravating factors.¹⁰³

On October 30, 1995, Congress rejected the proposed amendment to the sentencing guidelines and directed the commission to make further recommendations regarding the powder and crack cocaine statutes and guidelines that did not advocate parity.¹⁰⁴ For the first time in the guidelines' history, Congress and the president rejected a guideline amendment approved by the commission.¹⁰⁵ Congress explicitly directed the Sentencing Commission that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."¹⁰⁶

In response to this directive, in April 1997, the Sentencing Commission issued a second report again urging the elimination of the 100:1 ratio. The commission indicated that it was "firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine."¹⁰⁷ Therefore, the commission recommended that Congress reduce the current 500-gram trigger for the 5-year mandatory minimum sentence in powder cocaine offenses to a level between 125 and 375 grams and that it increase the 5-gram trigger in crack cocaine offenses to between 25 and 75 grams.¹⁰⁸ The Clinton administration also publicly proposed reducing the ratio to 10:1.¹⁰⁹ Nevertheless, Congress made no changes to the sentencing structure despite the commission's recommendations.

In 2002, the Sentencing Commission examined the disparity again. 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.¹¹⁰ Among those experts was Dr. Glen Hanson, then Acting Director of the National Institute on Drug Abuse, who testified before the Sentencing 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.¹¹¹

Dr. Alfred Blumstein, Professor of Urban Systems and Operations Research at Carnegie Mellon University, indicated 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.¹¹² He also noted that the 100:1 drug quantity disparity suggests racial discrimination.¹¹³

After the 2002 hearings, the Sentencing Commission issued a new report on crack and powder cocaine disparities and once again found that the 100:1 ratio between the drugs was unjustified.¹¹⁴ In so stating, the commission made the following findings: 1) the current penalties exaggerate the relative harmfulness of crack cocaine; 2) the current penalties sweep too broadly and apply most often to lower level offenders; 3) the current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and 4) the current penalties' severity mostly impacts minorities.¹¹⁵

Based on these findings, the commission recommended a three-pronged approach for revising the sentencing policy, which would: 1) increase the threshold quantity to trigger a 5-year mandatory minimum for crack offenses to at least 25 grams and a 10-year mandatory minimum for 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine); 2) provide for sentencing enhancements; and 3) maintain the mandatory minimum thresholds for powder at their current levels.¹¹⁶ Recommending a 20:1 ratio, the Sentencing Commission made clear that it again "firmly and unanimously" believed the ratio to be unjustified.¹¹⁷

Despite three commission reports and 20 years of demonstrated evidence to the contrary, Congress has still not altered the disparities in the crack sentencing law. As of this writing, the Sentencing Commission has decided to make addressing this crack cocaine disparity a policy priority for its upcoming amendment cycle, and to once again address the crack/powder disparities. Specifically, the commission noted that it would continue "its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy, including holding a hearing on the issue and reevaluating the commission's 2002 report to Congress."¹¹⁸

Conclusion and Recommendations

The ultimate irony of this anniversary is that Len Bias did not die of a crack overdose, but rather from snorting powder cocaine and alcohol. Both forms of cocaine are dangerous, but the events that ensued after the death of this talented young man created a terrible legacy harming the futures of thousands of other young people.

■ **There is no rational medical or penological reason for the 100:1 disparity between crack and powder cocaine, and instead it causes an unjustified racial disparity in our penal system.**

Although there are more white cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in inner city communities of color being targeted almost exclusively. 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 disparities 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. Indeed, the Sentencing Commission recently reported that revising the disparity in sentences for crack and powder would do more to reduce the sentencing disparity “than any other single policy change” and would “dramatically improve the fairness of the federal sentencing system.”¹¹⁹

Recently, some members of 109th Congress introduced legislation addressing some of the problems discussed in this report. For example, a Senate bill reduces the drug quantity ratio to a 20:1 disparity, but leaves mandatory minimums in place.¹²⁰ A House bill equalizes the drug quantity ratio and eliminates the mandatory minimums for simple possession, although it also leaves other mandatory minimums in place.¹²¹ These bills are significant steps in the right direction, but more must be done in the next Congress. The mandatory sentences for crack cocaine and the disparity with powder cocaine have created a legacy that must come to an end.

Therefore, the ACLU urges that the public support and Congress and state legislators implement 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. As demonstrated above, there is no rational medical or penological reason for the 100:1 disparity between crack and powder cocaine, and instead it causes an unjustified racial disparity in our penal system.**
- **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.**
- **To the extent that the states have similar disparities in their laws, the states should also equalize differences in the drug quantity ratios between powder and crack cocaine at levels that properly focus on major drug dealers and not low-level participants.**

ENDNOTES

¹ Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, THE BOSTON GLOBE, July 5, 2006, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

² Pub. L. No. 99-570, 100 Stat. 3207 [codified as amended at 21 U.S.C. § 801 (2000)].

³ 21 U.S.C. § 841(b) (2000).

⁴ See U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 102-103 (2002) [hereinafter 2002 USSC REPORT].

⁵ 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] [hereinafter 1995 USSC REPORT].

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

⁷ Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

⁸ Mauer, *supra* note 1; see also Clarence Page, *Legacy Hijacked, 20 Years Later*, THE WASHINGTON TIMES, June 24, 2006, <http://198.65.148.234/commentary/20060623-085057-3629r.htm>; U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 34 (2003); SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 2004 NATIONAL SURVEY ON DRUG USE AND HEALTH, POPULATION ESTIMATES 1995, Table 1.43a (2005).

⁹ 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).

¹⁰ 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> [hereinafter CELLBLOCKS OR CLASSROOMS?]; 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].

¹¹ See *infra* notes 62-70 and accompanying text.

¹² 2002 USSC REPORT, *supra* note 4, at Appendix E, E-1-E-6.

¹³ *Id.* at 94.

¹⁴ *Id.* at 96.

¹⁵ *Id.* at 38, 99.

¹⁶ *Id.* at 54, 100, Table 17.

¹⁷ Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984) [codified as amended in scattered sections of 18 and 28 U.S.C.].

¹⁸ 28 U.S.C. § 991(a) (2000). The law established the United States Sentencing Commission and directed it to promulgate a system of detailed, mandatory sentencing guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes.

¹⁹ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 9 (1991) [hereinafter USSC MANDATORY MINIMUM REPORT].

²⁰ *Id.* at 5.

²¹ See, e.g., Orrin G. Hatch, *The Role Of Congress In Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, And The Search For A Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 188-190 (1993).

²² *Id.* at 195.

²³ Harrison Act of 1914, Ch.1, 38 Stat. 785. There has always been a racial compo-

nent to the prohibition of powder and crack cocaine. As one author notes, "Just as the crack scare blossomed only after the practice of cocaine smoking spread to lower class, inner-city African-Americans and Latinos, so did class and racial fears fuel the first cocaine scare." Craig Reinerman & Harry G. Levine, *Crack in Context: America's Latest Drug Demon*, in CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE 6-7 (Craig Reinerman & Harry G. Levine eds., 1997) [hereinafter *Crack in Context*]. There was no evidence that African Americans used as much cocaine as whites, yet white politicians used race to stir up public sentiment against cocaine for political purposes. *Id.* at 7 (citing DAVID MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (New Haven, CT: Yale Univ. Press, 1973)). For example, in order to persuade representatives that a federal drug policy was necessary, drug crusaders spread the myth that cocaine-induced African Americans intended to rape white women. *Id.* (citing MUSTO, *supra* at 6-10, 67-68). At the same time, police switched from .32 caliber pistols to .38 caliber pistols because it was believed that the smaller guns could not kill the "cocaine-crazed Negro." *Id.* at 7. Yale medical historian David Musto has noted that the first cocaine scare was actually a response to "black rebellion" against segregation and oppression. *Id.* (citing MUSTO, *supra* at 7).

²⁴ *Crack in Context*, *supra* note 23, at 2.

²⁵ *Id.*

²⁶ 1995 USSC REPORT, *supra* note 5, at 123.

²⁷ *Id.*

²⁸ David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1292 (1995).

²⁹ See Congressional Quarterly Almanac, *Congress Clears Massive Anti-Drug Measures*, 99th Cong., 2d Sess., Vol. 42 at 94 (1986) [hereinafter CQ Almanac].

³⁰ See *Hearings Before the United States Sentencing Comm'n on Proposed Guideline Amendments* (Mar. 22, 1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation).

³¹ William Spade, Jr., *Beyond the 100:1 Ratio: Toward a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1251-52 (1996).

³² See, e.g., 132 CONG. REC. 22,667 (1986) [statement of Rep. Traficant, D-OH].

³³ Spade, *supra* note 31, at 1253.

³⁴ 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.*

³⁵ See H.R. 5484, 99th Cong., § 608 (1986); see also David H. Angeli, Note, A

"Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection, AM. CRIM. L. REV. 1211, 1227, n.135 (1997).

³⁶ See 1995 USSC REPORT, *supra* note 5, at 117, 120.

³⁷ Spade, *supra* note 31, at 1251.

³⁸ See 132 CONG. REC. H6729 [daily ed. Sept. 11, 1986] [statement of Rep. LaFalce regarding H.R. 5484].

³⁹ Spade, *supra* note 31, at 1252.

⁴⁰ 132 CONG. REC. 26,447 (1986) [statement of Sen. Chiles].

⁴¹ See CQ Almanac, *supra* note 29, at 92.

⁴² Pub. L. No. 99-570, 100 Stat. 3207 [codified as amended at 21 U.S.C. § 801 (2000)].

⁴³ See 1995 USSC REPORT, *supra* note 5, at 116.

⁴⁴ *Id.* at 117-18; see also 132 CONG. REC. S14,300 [daily ed. Sept. 30, 1986] [statement of Robert Byrd D-WV].

⁴⁵ See CQ Almanac, *supra* note 29, at 92.

⁴⁶ 1995 USSC REPORT, *supra* note 5, at 116.

⁴⁷ Pub. L. No. 100-690, 102 Stat. 4181 (1988) [codified as amended in scattered sections of U.S.C.].

⁴⁸ 21 U.S.C. § 844 (2000).

⁴⁹ See USSC MANDATORY MINIMUM REPORT, *supra* note 19, at iii.

⁵⁰ MEIERHOEFER, *supra* note 9, at 20.

⁵¹ Nkechi Taifa, *The "Crack/Powder" Disparity: Can the International Race Convention Provide a Basis for Relief?* 1 (American Constitution Society for Law and Policy, May 2006).

⁵² U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING, Table 34 (2003).

⁵³ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, 2004 NATIONAL SURVEY ON DRUG USE AND HEALTH, POPULATION ESTIMATES 1995, Table 1.43a (2005).

⁵⁴ U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING, Figure J, at 91 (2003).

⁵⁵ 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).

⁵⁶ BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, Table 7.16, at 112 (2004).

⁵⁷ 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)).

⁵⁸ *Id.* at 17 (citing SUSAN BOYD, FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY 208-09 (2004)).

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 19.

⁶¹ *Id.* (citing Families Against Mandatory Minimums, *Kimberly McDowell #11145-058*, http://www.famm.org/Federal%20prisoner%20profiles%20women/kimberly_mcdowell_profile.htm).

⁶² Interfaith Drug Policy Initiative, *Mandatory Minimum Sentencing Fact Sheet*, http://idpi.us/dpr/factsheets/mm_factsheet.htm.

⁶³ Drug Policy Alliance, *Race and the Drug War*, <http://drugpolicy.org/communities/race/index.cfm?printpage=1>.

⁶⁴ 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* note 57, at 47-55.

⁶⁵ CELLBLOCKS OR CLASSROOMS?, *supra* note 10, at 10.

⁶⁶ See Common Sense for Drug Policy, *Drug War Facts: Race, Prison, and the Drug Laws*, <http://www.drugwarfacts.org/racepris.htm>; Craig Haney & Philip Zimbardo, *supra* note 10 at 716.

⁶⁷ 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).

⁶⁸ CAUGHT IN THE NET, *supra* note 57, at 49.

⁶⁹ 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* note 67, at 324.

⁷⁰ THE SENTENCING PROJECT, DRUG POLICY AND THE CRIMINAL JUSTICE SYSTEM 6 (2001).

⁷¹ Eric E. Sterling & Julie Stewart, *Undo This Legacy of Len Bias' Death*, THE WASHINGTON POST, June 24, 2006, at A21.

⁷² *Id.*; see also 2002 USSC REPORT, *supra* note 4, at 38, 99.

⁷³ See e.g., Kevin J. Cloherty & Dawn M. Perlman, *Powder vs. Crack: 100 to 1 Current Quantity Ratio Under Attack*, 50-APR. FED. LAW. 50 (2003).

⁷⁴ *National War on Drugs Symposium, Panel II: Social Justice & the War on Drugs* (2000) (statement of Hon. Robert Sweet), <http://www.pbs.org/wgwh/pages/front-line/shows/drugs/symposium/panel2.html>.

⁷⁵ *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/Cassel031606.pdf#search=%22paul%20g%20cassel%20%22mandatory%20minimum%22>.

⁷⁶ 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).

⁷⁷ U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 132 (2004).

⁷⁸ These 16 states include: Arizona, Alabama, Maine, New Hampshire, Ohio, California, Iowa, Maryland, Missouri, North Dakota, Oklahoma, South Carolina, Utah, Vermont, Virginia, and Wyoming. See 2002 USSC REPORT, *supra* note 4, at 73; IMPACTEEN ILLICIT DRUG TEAM, ILLICIT DRUG POLICIES: SELECTED LAWS FROM THE 50 STATES (Andrews Univ. 2002); UTAH CODE ANN. § 58-37d-5 (2006); VT. STAT. ANN. tit. 18 § 4231(c) (2005).

⁷⁹ See IOWA CODE § 124.413 (2001).

⁸⁰ The Real Cost of Prisons Weblog, CT: Gov. Signs Law to Help Correct Racial Injustice in Sentencing, http://realcostofprisons.org/blog/archives/2005/07/ct_gov_signs_la.html (July 24, 2005, 11:02am). Connecticut enacted a law that equalizes the amounts that trigger a mandatory minimum at 14 grams. This compromise legislation increased the trigger for crack cocaine from 0.5 grams, but decreased the trigger for powder from 28 grams. *Id.*

⁸¹ D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride. Are The Differences Myth Or Reality?*, 279 JOURNAL OF AMERICAN MEDICINE, No. 19, Nov. 1996, at 1580.

⁸² See also *Crack in Context*, *supra* note 23, at 4.

⁸³ John P. Morgan and Lynn Zimmer, *Social Pharmacology of Smokeable Cocaine*, in *CRACK IN AMERICA: DEMON DRUG, AND SOCIAL JUSTICE* 149, 151-152 (Craig Reinerman & Harry G. Levine eds., 1997).

⁸⁴ 2002 USSC REPORT, *supra* note 4, at E-4.

⁸⁵ *Id.*

⁸⁶ *Id.* at E-3.

⁸⁷ *Id.* at E-3-4.

⁸⁸ *Id.* at E-3-4.

⁸⁹ 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) [hereinafter *Crack and Homicides in New York City*].

⁹⁰ *Id.* at 119-120.

⁹¹ *Id.*

⁹² 2002 USSC REPORT, *supra* note 4, at 54, 100, Table 17.

⁹³ *Crack and Homicides in New York City*, *supra* note 89, at 120.

⁹⁴ D. K. Hatsukami & M. W. Fischman, *supra* note 81, at 1580

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 2002 USSC REPORT, *supra* note 4, at 17.

⁹⁸ *Id.* at 18.

⁹⁹ *Id.* at 19.

¹⁰⁰ Pub. L. No. 103-322 § 280006, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. §§ 13701-14223 (2000)). The 1994 Act addressed many criminal law issues, one of which was the 100:1 ratio. Section 280006 of the 1994 Act provided that “[n]ot later than December 31, 1994, the United States Sentencing Commission shall submit a report to Congress on issues relating to sentences applicable to offenses involving the possession and distribution of all forms of cocaine. The report shall address the difference in penalty levels that apply to different forms of cocaine and include any recommendations that the Commission may have for retention or modification of such differences in penalty levels.” *Id.*

¹⁰¹ U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997) [hereinafter 1997 USSC REPORT].

¹⁰² See Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, amend. No. 5 (proposed May 10, 1995).

¹⁰³ See *Statement of the Commission Majority in Support of Recommended Changes in Cocaine and Federal Sentencing Policy* for 1995 USSC REPORT (May 1995); see also Nkechi Taifa, *Unwarranted Disparity in Sentencing Between Crack and Powder Cocaine*, at 7 (May 19, 1995) in ACLU & COALITION FOR EQUITABLE SENTENCING, COCAINE EQUITABLE SENTENCING BRIEFING: THE CALL TO END DISPARITY IN CRACK COCAINE SENTENCING (1995).

¹⁰⁴ Pub. L. No 104-38, § 1, 109 Stat. 334 (1995) (an Act to disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences).

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* § 2(a)(1)(A).

¹⁰⁷ 1997 USSC REPORT, *supra* note 101, at 2.

¹⁰⁸ *Id.*

¹⁰⁹ Elizabeth Tison, Comment, *Amending the Sentencing Guidelines for Cocaine offense: The 100-to-1 Ratio Is Not as “Cracked” Up as Some Suggest*, S. ILL. U. L.J. 413, 427 (2002).

¹¹⁰ 2002 USSC REPORT, *supra* note 4, at Appendix E, E-1–E-6.

¹¹¹ *Id.* at E-3.

¹¹² *Id.* at E-4.

¹¹³ *Id.* at E-4.

¹¹⁴ *Id.* at v.

¹¹⁵ *Id.* at v–viii.

¹¹⁶ *Id.* at viii, 104.

¹¹⁷ *Id.* at 91–92.

¹¹⁸ U.S. Sentencing Commission, *Federal Register Notice of Final Priorities* (Sept. 2006), <http://www.ussc.gov/FEDREG/2007finalpriorities.pdf>. (to be published in the Federal Register).

¹¹⁹ U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING 132 (2004).

¹²⁰ Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. (2006).

¹²¹ Crack-Cocaine Equitable Sentencing Act of 2005, H. 2456, 109th Cong. (2005).

