

# DRUG MANDATORY MINIMUMS: ARE THEY WORKING?

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## HEARING

BEFORE THE  
SUBCOMMITTEE ON CRIMINAL JUSTICE,  
DRUG POLICY, AND HUMAN RESOURCES  
OF THE  
COMMITTEE ON  
GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

MAY 11, 2000

**Serial No. 106-205**

Printed for the use of the Committee on Government Reform



Available via the World Wide Web: <http://www.gpo.gov/congress/house>  
<http://www.house.gov/reform>

U.S. GOVERNMENT PRINTING OFFICE

70-887 DTP

WASHINGTON : 2001

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## **DRUG MANDATORY MINIMUMS: ARE THEY WORKING?**

**THURSDAY, MAY 11, 2000**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY,  
AND HUMAN RESOURCES,  
COMMITTEE ON GOVERNMENT REFORM,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 11:15 a.m., in room 2154, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Mink, Cummings, Kucinich, Turner, and Schakowsky.

Staff present: Sharon Pinkerton, staff director and chief counsel; Steve Dillingham, special counsel; Don Deering, congressional fellow; Ryan McKee, clerk; Cherri Branson, minority counsel, and Jean Gosa, minority assistant clerk.

Mr. MICA. Good morning. I would like to call this hearing of the Subcommittee on Criminal Justice, Drug Policy, and Human Resources to order.

I apologize for the delay in the beginning of this hearing this morning, but we did have six consecutive votes and all of the Members were delayed. I just spoke to Mrs. Mink, the ranking member. Unfortunately, she is on her way to the White House, but Mr. Cummings and several others from the other side are on their way.

In an effort to expedite the proceedings, I am going to go ahead. The order of business will be opening statements. I will start with mine. Then, we have three panels today and by proceeding at this time I think we will be able to move quickly and hopefully make up for some of the lost time.

Again, good morning and welcome to our subcommittee. The hearing before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources today will examine Federal drug sentencing policies and practices and issues. This will include examining whether mandatory sentences for serious drug offenders can be useful tools in holding serious drug offenders accountable.

To date, our subcommittee has examined topics relating to almost every major dimension of our Nation's drug policy, both on the demand side and also on the supply side. Today's hearing is another critical element of our overall efforts to ensure that our Federal Government is performing effectively its role in combating the Nation's threats posed by drug abuse and by serious drug offenders, particularly those who manufacture and distribute these deadly drugs to our communities. Our oversight of these and other anti-

drug policies, practices and priorities will continue in the months ahead.

Today, among our witnesses will be Federal officials who are engaged in developing and implementing drug sentencing policies and priorities. The U.S. Sentencing Commission was created to help ensure that our sentencing policies and practices are both rational and fairly administered. Now that the commission's vacancies have been filled, hopefully we can learn more about both existing practices and the commission's future plans and priorities.

The Department of Justice will testify regarding its prosecution policies and practices. They will discuss the tools and leverage prosecutors need in prosecuting and enforcing our laws against very serious drug offenders. We will also examine the impact on our prisons of locking up serious drug offenders and other multiple felony offenders, as well as the need and provision of drug treatment for appropriate offenders.

Looking at some of the Department of Justice data on Federal prisons, it is evident that drug abuse is a tremendous problem for the vast majority of our prisoners and that a sizable percentage admitted to being under the influence of drugs at the time of the commission of their crimes.

According to past data compiled by the Bureau of Justice Statistics, 73 percent of Federal prisoners admitted to prior drug use. More than one-half, 57 percent, admitted to regular drug use. More than one-third of the prisoners report being under the influence of alcohol or drugs at the time that they committed their crimes and one-fourth of all prisoners report being under the influence of illegal narcotics at the time of their offense.

According to these same statistics from the Source Book of Criminal Justice Statistics in 1998, nearly one-half, some 46.4 percent of all Federal prisoners reported receiving some prior treatment services, almost 40 percent receiving the treatment while under correctional custody. To me, this illustrates the need to carefully target those offenders who are most in need and likely to succeed in drug treatment and also raises questions about the effectiveness of some of our programs. After all, our Federal prisoners' current average annual cost to taxpayers exceeds \$21,000 a year, according to the Bureau of Prisons.

Regarding treatment services for eligible nonviolent offenders, let me remind members and others that I am introducing legislation that will assist State and local prosecutors in establishing viable drug treatment options for deserving nonviolent offenders who are, in fact, serious about reforming their lives. This program will use the full leverage of the criminal justice system to ensure offender compliance.

Such a program has been successfully implemented for almost a decade in Kings County, NY. It has saved that community millions of dollars and broken the chain of drug addiction for hundreds of addicts and restored them to productive lives without endangering the public. I hope that Congress will be able to authorize and fund this important program, and we have had those involved in that program testify. We have also visited onsite that program. It holds great promise.

While I am convinced that there is a very strong need for increased successful drug treatment programs in our prisons and that a select group of nonviolent offenders who suffer from addictions are deserving of this opportunity, let me be clear that serious and tough penalties are, in fact, needed for those who manufacture and distribute illegal narcotics and dangerous drugs.

The mere fact that such offenders may have a drug addiction problem while committing serious and dangerous crimes is no excuse for lenient penalties or slaps on the wrist.

We all know the direct link between illegal narcotics and serious and dangerous crimes, even deaths. The drug czar now claims that we lose approximately 50,000 lives per year in the United States to illegal narcotics. This cannot be allowed to continue. We must make some progress and, as I have said before, we must take action now.

The front page stories of both the Washington Post and the Washington Times newspapers this week provided a good example of what I am talking about. According to the news accounts, the ringleader of one of the most violent drug gangs in the District of Columbia is being prosecuted for 15 murders. Can you imagine that, how vile and violent can drug trafficking, in fact, be?

Sadly enough, beyond our wildest imagination, the U.S. Attorneys Office unsealed a 76-count indictment, an indictment with almost 100 pages of horrific details, charging 13 gang members with crimes that included murder, drug trafficking, racketeering and conspiracy.

Let me be clear on this point. I have no reservation whatsoever in seeing that these types of killers and habitual criminals receive the maximum and most severe penalties possible. The safety of our communities and our loved ones demands that we be tough and that there be consequences for these types of actions.

In that regard, I'm glad that we have testifying before us today a former Governor who has supported tough measures for serious and dangerous criminals. I thank him and all of our witnesses who have come forward to testify. We appreciate your willingness to appear before this subcommittee and to share your knowledge and experience as we strive to address this urgent national public health priority.

We will also learn more about the concerns of some that we have, in fact, inflexible penalties that may overly be harsh consequences in some cases and that some groups may experience these consequences and they may have direct impact on some groups in our society more harshly than others. I think we can all agree that our system must be fair, effective and just in responding to serious crimes.

With those opening comments, I am pleased at this time to yield to the gentleman from Maryland, my distinguished colleague Mr. Cummings.

[The prepared statement of Hon. John L. Mica follows:]

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INDEPENDENT

**OPENING STATEMENT**

**Chairman John L. Mica**  
Subcommittee on Criminal Justice, Drug Policy and Human Resources

May 11, 2000

**Drug Mandatory Minimums: Are They Working?**

This hearing before the Subcommittee on Criminal Justice, Drug Policy and Human Resources will examine federal drug sentencing policies, practices and issues. This will include examining whether mandatory sentences for serious drug offenses can be useful tools in holding serious drug offenders accountable.

To date, this Subcommittee has examined topics relating to almost every major dimension of our nation's drug policy -- on both the demand side and the supply side. Today's hearing is another critical element of our overall efforts to ensure that the Federal government is performing its role in combating the national threats posed by drug abuse and serious drug offenders, particularly those who manufacture and distribute these deadly drugs in our communities. Our oversight of these and other anti-drug policies, practices and priorities will continue in the months ahead.

Today, among our witnesses will be federal officials who are engaged in developing and implementing drug sentencing policies and priorities. The U.S. Sentencing Commission was created to help ensure that our sentencing policies and practices are rational and fairly administered. Now that the Commission's vacancies have been filled, hopefully we can learn more about both existing practices and the Commission's future plans and priorities.

The Department of Justice will testify regarding its prosecution policies and practices. They will discuss the tools and leverage that prosecutors need in prosecuting and enforcing our laws against very serious drug offenders. We also will examine the



impacts on our prisons of locking up serious drug offenders, as well as the need and provision of drug treatment for appropriate offenders.

Looking at some of the Justice Department data on the federal prisons, I see that drug abuse is a tremendous problem for the vast majority of prisoners, and that a sizeable percentage admitted to being under the influence of drugs at the time of the commission of their crimes. According to past data compiled by the Bureau of Justice Statistics, 73% of Federal prisoners admitted to prior drug use, more than one-half (57.3%) admitting to regular drug use. More than one-third of the prisoners report being under the influence of alcohol or drugs at the time they committed their crimes, and one-fourth of all prisoners report being under the influence of illegal drugs at the time of their offense.

According to these same statistics (Sourcebook of Criminal Justice Statistics: 1998; Bureau of Justice Statistics), nearly one-half (46.4%) of all federal prisoners report receiving some prior treatment services, with almost 40% receiving the treatment while under correctional custody).

To me, this illustrates the need to carefully target those offenders who are most in need and likely to succeed in drug treatment. After all, our federal prisoners current average an annual cost to taxpayers of more than \$21,000 each, according to the Bureau of Prisons.

Regarding treatment services for eligible nonviolent offenders, let me remind Members and others that I am introducing a bill, hopefully today, that will assist state and local prosecutors in establishing viable drug treatment options for deserving nonviolent offenders who are serious about reforming their lives. This program will use the full leverage of the criminal justice system to ensure offender compliance. Such a program has been successfully implemented for almost a decade in Kings County, New York. It has saved the community millions of dollars, and broken the chains of drug addiction for hundreds of drug addicts, restoring them to productive lives without endangering the public. I hope this Congress will be able to authorize and fund this important program.

While I am convinced that there is a very strong need for expanded successful drug treatment programs in our prisons, and that a select group of nonviolent offenders who suffer from addictions are deserving of this opportunity, let me be clear that serious and tough penalties are needed for serious manufacturers and distributors of illegal and dangerous drugs. The mere fact that such offenders may have a drug addiction while committing serious and dangerous crimes is no excuse for lenient penalties or slaps on the wrist. We all know the direct link between illegal drugs and serious and dangerous crimes, even deaths. The Drug Czar now claims that we lose approximately 50,000 lives per year to illegal drugs. This cannot be allowed to continue. We must make progress, and we must take action now.

The front-page stories of both the **Washington Post** and **Washington Times** newspapers yesterday provide a good example of what I am talking about. According to the news account, the ringleader of one of the most violent drug gangs in the District of Columbia is being prosecuted for **15 murders**. Can you imagine that? How vile and violent can drug traffickers be? Sadly enough, beyond our wildest imagination. The U.S.

Attorney's Office unsealed a 76-count indictment -- an indictment with almost 100 pages of horrific details -- charging 13 gang members with crimes that include **murder, drug trafficking, racketeering and conspiracy**. Let me be clear on this point, I have no reservation whatsoever in seeing that these types of killers and habitual criminals received the most severe penalties possible. The safety of our communities and our loved ones demands tough and certain consequences.

In this regard, I am glad that we have testifying before us today, a former governor who has supported tough measures for serious and dangerous criminals. I thank him and all of our witnesses who have come to testify today. We appreciate your willingness to appear before this Subcommittee and to share your knowledge and experience as we strive to address this urgent public health and safety priority.

We will also learn more about concerns that inflexible penalties can have overly harsh consequences in some cases, and that some offender groups may experience harsher consequences than others. I think that we can all agree that our system must be both fair and effective in responding to drug crimes.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I do thank you for holding this hearing on Federal drug sentencing policies and practices today.

In 1984, Congress passed the Anti-Drug Abuse Act, which reinstated mandatory minimum sentences and increased penalties for drug-related crimes in the Federal criminal justice system. The act also established a 100-to-1 sentencing differential between powder cocaine and crack cocaine. Further, in 1988, Congress created a mandatory minimum penalty for simple possession of crack cocaine. The U.S. Sentencing Commission incorporated these penalties into the Federal sentencing guidelines.

Noting serious problems resulting from the crack/powder cocaine sentencing differential, in 1995 and again in 1997, the U.S. Sentencing Commission asked Congress to reevaluate the crack/powder cocaine sentencing disparity. Congress rejected the 1995 request and has not acted on the 1997 request.

The Sentencing Commission's request was based on extensive research that showed many problems with the implementation of mandatory minimum sentences. The Sentencing Commission found that nearly 90 percent, nearly 90 percent of the offenders convicted in Federal court for crack cocaine offenses are African Americans, despite Federal surveys that routinely show that the majority of crack users are White.

In addition to these racial disparities, commentators have found that mandatory minimums lead to lengthy sentences for low-level drug dealers, fail to target violent criminals, and do not have a deterrent effect on major drug traffickers.

In a 1997 report, RAND found that mandatory minimum sentences are not cost-effective, do not reduce drug consumption, and do not decrease drug-related crime. Moreover, RAND found that mandatory minimums are less cost-effective than previous sentencing guidelines. In fact, it appears that the only thing mandatory minimum sentences have accomplished is growth in the prison industry. The Bureau of Justice Statistics estimates that drug sentencing and mandatory minimums may be largely responsible for the doubling of the prison population since the mid-1980's.

Given this kind of evidence, it is no wonder Chief Justice Rehnquist has described mandatory minimum sentences as "perhaps a good example of the law of unintended consequences."

Mr. Chairman, Federal drug policy must be well crafted and wisely applied so that it results in solutions, not unintended consequences. Our policy must be designed in coordination with a larger national effort that recognizes the appropriate allocation of drug enforcement and drug control efforts at all levels of government. To this end, Federal sentencing policy should reflect Federal priorities by targeting the most serious offenders to curb interstate and international drug trafficking and violent crime. Mandatory minimums do not achieve these goals.

Mr. Chairman, in 1970, Congress repealed most of the mandatory minimums which had been part of the Federal criminal justice system's sentencing structure. We took this action because the evidence clearly showed that increased sentence lengths were ineffective. Now we are confronted with similar evidence and have failed

to act for 3 years. Maybe this hearing will serve as the impetus to Congress's overdue reexamination of this issue.

And might I add that many of the people who sit in jail rotting are my constituents. They are African Americans, mostly men, and it is not funny. Then when I look and I see the people that you were talking about a little bit earlier, such as the man, Mr. Chairman, the indictment that you just talked about here in Washington, those are the people who really do deserve to be in jail.

We need more treatment. I have said it over again and I will say it and I will say it again. We spend a phenomenal amount of money building prison cells but when it comes to treatment, it is just not enough.

With that, Mr. Chairman, I look forward to hearing our witnesses today and again I thank you for calling this hearing.

[The prepared statement of Hon. Elijah E. Cummings follows:]

*Cong. Cummings (MD)*

DRAFT OPENING STATEMENT

Mr. Chairman, thank you for holding today's hearing on federal drug sentencing policies and practices.

In 1984, Congress passed the Anti-Drug Abuse Act which reinstated mandatory minimum sentences and increased penalties for drug related crimes in the federal criminal justice system. The Act also established a 100-to-1 sentencing differential between powder cocaine and crack cocaine. Further, in 1988, Congress created a mandatory minimum penalty for simple possession of crack cocaine. The United States Sentencing Commission incorporated these penalties into the federal sentencing guidelines.

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In addition to these racial disparities, commentators have found that mandatory minimums lead to lengthy sentences for low-level drug dealers, fail to target violent criminals and do not have a deterrent effect on major drug traffickers. In a 1997 report, RAND found that mandatory minimum sentences are not cost-effective, do not reduce drug consumption and do not decrease drug-related crime. Moreover, RAND found that mandatory minimums are less cost effective than previous sentencing guidelines. In fact it appears that the only thing mandatory minimums have accomplished is growth in the prison industry. The Bureau of Justice Statistics estimates that drug sentencing and mandatory minimums may be largely responsible for the doubling of the prison population since the mid-1980s.

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Thank you for holding today's hearing. I look forward to hearing the witnesses.

Mr. MICA. I thank the gentleman and I will recognize the gentleman from Texas, Mr. Turner, for an opening statement.

Mr. TURNER. Thank you, Mr. Chairman. I want to join Mr. Cummings in thanking you for the opportunity to have this hearing.

As a member of the Texas Legislature, I worked very hard in Texas to try to revise our penal code to be sure we kept violent offenders behind bars longer. We ended up with one of the largest prison systems in the world. That is not to say that we always put the right people behind those bars and I think we probably do need to take a very close look at the Federal law to be sure that we are using every prison cell to the best advantage and that we are holding violent offenders in those cells.

I am one who believes very firmly that we need to emphasize drug treatment much more than we do, that we need to be sure that we are being innovative in the way we administer punishment to those nonviolent offenders, so we do get their attention and recognize that even a nonviolent drug offender deserves to be dealt with very firmly. But I think this is a good hearing, a worthy purpose, to take a look at mandatory sentencing at the Federal level. Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman and recognize the gentlelady now from Illinois, Ms. Schakowsky, for an opening statement.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. Just a few words.

The United States now has more than most any other nation in the world in the number of people behind bars. Many of them are nonviolent drug offenders. I am concerned about the mandatory minimum sentences as perhaps being the very best way—I think they are not the best way to deal with this problem. I look forward to alternatives being discussed.

I am also concerned, as Mr. Cummings is, about the 100-to-1 sentencing ratio between powder cocaine and crack cocaine and the numbers of people, particularly minority people, who therefore are incarcerated disproportionately.

So I appreciate this hearing and look forward to the witnesses.

Mr. MICA. I thank the gentlelady.

The gentleman from Maryland moves that we keep the record open for 2 weeks for additional statements. We will probably be joined by additional members and we will give them an opportunity to submit or present their opening statements. Without objection, so ordered.

I am pleased now to turn to our witness list today and our first panel consists of one very well known individual, certainly well known because he served here in the House of Representatives from 1991 to 1993. He is a friend of many of the current Members of the Congress. He also has the distinction of representing one of the most historic States now in the position of Governor, but there he served as delegate from 1983 to 1991 in the Virginia House of Delegates and held some of the area that was Thomas Jefferson's seat.

So, we are indeed delighted to have a chief executive of the State of Virginia, their 67th Governor, the Honorable George Allen. Welcome, Governor Allen.



We are an investigations and oversight subcommittee and in that capacity, since you are not a Member of Congress, I am going to ask you to stand and be sworn real quickly.

[Witness sworn.]

Mr. MICA. Sorry to inflict that formality. We usually do not do that for Members but since you have left the gang, so to speak, we have to do that.

But again you are so welcome. We are pleased to have you testify. We would like to hear your position on the question before us. Welcome, and you are recognized, sir.

**STATEMENT OF GEORGE ALLEN, FORMER GOVERNOR OF VIRGINIA**

Mr. ALLEN. Thank you, Mr. Chairman, and members of the committee. I very much appreciate the opportunity and thank you for the invitation to testify today. I commend the subcommittee's interest in looking at how the Federal Government can partner with the States and localities in combating the scourge of illegal drugs, in trying to stop them and also stop them from ruining more lives.

Mr. Chairman, I fully endorse the sentiments that were expressed in your opening statement. I do believe the mandatory minimum sentences for drug dealers are logical and desirable and that mandatory sentences, in my view, ought to be increased, especially for those who sell drugs to children, so that they serve even longer sentences in those situations.

Now mandatory minimum sentences, as a general rule, reflect the desires of people in a State or in America in the sense that it comes from Washington, and it is their sense of outrage over certain crimes. There are mandatory minimum sentences not just in dealing with drug dealing but also there are mandatory minimum sentences for assaulting a police officer, as opposed to assaulting a citizen who is not a law officer. There are mandatory minimum sentences for second drunk driving offenses. There are mandatory minimum sentences for habitual offenders and also mandatory minimums, I think very appropriate, for the use of a firearm in commission of a crime.

Now, drugs breed so much of the crime. In fact, the majority of all crime is drug-related. The chairman mentioned, as did Congressman Cummings, the situation here in the District where this individual is indicted who had been involved in 15 murders, besides having a reign of terror as far as drug dealing.

Now, you also need to think of how many other people were victimized by his minions or part of his network and people who have been robbed, individually robbed, or their homes broken into, their businesses broken into or their cars broken into from people who are addicted to drugs and have to find ways to pay for that addiction.

Now, drug use is on the rise. It was declining maybe in the 1980's but we are seeing it rising. It is rising among college students. It is rising among high school students, even in middle schools. Reports from the Federal Government and national reports show that between the ages of 12 and 17, 1 out of every 10 youngster between that age group are currently using drugs.

The age of heroin use, first-time heroin use—early in 1990, the average age for first-time use was around 26, 27 years old. It is now at 17 years old for heroin use.

Now Mr. Chairman and members of the committee, I am the father of an 11-year-old daughter and younger kids than that, but this is very worrisome to me as a parent and I think to parents all across America. It is not just an issue, though, in urban areas; it is an issue in rural areas; it is an issue in suburban areas, as well, and we must do everything we can to keep the scourge of drugs from dimming and diminishing the great promise and bright future that all our children should have.

Now, I would like to share with you some of our experiences in Virginia and some of the things that clearly do work. What we did is we abolished the lenient, dishonest parole system. Criminals, felons, especially violent criminals, are serving much longer sentences, and it is common sense. The results are that the crime rates are way down in Virginia. Virginia's crime rates are lower than the national average.

And the effort in Virginia I think can be translated into what you all are facing here as you make these decisions, especially when you realize how much drugs are involved in crime activity. Drugs obviously breed crime. Drugs destroy young lives, especially young lives, and it also tears families apart.

I think that we need to send a message that we are serious, that as far as fighting these drug dealers, that we want you out of our neighborhoods, out of our communities, out of circulation, and especially we want you out of reach of our children.

So I proposed an idea called project drug exile. It builds upon what we have done in Virginia, and you had our attorney general, Mark Early, speak to this committee just a few months ago on project exile, which was cracking down on those possessing illegal drugs—excuse me—illegal guns, and that has worked very well in the city of Richmond.

Now, project drug exile builds upon that approach in that you have more law enforcement, you have more prosecution and when people are caught, then they get mandatory sentencing.

Congressman Cummings and Congresswoman Schakowsky brought up the disparities as far as the powder cocaine versus crack cocaine. Yes, there is that discriminatory result in sentencing. My view is that what ought to be done is do not diminish the punishment for using crack cocaine; you ought to increase the punishment for those who are selling powder cocaine and, in fact, Ecstasy or methamphetamines like Crystal Meth or Ice.

I also recommend that the committee increase the mandatory minimum sentences at the Federal level—in fact, double them, double the mandatory minimums for those who are selling drugs to minors. Also, I think you ought to raise the penalty for the lethal combination of the illegal possession of a firearm and illegal drugs, increase that penalty to 7 years.

So Mr. Chairman and members of the committee, I have no compassion or any sympathy whatsoever for these drug dealers who peddle this poison to our children. We ought to treat them as if they are forcing them to use rat poison because the results can be very much the same.

So I think what needs to be done is we need to have multi-faceted, consistent enforcement. We need strong incapacitation because if somebody is behind bars, they cannot be running their operations; they cannot be harming the lives of our loved ones, our families, and ruining our communities.

So I thank you again for your interest and hope that this committee can go forth to help make our communities, working with the States, working with localities, safer places for our children to live and play and learn and us to raise our families. Thank you, Mr. Chairman.

Mr. MICA. Thank you so much for your testimony and again your participation. You have answered, right off the bat, several of my questions, the first one about the results of your abolishing the lenient parole system. You said you had dramatic decreases in violent crimes as a result of that policy. Can you elaborate?

Mr. ALLEN. Yes. Here is what we found. I came into office in 1994 but in the early 1990's, crime was increasing in Virginia. And when you look at who was committing crimes, you found that three out of every four violent crimes were being committed by repeat offenders. Rapists, for example, were serving about a quarter of their sentence and if you look at the recidivist rate, rapists are actually the very worst and they were serving about 3.9 years on a 12-year sentence. They are now serving—well, they are still in but they are serving 12 to 13 years on average.

So what we found as that if you have these violent offenders who have shown a disposition to commit violent crimes, if you double the amount of time the first offenders are serving and indeed, for repeat offenders they are serving three to five times, in some cases seven times longer, they are behind bars and they are simply not in your neighborhood; they are not lurking in a parking garage.

And the violent crime rates are down by 17 percent. The overall crime rate is down 24 percent. Our juvenile justice reforms—our juvenile crimes also dropped by—I believe the figure is 13 percent, which is more than the drop in the national average. And we have found that it has worked very, very well. In fact, it has worked better than we anticipated.

Now, in having these folks behind bars, that also prevents crime. Having somebody incapacitated or incarcerated prevents crime. The estimates are that over a 10-year period we expect to avert 26,000 violent crimes and 94,000 nonviolent felonies between 1995, which is the year this went into effect, through the year 2005, and also save more than \$2.7 billion in crime-related costs that would be prevented by the time this law is 10 years old.

We also looked retrospectively at the thousands of people who would not have been a victim of rape or murder or malicious woundings or robberies had this law been in effect, rather than releasing felons early who had murdered a young student who was working at a Wonder Bread facility in Richmond or a law officer killed on Father's Day from somebody released early or a woman being raped by a rapist who was released early.

So we have found it to be very salutary. The crime rates are down; we are safer. Nevertheless, we still, I think, as citizens, as parents, as concerned leaders, especially you all in Congress, need to understand that drug use is on the rise across this country. It

is going to take a multi-faceted approach of fighting drug manufacturing overseas, stopping it at our borders. We also have to fight it in our streets and neighborhoods and communities and we also, as was alluded to by some of the members, we also, I think, need to get into the minds and the sentiments of youngsters never to use drugs and try to rehabilitate or get those who have started using drugs off of drugs so that they can hopefully lead a productive, fulfilling life.

Mr. MICA. One other question and I will yield to my colleagues. There is some concern that by increasing these penalties, that we are packing the prisons. I wondered about the impact, since you have abolished some of the lenient parole system, the impact on your prison population.

The second part of my question would be does this unfairly impact some of the minority population? One of the concerns that has been raised here and in the media in general debate about this is that the mandatory sentencing, the tough sentencing is unfair toward some minority populations.

So could you tell us about the effect on the prison population and minority impact?

Mr. ALLEN. OK. I have about three different areas that I would like to cover.

As far as prisons, when I came into office, what the State had been doing is putting all these felons—many felons—in local jails, so you had hardened criminals, tough criminals who were felons, in with misdemeanants who were serving less than 12 months and there were several sheriffs suing in that regard and we did not have sufficient prison capacity. We had to increase the prison capacity in Virginia.

Most of the people said when you are going to abolish parole, it is going to increase prison needs, and that is true, although there were prison needs that were needed anyway and had just simply not been built in the previous years.

Now, when you look at the abolition of parole and what happened in other States, such as Florida in particular and to some extent North Carolina, when they abolished parole, if they did not increase the prison capacity, what happened was Federal judges came in there and said you have overcrowded prisons and they started randomly releasing violent criminals. Naturally, the population was pretty upset with the crime and also the fact that they did not abolish parole and these folks were being released.

Now, what you can do in a prison system is run them intelligently, as well. The proper classification of prisoners is essential to making sure you do it in the most cost-effective manner. Violent criminals ought to be in maximum security. Others ought to be in medium. Nonviolent offenders ought to be in minimum security, so some of the prisons we built were work camps and they were just in big barracks and we had those folks working. We had them cleaning up State parks after floods. We had them planting riparian buffers. We had them painting courthouses, building baseball fields. Some were doing the grounds work on community colleges.

So they are working. They are doing things and it is obviously a much less costly way of doing things.

So yes, you do have to have more prison space if you are going to have more prisoners in there serving longer sentences, but that is a primary responsibility of government. That is why people create governments, to provide safety, to prevent men from injuring one another. And I also think it is important to have obviously a good education system as another top responsibility.

Now, as far as disparity in sentencing based on race, we had found, or at least there had been studies that showed that for apparently very similar circumstances, that the sentences in Virginia prior to the abolition of parole, that the sentences for African Americans were harsher than for those who were Caucasian or White. You also found disparities in region. There would be one region of the State that would be much tougher on burglaries than they would in another and it had nothing much to do with race. It was just differences in that we have jury sentencing in Virginia and juries may come up with different sentences.

Now, what we have found as a byproduct of the abolition of parole and the sentencing guidelines that we have put into Virginia, that the disparities have been reduced in that judges—and judges do sentence, also, not just juries—but judges sentence within these guidelines, that the sentencing disparities are much, much less. In fact, there is no disparity between those who are African Americans or Hispanic or Caucasian or Asian, whatever the race or ethnic origin may be. It is much closer than before, where you have these sentences that could be, say, 20 years to life or 5 years to 20 years.

Now with the sentencing guidelines, where we wanted to increase the amount of time served, that disparity aspect has been eliminated as a byproduct of the abolition of parole.

I will say one other thing as far as the minority population, and this is a concern to all of us, that we do not want any discrimination based on race. It is the actions of that individual that matter.

And while there is a disproportionate, compared to the population of percentages in the State of Virginia of African Americans in prison, which I think is the same in the Federal system, as well, what we have found in Virginia was that African Americans were disproportionately victims of crime. I will always recall folks who said they could not sit on their front porch until we had abolished parole and people were getting put into prison for committing those crimes and no longer running roughshod in the neighborhood, and also sending a message to folks that you are not just going to get—it is not going to be a catch and release system.

So African Americans, as all citizens, are benefiting from the lower crime rates in that African Americans just statistically are disproportionately victims of crimes.

I will finally close with this aspect on the prison situation, as you talk about, well, we will have to build more prisons, and so forth. I will always invite somebody to suggest to me or suggest to you or whoever runs the Federal Bureau of Prisons who would be released? Who do they think is in prison and ought to be released soon or early or released before their time is up? And then I would ask them to find out who that is and then ask them, do they want to rent out a room in their house to them? Would they like this wonderful nonviolent theoretical person to be moving in next to

them? Would they like them hanging around with their children? I have yet to have a good answer to that question.

So I think it is the responsibility of a government to protect law-abiding citizens, victims, and law enforcement professionals.

Mr. MICA. Thank you for your response and I would like to recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Governor, for being with us. I just want to make sure I am clear on one thing. You said African Americans, the statistics show that African Americans are more likely to be the victims of crime. Is that right?

Mr. ALLEN. Yes, sir.

Mr. CUMMINGS. Is that all over the United States or—

Mr. ALLEN. That was our experience in Virginia. That was the statistics and studies from Virginia.

Mr. CUMMINGS. Now, what you did not say, and I am trying to make sure I understand you, are you saying that African Americans are more likely to commit crimes, also?

Mr. ALLEN. I do not think anybody by race or religious view or by ethnic origin is more likely to commit crimes. The question from the chairman was that there are concerns that the proportion, the number, the percentage of African Americans in prison is a higher percentage than the African American general population, and that is true.

But it is also important to understand that African Americans are also more likely, as a percentage—and these are statistics from our experiences in Virginia—to be a victim of crime. What we found in Virginia is the highest crime areas were the Norfolk area and the Richmond area, and that is why project exile in Richmond, with the abolition of parole, with enhanced enforcement, with more prosecution, getting these folks off the streets and putting them in prison who have illegal guns, and I think the same will apply with project drug exile in getting after these drug dealers since drug dealing and drug addiction spawn so much crime, will actually be of great assistance in reducing the crime rates in the city of Richmond but it will also have an impact along the whole Interstate 81 corridor, where there is a lot of truck traffic and a lot of concern about some of these Ecstacies and Meth-Ice and so forth.

Mr. CUMMINGS. The reason why I asked you that question is because, as you are, I am sure, well aware, African American men have become—not become; it has been going on for a long time, this whole issue of profiling. I was just trying to make sure—you know, you talk about victims, but I am trying to figure out whether you had this belief that African Americans are more likely to commit crimes when in *Jones v. United States* in the Fourth Circuit, the Court of Appeals found that project exile was disproportionately enforced in African American communities.

Ninety percent of exile defendants are Black while Blacks constitute only 10 percent of the State.

Mr. ALLEN. Those statistics are slightly wrong but—

Mr. CUMMINGS. Well, why don't you correct me? I want to know. I want to be real clear.

See, the victim thing is one thing but I live in a neighborhood where I see the enforcement. And I practiced law for years and I watched how laws were enforced in White areas. As a matter of

fact, I remember when I first started practicing law I would go to White counties and they would have these programs where the person never got a record and I was shocked. When I was in the city, they would get a record just like that. They had all kinds of programs for White people but for Black people, it was a whole other thing.

So I am just trying to figure out how are we doing this measuring where you are talking about African Americans and Whites. Victims is one thing, but I want to know where you, the former Governor, are coming from because people listen to you. You are a very influential man and the papers are writing what you are saying and I want to make sure that we are all clear as to what you are saying.

And I want to be clear. If you have a feeling about African Americans, and I am one who grew up in a poor neighborhood and who was profiled many times and still am, I am just wondering what your feelings are on that.

Mr. ALLEN. I believe that the individual who commits a crime ought to be held accountable for the commission of that crime and for the devastation that they bring to whomever the victim is or to society as a whole. It is certainly not my belief that any group or individual based upon their race has a greater propensity to commit a crime than another.

I certainly oppose racial profiling. I think what you need to do is look at people's actions, look at what they are doing. Do not look at somebody by the color of their skin as a way of judging whether somebody has a propensity to do one thing or another. I think we all ought to be judged equally and based upon our actions.

And in the event that—you brought so many things up, Mr. Congressman. You mentioned, for example, that from your experiences, in some, as you called them, White communities or counties versus—

Mr. CUMMINGS. A metropolitan area like Baltimore City.

Mr. ALLEN. Right, and so forth, and you saw differences. That is one thing and this is what we found in Virginia. When we abolished parole and came up with these sentencing guidelines so that felons would be serving longer sentences, serving longer time, I should say, serving more time in prison, is that if you do have a mandatory minimum, you know darned well if somebody has actually been convicted of selling drugs to a minor—let's say it is a large amount—right now the Federal law says 5 years and I think it ought to be 10 years, and I do not care if that person is African American and I do not care if they are Caucasian and I do not care if they are Hispanic, Asian, whatever they may be. If that person is doing it, that vile person, that parasite ought to be treated just as harshly because what is happening to the children, the drugs know no color and the life that is being snuffed out knows no color.

And what we need to do, I think, as a government is to make sure that every single child in this country has an equal opportunity to succeed. And yes, that does mean we have to have good tax policies and reasonable regulatory policies. The key to success, in my view, is knowledge and education and make sure these youngsters who start off with so much potential, so much imagination, that when they get into middle school, when you see 12-year-

olds being sold Ecstasy, that is dimming their future. All of that great potential of life is—sure, they can turn it around but that is going to be tough. That is going to be tough.

And that is why I think it is so important that for all children, regardless—I do not look at people based upon their race; I look at them as a human being, as somebody with great potential, who is here on Earth for a short period of time. Let's make sure that they have an opportunity to succeed and compete and lead a fulfilling life.

I think that we, as a government, have to provide that good education and also make sure that they are living in a safe community and learning in a safe school, as well.

Mr. CUMMINGS. I just have a few more questions. Let me ask you this. I listened to everything you said. Talk about treatment for me, what you did with regard to treatment in your State.

One of the things that is interesting is that you talked about your daughter and I have two daughters and I certainly understand what you are saying. One of the things that I have found in talking to young people is that one experience with crack cocaine and you can become addicted, particularly women, girls.

Mr. ALLEN. And they are using it more apparently, from the studies.

Mr. CUMMINGS. Right. Now you talked about all of that potential of young people and wanting to see them accomplish the things that they want to accomplish in life. Let's say, and people do make mistakes; all of us do at some point in our lives, and let's say that person has that experience and becomes hooked on crack cocaine.

Now, treatment hopefully will bring that person back, to get them back to where you are talking about, but without the treatment, it is like falling off the cliff. So I was just wondering what your feelings were.

Mr. ALLEN. Well, as far as the users are concerned, the users do have to be held responsible and they are accountable, as well.

What we did, especially in the juvenile justice reforms, is where there were students or youngsters, juveniles under 18 who were getting into trouble but still were nonviolent, what was missing in their lives, we found so often, was discipline. They were not getting discipline at home. They were not on a sports team. They were not in any organized activity.

So what we found is that treatment was worthwhile but they needed structure in their life. So for those who were being disruptive, let's say, in school, we created alternative schools because they still needed an education but there would be more structure in those alternative schools. There would be kind of a military component to it.

For those who were actually committing crimes and were a danger to society, yes, they were treated as adults. Just because somebody is 16 years old when they rape someone, the rape victim does not feel any differently about the trauma of it if the person is 16, as opposed to 26. Or if somebody is shot or murdered, that does not matter, the age of the culprit, and therefore that person ought to be treated in that regard and get them out of society and treated like an adult.



Now, in there we do have military-style boot camps and you can see—I saw one myself, how some of them would become leaders. They would have to get up early. They had a lot of regimen to their lives, and that was a treatment of sorts.

Now as far as drug treatment, my general view is that if somebody is in prison, they should not be getting drugs. Maybe cold turkey is the term that is used. They should be getting no drugs whatsoever.

Mr. CUMMINGS. I agree with you on that.

Mr. ALLEN. So that is a treatment in itself.

I do think, and part of my proposal on combating drugs is to understand that there are those youngsters who still can be turned around and have not actually harmed anyone else. Chairman Mica was talking about that in his opening statement. I think we need to make sure that in this treatment, that we allow people who care in communities about folks to get involved, including those who are involved in religious organizations. They are communities of faith.

I have seen and have talked to folks who have done that, whether it is in the Newport News area, the Virginia Beach area, the Richmond area or Fredericksburg, and allowed communities of faith or religiously affiliated organizations to compete like everyone else or any other agency, secular or nonsecular, for these grants to try to turn these youngsters around and get them off of drugs.

Mr. CUMMINGS. And the older people?

Mr. ALLEN. Excuse me?

Mr. CUMMINGS. And the older people, like people 25 and—

Mr. ALLEN. They should be able to help them, as well, sure, of course. I was focussing—you were talking about our children.

Mr. CUMMINGS. I understand. I understand.

Mr. ALLEN. But older, as well. Same applies, although you do not have to worry about alternative schools and so forth for somebody who is 25 years old. You are not going to have them in the juvenile justice system.

But an older person, obviously the drug treatment can be important, although if they are incarcerated for committing another crime while on drugs, being on drugs is no excuse for committing a crime. You are still held accountable for that, any more than just because they are drunk on alcohol, that is not an excuse for committing the crime.

Mr. CUMMINGS. Thank you.

Mr. ALLEN. I want to make one more point to you, Congressman Cummings, because you bring up concerns that are on all our hearts, and no one wants to have disproportionate racially discriminatory sentencing. I did not as Governor and I am glad we resolved that.

I was very sensitive to the concern that you have expressed and others, so on the parole board, we could not abolish parole retroactively; it can only be abolished prospectively, after January 1. I made an effort to make sure we had viewpoints of many people on that five-member parole board and I had a majority of the members on the parole board who were African Americans. The majority indeed were also women.

One of the members was a former drug enforcement agent but two people on that parole board were victims of crime. One was a

mother whose son was murdered and the other was a rape victim of a rapist who had committed repeated rapes. So I thought that perspective from a variety of backgrounds was very much important in determining whether somebody should be released early on parole.

They did an outstanding job on that parole board, that group with their background, and the parole grant rate dropped, with those sentiments and with those experiences, the parole grant rate dropped from nearly 50 percent to around 10 percent, and that also helped make Virginia safer.

Mr. MICA. I would like to thank you.

I would like to yield now to Mr. Turner.

Mr. TURNER. Governor, I know we all agree that the efforts that we made in the various States, including my own in Texas, trying to toughen our laws against violent offenders, has been effective and I think the crime rate reductions that we have seen across the country, the results, the availability of prison cells for violent offenders, as well as the results the efforts that Congress and the administration have made to put more police officers on the street to arrest those offenders.

The purpose of our hearing today is primarily centered on taking a look at mandatory minimum sentences and I notice you expressed your support for them and I really think that some of our other witnesses will probably address those mandatory minimum sentences at the Federal level, which is, I think, the issue we really need to center in on today because I agree; there are some instances where I think they are definitely appropriate—repeat offenders, certain offenses that we determine to be particularly egregious. Certainly I think the Congress and I think the State legislatures should have certain mandatory minimum sentences.

What we are concerned about primarily today is the Federal system and the fact that the Department of Justice reports that there are one in five of our Federal prisoners today who find themselves incarcerated and according to the Department of Justice, many of those offenders are there without any prior record of violence; they are there without any prior criminal record but have simply been caught up by the mandatory minimum sentence laws, which placed them behind bars.

I am one who believes very firmly that we need every prison cell we have in this country at the Federal level and the State level because any time we end up seeing one person released on parole or after completing their sentence, there is another violent offender standing at the door that we need to use that cell for.

So I am as zealous as you are in trying to be sure we put violent offenders behind bars, but I think we have to be not only zealous but we have to be smart in the management of our prison systems. And if we are not smart, it means that there is going to be a dangerous, violent offender out on the streets that should be behind those bars.

I do not know how far we can go in this country continuing to build prisons. I have supported every prison appropriation that we have had here and in my State legislature, but we all know that smart management is going to help us save tax dollars. I think today we have almost 2 million people all across this country in

jails or prisons somewhere. And to be sure that the taxpayers can afford our criminal justice system, those of us in public policy positions have to be ready to make the tough choices and the smart choices about criminal justice policy.

Do you have any sense, Governor, about the differences between our Federal mandatory minimum sentences and the mandatory minimum sentences that you have in the State of Virginia? Or is that an issue that I really should not ask you about?

Mr. ALLEN. No, that is fair enough. In fact, when you are talking about prisons and building more prisons, this is almost an answer to the chairman's question. Thank goodness Texas had some excess prison beds when we were doing this because we were getting sued, as I said, by these local sheriffs because Virginia, as a State, was not being sufficiently responsible in having the capacity capable for handling felons. We double-celled them but we also had to send—I have forgotten—it seems like around 500 prisoners to Texas to I think they were privately or maybe locally county-run prisons in Texas because we simply did not have the space until we could get the prisons built.

We found that the mandatory minimums that you generally have in States, you have it for the drunk drivers, repeat drunk drivers, the habitual offenders, three strikes you're out for three violent crimes, violent felonies, three strikes you're out for life. You have them for assaulting police officers; there is a mandatory minimum sentence for that, and use of a firearm in the commission of a crime, and I would like to see the mandatory minimums increased, but you could not get but so far through the legislature on some of these.

So I think the mandatory minimums that I was speaking of today actually ought to be increased and maybe we would agree on the fact that those who are selling drugs to children, to minor children, these buzzards, these predators ought to be behind bars and they ought to be behind bars for a longer period of time.

I think that when you mix drugs and guns, illegal guns and illegal drugs, that is a type of situation that you are just asking—that is such a likelihood. It is such a volatile situation, literally and figuratively, that some individual like that should get a mandatory minimum sentence. And those are the types of people that you would want in prison.

I do not know of anyone actually in the Federal prison that I think ought to be released, but I think that the Federal prison system could obviously use the same sort of approach as we did and make sure that you are classifying prisoners properly. They do not all need to be in the same cell. Nonviolent offenders we found you can almost put them in a barrack situation in bunks and have 150 of them in this big room in bunk beds and you do not need as many correctional officers to watch them all, either, if you configure it. It is more of an engineering simplicity as far as keeping your eye-sight or keeping your viewing their activities.

So I do not have any suggestions on how they might run the Federal system more efficiently but I think we are running our Virginia system much more efficiently, with proper classification and also construction that reduces—first of all, uses greater use of tech-

nology, as well as configurations that do not require as many correctional officers per inmate as was previously the case in Virginia.

Mr. TURNER. I think in your State and in mine and in most States, we can take some comfort in the fact that violent offenses are on the decline.

Mr. ALLEN. Right.

Mr. TURNER. The crime rate is declining. But I do think that we do need to work very diligently when we all are faced with the fact and the reality that drug use is on the rise.

Mr. ALLEN. Sure is, right.

Mr. TURNER. That there has to be some public policy changes to ensure that we stem that tide. And a lot of those efforts, I am afraid, have to be centered on drug treatment, drug prevention, and to be sure that we are utilizing our prisons to hold the violent offenders and not the nonviolent.

If we end up with a system where we have incarcerated a whole lot of nonviolent drug offenders and we do not rehabilitate them properly, we are probably just perpetuating a cycle. And the thing that always amazed me in my time of practicing law was for certain elements of our society, how oftentimes a prison term does not result in a rehabilitated individual. We have to get smarter, I think, about doing that in our States and at the Federal level.

But I do appreciate your testimony today and your thoughts on the subject and I concur with your sense that we must continue to be sure that we work diligently on this problem and I commend you on your initiative.

Mr. ALLEN. Congressman, I commend yours, as well. I think the key to determining some of this is what is your definition of a drug offender? If the definition of a drug offender is if that person is a drug dealer, I think they ought to be incapacitated.

And while yes, the prison population is increasing across the country, also the crime rates are going down. And, as you well know, and I know you seem to have very good common sense and good knowledge about all of this from your experience in the State legislature, as well as here and as an attorney, is that if the incarceration was not at the rate it was now, the crime rates would not be dropping as much.

And there is a cost. Just as there is a cost of incarceration, there is also a cost to letting violent criminals or drug dealers and so forth loose and running rampant. There is a cost and I know you care very much that you do not want to see more victims of crime because there is a cost to that, as well.

So I commend you for your care, your patience and also your insight.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. MICA. Thank you. And I would again like to thank you, Governor Allen, for coming before us today, sharing with us your experiences as Governor, the Virginia experience, and also responding to questions and concerns about addressing mandatory minimum sentences.

We will excuse at this time. Thank you again for being with us and we wish you well.

Mr. ALLEN. Thank you, Mr. Chairman.

Mr. MICA. With that, we will call our second panel at this time. I am pleased to call before our subcommittee the Honorable John Steer, who is with the U.S. Sentencing Commission. He is a Commissioner with that body. Mr. John Roth is Chief of the Narcotics and Dangerous Drug Section of the Criminal Division of the Department of Justice. And Mr. Thomas Kane, Assistant Director, Information Policy and Public Affairs with the Bureau of Prisons in the Department of Justice.

As I did indicate, this is an investigations and oversight subcommittee of Congress. We do swear in our witnesses.

Also, if you have lengthy statements or documentation that you would like to have submitted as part of the subcommittee's hearing record today, just make a request through the chair and we will grant that request and put that information or lengthy documents, where possible, into the record of today's hearing.

With that, I would like you all to stand and be sworn, please.

[Witnesses sworn.]

Mr. MICA. Welcome. Now is it Mr. Steer who has a tight schedule, Commissioner Steer?

Mr. STEER. Thank you, Mr. Chairman.

Mr. MICA. You have a tight schedule, so I want to recognize—

Mr. STEER. I tried to loosen it up a little bit.

Mr. MICA. I want to recognize you first. We have been looking forward to hearing from you and welcome. You are recognized.

**STATEMENTS OF JOHN STEER, U.S. SENTENCING COMMISSIONER; JOHN ROTH, CHIEF, NARCOTICS AND DANGEROUS DRUG SECTION, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; AND THOMAS KANE, ASSISTANT DIRECTOR, INFORMATION POLICY AND PUBLIC AFFAIRS, BUREAU OF PRISONS, DEPARTMENT OF JUSTICE**

Mr. STEER. Thank you, sir. I did have a plane that I had scheduled to catch to Columbus, OH but I think it is leaving here in a minute or two. I will try to schedule a later flight.

Mr. MICA. I apologize. Again we got a delay because of the votes. So thank you for hanging in there, but we have been waiting for your testimony and look forward to it at this time.

Mr. STEER. I appreciate that. This is a very important hearing and I am pleased to be here as a representative of the newly reconstituted Sentencing Commission.

As of last November 15, seven new Sentencing Commissioners were sworn in. We had had an unprecedented break of more than a year prior to that when there were no voting Sentencing Commissioners. And when we came on board, we found that there was quite a backlog of work awaiting us, no less than seven major crime bills that Congress had enacted for which the Commission has a responsibility to write sentencing guidelines to implement the penalty provisions. So we got right to work on those, and I think in this first amendment cycle which just concluded with the submission of amendments to Congress on May 1, we have made a lot of progress in implementing each of those bills. For the most part, they dealt with economic crime policy and new technology of offenses.

They did, in one respect, deal with drug policy in the methamphetamine area, and in that regard, what we did was to conform the drug sentencing penalties and the guidelines to the heightened mandatory minimums that Congress had legislated in 1998.

By the way, Mr. Chairman, I should have asked at the beginning. I have a lengthy statement with some charts attached and I would ask permission that they be placed in the record. I am going to be summarizing my remarks.

Mr. MICA. Without objection, your entire statement will be included in the record and the attachments will be made part of the record.

Mr. STEER. The remainder of my testimony focusses primarily on three areas. First, I want to do a quick review for the committee if I could of the four major statutory enactments over the last 16 years that more or less set the stage for our drug sentencing policies today and hit the highlights of the way that the guidelines mesh or attempt to mesh with those major enactments of Congress.

Then I want to move into some discussion of some data. The commission collects quite a lot of data on the application of the sentencing guidelines, and we hope to share with you today some figures and charts that we have made that show some of the trends that have occurred over the last several years.

Along the way, I will be commenting on the interactions of the guidelines and mandatory minimums and will discuss some of the problems in trying to make those two systems as compatible as possible.

As far as the historical development of drug sentencing policy, as I said, there are essentially four laws over the last 16 years that comprise the major framework. The first of these was the Sentencing Reform Act of 1984. That was the law that set up the Sentencing Commission, and directed and authorized the creation of sentencing guidelines, which were to be presumptively mandatory. These guidelines took effect on November 1, 1987. And incidentally, in the discussion of the legislative history for that particular act, Congress showed a distinct preference for the use of guidelines, mandatory sentencing guidelines, over a system of statutory mandatory minimum penalties.

But that was in 1984. Two years later in 1986, as Mr. Cummings alluded to, Congress switched gears dramatically and enacted a series of 5 and 10-year mandatory minimum penalties for all of the major street drugs.

Now interestingly, again I would like to just recall a bit of the legislative history that was written here on the House side and to some extent reinforced in the Senate.

The theory of the 5-year mandatory minimum penalties that were prescribed for each of these major drugs was that it would impact, although it was designed based on type and quantity of drugs, it was hoped that the 5-year mandatory minimum would impact primarily on what Congress considered to be the serious traffickers, and that was described further in the legislative history as the manager at the retail level primarily—the individual who was in charge of the street-level distribution dealers but who had a management role in the events. And the 10-year mandatory minimum Congress described as being appropriate for what was considered

to be the major trafficker, the individual who was if not a kingpin, someone who was the head of a regional distribution network.

Just to give an example, under that regime of mandatory minimum sentences, the 5-year mandatory minimum was set for 100 grams of heroin or 500 grams of powder cocaine; the 10-year mandatory minimum was set for 1 kilogram of heroin or 5 kilograms of powder cocaine. There were also heightened mandatory minimums for individuals who had prior drug convictions.

As the Commission was developing the sentencing guidelines pursuant to the 1984 enactment, what it did when Congress passed the 1986 mandatory minimums was to also switch gears and to hitch, if you will, the drug sentencing guidelines' basic reference points to the mandatory minimums. So the 5-year mandatory minimum under the drug sentencing guidelines for a first offender corresponds to what we call an offense level of 26 as a measure of offense seriousness, and that, in turn, corresponds to a range of 63 to 78 months. The 10-year mandatory minimum, in turn, corresponds, again for a first offender—no other adjustments—to a level of 32, 121 to 151 months.

Of course, the guidelines also have a range of other aggravating and mitigating factors—the aggravating factors, such as use of a weapon, obstruction of justice, involving a minor in drug sales; mitigating factors such as mitigating role and acceptance of responsibility.

The third major enactment was the Anti-Drug Abuse Act of 1988. In that bill, Congress, on the one hand, applied the mandatory minimums to simple possession of more than 5 grams of crack; on the other hand, Congress doubled the mandatory minimum for continuing criminal enterprise offenses and, very importantly, made a decision, not much discussed in the consideration of the bill, but very important, that the conspiracy offenses, drug conspiracy offenses, should be subject to the same mandatory minimums as the substantive trafficking offenses.

And finally in the scheme of things, there was the Violent Crime Control and Law Enforcement Act of 1994. That is the bill that contained the so-called safety valve for low-level nonviolent drug offenders. The way that works essentially is that if the defendant can show that he meets five criteria spelled out in the law and mimicked in the sentencing guidelines, basically no violence, no weapon, no aggravating role, not more than one criminal history point, and that he tells all that he knows about the offense to the government, then it lets the defendant out from under the mandatory minimums and allows the guideline system to work with its mitigating factors that may apply. As a result, the sentence may be reduced below the mandatory minimum.

The Commission responded in 1995, and made a further response to the safety valve enactment in 1996 by reducing, for those who meet the safety valve requirements, drug offenses by an additional approximately 25 percent, so that this brought down all of the drug penalties across the range for those who meet the criteria of the safety valve.

With that as background, I would like to turn to a discussion of some of the data that we have summarized today. The first chart that these gentlemen have put up shows the way that drug types

have changed over time. Again we are focussing here not on law enforcement but rather on who actually has been sentenced in Federal court.

As you will see, the trend line for powder cocaine offenses, drug trafficking offenses, has been downward until, in this last year it has trended back up. That is the top yellow line as you see it.

For crack offenses, the red line, the trend has been mostly up over the years. The number of crack offenses has essentially doubled.

Methamphetamine and marijuana have also been on a fairly rapid growth track. Marijuana has become the predominant drug type in each of the last 3 years.

And now if we could look at two maps together you can see for two drugs, crack and methamphetamine, how they have changed in terms of the predominant drug type over the years.

In 1992, crack offenses, which are shown in yellow on these maps, were the predominant drug type sentenced in only three States and methamphetamine, shown in pink on the maps, was the predominant drug type in only one State, Hawaii. Now, you can see how rapidly that has changed over a period of time. By 1996, crack was the predominant drug type in 17 States, mostly in the Southeast and Midwest, and methamphetamine had become the predominant drug type sentenced in 10 States, mostly in the West.

Last year, the most recent one for which we have statistics, crack has declined somewhat as the predominant drug type and is now predominant in 10 States. Methamphetamine has continued to grow and is the predominant type in 12 States.

And by the way, Mr. Chairman, Florida is not shown in color on these maps, but powder cocaine has been the predominant drug type in Florida throughout this period but has decreased somewhat in importance, from 60 percent in 1992 to about 46 percent in 1999, while heroin and crack have been growing as drug types for which offenders were sentenced.

Now let's look at sentence length. This next chart shows that crack offenses are significantly the most severely sentenced and have been over time. The length of sentence has varied from 92 to 118 months. Methamphetamine sentences are likely to increase by one-third in the future years, according to Commission projections, because of recent Commission amendments, as I mentioned, that conform the guideline penalties to the mandatory minimums. But overall, the trend lines have been down as far as length of sentence for most all of the drug types.

I now have several charts that discuss some of the interactions between mandatory minimums and the guidelines. This first chart looks at a group of cases that did not qualify for the safety valve, and were not substantial assistance cases. It shows how, in some respects, the mandatory minimums interfere with the workings of the guidelines.

For example, the red bar at the second from the bottom shows that, for these defendants, 60 percent of these defendants who received a mitigating role adjustment under the guidelines had their sentence trumped and made irrelevant as far as guideline factors by the mandatory minimums. Thirty-eight percent of the defendants who qualified for a downward adjustment for acceptance of re-



sponsibility were trumped, and about a third of those who were in criminal history category one, had an absence of a weapon, and had no aggravating role were nevertheless subjected to a mandatory minimum.

If we can look at the next two charts, they compare how mandatory minimums apply in respect to guideline role adjustments. The chart on the left shows that mandatory minimums do impact defendants with a mitigating role. The red bar indicates the 5-year mandatory minimum, the white, the 10-year mandatory minimum, and the yellow, the 20-year mandatory minimum. This shows the percent of defendants in each year that were subject to those mandatory minimums and yet had a mitigating role. The chart on the right shows, for the same years, those defendants who were subject to an aggravating role.

Now, if you recall again the theory, the conceptual theory that Congress used in 1986, this shows some divergence from that theory. The chart on the left shows that mandatory minimums are impacting quite frequently defendants with a mitigating role, i.e., a minor or a minimal role in the offense and are not necessarily hitting regularly defendants who have an aggravating role in the offense.

Now, if we could turn for just a moment to the operation of the safety valve for the low-level nonviolent defendants, overall, the safety valve that was enacted in 1994 and implemented in the guidelines seems to be working very well to differentiate among offenders with lower culpability. About 25 percent of drug trafficking defendants now receive the safety valve and get somewhat lower sentences as a result. As you can see, this chart indicates the incidence of the safety valve over time with respect to the highest mandatory minimum to which they were subject. As you would expect, most of these defendants—they tend to be lower level defendants—escaped from the 5-year mandatory minimum most frequently; some were subject to the 10-year mandatory minimum and because they met the criteria, were no longer subject to it, and rarely would they have escaped from a 20-year mandatory minimum.

Now although the benefit of the safety valve is substantial in terms of reducing sentence, it nevertheless results in a substantial sentence, depending on the quantity of drugs involved and the other culpability factors. So these two figures or, these two bar graphs, contrast the sentence for defendants who were subject to the safety valve and those who were not and who were sentenced to imprisonment. The bar graph on the left shows that defendants who were subject to the safety valve go to prison very often, but their average sentence is 59 months, compared to 102 months for those who did not meet the safety valve.

Finally, let's just look very quickly at some of the demographic factors. I should tell you that the age of Federal offenders who are sentenced for drug trafficking has remained fairly constant at about 35 years but is lower for crack cocaine defendants, who are about age 28. Drug trafficking is predominantly dominated by males, although we have seen an increase in the degree to which females are represented in the drug trafficking population.

As far as the impact on race, these two charts indicate that there has been a differential impact with respect to the mandatory minimums. The first chart indicates that over time, mandatory minimums have applied differently based on the race of the defendant. The impact on White offenders has gone down somewhat; the impact on Blacks has evened out and has held fairly steady, and the impact on Hispanics has generally become greater.

In the most recent full year for which we have data, this chart on the right indicates that, insofar as the particular mandatory minimum that impacts on defendants, White defendants were more often subject to the 5-year mandatory minimum; with regard to the 10-year mandatory minimum, Blacks began to be impacted more frequently; and as far as the heightened mandatory minimums, the 20-year mandatory minimum and the life, mandatory life imprisonment, they impact most heavily on Black defendants.

I would add a note of caution in interpreting these data. These data indicate differential impact. They cannot be said to necessarily represent a systemic discrimination problem. They are based primarily on the defendants who had a particular quantity of drugs or, in some cases, quantity and prior drug conviction.

In conclusion, let me make just a couple of summary comments about the interaction of guidelines and mandatory minimums. I think that our data indicate over time that the guidelines can achieve the requisite level of toughness that Congress desires but also can do that by tempering toughness with individuality and proportionality.

Mandatory minimums are a very broad-brush approach. They look at just one or two factors, and they tend to treat offenders who may be very different as if they were similar. They tend to have the effect of blocking legitimate mitigators under the guideline system in deserving cases.

In conspiracy cases they tend to reach very broad because drug quantities are aggregated over time and quantities trafficked by one offender can be attributed to another offender. That is not true for the substantive offenses.

The crack possession mandatory minimum creates a unique structural problem with respect to the guidelines, and it is a situation where the guidelines simply cannot compensate for the way the statute is written. Specifically, under the statute, for a defendant with up to 5 grams of crack, the maximum sentence—the maximum sentence is 1 year. If you have any minute fraction over 5 grams, then the minimum sentence is 5 years. So there is that cliff effect and that gap effect.

Again I think the Commission can respond to direction from Congress. We can make the guidelines as tough as Congress wants them to be while also doing a superior job of recognizing important distinctions among offenders.

In the final analysis, of course, whatever system is in place is up to Congress. Congress is the ultimate arbiter of sentencing policy. The Commission, as a group, exercises delegated authority and we try to mesh these two systems as best we can.

As I hope our data indicates, we have a growing body of information and expertise to assist Members of Congress in understanding the impact of these policy decisions, and we certainly are anxious to work together with Congress to achieve the most effective and fair sentencing policy that we can. Thank you, Mr. Chairman.

[The prepared statement of Mr. Steer follows:]

**Statement of John R. Steer**

**Member and Vice Chair of the United States Sentencing Commission  
Before the House Governmental Reform Subcommittee on Criminal Justice,  
Drug Policy and Human Resources**

**May 11, 2000**

Chairman Mica, members of the Subcommittee, I am John Steer, a Member and Vice Chair of the United States Sentencing Commission (the "Commission"). I appreciate the opportunity to testify today about drug sentencing trends, mandatory minimum penalties, and how these statutory penalties interact with the federal sentencing guidelines. As you may know, on November 15, 1999, a full complement of seven voting commissioners was appointed to the Commission after a hiatus of more than a year during which there were no voting commissioners. As a group, we bring extensive and varied experience to our new jobs. Among the seven voting and two non-voting members of the Commission, five are federal judges, three have prosecutorial experience, two have criminal defense experience, two formerly were police officers, and several have had prior experience working as congressional staff. Two things we all have in common are our desire to (1) strengthen the Commission's good working relationship with Congress and others in the federal criminal justice community, and (2) maintain and improve the federal sentencing guideline system.

At the outset, let me state that all of the new commissioners are keenly interested in and concerned about drug sentencing policy. And this interest, of course, is no coincidence. Drug offenses account for approximately 40 percent of all criminal cases in the federal system, and over 150,000 drug offenders have been sentenced under the guidelines since 1989. Frankly,

however, our initial work primarily has focused on other issues – principally economic crimes, offenses involving new technologies, and sex offenses against children – as we sought to develop guidelines for a significant backlog of crime legislation and sentencing-related legislation from the 105<sup>th</sup> Congress that had accumulated during the unprecedented absence of commissioners. Accordingly, upon our appointment, we unanimously agreed that addressing these many legislative items should be our first priority for the abbreviated guideline amendment cycle that just ended on May 1, 2000.

Because we have been so busy clearing the backlog of legislative items, as a group we have not had an opportunity to discuss in great detail our views on drug sentencing policies and, thus, have not formulated “Commission” positions on these matters. We are planning to meet for three days later this month to begin our planning for the next amendment cycle and beyond. In the meantime, I can share with you some “historical” views the Commission has expressed on drug sentencing issues – views with which I am familiar because of my previous service as the Agency’s general counsel (from 1987 until my appointment). I can also share with the Subcommittee a variety of data regarding drug sentencing practices that the Commission regularly collects and analyzes.

I am pleased to report that our new Commission’s efforts to focus on outstanding legislative matters in its first amendment cycle was very productive. Last week the Commission submitted to Congress for its review guideline amendments that respond to the No Electronic Theft Act of 1997, Pub. L. 105 -147, 111 Stat. 2678, the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105 -184, 112 Stat. 520, the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105 -314, 112 Stat. 2974, the Identity Theft and Assumption Deterrence Act of

1998, Pub. L. 105 -318, 112 Stat. 2974, the Wireless Telephone Protection Act, Pub. L. 105 -172, 112 Stat. 53, firearms provisions contained in Pub. L. 105 -386, 112 Stat. 3469, and, most relevant to today's hearing, the Methamphetamine Trafficking Enhancement Act of 1998, Pub. L. 105 -277, Division E, 112 Stat. 2671.

The Methamphetamine Trafficking Enhancement Act of 1998 increased the statutory mandatory minimum penalties for methamphetamine offenses by cutting in half the quantity of pure substance and methamphetamine mixture that trigger separate five and ten year mandatory minimum sentences. Under the Act, five grams of methamphetamine (pure), or 50 grams of methamphetamine mixture, trigger the five year mandatory minimum sentence, and 50 grams of methamphetamine (pure), or 500 grams of methamphetamine mixture, trigger the ten year mandatory minimum sentence. The Act did not direct the Commission to amend the guidelines and, therefore, it was not legally required to do so. However, as I will explain more fully below, the Commission generally anchors its guideline penalties to the statutory mandatory minimum sentences. Consistent with that approach, the Commission passed an amendment that cuts in half the quantity of pure substance that corresponds to five and ten year sentences under the guidelines. The Commission did not amend the guidelines with respect to methamphetamine mixture because, in 1997, in response to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104 -237, 110 Stat. 3099, the Commission had modified the guidelines for methamphetamine mixture offenses in such a way that they were already aligned with the 1998 legislation.

With that background, I would like to focus the remainder of my testimony today on three areas: (i) the historical development of the principal statutory and guideline framework that

underpins drug sentencing today, (ii) the operation of these policies over time, and (iii) some of the problems created by the interaction between the guidelines and mandatory minimum sentences.

#### **Historical Development of Drug Sentencing Policy**

Four laws enacted in the last 16 years principally shape the current sentencing structure for drug offenses: the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986, the Anti-Drug Abuse Act of 1988, and the Violent Crime Control and Law Enforcement Act of 1994.

The Sentencing Reform Act of 1984, Pub. L. 98 - 473, 98 Stat. 1837 (1984), extensively overhauled sentencing at the federal level by abolishing parole, limiting “good-time” credit in prison, and directing the promulgation of detailed, mandatory, determinate federal sentencing guidelines to be issued by a newly-created United States Sentencing Commission. In enacting the Sentencing Reform Act, Congress identified three basic objectives: (i) to establish certainty and honesty in sentencing, (ii) to assure more uniform federal court sentencing decisions so that similar defendants convicted of similar offenses would receive similar sentences, and (iii) to provide proportionality and just punishment in sentencing by directing the Commission to create a system that recognizes differences among defendants and offenses and provides appropriate sentences with those differences in mind. In the drug area, for example, an off-loader whose role consisted solely of assisting in unloading several bales of marijuana would receive a sentence different from that of the kingpin who organized the drug distribution ring and received the bulk of its illicit profits. *See* 28 U.S.C §§ 991(b), 994.

Before the initial guidelines could be completed, Congress enacted the Anti-Drug Abuse Act of 1986, Pub. L. 99 - 570, 100 Stat. 3207 (1986), which created the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses. The 1986 Act set up a new regime of mandatory minimum sentences for drug trafficking offenses based on the type and amount of drug mixture involved in the offense. According to the report issued by the House Judiciary Committee following its consideration of an earlier version of the bill (H.R. 5395), the mandatory minimum scheme was designed to create proper incentives for the Department of Justice to direct its enforcement focus on “major traffickers” and “serious traffickers.” The Committee defined “major traffickers” as “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities” and intended that those persons would generally be subject to the ten year mandatory minimum sentences. Correspondingly, the Committee Report defined “serious traffickers” as “the managers of the retail level traffic, the person who is filling the bags of heroin, packaging the crack cocaine into vials . . . and doing so in substantial street quantities.” These persons generally were expected to receive the five year mandatory minimum terms. H.R. Rep. No. 845, 99<sup>th</sup> Cong., 2d Sess. Pt. 1, at 16-17 (1986).

Based on this conceptual framework, the Act set specific quantity levels for the principal street drugs that would trigger five and ten year mandatory minimum penalties and that were thought to be generally associated with serious and major traffickers, respectively. Thus, for example, one kilogram or more of a mixture or substance containing heroin triggered the ten year mandatory minimum, as did five kilograms or more of a mixture or substance containing cocaine. *See* 21 U.S.C. § 841(b)(1)(A). Drug quantities such as 100 grams or more of a mixture



or substance containing heroin, and 500 grams or more of a mixture or substance containing cocaine, triggered the five year mandatory minimum. In addition, the Act contained “heightened” mandatory minimum penalties for subsequent convictions that doubled the ten year mandatory minimum sentence to 20 years, and doubled the five year mandatory minimum sentence to 10 years. Maximum penalties also were increased for these prior record offenders.

Congress further underscored its concern about drugs by enacting the Anti-Drug Abuse Act of 1986. Pub. L. 100 - 690, 102 Stat. 4181 (1988). At one end of the drug distribution chain, Congress amended 21 U.S.C. § 844 to provide a mandatory minimum of five years for simple possession of more than five grams of crack cocaine. At the other end, Congress doubled the existing ten year mandatory minimum under 21 U.S.C. § 848(a) for an offender who engaged in a continuing drug enterprise, requiring a minimum 20 year sentence in such cases. The Act also established for the first time mandatory minimum penalties for methamphetamine trafficking offenses.

Perhaps the most far reaching provision of the 1986 Act, however, was a change in the drug conspiracy penalties. This change made the mandatory minimum penalties previously applicable only to substantive distribution and importation/exportation offenses also applicable to conspiracies to commit these substantive offenses. *See* Pub. L. 100 - 690, § 6470(a), 102 Stat. 4377 (1988). Because co-participants in drug trafficking conspiracies may have widely different levels of involvement, this change increased the potential that the applicable penalties could apply equally to the major dealer and the mid- and low-level participant.

The Commission, which at the time Congress passed the 1986 Act had not yet promulgated its initial guidelines, responded to the 1986 Act by adopting the five and ten year

mandatory minimum sentences, and the controlled substances and quantities associated with these mandatory minimum sentences, as basic reference points for the development of its drug trafficking offense guideline. See USSG §2D1.1, comment (n.10) (“The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)) as the primary basis for the guideline sentences.”). Trafficking in controlled substances and quantities listed in 21 U.S.C. §§ 841(b)(1)(A), offenses that carry a ten year mandatory minimum term of imprisonment, was assigned an “offense level” 32, which corresponds to a guideline range of 121 to 151 months for a defendant in criminal history category I (criminal history category I is associated with no or minimal criminal history; criminal history category VI is associated with a serious criminal history). Trafficking in the controlled substances and quantities listed in 21 U.S.C. § 841(b)(1)(B), offenses that carry a five year mandatory minimum term of imprisonment, was assigned an offense level 26, which corresponds to a guideline range of 63 to 78 months for a defendant in criminal history category I.

Using the above two reference points, the drug offense guideline was expanded upward and downward in two level increments to address trafficking in larger and smaller quantities of the controlled substances listed in 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B). Thus, for offenses involving drug quantities greater than those that trigger a mandatory minimum, the guidelines sentences progressively increase from the congressionally-set minimum to account for the greater quantity of drug involved. In addition, for offenses in which the defendant was deemed more culpable than a typical offender (*e.g.*, because the defendant used a weapon, had a prior criminal record, or took a leadership role in the offense), the guidelines provided for

enhanced penalties above the mandatory minimums to account for these indicia of greater offense and/or offender seriousness.

The interaction of the sentencing guidelines and mandatory minimum penalties causes some problematic results. In cases in which the guideline sentence is higher than the mandatory minimum, any applicable mitigating factors recognized by the guidelines (*i.e.*, acceptance of responsibility, reduced role in the offense) will operate to provide a proportionally lower sentence than would apply to a similarly situated offender who lacked these mitigating characteristics. Ironically, however, for the very offenders who arguably most warrant proportionally lower sentences – offenders who by guideline definitions are the least culpable – mandatory minimums generally operate to block the sentence reflecting mitigating factors. This means that these least culpable offenders may receive the same sentences as their relatively more culpable counterparts.

Congress sought to mitigate this apparent sentencing anomaly with the enactment of the “safety valve” provision contained in section 80001 of the Violent Crime Control and Law Enforcement Act of 1994. *See* H.Rpt. 103-460, 103<sup>rd</sup> Congress., 2d Sess. (1994). The safety valve relieves the defendant from being subject to a mandatory minimum sentence if the court finds: (1) the defendant does not have more than 1 criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense and was not engaged in a continuing criminal enterprise (as defined in 21 U.S.C. § 848); and (5) not later than the time of the

sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. 18 U.S.C. § 3553(f). In cases in which the court finds all of these factors, the defendant is sentenced in accordance with the applicable sentencing guidelines, without regard to any statutory minimum sentence. *Id.*

The Commission initially responded to the 1994 Act by promulgating a guideline, USSG §5C1.2., which essentially incorporates the statutory provision verbatim. In 1995, the Commission amended the drug trafficking guideline, USSG §2D1.1, to provide a downward adjustment of two offense levels for defendants who meet the safety valve criteria, but for whom, absent the amendment, relief from the mandatory minimum sentence would have no effect because their offense level as otherwise determined is level 26 or greater. As amended, the safety valve provisions in the guidelines now provide a minimum sentence of 24 months – the statutory minimum allowed under the directive to the Commission – for the least culpable category of defendants who meet the five safety valve criteria, with proportionally greater sentences for those who meet the criteria but are involved with higher drug quantities or have other factors that warrant an incremental increase in sentence.

#### **Drug Sentencing Data**

The Commission receives sentencing documents from federal courts for all felonies and Class A misdemeanors sentenced under the guidelines. During 1999, the Commission received sentencing information on approximately 55,000 offenders. For each case, the Commission extracts and enters into its comprehensive database more than 260 pieces of information, including case identifiers, sentence imposed, demographic information, statutory information, the

complete range of court guideline application decisions, and departure information. From this database, the Commission has at its fingertips a wealth of information concerning drug sentencing. The Commission uses this information to inform its consideration of amendments to the guidelines, as well as to inform others — including Congress — about sentencing policy matters. Because of time constraints, I can share only a small fraction of our data today, but we would be happy to respond to any specific data requests that you may have now or in the future.

#### **General Observations**

Since the advent of the guidelines and our data collection process, drug offenses have consistently accounted for approximately 40 percent of all sentenced federal criminal cases, and five drugs — powder cocaine, marijuana, crack cocaine, heroin, and methamphetamine — have consistently accounted for nearly all federal drug trafficking offenses. However, the contribution that each drug has made to the mix of sentenced drug offenses has varied considerably over time. Figure 1 shows the most prevalent drug type for each year from 1992 to 1999. The number of crack cocaine cases has doubled during this time, while the number of powder cocaine cases has dropped significantly, before rising again last year. In fact, powder cocaine was the most prevalent drug type in 1992, but by 1996 crack cocaine had surpassed powder cocaine to become the most prevalent drug type. Since 1996, however, the number of marijuana cases has increased dramatically to become the most prevalent drug type for the last three years.

The predominance of crack cocaine is also illustrated by Figures 2 and 3, which show the predominant drug type by state from 1992 to 1999. In 1992, crack cocaine was the predominant trafficked drug in only three states. However, by 1996, crack cocaine was the predominant drug

type in 17 states (most of which are in the midwest and southeast). According to the most recent data, crack cocaine still is the predominant drug type in 10 states (again largely in the midwest and southeast).

Equally dramatic has been the increase in the number of methamphetamine offenses. Like crack cocaine, the number of methamphetamine cases also has doubled during this time period. *See* Figure 1. The spread of methamphetamine perhaps can be best demonstrated by Figures 2 and 3. In 1992, methamphetamine was the predominant trafficked drug in only one state, Hawaii. By 1999, methamphetamine was the predominant drug in 12 states, all west of the Mississippi.

The mean length of imprisonment for each drug type for 1992 to 1999 is shown in Figure 4. Throughout this period, the mean sentences for crack cocaine offenses have been longer than for any other drug type, varying from 92 months to 118 months. The mean sentences for powder cocaine have been significantly shorter than sentences for crack cocaine (about two-thirds as long), which is not surprising given the different mandatory minimum provisions governing each drug. After crack cocaine, methamphetamine has been the most severely penalized drug, with a mean length of imprisonment ranging from 88 months to 113 months. The mean sentence for methamphetamine offenses is likely to increase in the coming years as the effect of the Commission's 1997 amendment to the drug quantity table for methamphetamine mixture becomes fully realized, and the 2000 amendment for pure methamphetamine becomes effective on November 1, 2000. The Commission expects methamphetamine offenders affected by the 2000 amendment to receive sentences 28.9 percent greater than sentences received in 1999.

**Interactions of Mandatory Minimums with the Guidelines**

Mandatory minimum sentences often trump guideline sentences for offenders who have characteristics that tend to reduce the seriousness of the offense and/or the culpability of the defendant. However, because of the applicability of the mandatory minimum provisions, the full effect of the proportionate reduction in sentence provided by the guidelines is not always permitted. Thus, mandatory minimums can have a severe effect on some offenders who are less serious, less culpable defendants.

Figure 5 shows the percentage of cases in which defendants qualified for five offender and offense characteristics, some of which qualify the defendant for downward adjustments under the guidelines, but the mandatory minimum trumped the guideline sentence. Cases in which the mandatory minimum was mooted because the defendant qualified for the safety valve or benefitted from a government substantial assistance motion (*see* 18 U.S.C. § 3553(f); USSG §5K1.1) are excluded from this analysis. In approximately 60 percent of these cases the defendant qualified for a mitigating role reduction under USSG §3B1.2 (Mitigating Role), but the mandatory minimum trumped the guideline sentence, thereby nullifying the effect of the mitigating role on the resulting sentence.

Figure 5 also shows that approximately 38 percent of these defendants qualified for a downward adjustment for acceptance of responsibility under USSG §3E1.1 (Acceptance of Responsibility), but the mandatory minimum trumped the guideline sentence. Moreover, about one-third of defendants who were in criminal history category I, which means they have no or minimal criminal history, were subject to a mandatory minimum that trumped the guideline sentence. The same holds true for defendants with no weapons involved in the offense.

Figure 6 also appears to confirm that mandatory minimums trump the guidelines in a substantial number of cases involving offenders who have offense and offender characteristics that should qualify them for proportionately lower sentences than some other offenders who receive the same mandatory minimum sentence. The percent of offenders who are subject to five year mandatory minimum sentences and who qualify for a mitigating role reduction has increased from approximately 14 percent in 1993 to approximately 22 percent in 1999. (The same table shows that defendants subject to mandatory minimum penalties of ten years are less likely, and those subject to heightened mandatory minimums of 20 years are far less likely, to qualify for a mitigating role adjustment, which is not surprising since those offenders typically are more serious offenders.) Figure 7 also evidences that offenders subject to the five year mandatory minimum provisions are not necessarily the most culpable offenders. Only five percent of defendants subject to five year mandatory minimums in 1999 qualified for a sentencing enhancement based on an aggravating role as provided by the guidelines. USSG §3B1.1 (Aggravating Role).

#### **Operation of the Safety Valve**

Available data seem to indicate that the safety valve provision is operating as Congress intended. Overall, approximately 25 percent of drug offenders benefit from the safety valve provision. Application of the safety valve increased consistently from 1995 to 1998 and has leveled off since then, as indicated by Figure 8. In particular, for each of the past three years, the safety valve has applied in over 40 percent of the cases otherwise subject to a five year mandatory minimum, and to about 30 percent of those otherwise subject to a ten year mandatory minimum. (The same figure shows that defendants subject to 20 year mandatory minimum



sentences rarely qualify for the safety valve, which is expected because they tend to be the most serious offenders with prior, disqualifying criminal history.)

Defendants who qualify for the safety valve, however, are still sentenced to substantial terms of imprisonment. Figure 9 shows that virtually all of the defendants who qualify for the safety valve received a sentence of imprisonment. Moreover, these defendants are sentenced on average to 59 months in prison, which is a substantial sentence. Offenders who do not qualify for the safety valve on average receive a much greater sentence, 102 months, which is consistent with Congress's intent in enacting the safety valve provision, and the Commission's intent in implementing it.

#### **Demographic Effects of Mandatory Minimums**

Commission data show two demographic trends with respect to the application of mandatory minimum sentences that may raise some concerns. First, Figure 10 shows that since 1993, the percent of mandatory minimum cases in which the defendant is white has decreased from 30 percent to approximately 23 percent, while the percent of such cases in which the defendant is Hispanic has increased from approximately 33 percent to almost 39 percent. Thus, during this period, Hispanics subject to mandatory minimums displaced white defendants on almost a one-to-one basis.

The percent of mandatory minimum cases in which the defendant is black has stabilized around 38 percent during the last three years. However, blacks are much more likely than white or Hispanic defendants to receive heightened mandatory minimum penalties, and the difference in the likelihood increases as the penalty increases. Figure 11 shows that in 1998 black defendants comprised only 30 percent of cases subject to a five year mandatory minimum.

However, they comprise over 40 percent of cases subject to a ten year mandatory minimum, over 60 percent of cases subject to a 20 year mandatory minimum, and almost 80 percent of cases subject to a mandatory life term.

Conversely, whites and Hispanics are less likely to receive heightened mandatory minimum penalties as the mandatory term increases. Hispanic defendants comprise approximately 44 percent of cases subject to a five year mandatory minimum, 20 percent of cases subject to a 20 year mandatory minimum, and approximately 8 percent of cases subject to a mandatory life term. Similarly, white defendants comprise approximately 25 percent of cases subject to a five year mandatory minimum, approximately 17 percent of cases subject to a 20 year mandatory minimum, and approximately 13 percent of cases subject to a mandatory life term.

Caution should be advised in interpreting this data. While the data tend to show differing impacts according to race of the defendant, the data above cannot be said to establish systemic racial discrimination.

#### **Concerns of Prior Commissions about Mandatory Minimums**

Although Congress has ultimate authority over sentencing policy and has the prerogative to set mandatory minimum penalties, the past Commissions held the position that the more efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines. This approach permits the sophistication of the guideline structure, which in essence is a more proportionate, finely tuned system of presumptively mandatory sentences, to work. The Commission described in detail the problems created by mandatory minimums, and their interaction with the guidelines, in its

Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (as directed by section 1703 of Public Law 101- 647). I will not review all of the issues raised by that report here, but I would like to highlight a few of them that are particularly relevant to drug sentencing policy.

Whereas the guidelines provide a substantial degree of individualization in determining the appropriate sentencing range for “each category of offense involving each category of defendant” as directed by 28 U.S.C. § 994(b)(1), mandatory minimums typically focus on only one or two indicators of offense seriousness (*e.g.*, the type and quantity of controlled substance involved in a trafficking offense), and perhaps one indicator of criminal history (*e.g.*, whether the defendant at any time was previously convicted of a felony drug offense).

As a result of the narrow, tariff-like approach employed by mandatory minimums, the same sentence may be imposed on divergent cases. For example, whether the defendant was a peripheral participant or the drug ring’s leader, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, all have no bearing on the mandatory minimum to which each defendant is exposed under the drug statutes.

The same tariff effect arises from doubling the mandatory minimum sentences for a single prior conviction for a felony drug offense under 21 U.S.C. § 841. The effect on the resulting sentence is the same whether the sentence for the prior conviction was probation or ten years, and whether the conviction occurred 20 years ago or one month ago. Equally problematic, if not more so, is the fact that the heightened mandatory minimums for prior felony convictions are applied inconsistently. In its mandatory minimum report, the Commission reported

prosecutors did not seek or obtain heightened punishments for prior drug felony convictions in 63 percent of the cases in which the defendant qualified for such an increased punishment.

Mandatory minimums also create a problematic cliff effect that creates sharp differences in sentences for defendants who fall just below the threshold of a mandatory minimum compared with those whose criminal conduct just meets the criteria of the mandatory minimum provision. Just as mandatory minimums fail to distinguish among defendants whose conduct and prior records differ markedly, they may distinguish far too greatly among defendants who have committed offense conduct of highly comparable seriousness. This cliff effect is particularly glaring in the area of crack cocaine penalties. Section 844 of title 21, United States Code, mandates a minimum five year term of imprisonment for a defendant convicted of a first offense, simple possession of 5.01 or more grams of crack cocaine. However, a first offender convicted of simple possession of 5.0 grams of crack cocaine is subject to a *maximum* statutory penalty of one year imprisonment. The guidelines simply cannot harmonize a statutorily mandated four-year difference in penalties between defendants whose cases may differ only by .01 gram of crack.

Mandatory minimums also throw a functional block in front of guideline factors – in particular, a defendant’s reduced role in the offense and acceptance of responsibility – that might otherwise appropriately reduce the sentence below the applicable mandatory minimum. By requiring the same sentence for defendants who are markedly dissimilar in their level of participation in the offense and in objective indications of post-offense reform, these mandatory minimum provisions short-circuit the guidelines’ design of implementing sentences proportional to the defendant’s level of culpability.

Another problematic result arises from the change in the drug conspiracy penalties in the Anti-Drug Abuse Act of 1988. As indicated above, this change made the mandatory minimum penalties previously applicable to substantive distribution and importation/exportation offenses also applicable to conspiracies to commit these substantive offenses. *See* Pub. L. 100 - 690, § 6470(a), 102 Stat. 4377 (1988). The purpose of the legislation was to synchronize the penalties for conspiracies and their underlying offenses by ensuring that a defendant who is charged with only conspiracy is not in a better position for sentencing than one who is charged solely with possession of the same amount of narcotics. However, under the principles set forth by the Supreme Court in *Pinkerton v. United States*, 328 U.S. 640 (1946), a coconspirator is criminally liable for acts of other members in the conspiracy which are done “in furtherance of the conspiracy” and which are “reasonably foreseen as a necessary or natural consequence” of the conspiracy. Consequently, lower level drug offenders can have mandatory minimums triggered by the acts of other individuals involved in the joint undertaking when those acts are reasonably foreseeable. Moreover, the drug quantity used to determine whether a mandatory minimum is triggered (as well as for calculating offense levels under the guidelines) is calculated cumulatively during the entire course of the conspiracy. The result is that many smaller scale traffickers are swept into the mandatory minimum penalties and, as explained above, the mandatory minimums may then block the operation of guideline mitigators that otherwise would tend to adjust or proportionately differentiate sentences for these offenders.

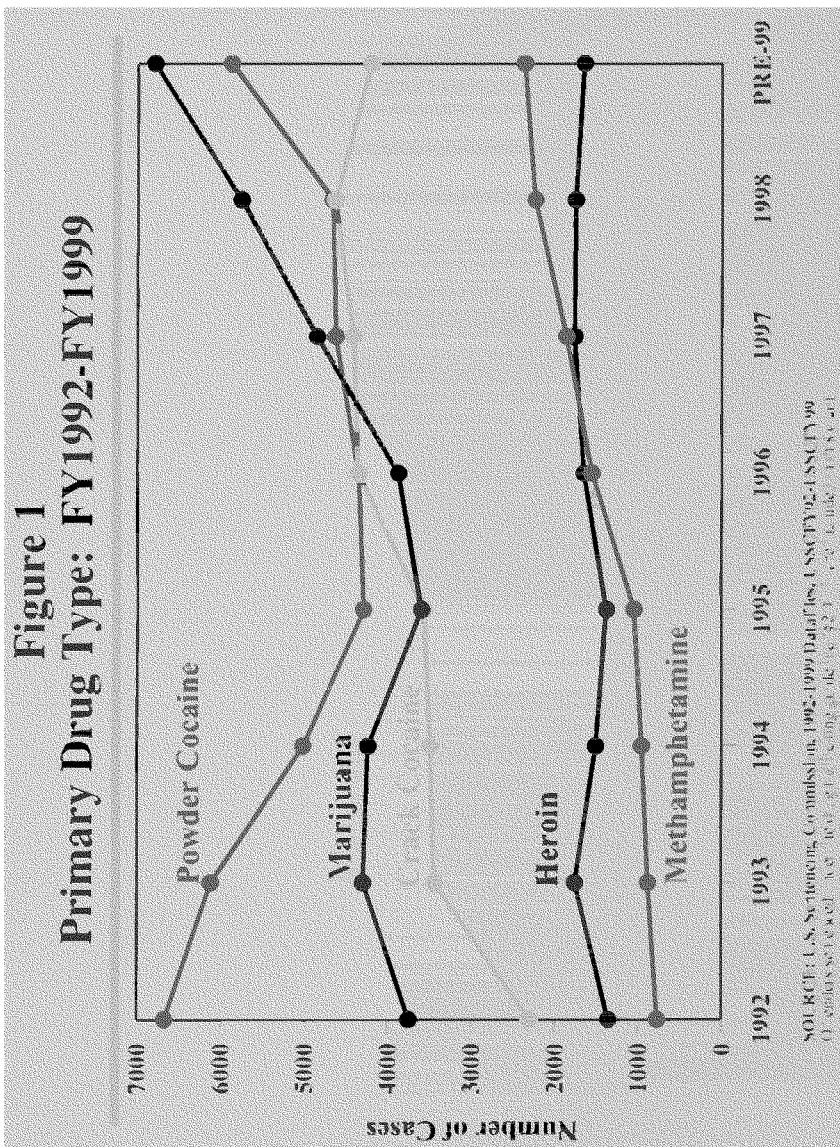
#### **Conclusion**

In conclusion, I would like to recall some of the statements made by United States Supreme Court Justices concerning mandatory minimums and the sentencing guidelines. Chief

Justice William Rehnquist has stated that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.” Remarks of Chief Justice, Nat’l Symposium on Drugs and Violence in America, June 18, 1993, at 10.

Associate Justice Stephen Breyer, in a recent speech, echoed the sentiments of the Chief Justice and stated “statutory mandatory sentences prevent the commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. Mandatory minimums will sometimes make it impossible for the Commission to adjust sentences in light of factors that its research shows to be directly relevant . . . and their existence then prevents the Commission from writ[ing] a sentence that make sense.” Justice Breyer further described Congress, in simultaneously requiring guideline sentencing and mandatory minimum sentencing, as “riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions.” Justice Breyer: *Federal Sentencing Guidelines Revisited*, FSR, Vol. 11, No. 4, Jan/Feb 1999, at 184-185.

In the final analysis, of course, it remains for Congress to shape and decide the basic framework for drug sentencing policy. However these issues may be addressed in the future, the Commission stands ready with its excellent data and research capabilities and its expertise to assist the Congress in any way it can. We look forward to working with the Congress in devising the most rational, just, and effective sentencing policies possible – for drug trafficking and other offenses.

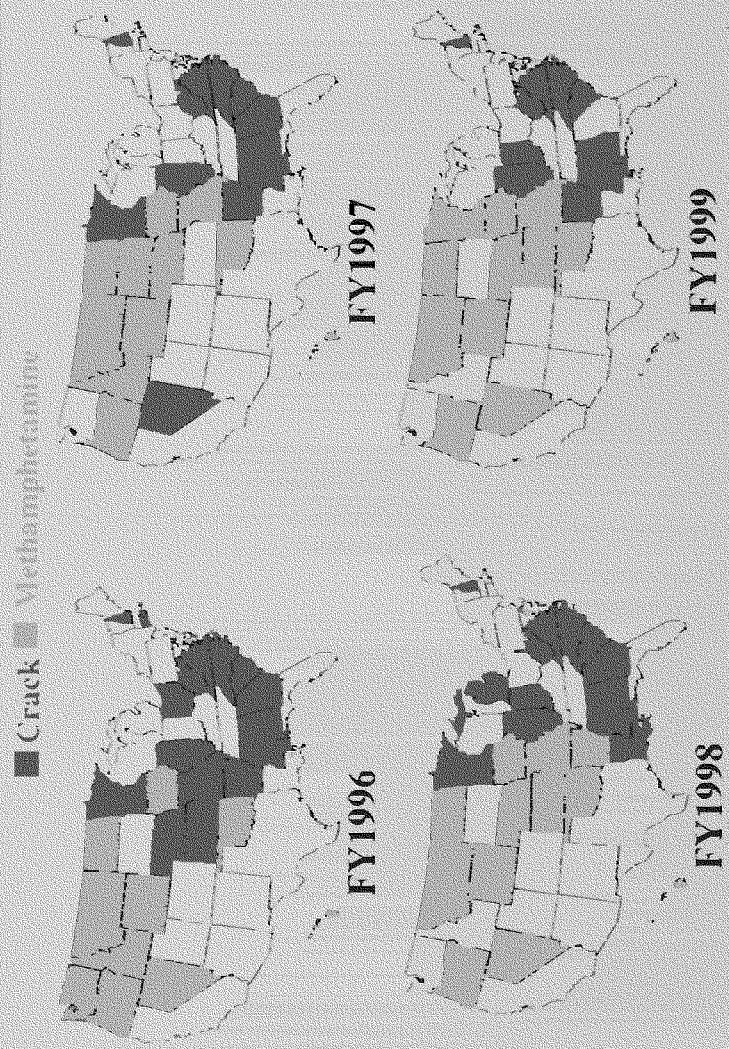


**Figure 2**  
**Predominant Drug Type by State: FY1992-FY1995**

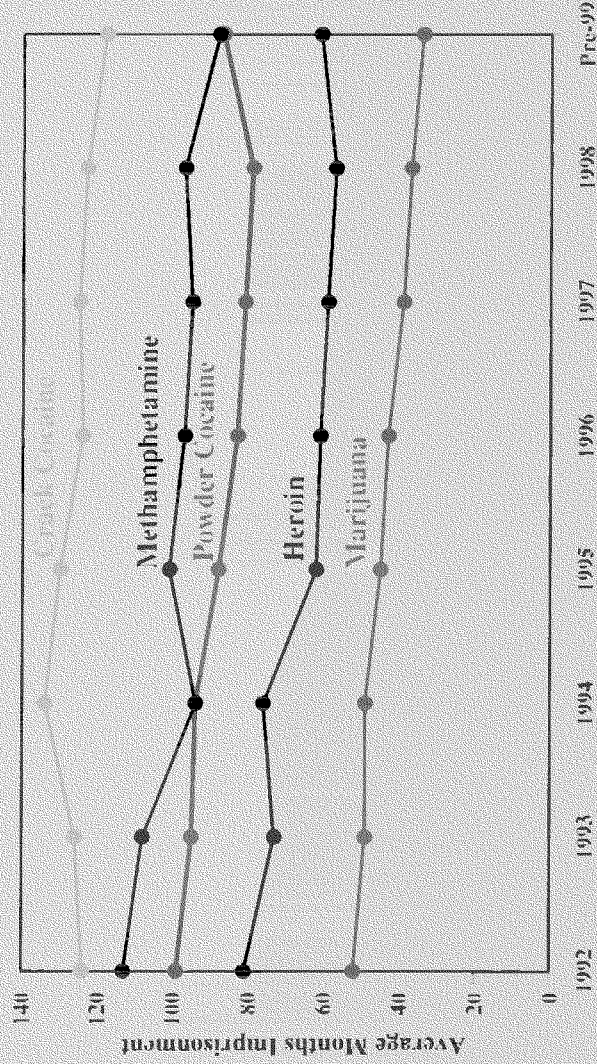




**Figure 3**  
**Predominant Drug Type by State: FY1996-FY1999**

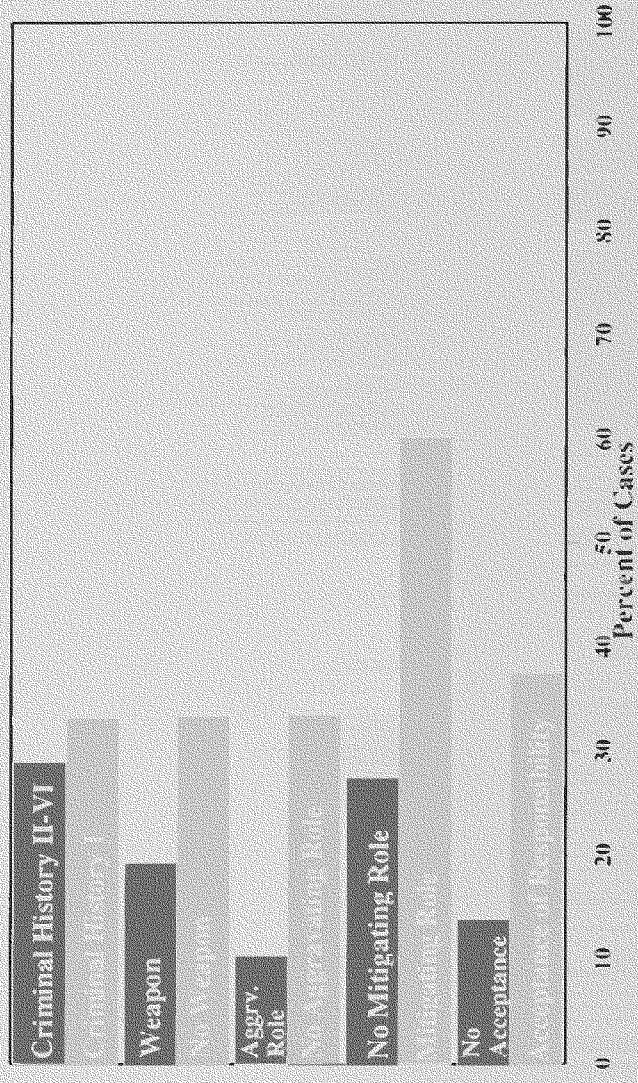


**Figure 4**  
**Average Length of Imprisonment by Drug Type**  
**FY1992-FY1999**



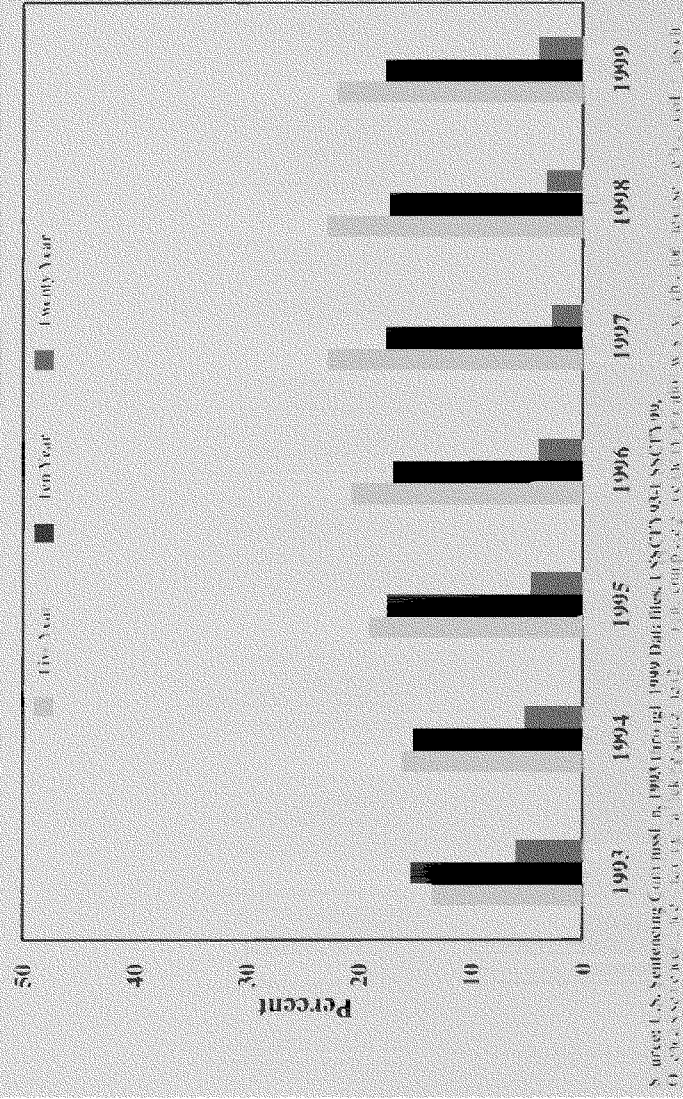
SOI RCLE, U.S. Sentencing Commission, 1992-1999 Datafiles, USSC FY 92-1 SSCTFY 99  
 OLA, SSRC, SSCTFY 92-1, and WILSON, SSCTFY 92-1, SSCTFY 99-1, SSCTFY 99-1

**Figure 5**  
**Distribution of Mandatory Trumps by Guideline Factors**

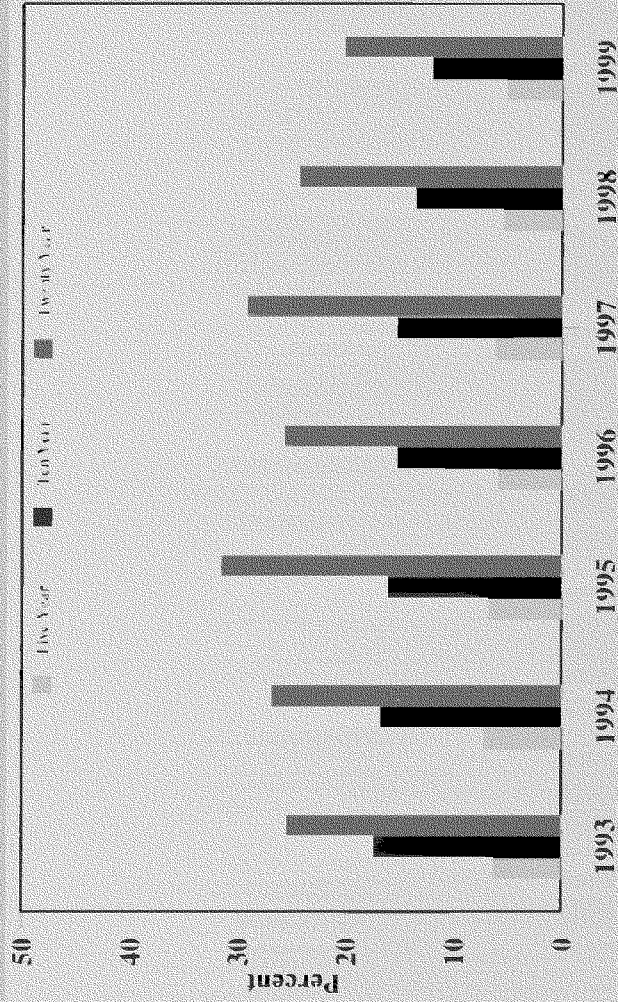


SOURCE: U.S. Sentencing Commission, 1998 Database, USSC FY98.  
Of course, the actual percentage of cases with a particular guideline factor may vary slightly from the percentages shown in this chart because of rounding.

**Figure 6**  
**Drug Trafficking Offenders with a Mitigating Role**  
**Adjustment by Length of Mandatory Minimum**

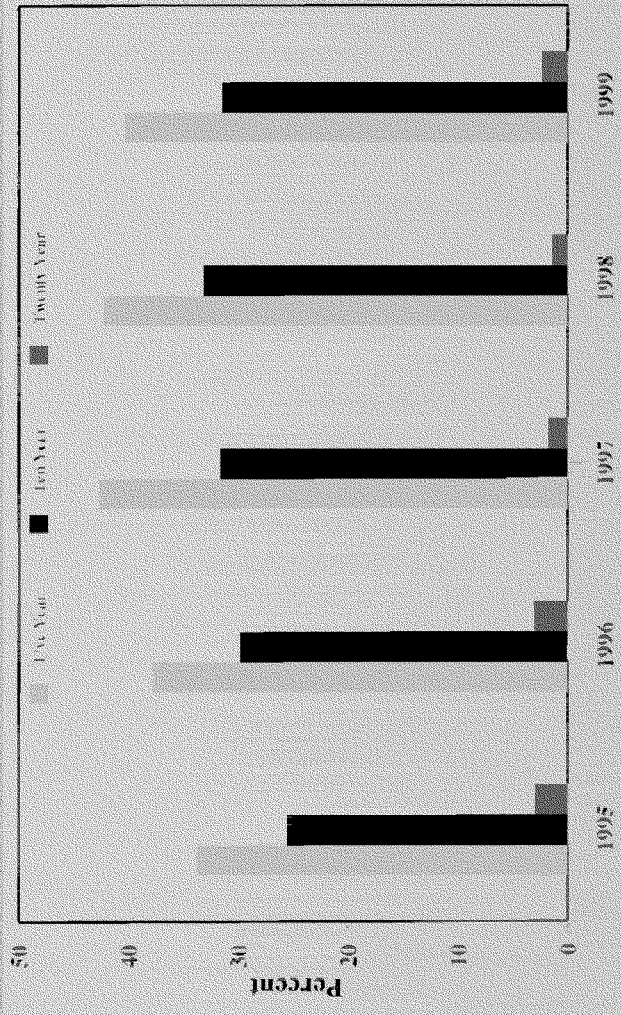


**Figure 7**  
**Drug Trafficking Offenders with an Aggravating Role**  
**Adjustment by Length of Mandatory Minimum**



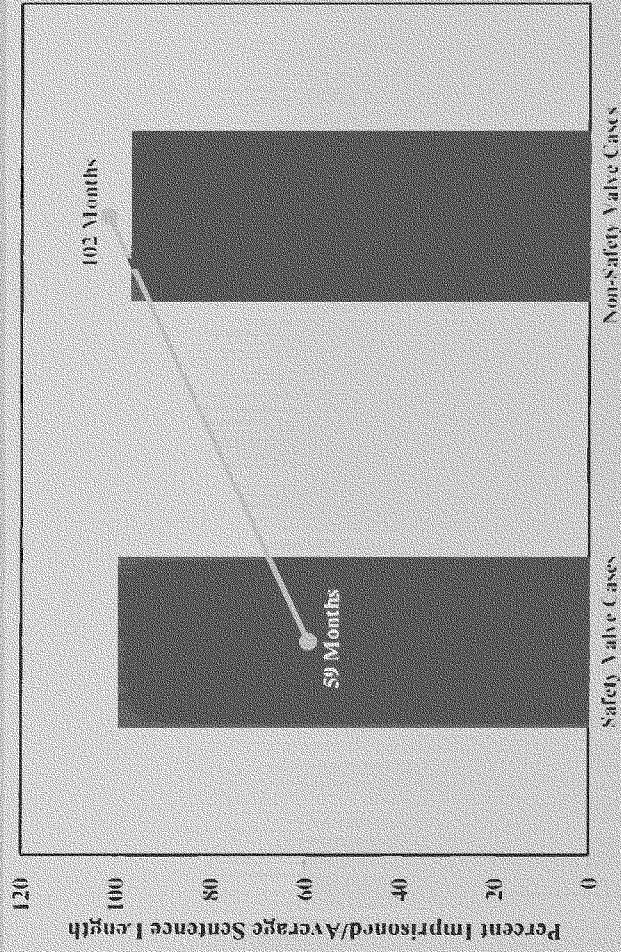
Source: U.S. Sentencing Commission, 1993 through 1999 Data on USSC FARA-USSC FY99, OASYS, U.S. Sentencing Commission, 2000. U.S. Sentencing Commission, 2000. U.S. Sentencing Commission, 2000.

**Figure 8**  
**Drug Trafficking Offenders with Safety Valve by Length of Mandatory Minimum**



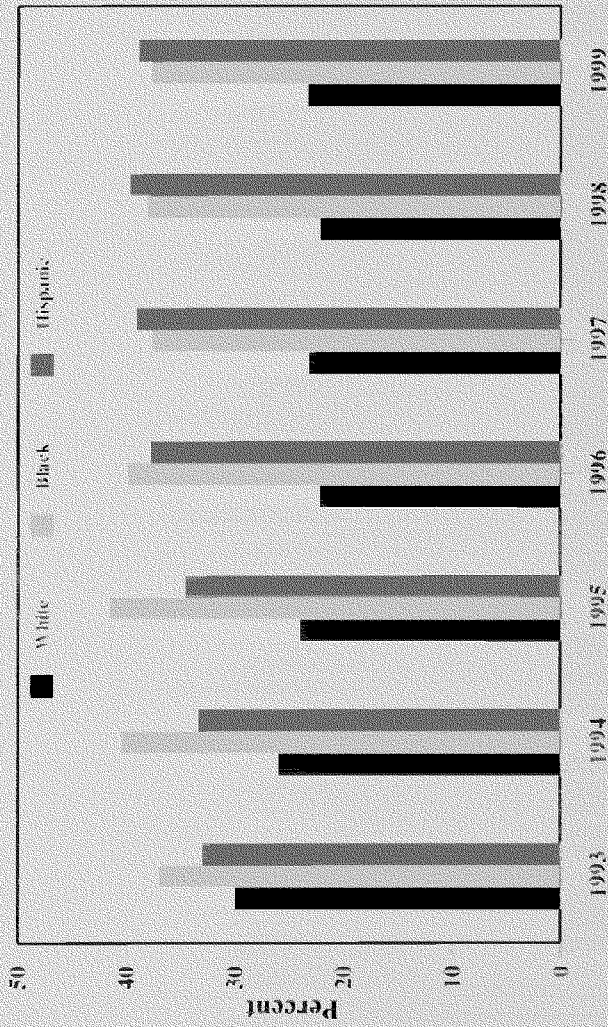
Source: U.S. Sentencing Commission, 1995 through 1999 Datafile, (see USSC FY95-1999 FY99).  
U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, FEDERAL BUREAU OF INVESTIGATION

**Figure 9**  
**Imprisonment Rates and Lengths for**  
**Safety Valve and Non-Safety Valve Cases**



SOURCE: U.S. Sentencing Commission, 1998 Datafile, USSC FY98.  
NOTE: The average sentence length for cases with a safety valve is 59 months, and the average sentence length for cases without a safety valve is 102 months.

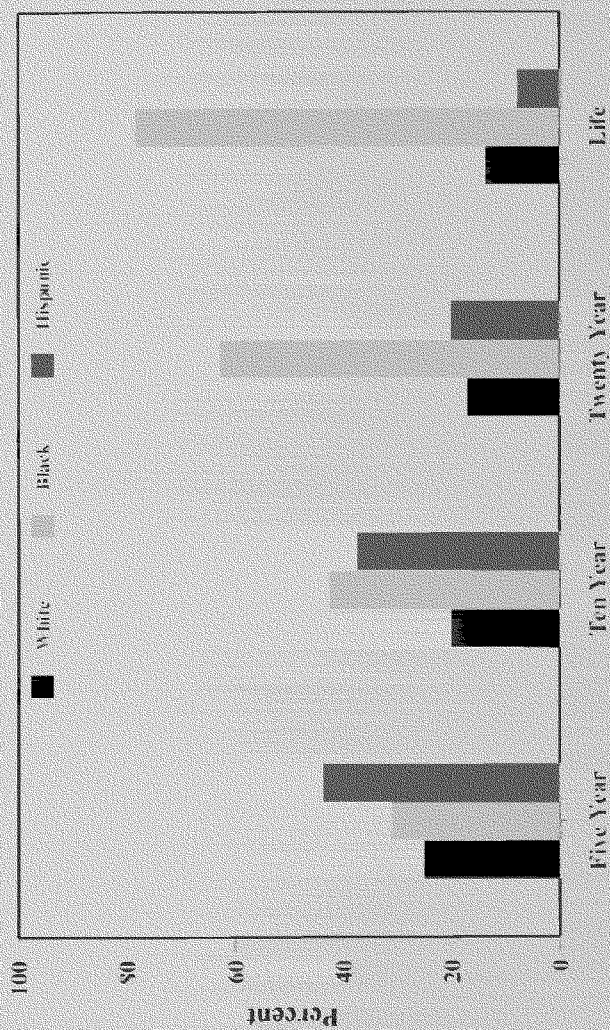
**Figure 10**  
**Race of Drug Trafficking Offenders**  
**by Application of Mandatory Minimum**



Source: U.S. Sentencing Commission, 1993 through 1999 Data Files, U.S. SENTENCING COMMISSION, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, 2001.



**Figure 11**  
**Race of Drug Trafficking Offenders**  
**by Length of Mandatory Minimum**



Source: U.S. Sentencing Commission, 1998 Data (USSCY8).  
U.S. Sentencing Commission, 2000 (USSCY00). Figures are percentages of total offenders.

Mr. MICA. Thank you for your testimony. We will withhold questions until we have heard next from Mr. John Roth, who is Chief of the Narcotics and Dangerous Drug Section, Criminal Division of the Department of Justice. Welcome, sir, and you are recognized.

Mr. ROTH. Thank you. Mr. Chairman and members of the subcommittee, my name is John Roth. I am the Chief of the Narcotic and Dangerous Drug Section in the Department of Justice.

I come to you today as a career prosecutor, someone who has represented the United States in criminal courts, primarily in narcotics cases, for the last 14 years. I have done so in two different U.S. Attorneys Offices, as well as in the Criminal Division of the Department of Justice. I have had the opportunity to be involved in the prosecution of literally hundreds of narcotics cases and I have seen the operation of the guidelines and the mandatory minimum sentences at a first-hand level. On behalf of the Department of Justice, I thank you for the opportunity to speak here today.

We are the Nation's prosecutors. The Department enforces Federal criminal laws enacted by Congress, including those laws that carry mandatory minimum sentences. We believe that the existing sentencing scheme for serious Federal drug offenses provides prosecutors with a valuable weapon in the fight against major drug traffickers. At the same time, the current mandatory minimum laws strike the right balance between allowing nonviolent offenders to escape the mandatory minimum sentences in appropriate circumstances.

Mandatory minimum sentences are reserved principally for serious narcotics offenders based on the quantity of narcotics distributed. Additionally, criminals with serious violent or drug felony convictions or who have operated a continuing criminal enterprise also receive stricter sentences. These crimes threaten our safety and should be dealt with severely. Mandatory minimums assist in effective prosecution of drug offenses by advancing several important law enforcement interests. I will talk about two of them.

First, mandatory minimums increase the certainty and the predictability of incarceration for certain crimes and ensure uniform sentencing for similarly situated offenders. The department believes that uniform and predictable sentences deter certain types of criminal behavior by forewarning the potential offender that, if apprehended and convicted, his punishment will be certain and substantial.

Mandatory minimum sentences also incapacitate certain dangerous offenders for long periods of time, thereby increasing public safety.

In addition to serving important sentencing goals, mandatory minimum sentences also provide an indispensable tool for prosecutors because we are allowed to provide, under a substantial assistance departure, we are allowed to ask the court to relieve specific defendants who cooperate in the prosecution of another individual from the mandatory minimum sentence.

In drug cases this is especially significant. Unlike a bank robbery, where a witness, for example, could be a bank teller or an ordinary citizen, typically in narcotics cases, especially serious narcotics cases, the only other witnesses are other drug traffickers. Drug dealers take pains to ensure that their distribution takes

place far from the prying eyes of law enforcement and the more sophisticated the drug dealer, the more cautious he is about dealing with anyone who might be law enforcement.

As a result, Congress has given us a tool to conduct effective narcotics investigations. The offer of relief from the mandatory minimum sentence in exchange for truthful testimony and other forms of substantial assistance allow us to move up that chain of supply, offering the sentence against the lesser dealers to go after the more serious drug traffickers—the organizers and the source of supply.

Substantial assistance agreements also give us the best evidence that we can possibly have concerning a trafficking organization—evidence from the inside of the trafficking organization as to what was involved. It allows us to strip away the secrecy in which narcotics traffickers conduct their business and to obtain the truth. Such cooperation is essential in our efforts, and we use it every day. It is no exaggeration to say that it would be impossible to do our jobs without substantial assistance departures.

While the Department views mandatory minimums as effective law enforcement tools, we also recognize the need to apply the provisions appropriately, protecting the rights of the individual defendants and to prevent miscarriages of justice.

In this regard, the primary change of the law in 1994 was the addition of the safety valve provision, which Mr. Steer discussed. It allows the courts to impose a sentence without regard to any mandatory minimum sentence in certain cases. Specifically, the safety valve allows even an otherwise serious drug defendant who didn't use a firearm or violence, who is not a leader, manager, organizer, and who does not have a serious criminal history, to be sentenced below the mandatory minimum, provided that the offense did not result in death or serious bodily injury. The defendant, in exchange, must truthfully tell the prosecutor all of the facts he knows about the case—the fact that those facts are not useful for cooperation or in other cases is irrelevant. He still is allowed to have the safety valve.

The sentencing guidelines also provide a reduction of two levels for those individuals who meet the safety valve criteria. I will just give one example of how the safety valve works.

Assume a defendant is charged with possession with intent to distribute cocaine, approximately 5 kilos of cocaine, which has a rough wholesale value of \$100,000. He does not have a significant criminal history, does not possess a firearm or violence, no death resulted, and he has expressed some responsibility for his crime. Normally, that is a 10-year mandatory minimum, 120 months, but because he is eligible for the safety valve, he would be subject to a sentencing range of between 70 and 87 months, a little under 6 years on the low end of that guideline range. If the court found that he, in fact, played a minor role in the offense, he would actually get between 57 and 71 months, or just under 5 years for 5 kilograms of cocaine. So essentially it is a 50 percent reduction from the mandatory minimum for a minor role offender.

The safety valve provision has succeeded in its purpose of preventing mandatory minimum provisions from sweeping too broadly. Its provisions are mandatory and not discretionary and it is widely used. According to Sentencing Commission data for 1998, there

were 12,055 drug defendants sentenced where the mandatory minimum was applicable. Of those cases, 4,185 or about a third were provided relief from mandatory minimum sentences.

As a result in large part of these amendments to the mandatory minimum sentences, sentences for Federal drug cases on the whole have decreased. In 1992, the average drug sentence was 89 months; in 1998, the average was 78 months, or a 12 percent decline.

In the Department of Justice we have an obligation to apply the law fairly and without discrimination. We promote uniform and equitable application of the guidelines and mandatory minimum sentences in two ways. First, we are required to charge the most serious readily provable offense or offenses, consistent with the defendant's conduct. We have no discretion to charge a lesser offense, except under narrow circumstances. Second, prosecutors must seek a plea to the most serious, readily provable offense charged. While these rules are subject to limited exceptions, the prosecutor must have a specific approval of the U.S. Attorney or a supervisor in the office and the reasons for that departure must be set forth in the file and disclosed to the court.

I would like to address finally the contention that mandatory minimums put too much discretion in the hands of the prosecutor. First, it is important to note that the provisions of the safety valve are mandatory; they are not discretionary. If a criminal defendant meets the characteristics within the safety valve, the government or the judge has no discretion but to award that reduction to the defendant.

Second, if the prosecutor makes a substantial assistance motion to the court because the defendant has assisted in the prosecution of another, the court has complete discretion to sentence the defendant without regard to the sentencing range. While the prosecutor could recommend a sentence, the court would not be bound by that sentence and could sentence the defendant to whatever sentence the court saw fit.

And finally, because the sentencing guidelines are based to a great extent on offense conduct, rather than simply on the crime charges, and that is especially true in narcotics cases, the prosecutor's ability is limited to determine the guideline sentence simply by the charges.

Taken as a whole, the Department of Justice believes that the system of mandatory minimums is fair and effective, promoting the interests of public safety while protecting the rights of the individual. We also recognize the need to periodically review the mandatory minimum provisions and to adjust their levels in light of our experience.

Again, thank you for the opportunity to speak on this important issue and I welcome your questions.

[The prepared statement of Mr. Roth follows:]

**Testimony of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal  
Division, Department of Justice**

**Before the Subcommittee on Criminal Justice,  
Drug Policy, and Human Resources  
Committee on Government Reform  
United States House of Representatives**

**Review of Drug Sentencing Policies, Guidelines, and Practices**

**May 11, 2000**

Mr. Chairman and members of the Subcommittee, my name is John Roth, the Chief of the Narcotic and Dangerous Drug Section of the Department of Justice, Criminal Division, and I appreciate the invitation to speak to you today. I come to you today as a career prosecutor having represented the United States in criminal cases, primarily narcotics cases, for the last 14 years, in two different U.S. Attorneys' offices, as well as in the Criminal Division of the Department of Justice. I have had the opportunity to be involved in the sentencing of hundreds of defendants and to see the real life workings of the sentencing guidelines and mandatory minimum drug sentences. On behalf of the Department of Justice, I thank you for the opportunity to share our views on these issues.

As the Nation's prosecutor, the Department enforces federal criminal laws enacted by Congress, including those laws that carry mandatory minimum sentences. We believe that the existing sentencing scheme for serious federal drug offenses provides prosecutors with a valuable weapon in the fight against major drug traffickers. At the same time, the current mandatory minimum laws strike the right balance by allowing nonviolent

offenders without significant criminal histories an opportunity to be sentenced without regard to the mandatory minimums.

In narcotics enforcement, mandatory minimum sentences are reserved principally for serious drug offenders, based on the quantity of narcotics distributed, and for related firearms violators. Criminals with prior drug felony convictions or who have operated a continuing criminal enterprise also receive stricter sentences.

These crimes threaten our national safety and must be prosecuted vigorously. Mandatory minimums assist in the effective prosecution of drug offenses by advancing several important law enforcement interests.

First, mandatory minimums increase the certainty and predictability of incarceration for certain crimes, assuring uniform sentencing for similarly situated offenders. The Department believes that uniform and predictable sentences deter certain types of criminal behavior by forewarning the potential offender that, if apprehended and convicted, his punishment will be certain and substantial. Mandatory minimum sentences also incapacitate serious dangerous offenders for substantial periods of time, thereby enhancing public safety.

In addition to serving important sentencing goals, mandatory minimum sentences also provide an indispensable tool for prosecutors, because the law provides relief from mandatory sentences if a defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense. This assistance can take the form of truthful and complete testimony against other traffickers. Unlike bank robbery, where the witnesses might be ordinary citizens, in narcotics violations the only witnesses typically are other criminals. Drug dealers take pains to ensure that their distribution takes place far from the prying eyes of law enforcement, and the more sophisticated the drug dealer, the more cautious he is about dealing with anyone who might be a law enforcement officer.

As a result, Congress has given us a powerful tool to conduct effective narcotics investigations. The offer of relief from a mandatory minimum sentence in exchange for truthful testimony and other forms of substantial assistance allows us to move up the chain of the drug supply, offering incentives against the lesser dealers in exchange for substantial assistance against the leaders. Substantial assistance agreements give us the best evidence we have concerning a trafficking organization — the sworn truthful testimony or other assistance of someone on the inside of the organization. It allows us to strip away the secrecy in which narcotics traffickers conduct their business and to obtain the truth.

Such cooperation is essential in our efforts to combat local, national, and international drug trafficking and related crimes. Federal prosecutors use substantial assistance departures every day to prove their cases against significant traffickers, and it is no exaggeration to say that their job would be nearly impossible without it. Courts have time and again approved the use of these departures as a legitimate tool in the enforcement of federal criminal law.

While the Department views mandatory minimums as an effective law enforcement tool, we also recognize the need to apply the provisions appropriately, protecting the rights of the individual defendant and avoiding miscarriages of justice. In this regard, the law and policy governing mandatory minimums has continually evolved. Primary among these changes has been, in 1994, the addition of the so-called "safety valve provision," located at section 3553(f) of Title 18, United States Code, which directs courts to impose a sentence "without regard to any statutory minimum sentence" in certain cases. Specifically, the safety valve allows even an otherwise serious drug defendant who did not use a firearm or violence, was not a leader or manager, and who does not have a serious criminal history, to be sentenced below the statutory mandatory minimum sentence, provided the offense did not result in death or serious bodily injury. The defendant, in exchange, must truthfully tell the government all of the facts known to him about his crime and related conduct. The sentencing guidelines also provide a



reduction in the guideline sentence for safety-valve defendants.

Let me give you an example of how the safety valve works. A defendant is charged with the possession with intent to distribute five kilograms of cocaine, which has a wholesale price of approximately \$100,000. He does not have a significant criminal history, did not possess a firearm or otherwise use violence, and has expressed an acceptance of responsibility for his crime. Ordinarily, he would be subject to a mandatory minimum sentence of 10 years. However, because he is eligible for the safety valve, he would be subject to a sentencing range of 70 to 87 months, or a little under six years on the low end of the range. [Sentencing level 32 minus 3 (acceptance of responsibility) minus 2 (safety valve) = level 27.] If the court found that he had played a minor role in the offense, he would be sentenced within a range of 57 to 71 months, or a little under five years on the low end of the range. [Level 32 minus 3(acceptance of responsibility) minus 2 (safety valve) minus 2 (minor role).]

The safety valve provision has succeeded in its purpose of preventing the mandatory minimum drug provisions from sweeping too broadly. Its provisions are mandatory, not discretionary, and it is widely used. According to the Sentencing Commission data for Fiscal Year 1998, there were 12,055 drug defendants sentenced in which a mandatory minimum was applicable. Of those cases, 4,185, or approximately

one third, were provided relief from a mandatory minimum sentence. These statistics demonstrate that the safety valve provisions are being applied regularly by federal judges, allowing greater flexibility in sentencing while maintaining appropriately serious penalties for the serious drug traffickers who use violence, who lead others in criminal activity, or who have significant criminal histories.

As a result, in large part, of these legislative amendments to the mandatory minimum sentencing provisions, sentences for federal drug cases on the whole have decreased. In 1992, the average drug sentence was 89 months; in 1998, the average drug sentence was 78 months, a 12 percent decline.

We have an obligation to apply the law fairly and without discrimination. The Department of Justice promotes uniform and equitable application of the sentencing guidelines and the mandatory minimum sentences by requiring prosecutors to charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Similarly, prosecutors must seek a plea to the most serious readily provable offense charged. While these rules are subject to limited exceptions, the prosecutor must have the specific approval of the United States Attorney or designated supervisory level official, and the rationale for diverging from the basic rule must be explicitly set forth in the prosecutor's file.

Finally, I would like to address the contention that the mandatory minimums put too much discretion in the hands of the prosecutor. First, it is important to note that the provisions of the "safety valve" are mandatory, not discretionary. As a result, if a criminal defendant meets the factors set forth in the statute, then there is no discretion on the part of either the prosecutor or the court. The defendant will be sentenced without regard to the mandatory minimum sentence. Secondly, if the prosecutor makes a substantial assistance motion to the court because the defendant has assisted in the prosecution of another, the court has complete discretion to sentence the defendant without regard to the sentencing guideline range. While the prosecutor can recommend a sentence, the court is not bound by that recommendation and may sentence the defendant to whatever the court deems is appropriate. Finally, because the sentencing guidelines are based to a great extent on offense conduct, rather than simply on the crime charged, there are significant limitations on the prosecutor's ability to determine the guideline sentence by the charges he or she files, particularly with respect to sentencing in drug-trafficking cases.

Taken as a whole, the Department of Justice believes that the system of mandatory minimums is fair and effective, promoting the interests of public safety while protecting the rights of individuals. We also recognize the need periodically to review the mandatory minimum provisions and adjust their levels in light of experience.

Again, thank you for the opportunity to speak on this important issue, and I welcome your questions.

Mr. MICA. Thank you and we will suspend questions until we have heard from our final witness, who is Thomas Kane, Assistant Director, Information Policy and Public Affairs, with the Bureau of Prisons.

Welcome, sir, and you are recognized.

Mr. KANE. Thank you, Mr. Chairman. I do have a longer witness statement that I would submit for the record and would summarize—

Mr. MICA. Without objection, your entire statement will be made part of the record. Thank you.

Mr. KANE. Thank you. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to provide information regarding Federal sentencing policy and practices as they impact the Federal Bureau of Prisons.

The Sentencing Reform Act of 1984, which established determinate sentencing, abolished parole, and reduced good time, as well as mandatory minimum sentences for drug and weapon offenses and increases in prosecutions and convictions, all have given rise to a dramatic increase in the Federal inmate population. From 1980 to 1989, the inmate population more than doubled, from over 24,000 to almost 58,000. During the 1990's the population more than doubled again, reaching 140,000 early this year.

Based upon our population projections, we anticipate in fiscal year 2007 a Federal inmate population of approximately 205,000. That is growth of nearly 50 percent over the current level.

Overcrowding in BOP facilities is currently 34 percent over capacity systemwide. At medium and high security facilities it is at 58 percent and 52 percent respectively. We must reduce overcrowding at those facilities for the safety of surrounding communities, staff, and inmates. We are making substantial progress, with 22 new prisons fully or partially funded, and for fiscal year 2001, we are requesting additional funding for nine new prisons over the next 3 years, as well as 6,000 additional contract beds, primarily for low security criminal aliens.

Since the passage of the Anti-Drug Abuse Acts of 1986 and 1988, both of which included an increased emphasis on resources for drug treatment, the Bureau has redesigned its drug treatment programs. These programs are designed to treat offenders with substance abuse problems, regardless of the offense for which they are incarcerated. Upon entry into each institution, all inmates are interviewed by our psychology staff concerning their past drug use and their records are reviewed to determine their need for drug treatment.

Based upon the result of these reviews, some inmates are required to participate in a drug abuse education course which is available in every Bureau institution. Participants in drug abuse education receive information on the physical, social, psychological and criminal impact of alcohol and drugs. In fiscal year 1999, 12,200 inmates participated in the drug abuse education course.

Currently, there are 47 drug abuse treatment programs in Bureau institutions, with a combined annual capacity of over 12,000 participants. Residential program participants are housed together in a separate unit of the prison that is reserved for drug treatment.

The programs average 9 months in duration and provide a minimum of 500 hours of drug abuse treatment.

An inmate is eligible for a residential drug abuse treatment program if he or she meets the following three criteria: No. 1, has a diagnosis based on the American Psychiatric Association diagnostic criteria for alcohol or drug abuse or dependence disorders and a record review supports this diagnosis; No. 2, signs an agreement to participate in the Bureau's drug abuse programs; and No. 3, is ordinarily within 24 months of release.

Ninety-two percent of inmates who are eligible for these treatment programs have volunteered to participate in the program. Residential treatment typically is provided within the last 2 years of an inmate's sentence, close to the inmate's release to the community. This ensures continuity with an inmate's transitional treatment program, which includes 6 months of community corrections center or halfway house placement with drug treatment.

In fiscal year 1999, 10,800 inmates participated in residential drug abuse treatment programs. In fiscal year 2000, 12,400 inmates are expected to participate.

In 1998, the Bureau's Office of Research and Evaluation completed the interim report for a study of the effectiveness of the residential drug abuse treatment program. The study, conducted with funding and assistance from the National Institute on Drug Abuse, revealed that the program has a beneficial impact on the ability of inmates to remain drug- and crime-free upon release from confinement. In comparison to inmates who did not receive residential treatment, inmates who completed treatment were 73 percent less likely to be rearrested within 6 months of their release from custody and 44 percent less likely to use drugs within 6 months of release from custody.

The results also showed that program graduates had a lower incidence of misconduct while incarcerated than did the comparison group of individuals who did not participate in the program. The results of the final report based on a 3-year followup will help us determine whether the positive effects continue beyond the initial period.

In addition to the 47 residential programs, nonresidential drug counseling is available in every Bureau institution and is provided by staff from the psychology services department. This treatment is available for drug-abusing or drug-dependent inmates who have minimal time remaining on their sentences, have serious mental health problems or are otherwise unable to participate in one of the Bureau's residential units.

In closing, we continue to effectively meet the statutory requirement to treat 100 percent of eligible offenders prior to their release. Thus far this year, the Bureau has opened four new residential drug abuse treatment programs. As our population continues to grow, including the addition of approximately 7,000 more D.C.-sentenced felons by the end of 2001, we will evaluate our need for additional beds and request them as appropriate.

Mr. Chairman, this concludes my prepared remarks. Thank you very much.

[The prepared statement of Mr. Kane follows:]

Written Statement of  
Thomas R. Kane  
Assistant Director, Information, Policy, and  
Public Affairs Division  
Federal Bureau of Prisons

Before The  
Subcommittee on Criminal Justice, Drug Policy,  
and Human Resources

Of The  
House Committee on Government Reform

May 11, 2000

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today to provide information regarding drug sentencing policy and practices as they impact the Federal Bureau of Prisons. Let me begin by thanking you, Chairman Mica, Ranking Minority Member Mink, and other members of the Subcommittee for your support of the Bureau.

**Growth of the Federal Inmate Population**

Most of the challenges affecting the Bureau today relate to the agency's growth. At the end of 1930 (the year the Bureau was created), the agency operated 14 institutions for just over 13,000 inmates. In 1940, the Bureau had grown to 24 institutions with 24,360 inmates. Except for a few fluctuations, the number of inmates did not change significantly between 1940 and 1980 (when the population was 24,252); however, the number of institutions almost doubled (from 24 to 44) as the Bureau gradually moved from operating large institutions to operating smaller, more manageable, and more cost-effective facilities of various security levels.

The Sentencing Reform Act of 1984, which established determinate sentencing, abolished parole, and reduced good time,

and mandatory minimum sentences for drug and weapon offenses gave rise to a dramatic increase in the federal inmate population. From 1980 to 1989, the inmate population more than doubled, from over 24,000 to almost 58,000. During the 1990's, the population more than doubled again, reaching 140,000 in early 2000. In fact, during Fiscal Year (FY) 1999, the BOP experienced its second consecutive year of record breaking inmate population increases. In FY 1998, the population increased by more than 10,000, and in FY 1999, the increase was over 11,300. By FY 2007, we anticipate a federal inmate population of approximately 205,000. That is growth of nearly 50 percent over the current level.

In addition to absorbing the rapidly increasing federal inmate population, the BOP has begun assuming responsibility for the incarceration of approximately 9,000 District of Columbia sentenced felons. We have taken custody of over 2000 to date, and must absorb all remaining D.C. sentenced felons by December 2001, as required by the National Capital Revitalization and Self-Government Improvement Act of 1997.

As a result of both the aforementioned sentencing modifications and increased law enforcement initiatives, overcrowding in BOP facilities is 34 percent over capacity system wide. At medium and high security facilities, overcrowding levels are at significantly higher proportions, 58 percent at medium security and 52 percent at high security. We must reduce overcrowding at those facilities for the safety of surrounding communities, staff, and inmates. With the resources Congress has already provided, we are making substantial progress with 22 new prisons fully or partially funded. However, we need to do more. In the FY '01 budget request, we seek funding and advanced appropriations to fund 9 new prisons over the next three years,



as well as \$72.1 million for 6,000 additional contract beds. Advanced appropriations, coupled with design-build contracting, will enable the BOP to build the new facilities more quickly and at less cost.

To manage the growing inmate population, staffing levels also have risen dramatically in recent years. In 1980, the Bureau had approximately 10,000 employees. That number almost doubled in 10 years to just over 19,000 in 1990. Currently, there are over 31,000 employees in the Bureau, and we anticipate needing over 49,000 employees by 2007 to accommodate our projected inmate population growth.

#### **Prison Population Projections**

We project future federal inmate populations on a regular basis using data from a variety of sources. For example, the Administrative Office of the United States Courts provides the Bureau with regular updates on federal indictments and convictions which serve as valid leading indicators of future admissions to facilities operated by, or under contract with, the BOP. In addition, we frequently estimate the impact of potential legislation upon our future prison population level.

The logical basis underlying prison population projections is quite straightforward: over time the size of a prison population essentially depends upon two factors: admissions and length of stay. Thus, in the long run, all other things being held constant, a system where 200 inmates are admitted per year each with a sentence of five years, and a system where 500 inmates are admitted per year each with a sentence of two years will have the same population: 1,000.

To estimate the impact of federally proposed legislation, we only need to estimate any change in future admissions and any

change in sentence length for those future admissions that would result from the legislative initiative. Using the new estimates of sentences, and length of stay, combined with our assumptions about future admissions, we can then compute the population impact of such pending legislation.

#### **Offender Drug Use While in Prison**

As part of the Bureau's urine surveillance and narcotic identification program within our institutions, we conduct random monthly urine testing on the inmate population. Each month we randomly test ten percent of inmates at high security facilities, five percent at medium security facilities, and three percent at low and minimum security facilities. Approximately one percent of the randomly tested inmates test positive for illicit substances, with those testing positive receiving appropriate sanctions through our disciplinary hearing process.

#### **Identifying Offender Treatment Needs**

Consistent with the research literature on drugs and crime, the Department of Justice has identified two types of incarcerated drug offenders based on their respective treatment needs:

(1) Some offenders violate laws that prohibit the possession, distribution, or manufacture of illegal drugs. Typically, these individuals are involved with drugs as a business venture and are motivated solely by financial gain. Consequently, in federal prison simple possession cases are rare. Generally called "drug-defined" offenders, these individuals may not need drug treatment, although they may benefit from other treatment that the Bureau provides, such as education, work programs, values development or anger management. This category of offenders has decreased from 61 percent in 1993 to 57.2 percent today.

(2) Other offenders violate laws as a direct result of their drug use. These offenders may experience a drug's pharmacological effects in a way that contributes to illegal activities, or they may be involved in illegal activities (such as robbery) to support continued drug use. Generally called "drug-related" offenders, these individuals are more likely to need drug treatment.

Sorting out the offender population in the Bureau and providing treatment to those in need has been the primary emphasis in the development of drug abuse treatment programs. Based upon a 1997 survey of our inmate population, we estimate that 34 percent of our population meets the criteria for drug dependence as listed in the American Psychiatric Association's Diagnostic and Statistical Manual, Fourth Edition, Revised.

#### **Bureau of Prisons Drug Treatment Programs**

Since the passage of the Anti-Drug Abuse Acts of 1986 and 1988, both of which included an increased emphasis on and resources for drug treatment, the Bureau has redesigned its treatment programs. With the help of the National Institute on Drug Abuse (NIDA), and after careful review of drug treatment programs around the country, the Bureau has developed a drug treatment strategy that incorporates the "proven effective" elements found through this review. The Bureau's strategy addresses inmate drug abuse by attempting to identify, confront, and alter the attitudes, values, and thinking patterns that lead to criminal and drug-using behavior. The current residential drug abuse treatment program includes an essential transitional component that keeps inmates engaged in treatment as they return to the community following release from prison.

#### Drug Abuse Education

As part of the standard psychological screening conducted on each inmate upon entry into a Bureau facility, inmates are interviewed concerning their past drug use to determine their

need for drug treatment. In addition, each inmate's record is assessed to determine whether: 1) there is evidence in the Presentence Investigation that alcohol or other drug use contributed to the commission of the instant offense; 2) the inmate received a judicial recommendation to participate in a drug treatment program; or 3) the inmate violated his or her community supervision as a result of alcohol or other drug use. If an inmate's record reveals any of these elements, the inmate is required to participate in a drug abuse education course, available in every Bureau institution.

Participants in drug abuse education receive information on the physical, social, and psychological impact of alcohol and drugs. Participants are also introduced to the drug abuse treatment programs that the Bureau provides. Those inmates who are identified as having a further treatment need are strongly encouraged to volunteer for the Bureau's Residential Drug Abuse Treatment Program. In Fiscal Year 1999, 12,202 inmates participated in the Drug Abuse Education course.

#### Residential Drug Abuse Treatment

Currently, 47 Bureau institutions operate residential drug treatment programs, with a combined annual capacity of over 12,000 participants. Residential program participants are housed together in a separate unit of the prison that is reserved for drug treatment programs. The programs average 9 months in duration, and provide a minimum of 500 hours of drug abuse treatment.

Prior to acceptance into a residential drug treatment program, inmates are interviewed to determine whether they meet the diagnostic criteria for an alcohol or drug dependence/abuse disorder as defined by the American Psychiatric Association,

Diagnostic and Statistical Manual, Fourth Edition (DSM-IV). An inmate is eligible for a Residential Drug Abuse Treatment Program if he or she meets the following criteria:

- (1) has a DSM-IV diagnosis for alcohol or illegal/illicit drug abuse or dependence disorder and a record review supports this diagnosis;
- (2) signs the Agreement to Participate in the Bureau's Drug Abuse Programs; and
- (3) is, ordinarily, within 24 months of release.

We are required by law to provide residential drug treatment to all eligible inmates, and resources have been requested by the Administration and appropriated by Congress to provide sufficient treatment beds. Ninety-two percent of inmates who are eligible for treatment have volunteered to participate in the program. Residential treatment typically is provided within the last two years of an inmate's sentence, close to the inmate's release to the community. This ensures continuity with the inmate's transitional treatment program, which includes six months of Community Corrections Center (halfway house) placement with drug treatment.

The Bureau's residential drug treatment program places responsibility for change on the individual by demanding compliance with the rules and regulations of treatment, encouraging the inmate to accept "ownership" of the norms of treatment, and motivating the inmate to make a firm commitment to positive change. These objectives mesh well with traditional individual and group therapy, as well as with positive skill-building techniques. In Fiscal Year 1999, 10,816 inmates participated in residential drug abuse treatment programs.

In 1998, the Bureau's Office of Research and Evaluation completed the interim report for a study of the effectiveness of the residential drug abuse treatment program. Results revealed

that the program has a beneficial impact on the ability of inmates to remain drug- and crime-free upon release from confinement. The study, conducted with funding and assistance from the National Institute on Drug Abuse, finds that inmates who completed treatment were 73 percent less likely to be re-arrested within 6 months of release from custody than those who were not treated. Similarly, inmates who completed the residential drug abuse treatment program were 44 percent less likely to use drugs within 6 months of release from custody than inmates who did not receive such treatment. Finally, the results show that program graduates had a lower incidence of misconduct while incarcerated than did a comparison group of individuals who did not participate in the program. The reduction in the incidence of misconduct among treatment graduates was 25 percent for men and 70 percent for women.

The findings are all the more encouraging because the first 6 months of an offender's release back to the community are particularly difficult. It is during that period that inmates are most vulnerable to a return to the lives they led prior to entering prison. This study indicates that residential drug abuse treatment assists inmates during this initial reintegration into the community. The results of the final report, based on a 3-year follow-up, will help us determine whether the positive effects continue beyond this initial period.

#### Transitional Services

Once a residential drug treatment program graduate is transferred from an institution to a Community Corrections Center (halfway house) or released from custody to the supervision of the U.S. Probation Service, he or she is required to continue participation in treatment. During the inmate's time in a Community Corrections Center, drug treatment is provided through community-based providers whose treatment regimen is similar to the Bureau's, ensuring consistency in treatment and supervision.

Bureau staff monitor inmate compliance with the inmate's individualized treatment plan and ensure the inmate remains drug-free by monitoring his or her progress and requiring regular urinalysis testing. In Fiscal Year 1999, the community transitional services program provided treatment for 7,386 inmates.

#### Non-Residential Drug Abuse Treatment

In addition to the 47 residential programs, non-residential drug counseling is available in every Bureau institution. This treatment is available for drug-abusing or dependent inmates who have minimal time remaining on their sentences, have serious mental health problems, or are otherwise unable to participate in one of the Bureau's residential units and seek treatment by staff in the institution's Psychology Services Department. In these programs, a licensed psychologist develops an individualized treatment plan based on a thorough assessment of the inmate. Treatment often includes individual and group therapy. Self-help groups such as Twelve-Step and Rational Recovery Groups are also available to provide support for recovering substance-dependent inmates. The Bureau's non-residential treatment component also accommodates the requirement for a prison-based aftercare program for inmates who successfully complete the residential program and return to the institution's general population prior to their release. In Fiscal Year 1999, 6,535 inmates participated in non-residential drug abuse treatment programs.

#### **Meeting the Demand for Treatment**

The Bureau continues to have a significant number of inmates volunteer for residential drug abuse treatment programs. One factor that contributes to the large number of inmates volunteering for residential drug treatment is the statutory provision that allows for the reduction of some inmates sentences

by up to one year following successful completion of a residential drug abuse treatment program. We continue to effectively meet the statutory requirement to treat 100 percent of all eligible offenders prior to their release, and we remain dedicated to monitoring this population and developing additional treatment programs and bed space as needed. Thus far this year, the BOP has opened four new residential drug abuse treatment programs. As our population continues to grow, including the addition of approximately 9,000 D.C. sentenced felons, we will evaluate our need for additional beds and request them as appropriate.

#### **Conclusion**

The Bureau of Prisons continues to meet effectively our mission to protect society by confining offenders in facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. Through their dedication and outstanding contributions, over 31,000 BOP staff continue to meet the challenges of growth and overcrowding while providing effective treatment to those in need, managing over 122,000 inmates in 95 institutions throughout the country.

Mister Chairman, this concludes my prepared remarks. I would be happy to answer any questions you or other Members of the Subcommittee might have.



Mr. MICA. Thank you, and I will start out with a few questions. First, Commissioner Steer, the offenses that you talked about, these are all for drug trafficking. There is no one involved here because of use of illegal narcotics; is that correct?

Mr. STEER. That is correct, Mr. Chairman.

Mr. MICA. And they are involved in drug trafficking in significant quantities, as set by law? They are exceeding or meeting that requirement; is that correct?

Mr. STEER. Well, they are involved with whatever quantity was trafficked, which may vary from a little to a lot.

Mr. MICA. The reason I bring that up, the marijuana, of course, has a high sentencing but people sometimes say that people are sitting in jail for our Federal—we have to limit this to Federal prisons right now—because of use of marijuana or a small quantity. None of these are those cases, right?

Mr. STEER. That is right. That is rarely the case in Federal prison, that you would find someone who has been sent there for use of a small quantity of drugs.

Mr. MICA. Also, the statistic, and I am not sure if you said 20 or 25 percent of those sentenced are now getting lesser sentences, and over what period of time is that?

Mr. STEER. The safety valve is applying to about 25 percent of the total number of defendants sentenced for drug trafficking, including the reduction that is available under the drug guidelines for those who are, because of quantity or other factors, above the mandatory minimum.

Mr. MICA. One of my concerns early on with it, the administration, was the lack of prosecution in Federal drug courts and I have a chart here, 1981 to 1998. In 1992 there were 29,000 Federal drug prosecutions and then it dropped in 1993, dropped in 1994, dropped in 1995, dropped in 1996, dropped in 1997 below those levels. It did increase in 1998. We finally got an increase in drug prosecutions. It did not seem to be a priority.

Now we are back to 1992 levels of prosecution but let me share with you, and I might ask Mr. Roth to respond to this, this is last month, a Knight Ridder report. It said, “Convicted drug offenders are spending less time behind bars but more of them are being prosecuted.” That would bring us up to date.

My concern is we were prosecuting less; now they are spending less time behind bars, and this is according to a new study of judicial records. Shorter sentences over the 1992 to 1998 time span—that includes most of the Clinton administration—suggests that the Federal judges and prosecutors are finding ways around tough mandatory minimum sentences mandated by Congress to crack down on drug offenders.

To some experts, the findings also suggest that Federal agents are increasingly nailing “small fry” drug offenders rather than the kingpins whom the Federal agencies are uniquely suited to pursue. This study by the Transactional Record Access Clearinghouse, a government performance analysis center in Washington that is associated with Syracuse University, found the average Federal drug sentence dropped by about 20 percent between 1992 and 1998. I guess we are hearing up to 25 percent.

Is this the case, Mr. Roth? Is this our policy?

Mr. ROTH. I do not believe it is, Your Honor, or chairman. A couple of issues.

One, the TRAC data uses different data than the Sentencing Commission. The Sentencing Commission's own data indicate that there has been a drop of about 12 percent in the average sentence length between 1992 and 1998. Much of that, I think, can be attributed to the fact that there is a safety valve.

So in roughly a third of the cases, we are not sentencing people who would otherwise be eligible for a mandatory minimum sentence to the mandatory minimum sentence. The example I gave, for example, of a 5 kilogram cocaine dealer who had a minor role in the offense, instead of getting the 120 months, he is going to get 60 months.

It is the department's policy that we honor the law and the spirit behind the mandatory minimums and the sentencing guidelines, that we charge the most serious criminal offense that is readily provable, and that we plea defendants, except in narrow exceptions, to the most serious readily provable offense, and we take that very seriously.

Mr. MICA. Congress also created a safety valve, Commissioner Steer, to allow for mitigating circumstances. Mandatory minimum sounds good and it probably should be applied. I think if we polled Members of Congress, they would want strong sentences for those who commit serious crimes but sometimes when you do a law one-size-fits-all, you do need some mitigating circumstances.

Is the safety valve adequate enough or should we do away with mandatory minimum sentences because there is not the ability to be fair or flexible?

Mr. STEER. Well, Mr. Chairman, I think that the safety valve is doing, relatively speaking, a good job of sorting among offenders, and those who are less culpable and less dangerous are receiving lesser sentences.

I think in an ideal world, when you have a well-functioning system of mandatory guidelines, and I think you have a pretty good system, not a perfect system at the Federal level but a good system, then arguably there is not the need for mandatory minimums that there may have been without mandatory sentencing guidelines. Some of the data that I attempted to share indicates that there are defendants who have mitigating factors about them that are left behind, that do not necessarily meet the safety valve criteria.

After all, we are talking about in some cases a difference of one criminal history point, one prior conviction for driving under the influence or one prior conviction for some other very minor offense that can disqualify the defendant. That one prior conviction may result in a total of two criminal history points and, as a result, the defendant does not meet the criteria for the safety valve. Or some other small change in sentencing factors can make a big difference in sentence because—

Mr. MICA. The question was is there enough flexibility or do we need to change the law again?

Mr. STEER. Well, I think that we could improve on the current law. In my estimation, we could have a good system without the mandatory minimums by relying on tough sentencing guidelines

that make appropriate distinctions. We can make them as tough as Congress wants, in response to whatever direction Congress chooses to give the Commission.

Beyond that, if that was not acceptable to Congress, and realistically, it probably is not at the current time, there are a number of things that could be done with respect to fine-tuning the system of mandatory minimums or expanding the safety valve that might make them work better overall.

Mr. MICA. Has the Commission recommended any legislative changes to modify the safety valve provision or are you prepared to make any recommendation at this time?

Mr. STEER. I am not on behalf of the Commission prepared to do that today because we are so relatively new and we have not had a chance to focus on drug mandatory minimum sentencing policy. I think we will be doing that and we will be glad to, at an appropriate time, share some recommendations with the Congress on what changes they might make.

Mr. MICA. Thank you. We look forward to that.

Finally, Mr. Kane, what percentage of our Federal prisoners have access to drug treatment? Did you say we now have about 140,000 Federal prisoners?

Mr. KANE. We do, Mr. Chairman.

Mr. MICA. OK. What percentage of those prisoners now have access to drug treatment? One of the things we are hearing is that there is a lack of access to drug treatment among prisoners at large, but our direct and immediate responsibility is over our Federal prison system. We can look beyond that but in your case, can you give us a guesstimate as to where we stand?

Mr. KANE. Yes. We are meeting the statutory requirement to provide 100 percent of individuals who require residential substance abuse treatment that type of treatment. We also do nonresidential treatment and drug education programs for the kinds of people, for the latter two, for the kinds of people, Mr. Chairman, who I think you mentioned in your opening statement, who may be users, occasional users, even regular users but do not rise to the level of drug abuse or dependency. The dependency or addiction people are typically treated in the residential programs.

I would say virtually all Federal offenders who are in Bureau of Prison facilities have access to the level of treatment that they need.

Mr. MICA. Virtually all?

Mr. KANE. Yes.

Mr. MICA. And residential, I consider them residents when they are sitting in prison, but residential also would have a different connotation. I am trying to look at from the entire spectrum. You are telling me virtually all of our Federal prisoners in prison, in residential programs and others, have access to some drug treatment?

Mr. KANE. Yes. Actually, of the 122,000 Federal prisoners who are actually in Bureau of Prison facilities; some are also in halfway houses, some are also in contract facilities; but within Bureau of Prison facilities, there are three types of drug treatment programs. One is residential and it is only called that because the individuals who participate actually live in a dedicated area and do their drug

programming in that area; so by definition, residential treatment program.

There are also nonresidential treatment programs that involve individuals who live anywhere in a Bureau institution but who would go to a psychologist for diagnosis and then participate in programs as part of their daily routine. That also involves such things as work programs, education, etc.

And then third, for individuals whose crimes may have been related to their involvement in drugs or alcohol, those who are under the influence, as you mentioned in your opening statement, anyone who has been recommended by the court for treatment and an individual who may have violated a condition of release, supervised release, parole, etc—all of those folks must—they are required to undertake a drug treatment education program.

In the education program, those who have higher needs—regular users, for example, those addicted—are then educated and encouraged to go on to nonresidential programming, if that is what they need, or the residential programming if they rise to the level of dependency or abuse.

So again, literally virtually all offenders have access to those treatment programs.

Mr. MICA. We have about 11 minutes left. I will just yield it to the minority.

Mr. CUMMINGS. I will just be very brief.

Mr. Roth, in a recent report, the Leadership Conference on Civil Rights found that the U.S. Attorneys Office in Los Angeles had prosecuted hundreds of minorities on crack cocaine offenses but not a single White person had been similarly prosecuted in a 6-year period. And I am just wondering what is the Justice Department's feeling on that?

Mr. ROTH. That is a good question, Mr. Cummings. I think I will have to get back to you on that because I do not have an answer for you.

Mr. CUMMINGS. That is incredible, isn't it?

Mr. ROTH. I am sorry, sir?

Mr. CUMMINGS. I said that is incredible, isn't it?

Mr. ROTH. As I said, I cannot comment on it until I actually see it.

Mr. CUMMINGS. OK.

Our first panelist, can we go to chart No. 11? Can you explain that to me real quick? What does it mean? I mean I see it but tell me what it means. Does that mean that—

Mr. STEER. This looks at the highest mandatory minimum to which defendants were subject and sorts according to the race of the defendant. So it shows that the 5-year mandatory minimums most frequently impacted on Hispanic defendants; the 10-year mandatory minimum most frequently impacted on Black defendants, the same for the 20—

Mr. CUMMINGS. Is that the percentage, say, of Black folks being sentenced or Hispanics being sentenced, or is that the percentage that—

Mr. STEER. Mr. Cummings, I believe it is a percent of those who were subject to that particular mandatory minimum.

Mr. CUMMINGS. OK, I got you.

I am just wondering, what do you think accounts for that? Even the chairman had to kind of look at that one. That is a substantial change. I mean when you look at the figures as the years go up, what accounts for that?

Mr. STEER. I think we do not know fully what accounts for that. I can speculate to a certain extent. Part of it is certainly the conduct of the defendant. The quantity of drugs in particular, the quantity and type of drugs for which they were held accountable at sentencing explains largely the 5 and 10-year mandatory minimums.

The 20-year and life mandatory minimums bring in another factor—prior record in many instances, prior felony conviction. And in those instances, the prosecutor also has to make a decision to file a piece of paper, to file an information seeking the application of the heightened mandatory minimums. So it is a combination of conduct, prior conduct, and a decision of the prosecutor to seek that higher mandatory minimum.

Mr. CUMMINGS. Now, the safety valve provision was enacted to allow judges to sentence first-time nonviolent drug offenders to less than the mandatory minimum if they provide substantial assistance to the government. If the Federal drug policy concentrates on kingpins and major traffickers, how can the testimony of the low-level people be helpful? Shouldn't the low-level people be prosecuted in State court? Mr. Roth.

Mr. ROTH. It is a combination of two. Low-level people are prosecuted in State court. When you look at the statistics of State prosecutions versus Federal prosecutions, it is far and away predominantly State prosecutions.

On the other hand, when you are investigating a conspiracy or an organization, it is fundamental that you have to start at the bottom because the kingpin is not going to be dealing with the undercover officer, the informant, or the person who is actually selling the drugs on the street. You just have to work your way up the chain. Frankly, the only way we have to do that is with the substantial assistance departure.

Mr. CUMMINGS. And you found that to be very helpful?

Mr. ROTH. It is one of the most effective tools that we have to prosecute the kingpins. I cannot recall a single large conspiracy case involving significant drug traffickers where we have not given somebody a substantial assistance departure.

Mr. CUMMINGS. Because of time, I am going to have to yield to Mr. Turner.

Mr. TURNER. Mr. Roth, I certainly can understand how you believe mandatory minimums are a powerful tool for the prosecution, how they increase certainty and predictability of crimes. I am not sure that I agree that they always result in justice.

The thing that I really want to ask in my very limited time here, Mr. Steer, what would it take for us to get a recommendation from the Sentencing Commission with regard to improvements in the mandatory sentencing scheme?

Mr. STEER. Well, I think you just need to ask and give the Commission some time to focus on that. As I said, we have only been in our positions for a few months and have not had a chance to focus broadly or deeply on Federal drug sentencing policy.

But part of what we are statutorily authorized and directed to do is to provide recommendations to Congress from time to time that would help improve Federal sentencing policy and I think we are anxious to do that.

Mr. TURNER. Well, I will certainly ask. You might give me some indication of how long it will take.

Mr. STEER. Well, we are meeting in a few weeks—excuse me—in just a couple of weeks to reflect on this past amendment cycle, which has been a fairly hurried, compressed one, and to try to do some mapping of plans for the future. I am sure that the topic of drug sentencing policy will come up.

Now, I think it will take a while for us to develop a whole slate of recommendations, but we will be glad to get to work on that.

Mr. TURNER. Give that some thought. I will talk with you after the hearing. I would like to know what kind of timetable it might be on, but I think it would be very helpful to the committee to have the recommendations from you.

Obviously, the presentation you made indicated that there is some need for improvement. We notice in your own testimony you cited two Supreme Court justices who have been critical of the mandatory sentencing laws and I think if we can take an objective look at it, this Congress would be doing the right thing.

Mr. STEER. Thank you, sir.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman.

Well, we do have additional questions, both Mr. Cummings and myself, but unfortunately we do have also a total of five votes. So I guess this panel is very fortunate to be excused at this time, but we will be submitting additional questions to you for the record and trying to work with you as we sort out the law and trying to make minimum mandatory as effective as possible and the laws relating to illegal narcotics trafficking and violent offenses against our society as effective as possible.

So I thank each of you for your participation at this time and excuse this panel.

The bad news is for the third panel, we are going to recess until 2:05 in order to accommodate the five votes that are coming up. So approximately 2:05 we will regather here and this hearing will stand in recess until 2:05.

[Recess.]

Mr. MICA. I would like to call the subcommittee back to order.

Our next order of business is our third panel of witnesses. The three witnesses consist of Frances Rosmeyer from Families Against Mandatory Minimums; Mr. William Moffitt, who is president of the National Association of Criminal Defense Lawyers; Mr. Wade Henderson, executive director of the Leadership Conference on Civil Rights. I am pleased that these witnesses have joined us.

Again this is an investigations and oversight subcommittee of Congress. I will swear you in in just a moment.

If you have lengthy statements or material which you would like to have made part of the record upon request of the chair, unanimous consent will be granted.

I am pleased also to be joined by our ranking member, Mrs. Mink, who was not with us. Did you have an opening statement or some comments you would like to make?

Mrs. MINK. No, I just want to apologize for missing the earlier portion, but we had an event at the White House on pay equity that I had to be present for. Thank you very much.

Mr. MICA. Thank you. And we have, with the consent of the minority, left the record open for 2 weeks and we will be submitting questions to our witnesses.

With those guidelines, let me ask our witnesses to stand, please. [Witnesses sworn.]

Mr. MICA. Witnesses answered in the affirmative and we are so pleased to have each of you with us today. I appreciate so much your patience. We have had two full panels and a recess on any number of votes. Some days we can get through the whole process without those interruptions but today was not one of those days. So again we thank you for your patience.

I will first recognize Frances Rosmeyer, again with Parent, Families Against Mandatory Minimums. You are welcomed and recognized.

**STATEMENTS OF FRANCES ROSMEYER, PARENT, FAMILIES AGAINST MANDATORY MINIMUMS; WILLIAM MOFFITT, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AND WADE HENDERSON, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS**

Ms. ROSMEYER. Thank you. Good afternoon and thank you for the opportunity to speak to the committee this afternoon.

I am Frances Rosmeyer and I reside in Alpharetta, GA, a suburb of Atlanta. I am a very proud member of FAM, Families Against Mandatory Minimums.

My daughter, Kellie Mann, is incarcerated at the Federal prison camp in Alderson, WV and has entered her 7th year of incarceration. Kellie was sentenced in 1994 for a crime that was committed in 1992. Her sentence was under the mandatory minimums as a first-time, nonviolent drug offender, along with her ex-boyfriend, Patrick. Both Kellie and Patrick were charged with three Federal conspiracy drug charges for 19 grams of LSD. The actual weight of the drugs was 0.33 gram but because of the carrier, which was paper, the weight was increased to 19 grams. Hence the charge of 19 grams.

The weight of the LSD triggered the 10-year mandatory minimum sentence, something I have always questioned. Kellie's sentence includes 10 years in prison, 5 years supervised release, and countless hours of community service.

Her sentence began in 1994 and will not officially end with a release from the government until about 2007, and I am sure it will affect her much further into her life far past 2007.

Patrick, on the other hand, received 36 months and served approximately 18 months because of his ability to help the government.

This began in 1992 when Kellie visited Atlanta from our home in San Francisco. We formerly lived in Atlanta and moved to California for career opportunities. At the time, Kellie had not dated

Patrick for about 2 years and had moved along in her life wonderfully. She was a full-time college student, working full-time, and still living at home. While visiting Atlanta, she had a chance meeting with Patrick. They ran into each other at a friend's house. Their relationship had always been one of testing and daring, and he proposed another test. He asked her to send him some LSD on her return to San Francisco. When she returned home, she began her search. Being relatively new to the area, she knew very few people and it took her a while to locate any drugs, which she finally located at a concert.

She purchased the drugs, placed them in an envelope and mailed them to Patrick. When Patrick went to the post office to pick up the package, he was arrested by DEA agents and this ordeal began for all of us. He gave her name to help himself and soon the government was at my door in San Francisco.

The words mandatory minimum laws were foreign to me. I had never heard of these laws. Kellie has never professed her innocence. She realized she broke the law; she admitted she broke the law. She admitted to her crime. Our question has always been does her punishment fit her crime?

She is serving a sentence longer than many violent criminals, longer than repeat offenders and longer than those receiving the benefit of the safety valve. Why? In 1994, Congress passed a new crime bill which included the safety valve, but what they failed to include was retroactivity for inmates like my daughter. At that time, about 5,000 inmates would have been affected. Today, after attrition, it is below 1,000.

This has not only affected Kellie; our entire family went to prison. It has cost us not only economically but the larger cost is the psychological effect that it has on all of us as a family and will continue to deteriorate and hold us hostage for many years after her sentence.

My husband and I live in fear daily—in fear not only of her daily life because of where she is, but the larger fear is of her future. Kellie is an intelligent woman but now has many more obstacles to overcome. Losing her 20's, where does she go when she has to start over?

My daughter is not and never has been a threat to society. I do have a picture of my daughter. Do you have it? Thank you.

While professing we are fighting a war on drugs, where does the war end? We must clear our vision and realize what we are doing. It is not working. Help my family and thousands of others. Change these laws to treat each individual as an individual, to have the ability to look at the way they lived their lives before that one dreaded mistake. She is not a violent woman, never has been, and I can tell you if you went to the prison today, they would tell you she will never be a violent person.

Sunday is Mother's Day, a very difficult day for me. I have spent many Mother's Days without her and it is time for her to come home.

I am here to beg my government to make changes. This kills families. It not only takes fathers away, it takes mothers away, it takes daughters away, and sons. There are many women in prison with small children that have become part of the government hous-



ing because they have been taken away as first-time nonviolent offenders, not just for drugs—for being bookkeepers of people who were laundering money. Please bring them home. These laws are not working. The basis is there but changes need to be made.

Someone here in this city has to stand up for me, in my city. I elect the officials here. I expect them to do my voting and to do what is good for me. I am the citizen. I am the taxpayer and I am begging you all to stand up and take a stand, a deep look at what we are doing.

This morning I heard something that I never thought would affect me, such simple words. Someone on the panel announced that we had 2 million people in prison in this country. It smacked me in the face because when he said it it was with some form of pride. It does not make me proud to live in a country where we house people in prisons, where we refuse to help the drug addicts on the street, where we refuse to even help the homeless. It does not make me proud. I want to be proud of my government my country, so please help me get there.

I have a few words for the Governor that I just wrote down this morning from his own testimony. I want to thank him for realizing that the war on drugs is not working. He said those words and then he contradicted himself.

Governor Allen uses a very broad brush to paint the people in prison. They are not all murderers; they have not raped people; they have not stolen money. Some of them, like my daughter, made a bad decision and she has always been willing to take that responsibility, but 10 years—and actually, it is not 10 years; it turns into 16 years—of her young life to pay for that mistake it is outrageous. It is despicable.

We need to start thinking about our children. My daughter has lost her 20's. She was a bright girl in school, had a wonderful future as an anthropologist. It is gone. It is absolutely gone. She is paying that price. And on many occasions throughout the years she has been in prison I have wondered why our government doesn't stop to look at children like mine who were young, bright, and have so much to give. Why did they not choose to use her mistake to educate other teenage kids, other kids in college? Why not use that intelligence intelligently, versus locking her up somewhere where she does not pay taxes, she is useless; she costs us money. That is what she does as a taxpayer. That is how I look at people there.

They have so much to give this country, so much to offer, so much intelligence, so much knowledge. Use them. Put them in the high schools. Put them in colleges to educate the children.

You know, a Senator one time told me many years ago when I first got involved in this, when this all first happened, I asked him what it was going to take for the government to realize that they are passing laws that citizens like me know nothing about. I said, "Don't you, as my representative, think that I deserve an education about the laws? Don't you think that the kids that you are putting in prison, the college students, the high school students, don't you think that they deserve to be educated on the laws that you are going to sentence them to?" And his words to me were incredible. He told me that they were going to use my daughter to teach other college students. That is despicable.

The government has a responsibility to its citizens and if you are going to pass laws in this town, we deserve to be educated. Thank you.

Mr. MICA. Thank you for your testimony and we will now hear from William Moffitt, who is the president of the National Association of Criminal Defense Lawyers.

You are most welcome today. I again thank you for your patience, and you are recognized.

Mr. MOFFITT. Thank you very much. We at the National Association of Criminal Defense Lawyers are greatly appreciative of this opportunity to be heard on this issue of primary importance.

Not only am I president of the National Association of Criminal Lawyers; I am a member of the Virginia Bar for 25 years and I think I could be helpful to this committee in expressing and telling this committee that the system described this morning, the Virginia system, is very different from the Federal system that you are confronted with.

In the Virginia system as it currently exists, the system imposed by Governor Allen, a citizen avoids the imposition of a mandatory minimum penalty simply by pleading guilty or avoiding a trial by a jury. The judge at that point is left with the discretionary call as to what the sentence is, regardless of the fact that the statute imposes a mandatory minimum. So a statute that imposes a 5-year mandatory minimum, if the person simply pleads guilty or is tried without a jury, does not cause the person to suffer a penalty of 5 years. The judge in that situation is allowed to impose whatever penalty he or she deems is appropriate.

The guideline system in Virginia is not mandatory. It is advisory. Thus, the sentencing guidelines in Virginia are used by judges if they choose and they can avoid the use of the guidelines merely by sentencing the individual to a sentence outside the guideline range, either above or below. This is very different than the current Federal system, which has inviolable mandatory minimums and a mandatory guideline system.

We would suggest to you under the circumstances that one of the major issues in the Federal system, as opposed to any other system, is the absolute lack of discretion in the judiciary. What the mandatory minimum sentencing scheme has done has taken discretion from the judges and placed it in the hands of the prosecutor.

Now on its face, that means very little. In reality, it simply means this. Every discretionary call of a judge is reviewable by another set of judges. No discretionary call by a prosecutor is reviewable by anyone. So under the circumstances that you see, many of the discretionary calls that cause the disparities that you are seeing and that we have seen over the years that have existed in this system are unreviewable by anyone, and we suggest that this is a misplacement of discretion in the system.

It is an interesting placement of discretion in the system, where we spend a lot of time deciding who the Federal judges are going to be. We spend a lot of time vetting them and reviewing their credentials and questioning their judgment as to whether or not they are the appropriate people to exercise judgment over other human beings. We spend no such time questioning the prosecutors in the same way.

So we replace the discretion of people who have participated in the system for 20 or 30 years in order to get to the point of being a judge with that of a 26 or 27-year-old prosecutor who is just out of law school. And I suggest to you in an intelligent system, that is nowhere to place discretion. Discretion ought to be placed at the other end of the system.

One other thing that you do not see because we get caught in the elastic of the statistics and the numbers is the most important thing for a person to be in our system to avoid the impact of the mandatory minimum is to be a large and successful drug dealer. The larger and more successful the drug dealer, the more the drug dealer has to sell to the government at the time of his or her arrest, the easier therefore it is to avoid the mandatory minimums that exist supposedly to incarcerate the drug dealer at the highest level.

And I suggest to you what is happening in our system, in our current system, is the high level drug dealer avoids the consequences of the mandatory minimum system because the high level drug dealer has something to offer. It is the low level drug dealer that suffers the impact of the mandatory minimum system in the current system.

I am struck as I sit here. The drug war, as I remember it, began in 1968 when Richard Nixon began it. I was 19 years old and I was in college. I am 51 years old and I am the president of the National Association of Criminal Defense Lawyers and I have been a practicing lawyer for 25 years. My entire career, this country has been engaged in a drug war. My entire career, this drug war has been met over and over by people seeking greater penalties for political gain, and yet the war continues unabated, undisturbed.

I sat here this morning and listened to the fact that more of our children, despite since 1987 and the mandatory minimum system, I sat here while we listened to the Governor suggest that more people are using drugs today than were using when we began the mandatory minimum system.

The mandatory minimum system has not solved the problem. It will not solve the problem. You will not incarcerate us out of the drug problem in America today. We have to finally decide to be more intelligent about how we view this problem. This problem is symptomatic of other problems that exist within the framework of our system. And it is often the people who suffer most those other problems that suffer at the hands of these drug problems, and the laws as we define them.

We have got to begin to get intelligent about this. We have got, when we see the skyrocketing rates of incarceration of African Americans and Latinos in this country and we all turn our eyes to them and say this is horrible, it is time for us to do something about it.

I stood with a million men outside this Capitol. We were simply there asking, in part, that the 100 to 1 disparity of crack cocaine versus powder cocaine be changed. One million men petitioning their government. That very week this body was addressing that problem. That very week we were unheard.

I, too, have a daughter, a 16-year-old daughter who goes to high school. I have two explanations I have to give her. I have to talk

to her about drugs and then I have to talk to her as an African American woman and answer her question as to why this society punishes people of color differently than it treats people not of color. And every day I have to talk to her and tell her that she has to have faith. And every day generations before me told me I had to have faith, told my mother that she had to have faith, told my father and my grandfather that they had to have faith. We are losing faith. Faith is no longer enough. We today must do something.

We have international treaties in the United Nations that suggest that when we have laws that have adverse racial impact, they are to be changed, and yet the United States does nothing.

When will we change? When will we provide more than lip service to the notion that we cannot keep incarcerating minorities using these types of laws for the lengths of time, in the numbers? We have already disfranchised 1.4 million African American people in this country through the use of drug incarcerations. How many more? When will it end? When will we declare peace and begin to change how we perceive this problem so that we might be progressively solving it?

I really do appreciate the opportunity to be heard today. This is an important issue. It is an important issue not just because of mandatory minimums. It is an important issue because of the signal that it sends to the people of this country about whether we care or not, whether we are concerned or not.

I appreciate your concern. I hope that it is time that we stop talking and we begin doing and that we change this. The war has gone on long enough. It seems a bit irrational to me that as a society, we declare war on ourselves. So thank you for having me.

[The prepared statement of Mr. Moffitt follows:]



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Written Statement of  
William B. MoEiffitt  
on behalf of the  
**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**  
before the  
**UNITED STATES HOUSE GOVERNMENT REFORM COMMITTEE**  
SUBCOMMITTEE ON CRIMINAL JUSTICE,  
DRUG POLICY, AND HUMAN RESOURCES  
Hearing on Thursday, May 11, 2000

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Mr. Chairman and Members of the Subcommittee.

I am pleased to appear before you today on behalf of the National Association of Criminal Defense Lawyers (NACDL). My name is William B. Moffitt. I am an attorney of twenty five years with a practice that is dedicated to representing citizens accused of crime in our society. I currently serve as the President of the National Association of Criminal Defense Lawyers.

I would like to begin today by commending the subcommittee for its decision to take a fresh look at the subject of mandatory minimum sentences. In our view mandatory minimum sentences have a detrimental effect on the functioning of both the federal criminal justice system and on society in general. I hope that your inquiry into the continued viability of mandatory minimum sentences heralds the beginning stages of Congress taking a critical step towards restoring public faith in the federal criminal justice system by repealing mandatory minimum sentences.

NACDL's opposition to mandatory minimum sentencing is long standing. We have raised our concerns with law makers in Congressional hearings on previous occasions. Because we believe mandatory minimum sentences have a detrimental impact on society and the criminal justice system we have made their repeal one of our top legislative priorities. I will address some of our concerns in this testimony but I would like all of you to keep one statistic in mind as I proceed:

On April 19, 2000 the Justice Department's Bureau of Justice Statistics (BJS) announced that at midyear 1999, one in every 147 U.S. residents was incarcerated, with an estimated 1,860,520 men and women held in the country's prisons and jails. Overall the incarceration rate had more than doubled in the past 12 years. If the current growth continues, BJS noted, the future jail population may reach 2 million around the end

of 2001.<sup>1</sup>

The cause, in large part, is the implementation of federal mandatory minimum sentencing policy.

#### **History of Mandatory Minimum Sentencing Laws**

In the United States mandatory minimum sentencing was first broadly used in the 1950's. In 1951, Senator Hale Boggs (D-LA) championed a series of harsh mandatory minimum sentences for drug offenses. Known as the Boggs Act they comprised penalties for drug offenses which by 1956 increasing penalties for many drug offenses to include a sentence of five-to-twenty years for any first offense sale or smuggling conviction and the death penalty for sale of narcotics by an adult to a minor under eighteen years of age.

By the late 1960s, the Boggs Act penalties had created many of the same problems we see with today's mandatory minimum drug punishments. Just as today, mandatory minimums were criticized then for treating casual violators as severely as they treat hardened criminals, interfering with the judicial role of making individualized sentencing judgements, and perhaps more importantly, producing no reduction in drug violations. As part of the 1970 Comprehensive Drug Abuse and Control Act, Congress recognized that federal crime policy needed a shift in approach and repealed virtually all mandatory minimums for drug offenses.<sup>2</sup> Congress reasoned that mandatory minimums were overly severe and inflexible<sup>3</sup>.

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<sup>1</sup>Department of Justice Press Release Wednesday, April 19, 2000

<sup>2</sup>Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970)

<sup>3</sup>S. REP. No. 613, 91st Cong., 1st Sess. 2 (1969)

The repeal was praised by many lawmakers, including conservative freshman Congressman George Bush who spoke on the House floor in support of the repeal bill:

"Contrary to what one might imagine, however, this bill will result in better justice and more appropriate sentences. ... Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion. ... As a result [of repealing mandatory minimums], we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences."<sup>4</sup>

The repeal of mandatory minimum sentencing was short lived. The 1980's saw Congress rush to pass legislation that created a series of mandatory minimum sentences. The impetus was, in large part, real and perceived public pressure to address a rise in drug use and the crime that was attributed to this increased usage. This public pressure was converted into the perception that support for mandatory minimum sentencing was equated with being tough on crime.

The 1986 Anti-Drug Abuse Act marked a profound shift not only in America's drug-control policy but also in the workings of the criminal justice system. The Act established the bulk of drug-related mandatory minimums, including the five- and ten-year mandatory sentences for drug distribution or importation, tied to the quantity of any "mixture or substance" containing a "detectable amount" of the prohibited drugs most frequently used today. More importantly, these mandatory sentences completed the transfer of sentencing power from federal judges to prosecutors.<sup>5</sup>

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<sup>4</sup>Congressional Record, House (116 CONG. REC. H 33314) (Sept. 23, 1970)

<sup>5</sup>At this time Congress repealed the parole laws ensuring that defendants served at least eighty five percent of their sentences.



**Concerns with Mandatory Minimum Sentencing Policy**

It is the belief of NACDL that mandatory minimum sentencing creates restrictively rigid sentencing policy and frustrates the intent of the sentencing guidelines. There is recognition among all individuals who work in the justice system that justice is not served in a system that apportions sentencing without regard to circumstance. Every case is unique and thus a fair and equitable criminal justice system requires judicial discretion. A judge should be able to consider aggravating and mitigating circumstances when sentencing is to be considered. Mandatory minimum sentencing eliminates this discretion and puts it in the hands of the prosecutor. One of our chief concerns regarding the shift of discretion from the judge to the prosecutor is that judicial discretion is subject to review, prosecutorial discretion is not.

Concern for this lack of judicial discretion has been raised by the Sentencing Commission and a host of State and Federal Judges including United States Supreme Court Chief Justice William Rehnquist and Supreme Court Justice Stephen Breyer. Justice Breyer, in a speech at the University of Nebraska College of Law in Lincoln, NE, stated "Mandatory sentencing laws should be abolished." Justice Breyer said he remains "cautiously optimistic" about sentencing guidelines but feels the system, designed to reduce disparity, has "become too complex and too intertwined with the mandatory minimum sentences that Congress has attached by the dozens to the criminal code."

Justice Breyer's condemnation of mandatory sentences echoes that of Chief Justice William Rehnquist, who in a 1993 speech said that mandatory sentences "are a good example of the law of unintended consequences" and "frustrate the careful calibration of sentences" the guidelines intended to accomplish.

The proponents of mandatory minimum sentencing have touted that it

is a policy that can be used to eliminate sentencing disparity, in fact such disparities are rampant within the criminal justice system. This is highlighted by the 1991 United States Sentencing Commission Report to Congress. The Commission found that in thirty five percent of cases which meet the criteria for mandatory minimum sentencing, defendants were charged with offenses carrying non-mandatory minimum or reduced mandatory minimum provisions. This is a "behind closed doors" process and thus the honesty and truth in sentencing intended by the guidelines is compromised.

In the current system, federal judges who wish to depart from sentencing guidelines must publically explain their reasons. Their explanation is then subject to appellate review. By contrast, prosecutorial or executive decisions which avoid the effect of mandatory minimum sentencing provisions are not subject to any review. These prosecutorial decisions which are not reviewable lead to the dissimilar punishment of similar offenders, directly contrary to the intent of current federal sentencing regime.

Compounding NACDL's serious concern regarding mandatory minimums, is the body of evidence that shows rampant racial and ethnic sentencing disparities. Studies by both the United States Sentencing Commission and the Federal Judicial Center have revealed that white defendants whose criminal conduct falls within the scope of mandatory minimum statutes are much more likely than African American defendants and Hispanic defendants to avoid application of mandatory minimum penalties. Racial disparities in sentencing and incarceration have never been worse. Fifty years ago, black men comprised five percent of the nations population and a disturbing thirty percent of the nations prison population. Today African American men constitute six percent of the population and an astounding fifty percent of the burgeoning prison population.

In 1993, Whites accounted for over thirty percent of all convicted federal drug offenders, Blacks and Hispanics each accounted for over thirty three percent.<sup>6</sup>

These racial disparities are exacerbated by the inequity of the current sentencing regime which sees the existence of a 100 : 1 ratio between the weight of crack cocaine and all other forms of cocaine. Findings in a recent BJS study suggest that between 1986 and 1990 both the rate and the average length of imprisonment for federal offenders increased for Blacks in Comparison to Whites. The researchers found that this was caused in large measure by mandatory minimum sentences for drug offenses and more specifically by the 100 : 1 quantity ratio of powder and crack cocaine.<sup>7</sup>

There is a belief among many individuals involved in criminal justice work that the policy behind this disparity is a policy of racial and ethnic prejudice<sup>8</sup>. This disparity is an irrational sentencing policy which, when coupled with mandatory minimum sentencing, compounds the error of the broader irrational sentencing policy. This is a key reason why mandatory minimum sentencing most greatly impacts the minority community.

Congress established the United States Sentencing Commission for the purpose of developing sentencing policies and practices that address congressional concerns, to evaluate policy effectiveness, to refine the sentencing guidelines, and to recommend needed

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<sup>6</sup>United States Sentencing Commission 1995 Report to Congress on Cocaine and Federal Sentencing Policy.

<sup>7</sup>see generally NACDL's written comments regarding the Commissions February 1995 Report to Congress on the Current 100-1 Federal Sentencing Disparity Between "Crack" and Powder Cocaine Offenses.

<sup>8</sup> see generally NACDL's written testimony before the United States House Judiciary Committee, Subcommittee on Crime, June 29,1995.

legislation. The Commission has accordingly made recommendations to correct the sentencing disparity between crack verses other forms of cocaine. The Commission has recommended that it be allowed to treat all forms of cocaine in the same manner, with sentencing enhancements for relevant, case specific harms like weapon use, violence, use of juveniles and criminal history. Such a reform coupled with the repeal of mandatory minimum sentencing would remove some of the racial and ethnic bias in the criminal justice system.

Our current criminal justice system hands out disparate sentences that disproportionately impact our most economically vulnerable communities, namely our minority communities. As of 1998, 1.4 million black men have been deprived of their right to vote or hold political office and of their opportunities for meaningful work because of disproportionate convictions. One simple question that must be asked is whether current sentencing regimes are catching the drug king-pins Congress professes to be targeting. A partial answer to this question can be found in a Department of Justice "Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories" from Feb. 4, 1994. The Department of Justice report found that more than one in five federal prisoners (21.5 percent) are low-level drug offenders with no record of violence, no involvement in sophisticated criminal activity, and no prior prison record.

Similarly a Rand Drug Policy Research Center study which undertook to determine whether mandatory minimum sentencing regimes can be considered fiscally cost effective, from a crime fighting perspective, found that a jailed supplier is often replaced by another supplier. Thus the problem continues unabated and the low level dealer is incarcerated, at great fiscal expense, for an unreasonably long period of time, causing considerable individual, societal and community loss. The Rand study finds that high level dealers, the king-pins, are impacted by long sentences, however the study finds that it is difficult to identify those dealers solely by quantity of drug possessed. It seems that it would be easier to

find them if the criminal justice system could consider additional factors such as a dealers position in the hierarchy. Such factors, ignored by mandatory minimum sentencing policy can be taken into account by judges working under discretionary sentencing.

It is clear to the NACDL, the United States Sentencing Commission, the Chief Justice of the United States Supreme Court, the American Bar Association and a greater portion of the public than Congress may recognize, that mandatory minimum sentencing policy is flawed throughout. It removes discretion from the judge, creates a uniform approach to sentencing that is unfair, reduces transparency in the criminal justice system, leads to racial and ethnically disparate sentencing, is not cost effective, does not reduce crime and has led to a prison population that will soon hit the two million mark. It is up to all of you to consider when our breaking point will be reached. By this I do not mean the time when, as a society, we cry enough. I do not mean this for such a cry has been heard for many years past as we have locked up our sons and daughters in the name of a war...a war on ourselves.

No; my question to you is when will our society be unable to pay, fiscally, for incarcerating our own? When will our society be unable to cope with our bloated prison population? When will our very fabric crumble as the hundreds of thousands of individuals who we have locked away for five, ten or twenty years, return to our midst, unenlightened and disfranchised. For I do not believe that they have assimilate and become "one of us." I believe that they will feel betrayed and angry and we will have no answers only regrets.

The question that remains is when will you, our elected officials recognize that we cannot continue down this path of ever increasing incarceration. I will end my testimony with some remarks from Don Williamson, Philadelphia Daily News, November 4, 1985.

If for no more honorable reason than our own societal self preservation, we need to heed where the current state of affairs is taking us: A raging epidemic of poor, dumb children in the richest, most educated nation on earth can be ignored (for now) because these children have no power, no constituency. They cannot vote. They have no money. They own no property. There is no well financed, influential Washington based lobby group insuring that their birth right is protected.

But there will be more of them every day. And they are having babies who will be poorer, and dumber than they are. They will be poorer and dumber and have no allegiance to this or any nation, no concept of right or wrong, no adherence to cherished traditions and no compassion or regard for the elders who abandoned them. Soon fourteen million poor children will become fourteen million unskilled uneducated, angry dangerous adults. There will not be enough jails, enough bullets, enough quick fix federal programs. There will be them and an older feebler, increasingly dependent us. They will blot out the sky, foul the air, make the water unfit to drink. They will steal tomorrow. They are time bombs.

They will steal tomorrow. And society will have aided and abetted the theft.

Attachment A to NACDL Testimony  
Re: Cocaine Sentencing

June 29, 1995





On behalf of the National Association of Criminal Defense Lawyers (NACDL), I want to thank the Commission for the opportunity to submit for the record the following public comment on the Commission's February 1995 special report to Congress regarding the current 100-1 "crack" versus powder cocaine sentencing disparity, and the Commission's intention to submit to Congress recommendations on May 1, 1995 -- for case-specific, guidelines adjustment-oriented models for modification of the federal sentencing policy as it relates to cocaine offenses.

## I.

**NACDL Applauds the Commission's Work and Urges Commission Action in Full Accordance With the Report's Comprehensive Research**

The members of NACDL, front-line defenders of the People's rights and liberties, have long recognized and pushed for reform of the irrational and unfair federal requirements that impose a mandatory minimum sentence of at least five years for the first-time possession of more than five grams of cocaine "base" ("crack"), while imposing a minimum sentence of probation for the possession of the same quantity of cocaine hydrochloride (powder cocaine). The mandatory sentence for possession of 50 grams of crack is ten years. While for this same penalty, a defendant would need to be convicted of possessing 100 times as much powder cocaine. A defendant with no prior convictions who is found guilty in federal court of possessing 70 grams of powder cocaine with the intent to sell it faces between 21 and 27 months in prison. Meanwhile, a like conviction involving the same amount of crack cocaine would qualify for a sentence more than five times as long -- between 10 and 12 1/2 years. From both the market-value and the potential punishment perspectives, powder cocaine, and not crack, is in fact the more profitable drug.<sup>1</sup>

As the report states: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), created the basic framework of mandatory minimum penalties that currently apply to federal drug offenses. This Act establishes two tiers of mandatory prison terms for those convicted as first-time drug distributors -- a five year and a ten-year minimum sentence. Under the terms of the statute, the different minimums are triggered depending on the quantity and

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<sup>1</sup> See, e.g., Table 19 in *Special Report to Congress: Cocaine and Federal Sentencing Policy*, United States Sentencing Commission 173 [herein the February 1995 report or the report] ("Street-Level Value of Drug Quantity By Drug Type and Base Offense Level") (reflecting, for example, that in order for one to reach a quantity-oriented, "base offense level" for sentencing purposes of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, \$230 worth of crack; likewise, to reach the highest base offense level, "38," one must be convicted of either \$16,050,000 worth of powder cocaine, or else \$172,500 worth of crack).

the type of drug involved. This 1986 Act gave birth to the federal criminal law sentencing distinction between cocaine "base" and other forms of the same drug. The quantity thresholds triggering the penalties create the 100-1, crack versus powder cocaine sentencing ratio.

As the report also well notes: the 1986 Act "was expedited through Congress. As a result, its passage left behind a limited legislative record."<sup>2</sup> While many individual members delivered floor statements about the Act, Congress dispensed with most of the typical legislative process, including committee hearings. And no committee produced the standard committee report on the legislation reflecting actual *analysis* of the Act's provisions.<sup>3</sup> The legislative history thus does not include any discussion of the Act's 100-1 crack versus powder cocaine quantity-based sentencing disparity.<sup>4</sup>

But we do know this:

The sentencing provisions of the Act were initiated in August 1986, following the July 4th congressional recess during which public concern and media coverage of cocaine peaked as a result of the June 1986 death of NCAA basketball star Len Bias.<sup>5</sup>

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Len Bias's case was cited 11 times [ ] in connection with crack.<sup>6</sup>

Eric Sterling, who for eight years served as counsel to the House Judiciary Committee and played a significant staff role in the development of many provisions of the Drug Abuse Act of 1986, testified before the United States Sentencing Commission in 1993 that the "crack

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<sup>2</sup> *Id.* at 116.

<sup>3</sup> See *id.* at 116-117. See also, e.g., 132 Cong. Rec. 26,462 (Sept. 26, 1986) (statement of Sen Mathias) ("Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process.").

<sup>4</sup> February 1995 report, *supra* note 1, at 117.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 123 (citing transcript of the "Crack Cocaine" hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99th Congress).

cocaine overdose death of NCAA basketball star Len Bias" [ ] was instrumental in the development of the federal crack cocaine laws. During 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.<sup>7</sup>

Not until a year later, during the trial of Brian Tribble who was accused of supplying Bias with the cocaine, did Terry Long, a University of Maryland basketball player who participated in the cocaine party that led to Bias's death, testify that he, Bias, Tribble, and another player snorted powder cocaine over a four-hour period. Tribble's testimony received limited coverage.<sup>8</sup>

And still, for almost a decade now, this irrational and unfair system of cocaine sentencing disparity -- child of hysteria and haste -- has existed without comprehensive examination. There have been many victims of this system over the years. And they have been among the most vulnerable, at-risk members of our society: the poor, the young and the minority.

NACDL accordingly applauds the Commission for its February 1995 report's comprehensive research, and for the report's unequivocal conclusion that the current 100-1 sentencing ratio between crack and powder cocaine offenses is too high, irrational and unfair. Further, though, NACDL respectfully urges the Commission to act in accordance with the facts canvassed in the report. While NACDL commends the Commission for the studied research reflected in the February 1995 report, NACDL submits that the Commission should immediately follow the data referenced in the February 1995 report to the data's full, logical conclusion: there is no rational justification for any sentencing disparity between powder and crack cocaine; racism and unfounded suspicion should be removed from the federal sentencing law; the sentencing guidelines' (and statutory) ratio between powder and crack cocaine should be 1-1, with all cocaine offenses being subject to the same penalties as those now in effect for powder cocaine.

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<sup>7</sup> *Id.* (citing testimony of Eric Sterling before the United States Sentencing Commission on proposed guideline amendments, public comment, March 22, 1993).

<sup>8</sup> *Id.*

## II.

There Is No Rational Basis for Any Disparity  
Between Crack and Powder Cocaine

Although several courts have generously deferred to the congressional cocaine sentencing conclusion -- i.e., assuming that Congress *must* have had some reason for its creation of the crack versus powder cocaine sentencing disparity -- the research and analysis of the Commission's report shows that any assumed congressional "rationale" must be regarded as simply unfounded, and erroneous. The abbreviated, murky legislative history does not provide a consistently cited "rationale" for the crack versus powder cocaine penalty structure.<sup>9</sup> But, as the Commission's report rightly points out, to the extent Congress can be viewed as having perhaps thought about support for its statutory conclusion to create a 100-1 crack versus powder cocaine sentencing disparity, its conclusion rests upon mere "assumptions": assumed qualities of addictiveness; speculative correlations to other, serious crimes; conjured special psychological effects of this newly discovered bogey-man called crack; fears of heightened risks to youths; and the supposedly peculiar "purity and potency," market incentives, and ease of movement qualities of crack.<sup>10</sup>

## A.

*Regarding "Pure and Potent,"  
and Ease of Movement and Administration Assumptions*

Yet, as the Commission's report clarifies: the mood altering ingredient in both powder and crack is the same -- cocaine. "Pure and potent" cocaine powder can be *easily* moved and administered, and it can be easily transformed into crack by combining the powder with baking soda and heat.

The difference in *effect* between the two varieties of cocaine lies in the way the drug is *ingested*. Cocaine powder is generally sniffed or snorted through the nostrils or dissolved in water and administered intravenously, whereas crack is usually smoked in a pipe. The onset of drug effects is slowest for swallowing and sniffing, and fastest for smoking and injection. Intravenous injection deposits drugs directly into the user's bloodstream, for fast transmission to the user's brain.

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<sup>9</sup> See *id.* at 121.

<sup>10</sup> See generally *id.* at 118.

## B.

*Regarding Medical and Addiction Assumptions*

Of course, the use of drugs, including all forms of cocaine, impacts upon the public health of the United States.<sup>11</sup> But speculation and Congress-inspiring sports celebrity deaths aside,<sup>12</sup> according to *emergency medical experts*: there is no objective scientific data to support the oft-cited assumption that crack is more addictive or dangerous than the powder cocaine from which it is derived. In fact, studies disclose that the most frequent route of administration for cocaine-related deaths is through *injected, water-dissolved, powder cocaine* -- not by the smoking of crack.<sup>13</sup> Crack cannot be injected.

Likewise, the injection of cocaine powder -- and not the smoking of its derivative, crack -- increases the social threat of infections (including HIV and hepatitis).

And as the Commission report also notes, although the national estimate of (crack and powder) cocaine-exposed infants according to some studies is notable at between two to three percent, cocaine is actually used less frequently during pregnancy than are all sorts of other drugs, both "licit" and "illicit."<sup>14</sup>

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<sup>11</sup> Still, as the report points out, studies by organizations including the Drug Abuse Warning Network (DAWN) and the Rand Foundation reflect that the casual use of cocaine has decreased since 1988; and that fewer Americans are now using cocaine than in the 1980's. *Id.* at 46-47. In fact, in terms of drug-based causes of hospital emergency room visits, cocaine ranks behind *alcohol*. *Id.* at 41.

<sup>12</sup> In addition to the assumed crack-related death of the Boston Celtics's first-round basketball draft pick, Len Bias, Congress was moved by the drug-related death of Cleveland Browns football player Don Rogers. "Recalling [these deaths], members of Congress [supporting the proposed 1986 Act] repeatedly described the dimensions of the drug problem in such dramatic terms as 'epidemic.'" *Id.* at 121.

<sup>13</sup> See, e.g., *id.* at 44-45. But it is also important to recognize, as the Commission has in its report, that "[a]mong cocaine-related deaths, concurrent use with *alcohol* was the most deadly combination." *Id.* at 45 (emphasis added).

<sup>14</sup> See, e.g., *id.* at 52 (citing *inter alia* D. Gomby & P. Shiono, *Estimating the Number of Substance-Exposed Infants, The Future of Children* 22 (Spring 1991)). As the report has well-recognized: fetal alcohol syndrome, a known cause of central nervous system abnormalities, is a more serious drug-related problem among newborns in the United States than fetal cocaine syndrome (whether caused by crack or powder -- there is no way to

## C.

*Regarding Assumptions About "Special Psychological Effects"*

Certainly, when cocaine use becomes uncontrolled, an individual's links to the social and economic world disintegrate. As the report reflects, some studies even find that physical, psychological, and behavioral changes in an individual can begin soon after the person begins to use cocaine. But there is nothing peculiarly pernicious about crack cocaine.

When users of cocaine, powder or crack, become dependent upon the drug, their family and social lives typically disintegrate. And the most "at risk" users -- the unemployed -- frequently are asked, or forced, to leave their family or friendship units. For example, as the report notes: in a study of voluntary inpatients in a hospital unit, 18.7 percent of the 245 study participants disclosed that they had been asked or forced to leave their social units; and of these individuals, more than half (51.1%) became homeless.<sup>15</sup> Research shows that those who are drug abusers and become homeless will likely abuse alcohol and other drugs. And homeless shelters in New York City, for example, have reported that the current most frequently abused drug among the shelter residents is cocaine -- but again, both crack and powder.<sup>16</sup> Yet, as the Commission's report suggests, it seems as likely that cocaine abuse is a reflection of sociological and psychological illness as it is likely that (as some members of Congress might be seen to have assumed in 1986) such use causes such illness.

Further, the report's discussion of psychopharmacological-driven crime data is telling. For example, alcohol-related homicides are considered to be psychopharmacological-driven at a considerably more significant rate than any other drug -- including cocaine (of either the powder or crack variety).<sup>17</sup> And at least one influential study concludes that "to date, there has been no systematic research linking crack cocaine use with increased

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distinguish the particular variety of the drug used by the effects on the infant); and a much more significant percentage of newborns in this country are reported to suffer from fetal tobacco-exposure or fetal marijuana-exposure, than from fetal cocaine syndrome. *Id.*

<sup>15</sup> *Id.*, at 58 (citing B. Wallace, *Crack Addiction: Treatment and Recovery Issues*, *Contemporary Drug Problems* 74 (Spring 1990)).

<sup>16</sup> *Id.* at 58-59 (citing W. Breakey & P. Fischer, *Homelessness: The Extent of the Problem*, *Journal of Social Issues* 40 (1990)).

<sup>17</sup> See e.g., *id.* at 98-99 (citing P. Goldstein, *Drugs and Violent Crime, Pathways to Criminal Violence*, table 2, 665 (Neil A. Weiner et al., eds. 1989)).

[psychopharmacological driven] violence."<sup>18</sup>

D.

*Regarding Market-Value Assumptions*

As stated above, the market-value assumption about crack cannot withstand analysis. The report recognizes this:

Individuals at the top of the drug distribution chain make considerably more money than others [lower down] in the organization. [ ] DEA data for 1992 indicate domestic wholesalers can purchase a kilogram of powder cocaine from Columbian sources for \$950-\$1,235. Powder cocaine from other source countries such as Bolivia and Peru generally is more expensive, typically selling for \$1,200-\$2,500 and \$2,500-\$4,000 a kilogram, respectively. \* \* \* [A] kilogram of powder cocaine can be sold wholesale, after dilution, for \$11,000-\$42,000, and can be marketed, after further dilution, in gram quantities for \$17,000-\$173,000. These figures, not considering distribution expenses, produce profits of \$16,000-\$171,000 per kilogram of powder cocaine.<sup>19</sup>

And yet, the 100-1 sentencing disparity between crack and powder cocaine results in market-oriented sentencing irrationality: for example, in order for one to reach the quantity-oriented base offense level of "20," one must either have been convicted of \$21,400 worth of powder cocaine, or else, a mere \$230 worth of crack.<sup>20</sup>

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<sup>18</sup> J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson *Drugs and Crime* (1990)), quoted in *id.* at 99.

<sup>19</sup> The report, *supra* note 1, at 87 (citing *inter alia*, United States Department of Justice, *Drug Enforcement Administration, Source to the Street: Mid-1993 Prices for: Cannabis, Cocaine, Heroin* 6 (Sept. 1993)).

<sup>20</sup> See Table 19, *id.* at 173.

## E.

*Regarding Assumptions About Correlations to Other, Serious Offenses*

The report notes that at least one major study has concluded that it is the frequency with which one sells a cocaine product, and not the selling of cocaine in its *smokeable form*, that seems to best explain any violence associated with cocaine distribution.<sup>21</sup> Several researchers agree: "[T]he primary association between [crack] cocaine and violence is systemic. It is violence associated with the black market and distribution."<sup>22</sup> And as also noted in the February 1995 report, studies reflect that systemic violence of this sort is found in analyses of powder cocaine, and presumably other illicit drug markets as well.<sup>23</sup>

## F.

*Regarding Assumptions About Other Heightened Risks*

Already-existing guideline enhancements sufficiently account for any additional harm that may actually be found associated with cocaine offenses. Federal sentencing guidelines account for the involvement of firearms, or other dangerous weapons; serious bodily injury, or death; the use or employment of juveniles; leadership roles played by one in the commission of an offense; prior criminal histories; and other aggravating factors. Additional, sweeping, "built-in" sentencing enhancements reflecting crack cocaine's presumed, peculiar, always-aggravating qualities are unnecessary, unfair, and -- in the creation of irrational, increased incarceration time -- economically inefficient in their undue cost of tax dollars, as well.

For example, with regard to the issue of youth, especially youth gang related activity: as the report reflects, noted researchers have concluded that it is "the underlying culture of the gangs in a particular area that accounts for the violence more than anything else."<sup>24</sup> And as the report reflects, other

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<sup>21</sup> See the report, *supra* note 1, at 95 (quoting K. Chin & J. Fagan, *Violence as Regulation and Social Control in the Distribution of Crack*, in M. de la Rosa, B. Gropper, and E. Lambert (eds.), *Drugs and Violence: Causes, Correlates and Consequences* 36 (1990)).

<sup>22</sup> United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993).

<sup>23</sup> See, e.g., February report, *supra* note 1, at 97-98.

<sup>24</sup> Testimony of Dr. J.H. Slotnick before the United States Sentencing Commission, *Hearing on Crack Cocaine* (Nov. 1993), at 70, quoted in *id.* at 104. See also E. Walsh, "Chicago Street Gang



researchers have drawn like conclusions about the various, complex, non-crack-oriented social factors underlying gang and inner-city cultural violence -- such as "the increasing social and economic disorganization of the nation's inner cities beginning in the 1980's, and the mounting proliferation of more powerful guns . . . ." <sup>25</sup> Indeed, as the Commission's report points out: researchers tend to agree that from a historical perspective, crack cocaine is not unique. For example, as Professor Paul J. Goldstein testified before the Commission, the national homicide rate has "changed very little over the last 25 years." Indeed, in 1992, the homicide rate was lower than in 1980, when systemic violence arising out of the newly developing powder cocaine market was about at its peak, and lower than in 1933 -- at the end of alcohol prohibition. <sup>26</sup>

## G.

*Recap Regarding Assumptions*

Although some courts have generously deferred to Congress with regard to the 100-1 sentencing disparity between crack and powder cocaine -- i.e., assuming that Congress must have had some "reasons" for creating this disparity -- the Commission's report shows that any such assumed "rationales" are but flawed, erroneous assumptions. In short, the 100-1 crack versus powder cocaine sentencing disparity is shown by the Commission's report to be irrational, unwarranted, unfair, and economically inefficient -- when assessed under the very terms assumed to have been assumed by Congress.

## III.

**Race Matters**

Certainly given the irrational 100-1 cocaine sentencing policy, the racial ramifications of this sentencing policy invoke strong questions about our Nation's constitutional conceptions of equal protection, fundamental fairness and the People's right to be free from illogical, excessively disproportionate punishment.

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Study Shows Fearful Toll of Powerful Weapons," Wash. Post A 4 (Nov. 29, 1993) (citing study conducted by Carolyn Rebecca Black and Richard Black, which concluded that *gang turf* battles in many areas were more likely to lead to homicides than were drug trafficking disputes).

<sup>25</sup> Statement of Steven Belenko in J. Fagan, *Intoxication and Aggression*, in M. Tonry & J.Q. Wilson, *Drugs and Crime* (1990), at 27, quoted in February 1995 report, *supra* note 1, at 105.

<sup>26</sup> February report, *supra* note 1, at 108 (citing J. Inciardi & A. Pottieger, *Crack-Cocaine Use and Street Crime*, *Journal of Drug Issues* (1994), at 65).

The evidence does reflect that crack cocaine is significantly different from powder cocaine in one respect: crack sentences are almost exclusively meted out to African-Americans, while most powder cocaine sentences are Caucasian-Americans (the latter group being also the predominant group in Congress, in the federal Judiciary, and in the upper economic echelons of the populace generally).

Indeed, as this Commission knows and has recognized in its report, of all the defendants sentenced for crack cocaine offenses in the federal system, approximately 90% are African-American. In 1992, for example, 92.6% were African-American; and all of the persons sentenced in the federal system for simple possession of crack cocaine were African-American.

Certainly, in the light of the sentencing policy irrationality reflected in the report and referenced above, such "statistics" raise grave concerns about the grossly negative impact of this 100-1 policy on African-Americans -- given our society's supposedly equal, constitutional democracy. These African-Americans are subject to serving long mandatory minimum sentences for simple possession of small amounts of crack cocaine, while those typically Caucasian first time offenders convicted of possession of a much greater quantity of cocaine powder are subject to minimal sentences (even probation).

#### IV.

##### Sentencing Irrationality and Socio-Economic Inefficiency

NACDL points out that the irrational, unfair sentencing disparity between crack and powder cocaine offenses carries serious macro-economic costs in addition to the costs such a policy extracts from individual sentences and, in turn, from our Nation's fundamental conceptions of justice. Increased mandatory minimums of the irrational sort existing under the current system of cocaine sentencing take substantial amounts of taxpayer dollars to fund; dollars that could be more usefully and rationally applied, e.g., to the future of this country -- to education or national debt interest payments.

#### V.

##### NACDL Urges the Commission to Recommend Retroactive Application of a 1-1 Crack/Powder Cocaine Sentencing Ratio

The current cocaine sentencing system has been allowed to exist for too long, at great costs to individual lives and great cost to taxpayers. NACDL encourages the Commission to recommend to Congress a 1-1 ratio between crack and powder cocaine sentences. Further, NACDL strongly urges the Commission to recommend that this change be given immediate, retroactive effect.

It is not the fault of the victims of this flawed and racist eight-year old policy -- those sentenced under the crack 100-1 automatic enhancement policy -- that this policy came into existence and was allowed to exist for a significant period of time. They should be peculiarly and irrationally punished under this pernicious regime no longer. They should not be forced to continue the unreasonable forfeiture of their lives to this clearly flawed system of cocaine sentencing. The similarly situated should be similarly situated. This is a priceless fundamental value.

Further, though, the taxpayers deserve retroactive relief. They should be given the monetary relief associated with a retroactively applicable implementation of a more equitable, efficient cocaine sentencing policy. Indeed, any institutional costs associated with such retroactive application of a 1-1 cocaine sentencing ratio are obviously and substantially less than the costs associated with the continued subsidized irrationality of incarcerating those convicted of crack offenses, who should by all rights be serving but the sentence they would have received had they been but convicted of a powder cocaine offense. At the very least, such sanity and fairness would make room for the incarceration for the truly violent offenders among us, and perhaps even save us all the tax costs of a new prison or two.

#### VI.

##### Conclusion of NACDL Comments

Again, NACDL applauds the comprehensive research reflected in the Commission's report, and is grateful to the Commission for this opportunity to offer comments about the report and the Commission's forthcoming recommendations to Congress on cocaine sentencing policy. NACDL respectfully encourages the Commission to follow through on the implications of its study -- to recommend to Congress an immediate and retroactively applicable establishment of a fair and rational, 1-1 cocaine sentencing ratio, with all cocaine offenses being subject to the same penalties as those in effect for powder cocaine.

## Gerald H. Goldstein

Gerald Harris Goldstein is a native of San Antonio, Texas. He graduated from Tulane University in 1965 then attended the University of Texas School of Law. He graduated in 1968 and has devoted his practice since that time to the representation of those accused of crime. He is admitted to practice before the state courts of Texas and numerous federal district courts, U.S. Courts of Appeals and the United States Supreme Court. He is certified as a criminal law specialist by the State Bar of Texas Board of Legal Specialization. In addition to his practice he serves as an Adjunct Professor of Law at the University of Texas School of Law and lectures frequently on criminal law and procedure at continuing legal education seminars throughout the United States. He has served as appellate counsel in numerous death penalty cases and has been counsel of record for NACDL as *amicus curiae* in several important controversies before the U.S. Supreme Court. His law firm, Goldstein, Goldstein and Hilley, devotes approximately fifteen percent of its time to *pro bono* work. He is currently the President of NACDL.

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NACDL is a specialized bar association representing the nation's criminal defense lawyers. Its 8,700 direct members and 70 state and local affiliates include private criminal defense lawyers, public defenders, and law professors. The 36-year old association is devoted to ensuring justice and due process for persons accused of crime; fostering the integrity, independence, and expertise of the criminal defense profession; and promoting the proper and fair administration of criminal justice.

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Attachment B to NACDL Testimony  
Re: Cocaine Sentencing

June 29, 1995

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June 14, 1995

Gerald H. Goldstein, President  
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re: **Report to NACDL: Statistical Analysis of Potential Savings  
from Enactment of the Revised Crack Cocaine Penalties**

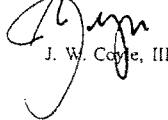
Dear President Goldstein:

As you and I have discussed, back in 1990, I handled my first federal crack cocaine case as a defense lawyer. Since that time, I have seen many people (all African-Americans) warehoused by the unfair penalties associated with federal crack cocaine sentencing. The statistics in the attached report can be viewed as supplementing the materials transmitted to Congress by the U.S. Sentencing Commission on May 1, 1995, when the Commission recommended enactment of the "Cocaine Penalty Adjustment Act of 1995." These data are particularly relevant to the prison impact information mandated by Section 20402 of the Violent Crime Control and Law Enforcement Act of 1994 (18 U.S.C. Section 4047(a)).

The report demonstrates the enormous savings to the nation -- \$3.5 billion -- that could be realized by passage of this important legislation. Three law students in my office -- Bennett Hirschhorn, Maurice Woods, and Ambre Gooch -- worked non-stop for three weeks to ensure that the figures in the report are as accurate as humanly possible. They drew on materials from Congress, the Sentencing Commission, and the U.S. Bureau of Prisons. Their commitment has been extraordinary.

I hope that our statistical report will give added momentum to the outstanding efforts of the Sentencing Commission, NACDL and other concerned organizations to rectify the terrible inequity of crack cocaine sentences. They clearly show that equalizing sentences is not just the right thing to do; it will save taxpayers money, too.

Respectfully yours,

  
J. W. Coyle, III

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STATISTICAL ANALYSIS OF  
POTENTIAL SAVINGS  
FROM ENACTMENT OF THE REVISED  
CRACK COCAINE PENALTIES

---

JUNE 9, 1995

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EXPLANATION OF STATISTICAL METHODOLOGY

COYLE & COYLE  
A PROFESSIONAL CORPORATION  
ROBINSON RENAISSANCE  
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June 9, 1995

Dear Reader:

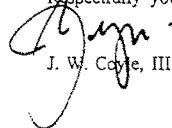
In 1990 I handled my first federal crack cocaine case as a defense lawyer. Since that time I have seen many people (all African Americans) warehoused by the unfair penalties associated with federal crack cocaine sentencing. The statistics that follow in this report are hopefully supplemental to the materials transmitted to Congress by the U.S. Sentencing Commission on May 1, 1995 recommending passage of the "Cocaine Penalty Adjustment Act of 1995", and particularly the prison impact section mandated by §20402 of the Violent Crime Control Law Enforcement Act of 1994. (18 U.S.C. §4047(a))

What we have attempted to do is translate into dollars the enormous savings (\$3.8 billion) realized by passage of this important legislation.

Three law students in my office have worked virtually non-stop for the last three weeks to insure that the figures in this report are as accurate as possible. They have utilized statistics and written materials from Congress, the U.S. Sentencing Commission, and the Bureau of Prisons. The commitment of students Bennett Hirschhorn, Maurice Woods, and Ambre Gooch has been extraordinary.

I am convinced that our greatness as a nation is determined by how fairly we treat the weakest members of our society. No one holds less power than the shackled prisoner standing before the bar of justice.

Respectfully yours,

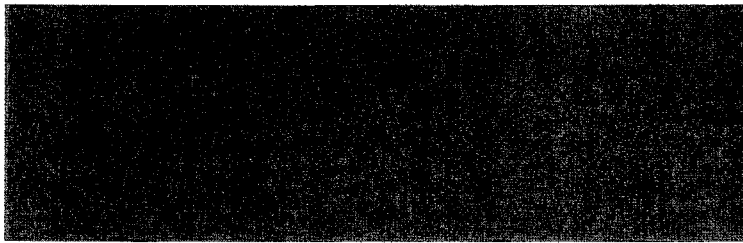


J. W. Coyle, III

JWC:sm  
L-CRA/COC

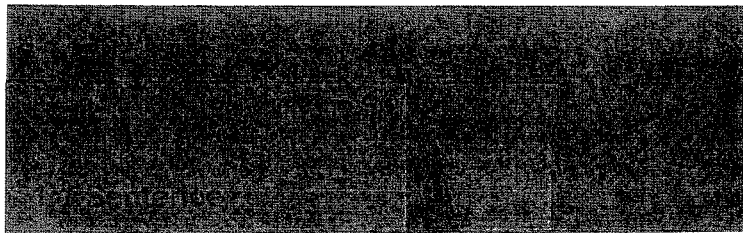
Potential Savings: \$ 3,452,612,222.62
\$ Spent to Date: \$ 399,363,435.55

In cases where the 1:1 sentence would end before the **Date of Enactment** of the Sentencing Commission's Recommendation, the **Potential Savings** account for the months after the date of enactment. **\$ Spent to Date** account for the prison months between the end of the 1:1 sentence and the **Date of Enactment**.



Date of Enactment of 1:1

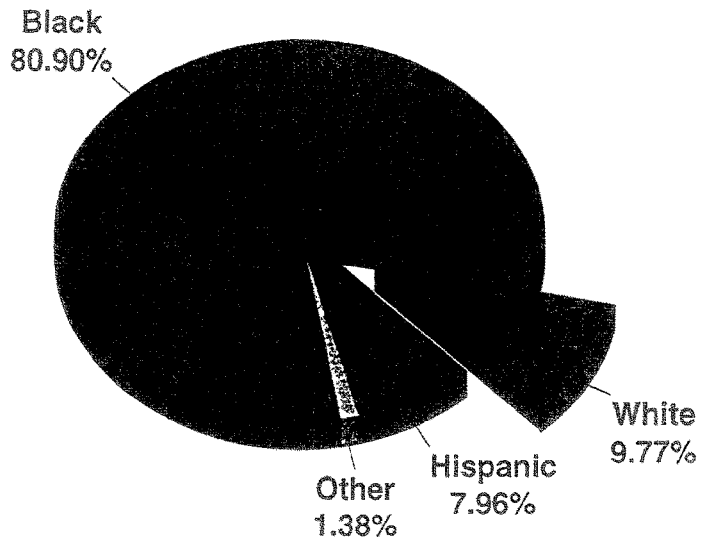
In cases where the 1:1 sentence would end after the **Date of Enactment**, the **Potential Savings** account for the months after the 1:1 Sentence.



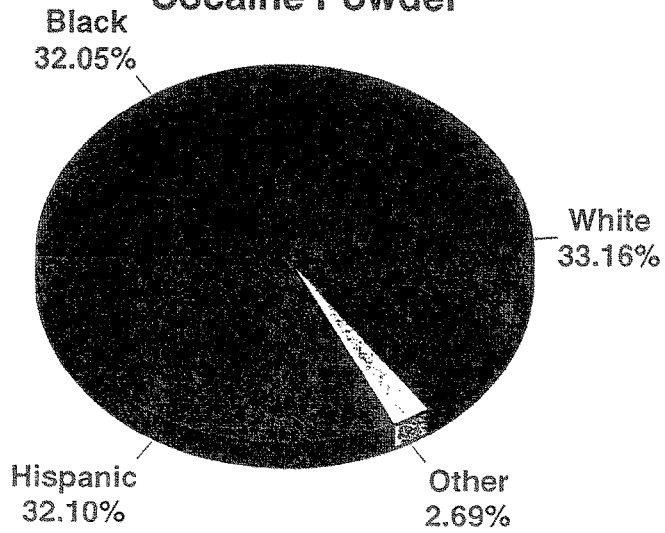
Date of Enactment of 1:1

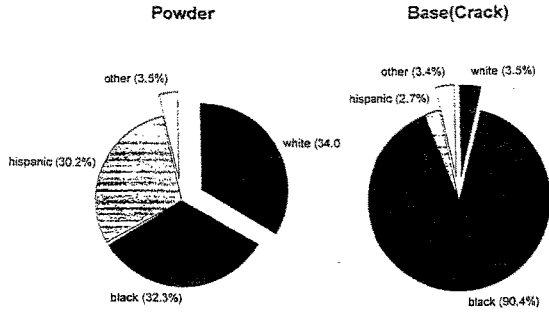
\* For a complete breakdown of savings by year and by Crack:Powder Sentencing ratios at 1:1, 5:1, and 10:1, see tab 5.

### Convictions in Our Federal Courts by Race Cocaine Base (Crack)

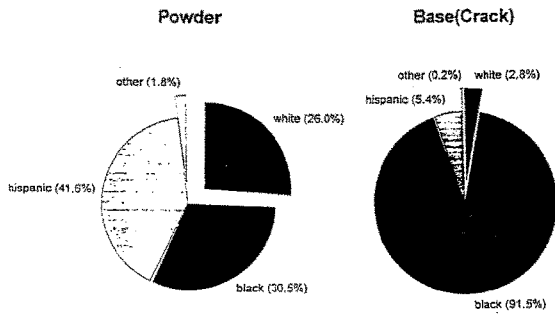


### Cocaine Powder

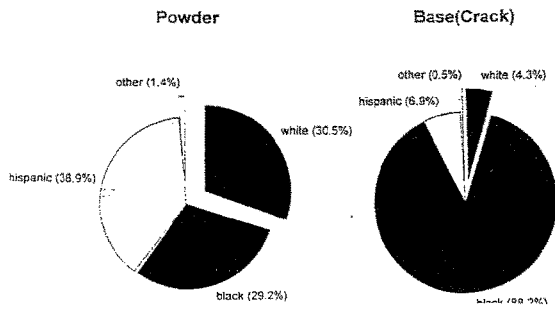




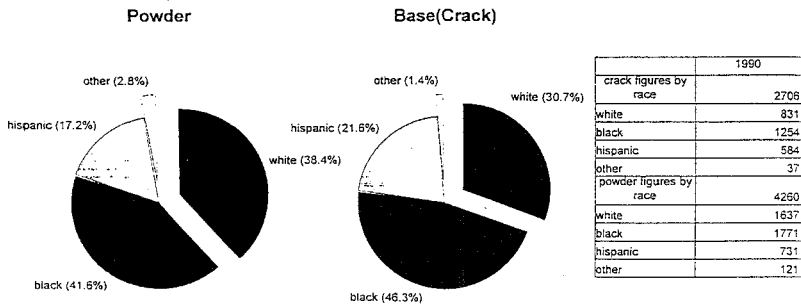
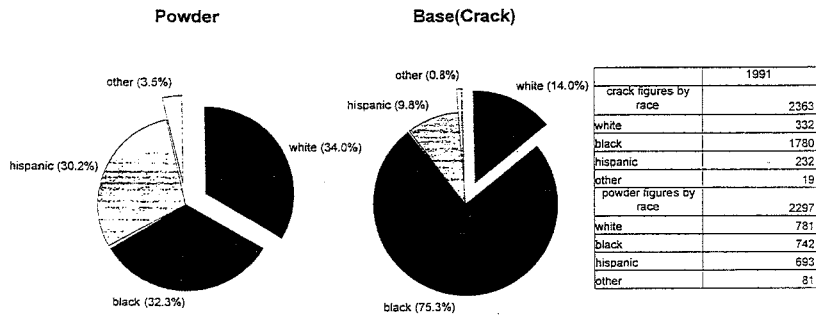
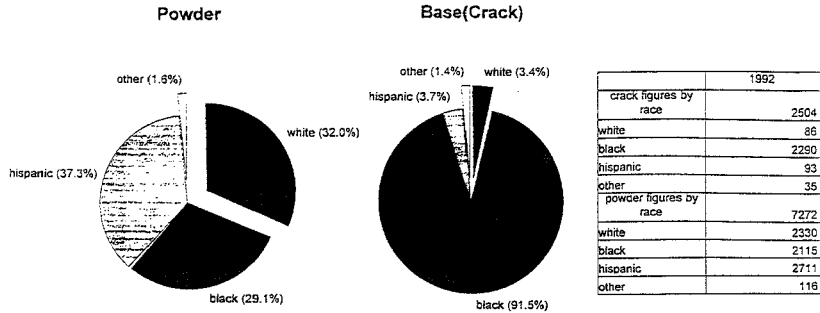
1995	
crack figures by race	4484
white	159
black	4053
hispanic	120
other	152
powder figures by race	3447
white	1173
black	1113
hispanic	1040
other	121



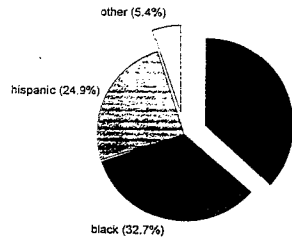
1994	
crack figures by race	3323
white	94
black	3042
hispanic	180
other	7
powder figures by race	4378
white	1140
black	1337
hispanic	1821
other	80



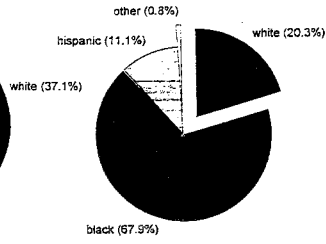
1993	
crack figures by race	3313
white	144
black	2922
hispanic	229
other	18
powder figures by race	5954
white	1815
black	1741
hispanic	2314
other	81



**Powder**

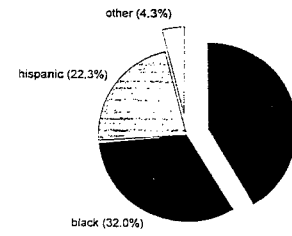


**Base(Crack)**

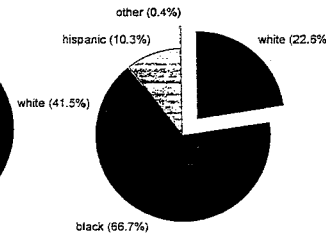


1989	
crack figures by race	
white	1422
black	288
hispanic	153
other	11
powder figures by race	
white	4841
black	1723
hispanic	1518
other	1157
total	249

**Powder**



**Base(Crack)**



1988	
crack figures by race	
white	243
black	55
hispanic	162
other	25
powder figures by race	
white	1148
black	475
hispanic	367
other	255
total	49

**Yearly Analysis of Potential Dollars Expended, Dollars Spent to Date, and Potential Savings from Enactment of the Sentencing Commission's Recommendation**

	1995
1:1 total for extra \$ spent at 100:1	\$649,782,188.85
\$ spent to date	\$0.00
potential savings	\$649,782,188.85

	1994
1:1 total for extra \$ spent at 100:1	\$513,895,425.06
\$ spent to date	\$0.00
potential savings	\$513,895,425.06

	1993
1:1 total for extra \$ spent at 100:1	\$544,606,811.85
\$ spent to date	\$16,768,558.76
potential savings	\$527,838,253.09

	1992
1:1 total for extra \$ spent at 100:1	\$436,000,349.00
\$ spent to date	\$42,124,355.00
potential savings	\$393,875,994.00

	1991
1:1 total for extra \$ spent at 100:1	\$626,062,707.42
\$ spent to date	\$79,182,883.79
potential savings	\$546,879,823.63

	1990
1:1 total for extra \$ spent at 100:1	\$672,508,309.00
\$ spent to date	\$154,474,875.00
potential savings	\$518,033,434.00

	1989
1:1 total for extra \$ spent at 100:1	\$354,978,175.00
\$ spent to date	\$88,434,736.00
potential savings	\$266,543,439.00

	1988
1:1 total for extra \$ spent at 100:1	\$54,141,692.00
\$ spent to date	\$18,378,027.00
potential savings	\$35,763,665.00



**Dollars Spent at 100:1, Dollars Spent to Date, and Potential Savings if Congress Adopts an Alternative Crack:Powder Sentencing Ratio of 5:1 or 10:1 in Opposition to the Recommendation of the Mandate to the Sentencing Committee**

5:1 total for extra \$ spent at 100:1	\$2,880,911,356.57
\$ spent to date	\$276,979,826.10
potential savings	<b>\$2,603,931,530.47</b>

10:1 total for extra \$ spent at 100:1	\$2,329,848,249.33
\$ spent to date	\$227,339,843.18
potential savings	<b>\$2,102,508,406.15</b>

	1995
1:1 total for extra \$ spent at 100:1	\$649,782,188.85
\$ spent to date	\$0.00
potential savings	\$649,782,188.85
5:1 total for extra \$ spent at 100:1	\$416,689,844.84
\$ spent to date	\$0.00
potential savings	\$416,689,844.84
10:1 total for extra \$ spent at 100:1	\$266,773,525.67
\$ spent to date	\$0.00
potential savings	\$266,773,525.67
total crack	4484
total powder	3447

	1994
1:1 total for extra \$ spent at 100:1	\$513,895,425.06
\$ spent to date	\$0.00
potential savings	\$513,895,425.06
5:1 total for extra \$ spent at 100:1	\$348,201,291.44
\$ spent to date	\$0.00
potential savings	\$348,201,291.44
10:1 total for extra \$ spent at 100:1	\$243,507,415.59
\$ spent to date	\$0.00
potential savings	\$243,507,415.59
total crack	3323
total powder	4378

	1993
1:1 total for extra \$ spent at 100:1	\$544,606,811.85
\$ spent to date	\$16,788,558.76
potential savings	\$527,838,253.09
5:1 total for extra \$ spent at 100:1	\$386,435,902.55
\$ spent to date	\$5,339,486.38
potential savings	\$381,096,416.17
10:1 total for extra \$ spent at 100:1	\$288,443,826.20
\$ spent to date	\$0.00
potential savings	\$288,443,826.20
total crack	3313
total powder	5954

	1992
1:1 total for extra \$ spent at 100:1	\$436,000,349.00
\$ spent to date	\$42,124,355.00
potential savings	\$393,875,994.00
5:1 total for extra \$ spent at 100:1	\$321,762,387.00
\$ spent to date	\$25,435,963.00
potential savings	\$296,326,424.00
10:1 total for extra \$ spent at 100:1	\$252,526,118.00
\$ spent to date	\$17,033,345.00
potential savings	\$235,492,773.00
total crack	2504
total powder	7272

	1991
1:1 total for extra \$ spent at 100:1	\$626,062,707.42
\$ spent to date	\$79,182,883.79
potential savings	\$546,879,823.63
5:1 total for extra \$ spent at 100:1	\$507,413,295.74
\$ spent to date	\$58,611,223.72
potential savings	\$448,802,072.02
10:1 total for extra \$ spent at 100:1	\$461,041,990.87
\$ spent to date	\$48,746,284.18
potential savings	\$412,295,706.69
total crack	2363
total powder	2297

	1990
1:1 total for extra \$ spent at 100:1	\$672,508,309.00
\$ spent to date	\$154,474,875.00
potential savings	\$518,033,434.00
5:1 total for extra \$ spent at 100:1	\$557,731,770.00
\$ spent to date	\$110,295,658.00
potential savings	\$447,436,112.00
10:1 total for extra \$ spent at 100:1	\$508,404,656.00
\$ spent to date	\$94,790,285.00
potential savings	\$413,614,371.00
total crack	2706
total powder	4260

	1989
1:1 total for extra \$ spent at 100:1	\$354,978,175.00
\$ spent to date	\$88,434,736.00
potential savings	\$266,543,439.00
5:1 total for extra \$ spent at 100:1	\$297,045,185.00
\$ spent to date	\$64,445,126.00
potential savings	\$232,600,059.00
10:1 total for extra \$ spent at 100:1	\$267,895,797.00
\$ spent to date	\$55,615,754.00
potential savings	\$212,280,043.00
total crack	1422
total powder	4841

	1988
1:1 total for extra \$ spent at 100:1	\$54,141,692.00
\$ spent to date	\$18,378,027.00
potential savings	\$35,763,665.00
5:1 total for extra \$ spent at 100:1	\$45,631,680.00
\$ spent to date	\$12,852,369.00
potential savings	\$32,779,311.00
10:1 total for extra \$ spent at 100:1	\$41,254,920.00
\$ spent to date	\$11,154,175.00
potential savings	\$30,100,745.00
total crack	243
total powder	1148

## EXPLANATION OF STATISTICAL METHODOLOGY

**Introduction:**

Our calculations were primarily based upon data provided to us by the University of Michigan Consortium, a clearing house for the US Sentencing Commission's databases. The database we used is called ICPSR 9317, and it contains data concerning federal sentencing (prisoner by prisoner) for the years 1987-1992.

The database, and the corresponding US Sentencing Commission reports from 1987 through 1990 compiled many statistics on the amount of sentence given to each drug related offender by crime and by race. However, the data was organized by General Offense Category, so that all drug crimes were grouped together, and then by Offense Type within that category (i.e. trafficking, possession, or importation). Drug Type (cocaine powder or cocaine base (Crack) was not specified, and had to be calculated based upon the fields of information given in the database: weight of drug, length of sentence, and involvement of weapon.

The 1991 data was less complete than the other years, and it was impossible to calculate crack and powder offenses from the information given.

The 1992 database distinguished between cocaine base and cocaine powder, but the weight was not given. The weight was calculated backwards from the formula we used for the first 3 databases.

No raw data could be provided to us from the University of Michigan Consortium for the years 1993, 1994, and 1995. The figures for these years have been mathematically interpolated and extrapolated based upon the race breakdown and quantity of each crime committed.

**1987-1990 METHODOLOGY**

First all cocaine offenders were separated from the database. By comparing the weight of the drug and the length of sentence (taking into account whether or not there was a weapon used) crack and powder cases were properly labeled. To allow for other aggravating circumstances, if the sentencing base level that the prisoner deserved at a 1:1 base:powder ratio was within 4 base levels of the actual sentence, then the record was treated as if it were a powder offense. Only if the base levels were more than 4 levels apart was the record labeled as a base offense.

**Determining Crack or Powder:**

The raw data used from the database fell within six general categories. First is COCAA which gives weight values, and second is COCAW which assigns a unit of measure. Combined, these two columns give a weight in units of cocaine. The units of cocaine were then all converted into Kilograms so that we had uniform figures in the amount of cocaine category.

**Proposed Base Level:**

Proposed base level was determined from the actual weight of the drug and how that correlated to what the Sentencing Guidelines recommend as a base level for that amount of drug. We assigned the proposed base levels at 1 to 1, 5 to 1, and 10 to 1, with the assumption that they were actually sentenced at 100 to 1.

**Actual Base Level:**

Actual base level was determined by comparing the length of sentence actually given to the range of months at each base level. When the length of sentence fell within a range, that base level was assigned.<sup>1</sup>

**Adjustment to Actual Base Level For Aggravating Base Level Increase:**

Under the Sentencing Guidelines Section 2D1.1(b)(1), if there is a weapon present in the commission of the crime, an increase of two base levels is recommended. If a weapon was present for each prisoner, we therefore subtracted two base levels from our estimated base level to closer approximate what we believe they were actually sentenced under. This category then equaled a final estimated adjusted base level at which each prisoner was sentenced.

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<sup>1</sup> In the database, 996, the identifier for life imprisonment, was replaced with 300 months which equals 25 years.

**Compare Actual Base Level to Proposed Base Level: "Crack or Powder?"**

Comparing the actual base level to the proposed base level equaled a difference in the base levels. The difference between actual 100 to 1 sentencing and the proposed base level sentencing at 1 to 1 was quite drastic for some prisoners, and approximately equal for others.<sup>2</sup> If the difference in base levels between the actual and proposed was greater than 4, we determined the drug to be CRACK. If it fell within 4 base levels, we determined the drug to be POWDER.<sup>3</sup>

**Accounting for Prisoners Where Weight of Drug is Not Available:**

All of the prisoners that did not have an actual amount of cocaine were assigned an approximate amount of cocaine based upon this scale:

(1)	Very small scale	=	10 to 21 months	Ave. base = 13
(2)	Small scale	=	22 to 33 months	Ave. base = 17
(3)	Medium scale	=	41 to 51 months	Ave. base = 21
(4)	Large scale	=	52 to 78 months	Ave. base = 25
(5)	Very large scale	=	79 to 151 months	Ave. base = 30
(6)	Extreme large scale	=	152 to 293 months	Ave. base = 36

**Conversion of Proposed Base Level Into Months:**

For purposes of converting proposed base level into proposed base level in months, the average number of months from the guideline at that base level were used (Criminal History Category I was assumed). For example, the range of sentences at base level 38 is 235 to 193 months. Base level 38 was therefore assigned an average proposed sentence of 214 months.

<sup>2</sup> Actual base level at 100 to 1 was always compared to proposed base level at 1 to 1 for purposes of determining whether the drug was crack or powder cocaine.

<sup>3</sup> A range of plus or minus four base levels will account for some differences in Criminal History Category sentencing levels, thereby determining small discrepancies as powder instead of crack.

Mr. MICA. Thank you so much for your testimony.

I am pleased to now recognize Mr. Wade Henderson, who is the executive director of the Leadership Conference on Civil Rights. You are welcome and recognized, sir.

Mr. HENDERSON. Thank you, Mr. Chairman and thank you, Mrs. Mink, for the opportunity to appear before you today.

I am Wade Henderson, the executive director of the Leadership Conference on Civil Rights. I would respectfully request that my complete statement and its attachment be made a part of the record of today's hearing.

Mr. MICA. Without objection, so ordered. Thank you.

Mr. HENDERSON. The Leadership Conference is the nation's oldest and most diverse coalition of civil rights organizations. The Leadership Conference on Civil Rights consists of over 180 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians and major religious groups. It is a privilege to represent the civil and human rights community in addressing the subcommittee today.

We commend you for convening this timely hearing. Last week the Leadership Conference released a new policy report entitled, "Justice on Trial: Racial Disparities in the American Criminal Justice System." I will first provide an overview of our report and then discuss the specific issue of drug sentencing.

The new Leadership Conference report compiles evidence about disparities in every aspect of the criminal justice system from police tactics to sentencing laws. We conclude that the criminal justice system is beset by massive unfairness. Both the reality and the perception of racial bias have adverse consequences for minority communities and for the criminal justice system itself. We respectfully submit the full report for the record. It is also available over the Internet at [www.civilrights.org](http://www.civilrights.org).

In the half century since the Leadership Conference was founded, the Nation has made great strides in combating racial discrimination. With the criminal justice field in particular, racial inequality is growing, not receding. Law enforcement disparities threaten 50 years of hard-fought civil rights progress.

For example, the Civil Rights Act of 1964 bans employment discrimination but today, 3 out of every 10 Black males born in the United States will serve time in prison, severely limiting their prospects for legitimate employment. The Voting Rights Act of 1965 guarantees the franchise but today, 31 percent of Black men in Alabama and Florida and 1.4 million Black men nationally have lost the right to vote as a result of felony criminal convictions.

Our civil rights statutes abolished Jim Crow laws and gave minority citizens the right to travel and to use public accommodations freely but today, racial profiling and police brutality make such travel hazardous to the dignity and health of law-abiding Black and Hispanic citizens.

"Justice on Trial" details how unequal treatment of minorities characterizes every stage of the process. Minorities are victimized by profiling and other police tactics, by racially skewed charging decisions of prosecutors, by biased sentencing practices and by the



failure of judges to redress inequities that become more glaring every day.

These disparities are unjustified. The vast majority of Blacks and Hispanics are law-abiding citizens. Enforcement tactics that assume otherwise are unfair and intolerable.

Now our report discusses the consequences of these policies. For example, almost one in three young Black males is under some form of criminal supervision, either in prison or jail or on probation or parole. A Hispanic male born in 1991 has a one in six chance of spending time in prison. There are more young Black men under criminal supervision than there are in college and for every 1 Black male who graduates from college, over 100 are arrested.

In my written testimony and in the Leadership Conference report itself, we present a number of recommendations to address these disparities, including more accountability for police and prosecutorial decisionmaking, more diversity in law enforcement, juvenile justice laws that do not turn Black and Hispanic youth into hardened career criminals, and a ban on racial profiling.

We do not propose less public safety. The issue is not whether to be tough on crime but whether to be fair and smart while being tough on crime. There is no contradiction between effective law enforcement and the promotion of civil rights.

Let me now discuss the report's specific recommendations regarding the subject of this hearing—drug sentencing. The decision to sentence a convicted criminal to prison has traditionally been entrusted to impartial judges but in recent years, sentencing has become mechanistic—a decision effectively controlled by legislators, prosecutors and sentencing commissioners. This change in the culture of sentencing has had disastrous consequences for racial minorities.

Our report analyzes mandatory sentencing laws enacted in the 1980's and concludes that they have led to racial injustice. These laws deprive judges of the discretion to tailor a sentence based on the culpability of the defendant and the seriousness of the crime. Mandatory minimum sentencing laws are not truly mandatory because prosecutors may grant exceptions. Prosecutors can choose to charge some defendants with offenses that do not carry mandatory penalties or they can accept a plea in which charges carrying mandatory penalties will be dismissed. These laws transfer sentencing authority from experienced, impartial judges to young adversarial prosecutors.

Now, some civil rights supporters originally favored mandatory minimums, but the evidence is clear that minorities fare worse under mandatory sentencing laws than they did under a system of judicial discretion. By depriving judges of the responsibility to impose fair sentences, mandatory sentencing laws represent injustice on autopilot.

The effect of current sentencing policies has been dramatic. Since 1972, the populations of Federal and State prisons have increased 500 percent to 1.2 million individuals. Including jail populations, America now incarcerates about 2 million people.

An increasingly large percentage of those in prison are charged with drug crimes. Between 1980 and 1995, the number of those serving time for drugs increased more than 1,000 percent. There

are now 400,000 Federal and State inmates serving time or awaiting trial for drug offenses.

These statistics describe a national strategy to address the public health problem of drug abuse with massive incarceration. A drug control strategy that depends so heavily on prison building is unwise for many reasons, including the racial disparities it creates. My written testimony and the LCCR report document these racial disparities in detail, but I will provide some highlights.

Whites who serve time for felony drug crimes serve shorter prison terms than Blacks—on average, 27 months for Whites and 46 months for Blacks. From 1970 to 1984, Whites comprised about 60 percent of those admitted to prisons and Blacks around 40 percent. By 1991, these ratios had reversed, with Blacks comprising 54 percent of prison admissions versus 42 percent for Whites.

Hispanics represent the fastest growing category of prisoners, having grown 219 percent between 1985 and 1995.

Between 1985 and 1995, the number of White drug offenders in State prisons increased by 300 percent while the number of similarly situated Black drug offenders increased by 700 percent.

Now, these disparities in drug sentencing do not occur because minorities use drugs at a higher rate than Whites. According to Federal health statistics, drug use rates per capita among racial minorities and White Americans are similar and studies show that drug users tend to purchase drugs from sellers of their own race. But while Blacks constitute about 12 percent of the population, they constitute 38 percent of those arrested for drugs, 59 percent of those convicted of drug offenses, and 74 percent of those sentenced to prison for a drug offense.

The statistics in certain cities are extraordinary. In Columbus, OH, Black males comprise 11 percent of the population but 90 percent of the drug arrests. In Jacksonville, FL, Black males comprise 12 percent of the population but 87 percent of drug arrests.

Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes prompts more minority arrests. Whites commit drug crimes, too, but police enforcement tactics do not focus on them. Drug arrests are easier to accomplish in inner city neighborhoods than in middle class White neighborhoods.

At the Federal level, differences in laws governing crack and powder cocaine cases cause disparity; that has already been noted. As members know, 5 grams of crack triggers the same mandatory sentence as 500 grams of powder cocaine. But in 1993, 95.4 percent of those convicted of Federal crack offenses were Black or Hispanic. Whites were prosecuted in State courts instead.

In 1995, the U.S. Sentencing Commission recommended that the differences in cocaine sentencing thresholds be abolished. And after Congress blocked that change, the Commission recommended a less dramatic reduction in the 100 to one disparity. Five years later, Congress has not adopted any of the Commission's recommendations on this subject.

The result is continued enforcement of a law that everyone agrees is irrational at best and racist at worst. Few policies contribute more to minority cynicism about law enforcement than the

crack/powder cocaine disparity. If anti-drug efforts are to have credibility in minority communities, these penalties must be equalized, as the commission initially proposed.

Mandatory sentencing laws are engines of racial injustice. They have filled America's prisons to the rafters with thousands of non-violent minority offenders. Repeal of these laws would be a significant step toward restoring racial fairness in the criminal justice system. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Henderson follows:]



**Leadership Conference  
on Civil Rights**

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Testimony of

**Wade Henderson**

**Executive Director  
Leadership Conference on Civil Rights**

**Before the  
Subcommittee on Criminal Justice, Drug Policy and Human Resources  
Committee on Government Reform  
U.S. House of Representatives**

***Drug Sentencing Practices and Issues***

**May 11, 2000**

Mr. Chairman and members of the Subcommittee: I am Wade Henderson, Executive Director of the Leadership Conference on Civil Rights. I am pleased to appear before you today on behalf of the Leadership Conference to discuss the civil rights implications of drug sentencing practices in the United States.

The Leadership Conference on Civil Rights (LCCR) is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, LCCR works in support of policies that further the goal of equality under law. To that end, we promote the passage of, and monitor the implementation of, the nation's landmark civil rights laws. Today the LCCR consists of over 180 organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. It is a privilege to represent the civil and human rights community in addressing the Subcommittee today.

We commend the Subcommittee for convening this very timely hearing. Last week the LCCR, in conjunction with the Leadership Conference Education Fund, released a major new policy report entitled *Justice on Trial: Racial Disparities in the American Criminal Justice System*. The Report examines inequities in the enforcement of criminal laws, and devotes substantial attention to the issue of today's hearing, drug sentencing. In my testimony today, I will first provide an overview of our report. I will then discuss in greater detail the civil rights implications of drug sentencing laws and practices.

#### **I. Overview of "Justice on Trial."**

There is growing concern about racial disparities in criminal justice. The new LCCR report, *Justice on Trial*, is an effort to compile and comprehensively analyze evidence about disparities in every aspect of the criminal justice system, from police practices to sentencing laws. Our conclusion is that the criminal justice system is beset by massive unfairness. Both the reality and the perception of racial inequities in law enforcement have disastrous consequences for minority communities and for the criminal justice system itself.

We respectfully submit the full report for the record. It is also available over the Internet at [www.civilrights.org](http://www.civilrights.org).

A half century has passed since the LCCR was founded. In that time, the nation has made great strides in combating racial discrimination and other vestiges of segregation. But in one critical arena – criminal justice – racial inequality is growing, not receding. Disparities in law enforcement threaten to render irrelevant fifty years of hard-fought civil rights progress.

- The Civil Rights Act of 1964 bans employment discrimination. But today, three out of every ten African American males born in the United States will serve time in prison, severely limiting their prospects for legitimate employment.

- The Voting Rights Act of 1965 guarantees the franchise. But today, thirty one percent of all black men in Alabama and Florida are permanently disenfranchised as a result of felony convictions. Nationally, 1.4 million black men have lost the right to vote under these laws.
- The Immigration and Nationality Act of 1965 sought to eliminate racial discrimination in immigration laws. But today, Hispanic and Asian Americans are routinely and sometimes explicitly singled out for immigration enforcement.
- In 1968 Congress passed the Fair Housing Act. Yet the current housing for approximately 2 million Americans – two-thirds of them African-American or Hispanic – is a prison or jail cell.
- Our civil rights statutes abolished Jim Crow laws and gave minority citizens the right to travel and use public accommodations freely. But today, racial profiling and police brutality make such travel hazardous to the dignity and health of law-abiding black and Hispanic citizens.

Today we have equality in law, but we do not have equality in law enforcement.

The system by which lawbreakers are apprehended and punished is one of the pillars of any democracy. But for that system to remain viable, the public must be confident that at every stage of the process, individuals in like circumstances are treated alike, consistent with the Constitution's guarantees of equal treatment under the law. Today, our criminal justice system strays far from this ideal.

*Justice on Trial* details how unequal treatment of minorities characterizes every stage of the process. Black and Hispanic Americans, and other minority groups as well, are victimized by disproportionate targeting and unfair treatment by police and other front-line law enforcement officials; by racially skewed charging and plea bargaining decisions of prosecutors; by discriminatory sentencing practices; and by the failure of judges, elected officials and other criminal justice policy makers to redress the inequities that become more glaring every day. Just this week, California police and city officials agreed to meet with the nation's top civil rights enforcement officer, acting assistant attorney general Bill Lann Lee, to begin negotiations about long-sought changes in police training and procedures in an effort to avert a lawsuit.

Disparities in the criminal justice system are unjustified. The vast majority of blacks and Hispanics are law abiding citizens and law enforcement tactics that assume otherwise are unfair and intolerable. As Representative John Lewis (D-GA) says in the foreword to *Justice on Trial*:

“...the unequal treatment of minorities at every stage of the criminal justice system perpetuates the stereotype that minorities commit more crimes. This perception helps

fuel racial profiling and a vicious cycle that affects both innocent and minority citizens. The reality is that the majority of crimes are not committed by minorities and most minorities are not criminals.”

Our report discusses the consequences of these policies in detail. Consider the following:

- In 1995, almost one in three black males aged 20-29 is on any given day under some form of criminal supervision – either in prison or jail, or on probation or parole.
- A Hispanic male born in 1991 has a one in six chance of spending time in prison.
- There are more young black men under criminal supervision than there are in college, and for every one black male who graduates from college, 100 black males are arrested.

*Justice on Trial* includes ten broad recommendations to begin to redress racial disparities in the Criminal justice system:

***One: Build Accountability into the Exercise of Discretion by Police and Prosecutors.*** Law enforcement discretion is necessary, but cannot continue to be exercised without meaningful, independent oversight and national standards.

***Two: Improve the Diversity of Law Enforcement Personnel.*** Much of the hostility between minority communities and the police can be traced to the under-representation of minorities in law enforcement. Police departments and prosecutors’ offices should redouble their efforts to recruit minorities. Police departments should encourage, and perhaps require, that officers live in the cities they patrol.

***Three: Improve the Collection of Criminal Justice Data Relevant to Racial Disparities.*** As in other areas of American life, we need to be more conscious of racial issues in criminal justice in order to achieve a color-blind criminal justice system eventually. The collection of racial data is essential to identify flaws in current policies and devise the means to redress them.

***Four: Suspend Operation of the Death Penalty.*** The decision of who will be sentenced to death depends, in significant measure, on the race of the defendant and the race of the victim. The LCCR opposes capital punishment altogether. But even death penalty supporters should acknowledge the need for a nationwide moratorium on application of the death penalty while flaws in death penalty procedures are studied and remedies are proposed.

***Five: Repeal Mandatory Minimum Sentencing Laws.*** As I will discuss later in my testimony, mandatory minimum sentencing laws are engines of racial injustice. The repeal of mandatory minimum sentencing laws would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

***Six: Reform Sentencing Guideline Systems.*** Sentencing guideline systems are often based on and infected by the racial disparities in current sentencing statutes. So even after mandatory minimum sentencing laws are repealed, it will be necessary to reform guideline systems. In particular, few policies have contributed more to minority cynicism about the war on drugs than the crack/powder cocaine disparity. If anti-drug efforts are to have any credibility in minority communities, these penalties must be equalized as the U.S. Sentencing Commission initially proposed.

***Seven: Reject or Repeal Efforts to Transfer Juveniles into the Adult Justice System.*** Laws that shun rehabilitation of youthful offenders in favor of their transfer into the adult criminal justice system are applied disproportionately to minority youth, and threaten to create a permanent underclass of undereducated, untrained, hardened criminals.

***Eight: Improve the Quality of Indigent Defense Counsel in Criminal Cases.*** Many of the racially disparate outcomes in the criminal justice system are attributable to inadequate lawyering. We recommend a systematic review of indigent defense services in the United States in order to inject new resources and effect significant improvements.

***Nine: Repeal Felony Disenfranchisement Laws and Other Mandatory Collateral Consequences of Criminal Convictions.*** Disenfranchisement laws are antithetical to democracy and disproportionately affect minorities, eroding the important gains of the civil rights era. These and other collateral consequences of criminal convictions such as eviction from public housing and restrictions on student loans should not be mandatorily imposed. Criminal sentences, including these collateral consequences, should be tailored to the nature of the crime and the circumstances of the offender.

***Ten: Restore Balance to the National Drug Control Strategy.*** Even if criminal justice procedures were reformed, we would be left with a national drug control strategy that seeks to combat drug abuse by locking up addicts. The current strategy inspires racial disparities and is ineffective in reducing the availability of drugs. The United States needs a more balanced drug strategy, one that adequately supports treatment, prevention, education, research and other efforts to reduce the demand for drugs in order to reduce drug-related crime.

Drug treatment and education are actually more effective weapons against drug abuse than mindless incarceration. The Rand Corporation has estimated that investing an additional \$1 million in drug treatment programs would reduce fifteen times more serious crime than enacting more mandatory sentences for drug offenders.

Nowhere in these recommendations does the LCCR propose less public safety or ineffective law enforcement. The issue is not whether to be *tough* on crime, but whether to be *fair* and *smart* in the course of being tough on crime. There is no contradiction between effective law enforcement and the promotion of civil rights.

## **II. Drug Sentencing Laws and Practices**



Sentencing, the topic of today's hearing, is arguably the most important stage of the criminal justice system. While policing strategies help determine who will be subjected to the criminal process, and prosecutorial choices help determine who will be granted leniency from the full force of the law, sentencing is where those earlier decisions bear fruit.

No one who has ever visited a prison and seen human beings locked in cages like animals can ever be unmindful of the enormity of society's decision to deprive one of its members of his or her liberty. The decision to sentence a convicted criminal to prison has, until recently, been viewed as a profound responsibility, one entrusted solely to impartial judges. Increasingly, however, sentencing has become mundane and mechanistic, a decision effectively controlled by legislators, prosecutors, and sentencing commissioners. This change in the culture of sentencing has had disastrous consequences for minorities in the United States.

In particular, the mandatory sentencing laws enacted by Congress and many state legislatures in the mid-1980's have led to racial injustice. These laws establish a minimum penalty that the judge must impose if the defendant is convicted of particular provisions of the criminal code, and deprive judges of their traditional discretion to tailor a sentence based on the culpability of the defendant and the seriousness of the crime.

Mandatory minimum sentencing laws are not truly mandatory because they provide opportunities for prosecutors to grant exceptions to them. Prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. And under federal law, only the prosecutor may grant a departure from mandatory penalties by certifying that the defendant has provided "substantial assistance" to law enforcement.

Mandatory minimums therefore embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.

I should note that some civil rights supporters originally supported mandatory sentencing as an antidote to racial disparities in sentencing. But the evidence is clear that minorities fare worse under mandatory sentencing laws than they did under a system of judicial discretion. By depriving judges of the ultimate authority to impose fair sentences, mandatory sentencing laws put sentencing on auto-pilot. Discretionary decisions of law enforcement agents and prosecutors engaged in what Justice Cardozo called "the competitive enterprise of ferreting out crime" are more likely to disadvantage minorities than judicial discretion.

The effect of current sentencing policies, including mandatory minimum sentencing laws, has been dramatic. In 1972, the populations of federal and state prisons combined were approximately 200,000. By 1997 the prison population had increased 500 percent to 1.2 million.

Similar developments at the local level led to an increase in the jail population from 130,000 to 567,000. America now houses some 2 million people in its federal and state prisons and local jails.

An increasingly large percentage of those incarcerated are charged with or convicted of non-violent drug crimes. Between 1980 and 1995, the number of state prison inmates serving time for drug crimes increased more than 1000 percent. Whereas only one out of every 16 state inmates was a drug offender in 1980, one out of every four in 1995 was a drug offender. By the middle of the 1990's, 60 percent of federal prison inmates had been convicted of a drug offense, as opposed to 25 percent in 1980. There are now some 400,000 federal and state inmates – almost a quarter of the overall inmate population -- serving time or awaiting trial for drug offenses. Drug offenders accounted for more than 80 percent of the total growth in the federal inmate population – and 50 percent of the growth of the state prison population – from 1985 to 1995.

The President's fiscal year 2001 budget calls for the construction of 17 new federal prisons. Even after these facilities are built, the prisons population is projected to exceed capacity by more than 30%.

These statistics describe a national strategy to address the public health problem of drug abuse with massive incarceration of those who use and sell drugs. A drug control strategy that depends so heavily on prison building is unwise and ineffective for many reasons, most beyond the scope of this testimony. But one of the chief failings of undue reliance on imprisonment is that this approach results in serious racial disparities. Incarceration rates for minorities are far out of proportion to their percentage of the U.S. population.

Racial disparities can be found in the fact of incarceration and in the length of prison time served. According to a Justice Department review of state sentencing, whites who serve time for felony drug offenses serve shorter prison terms than their black counterparts: An average of 27 months for whites, and 46 months for blacks. These discrepancies are mirrored with regard to non-drug crimes. Whites serve a mean sentence of 79 months for violent felony offenses; blacks serve a mean prison sentence of 107 months for these offenses. Whites serve a mean sentence of 23 months for felony weapons offenses, blacks serve a mean sentence of 36 months for these offenses. Overall, whites serving state prison sentences for felony conduct nationwide in 1994 served a mean time of 40 months, as compared to 58 months for blacks.

As the overall prison population has increased because of the war on drugs, so too has the percentage of minority Americans as a proportion of the overall prison population. From 1970 to 1984, whites comprised about 60 percent of those admitted to state and federal facilities, and blacks around 40 percent. By 1991, these ratios had reversed, with blacks comprising 54 of prison admissions versus 42 percent for whites. Other minority groups have also been affected by this trend: Hispanics represent the fastest growing category of prisoners, having grown 219 percent between 1985-1995. The percentage of Asian-Americans in prison has also grown; their percentage of the federal prison population increased by a factor of four from 1980 to 1999.

The changing face of the U.S. prison population is due in large measure to the war on drugs: Between 1985 and 1995, while the number of white drug offenders in state prisons increased by 300 percent, the number of similarly situated black drug offenders increased by 700 percent, such that there are more than 50 percent more black drug offenders in the state system than white drug offenders.

The fact that minorities are disproportionately disadvantaged by drug sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than whites. According to federal health statistics, drug use rates per capita among minority and white Americans are similar. Given the Nation's demographics, this means that many more whites use drugs than do minorities. Moreover, studies suggest that drug users tend to purchase their drugs from sellers of their own race.

But while blacks constitute approximately 12 percent of the population, they constitute 38 percent of all drug arrestees. Indeed, by 1989, with the war on drugs in full force and overall drug arrests having tripled since 1980, blacks were being arrested for drug crimes at a rate of 1600 per 100,000, while whites were being arrested at one-fifth the frequency per capita -- 300 per 100,000. The statistics in certain United States cities were even more eye-catching: In Columbus, Ohio, black males accounted to 11 percent of the total population, and for 90 percent of the drug arrests. In Jacksonville, Florida, black males comprise 12 percent of the population, but 87 percent of drug arrests.

Why are minorities the primary targets of the war on drugs? Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes prompts a disproportionate number minority arrests. Drug arrests are easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods. Whites are committing drug crimes too, but police enforcement strategies do not focus on white neighborhoods.

Blacks are not only targeted for drug arrests. They are also 59 percent of those convicted of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74 percent of those sentenced to prison for a drug offense. Thus, blacks are disproportionately subject to the drug sentencing regimes adopted by Congress and state legislatures. And these sentencing regimes, across all levels of government, increasingly provide for more and longer prison sentences for drug offenders.

Mandatory minimum sentencing laws result in the extended incarceration of non-violent offenders who, in many cases, are merely drug addicts or low-level functionaries in the drug trade. Indeed, in the first two years after enactment of California's "three strikes, you're out" law, more life sentences had been imposed under that law for marijuana users than for murderers, rapists, and kidnapers combined. An Urban Institute study examining 150,000 drug offenders incarcerated in state prisons in 1991 determined that 127,000 of these individuals -- 84 percent -- had no history of violent criminal activity, and half of the individuals had no criminal record at all.

In the federal system, 62 percent of those sentenced to prison under mandatory minimum drug sentences laws were considered “low-risk,” based on a lack of prior criminal histories. Yet these low-risk traffickers were expected to serve an average of 51 months in prison, as compared to 17 months for similarly situated federal prisoners who had been sentenced prior to the enactment of mandatory minimums.

While three strikes laws and mandatory minimums limit judicial discretion to reduce prison sentences, they do not reduce prosecutorial discretion over charging and plea negotiations – decisions which determine whether strict sentencing laws apply. For example, Georgia District Attorneys sought life sentences for 16 percent of black criminal defendants eligible for such sentences under the State’s “two strikes, you’re out law.” By contrast, Georgia prosecutors sought a life sentence in only one percent of the eligible cases involving white defendants. The result was that 98.4 percent of those serving life terms under the Georgia statute were black. Similarly, as of 1996, blacks made up 43 percent of Californians sentenced to prison under the State’s “three strikes you’re out” law, despite comprising only seven percent of the total State population.

Much of the racial discrepancy at the federal level is the result of differences in the sentencing of offenses involving crack and powder cocaine. These disparities, enacted into law as part of the Anti-Drug Abuse Act of 1986, arise from the different thresholds for the imposition of mandatory minimum prison sentences for crack and powder cocaine dealers. In short, federal law imposes mandatory 5-year federal prison sentences on anyone convicted of selling 5 grams or more of crack cocaine, and 10-year mandatory sentences for selling 50 grams or more of crack. But in order to receive the same mandatory 5- and 10-year sentences for selling powder cocaine, a defendant must be convicted of selling 500 and 5000 grams of powder cocaine.

Studies have shown that blacks and whites convicted of federal powder cocaine offenses go to jail for approximately the same length of time; so too do blacks and whites convicted of crack cocaine offenses. The problem is that few whites are prosecuted for crack offenses in federal court, and are instead prosecuted in state systems that may not impose mandatory minimum penalties for crack offenses. Indeed, in 1993, 95.4 percent of those convicted for federal crack distribution offenses were black or Hispanic. By contrast, almost one third (32 percent) of those convicted of federal powder cocaine distribution offenses in 1993 were white.

The crack/powder sentencing disparity, combined with the almost-exclusive federal targeting of blacks and Hispanics for crack-related crimes, means that minorities in general serve longer sentences for similar drug crimes than do whites. Combined with the far greater drug arrest rates for blacks than whites, and the general reliance on mandatory minimums for drug crimes, these longer sentences ensure that federal prisons house a disproportionately large number of minorities.

In 1995, the U.S. Sentencing Commission recommended to Congress that the drug statutes and sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds, noting both the inequality inherent in these differences and the cynicism they engendered toward

America's criminal justice system. After Congress blocked those changes, the Commission revisited the issue and has recommended a reduction, not an elimination, in the current 100-to-1 disparity, noting again that "[t]he current penalty structure results in a perception of unfairness and inconsistency."

To date, Congress has not adopted any of the Commission's recommendations on this subject. The result is perpetuation of a sentencing structure that every observer believes is irrational, and that many minorities view as racist. Few policies have contributed more to minority cynicism about the war on drugs than the crack/powder cocaine disparity. If anti-drug efforts are to have any credibility, especially in minority communities, these penalties must be equalized as the U.S. Sentencing Commission initially proposed.

Although sometimes conceived as a means to combat unwarranted racial disparity in sentencing, mandatory minimum sentencing laws are, in fact, engines of racial injustice. They have filled America's prisons to the rafters with thousands of non-violent minority offenders. The repeal of these laws would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

#### Conclusion

The Leadership Conference on Civil Rights would welcome the opportunity to work with this Subcommittee and others in Congress to reform drug sentencing laws and practices. In our view, such criminal justice reforms are a civil rights challenge that can no longer be ignored.

**JUSTICEonTRIAL**  
**Racial Disparities in the American Criminal Justice System**

**Ronald H. Weich and Carlos T. Angulo**

Leadership Conference on Civil Rights  
Leadership Conference Education Fund

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## FOREWORD

More than thirty years ago, at the height of the civil rights movement, the excesses and abuses of the southern system of justice were stark and clear. My colleagues and I often used the media to expose the overt racism and brutality of the police to help awaken Americans of good conscience to our cause. In those days, I went to jail willingly and endured the treatment that the police and courts meted out because we were set on changing America. And in large part through our efforts, along with that of countless others, we were successful. As stated in *Justice on Trial*, the United States has made significant progress toward ensuring equal treatment under law for all citizens. At the same time this report clearly shows that in the area of criminal justice, racial inequality is growing.

In my memoir, *Walking With the Wind*, I noted that the condition of poor black men, particularly in the inner-city, is the worst situation black Americans have faced since slavery. This report helps to explain why that is. Public policy that attempts to incarcerate the Nation out of its drug problem, and the crack-cocaine sentencing disparity have played a major role in creating far too many one-parent homes in the inner-city and further devastating minority communities. Further, the unequal treatment of minorities at every stage of the criminal justice system perpetuates the stereotype that minorities commit more crimes. This perception helps fuel racial profiling and a vicious cycle that affects both innocent and minority citizens. The reality is that the majority of crimes are not committed by minorities and most minorities are not criminals.

We may live in different rooms, but we are all under the same roof and we share the same walls. When sections of our house begin to rot, the entire structure is in danger of collapsing. As minority groups are treated differently by the criminal justice system, public confidence in the criminal justice system is eroded and our national faith in the rule of law is shattered.

There is no organization better posed to take on this challenge than the Leadership Conference on Civil Rights. As it has for the last 50 years, it will bring together a coalition that represents the diversity of America and that has honed its advocacy skills on every major piece of civil rights legislation enacted in the last 50 years. LCCR's advocacy for fairness and justice in our country's criminal justice system is one of the most important challenges it will face in the 21st century. But as the challenges of the late 20th century helped change the face of America, this challenge too holds great promise for continuing the Nation's progress toward true equality for all Americans in all facets of life.

I commend the LCCR and its sister organization the Leadership Conference on Education Fund for publishing this report and look forward to working with my friends at the LCCR on yet another civil rights campaign.

- U.S. Representative John Lewis (D-GA)

April 27, 2000



## ACKNOWLEDGMENTS

We would like to express our deep appreciation to the authors of the report – Ronald H. Weich and Carlos T. Angulo of the law firm Zuckerman, Spaeder, Goldstein, Taylor & Kolker -- for their counsel and scholarship. Prior to joining Zuckerman Spaeader, Weich served as an Assistant District Attorney in New York City and as Chief Counsel to Senator Edward M. Kennedy on the U.S. Senate Judiciary Committee. Angulo previously served as counsel to Senator Paul Sarbanes. In turn, the authors would like to thank David Cole, Angela Davis, David Harris and Mark Mauer for their assistance and expertise.

Thanks are also due to Laura W. Murphy, Director of the National Washington Office of the American Civil Liberties Union, Charles Kamasaki, Senior Vice President of the National Council of LaRaza, and Hilary Shelton, Director of the Washington Bureau of the National Association for the Advancement of Colored People. Murphy is chair of LCCR's Criminal Justice Task Force which advocates before the Congress and the Administration for fairness and justice in our criminal justice system. Kamasaki and Shelton assist greatly in those efforts.

Our thanks are also expressed to Carol Bergman, Alexander Robinson, and the Research and Policy Reform Center (RPR) for their support of our work on the report. RPR is a 501(c)(4) advocacy organization that seeks reform of state and federal laws in areas such as criminal justice and drug control policy, and U.S. policy toward landmines and Burma. George Soros is the principal donor to RPR.

- Wade Henderson, Executive Director, LCCR
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*The LCCR is the nation's oldest, largest and most diverse civil and human rights coalition, with more than 180 national organizations committed to the protection and advancement of basic civil and human rights for all persons in our society. Founded in 1950 by giants of the era - A. Philip Randolph, Arnold Aronson and Roy Wilkins - the LCCR's advocacy includes issues affecting persons of color, women, children, organized labor, major religious groups, persons with disabilities, gays and lesbians, and the elderly. In 1969, Arnold Aronson founded the LCEF to serve as the educational arm of the Leadership Conference. LCEF conducts research and educational activities on civil rights issues with the goal of strengthening the Nation's commitment to civil rights and equality of opportunity for all, and promoting an understanding and celebration of our Nation's diversity.*

## Introduction

In the half century since a tired seamstress named Rosa Parks refused to give up her seat on the bus, the United States has made significant progress toward the objective of ensuring equal treatment under law for all citizens. The right to vote and the right to be free from discrimination in employment, housing and public accommodations are enshrined in statute. The number of minorities in positions of authority in public and private life continues to grow. America's minorities now enjoy greater economic and educational opportunities than at any time in our history. While it certainly cannot be said that the United States has achieved complete equality in these areas, we continue to make slow but steady progress on the path toward that goal.

**But in one critical arena – criminal justice – racial inequality is growing, not receding. Our criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased. The injustices of the criminal justice system threaten to render irrelevant fifty years of hard-fought civil rights progress.**

- In 1964 Congress passed the Civil Rights Act prohibiting discrimination in employment. Yet today, three out of every ten African American males born in the United States will serve time in prison, a status that renders their prospects for legitimate employment bleak and often bars them from obtaining professional licenses.
- In 1965 Congress passed the Voting Rights Act. Yet today, 31 percent of all black men in Alabama and Florida are permanently disenfranchised as a result of felony convictions. Nationally, 1.4 million black men have lost the right to vote under these laws.
- In 1965 Congress passed the Immigration and Nationality Act, which sought to eliminate the vestiges of racial discrimination in the nation's immigration laws. Yet today, Hispanic and Asian Americans are routinely and sometimes explicitly singled out for immigration enforcement.
- In 1968 Congress passed the Fair Housing Act. Yet today, the current housing for approximately 2 million Americans – two-thirds of them African-American or Hispanic – is a prison or jail cell.
- Our civil rights laws abolished Jim Crow laws and other vestiges of segregation, and guaranteed minority citizens the right to travel and utilize public accommodations freely. Yet today, racial profiling and police brutality make such travel hazardous to the dignity and health of law-abiding black and Hispanic citizens.

The system by which lawbreakers are apprehended and punished is one of the pillars of any democracy. But for that system to remain viable, the public must be confident that at every stage of the process – from the initial investigation of a crime by the police officer walking a beat to the prosecution and punishment of that crime by prosecutors and judges – individuals in like circumstances are treated alike, consistent with the Constitution’s guarantees of equal treatment under the law.

Today, our criminal justice system strays far from this ideal. Unequal treatment of minorities characterizes every stage of the process. Black and Hispanic Americans, and other minority groups as well, are victimized by disproportionate targeting and unfair treatment by police and other front-line law enforcement officials; by racially skewed charging and plea bargaining decisions of prosecutors; by discriminatory sentencing practices; and by the failure of judges, elected officials and other criminal justice policy makers to redress the inequities that become more glaring every day.

Racial disparities affect both innocent and guilty minority citizens. There is obvious reason to be outraged by the fact that innocent minority citizens are detained by the police on the street and in their cars far more than whites. Those stops involve inconvenience, humiliation and a loss of privacy that is heightened when the rationale for the police action is the color of a motorist’s skin or a pedestrian’s accent. But there must also be outrage about the disparate treatment of minority citizens who have violated the law. A defendant surrenders many civil rights upon conviction, but equal protection of the laws is not one of them. It is an affront to all minority citizens – including the innocent – when a minority defendant is treated unfairly by the police, or by prosecutors, or at sentencing, because of his race or ethnicity.

The unequal treatment of minorities in our criminal justice system manifests itself in a mushrooming prison population that is overwhelmingly black and Hispanic; in the decay of minority communities that have given up an entire generation of young men to prison; and in a widely-held belief among black and Hispanic Americans that the criminal justice system is deserving neither of trust nor of support. All these factors contribute to a perception that lawlessness is a “colored” problem, and that the disproportionate treatment of blacks and Hispanics within the criminal justice system is a rational response to a statistical imperative.

Disparate treatment within the criminal justice system is not rational: the majority of crimes are not committed by minorities, and most minorities are not criminals – indeed, less than 10 percent of all black Americans are even arrested in a given year. Yet the unequal targeting and treatment of minorities at every stage of the criminal justice process – from arrest to sentencing – reinforces the perception that drives the inequality in the first place, with the unfairness at every successive stage of the process compounding the effects of earlier injustices. The result is a vicious cycle that has evolved into a self-fulfilling prophecy: More minority arrests and convictions perpetuate the belief that minorities commit more crimes, which in turn leads to racial profiling and more minority arrests.

The treatment of minorities in the criminal justice system is the most profound civil rights crisis facing America in the new century. It undermines the progress we have made over the past

five decades in ensuring equal treatment under the law, and calls into doubt our national faith in the rule of law.

This policy report examines the systematically unequal treatment of black and Hispanic Americans and other minorities as compared to their similarly situated white counterparts within the criminal justice system.<sup>1</sup> It reviews the effects of such unequal treatment on these groups in particular and on the criminal justice system generally.

Chapter One examines racial profiling and other law enforcement practices that single out blacks and Hispanics as objects of suspicion solely on the basis of the color of their skin or their ethnic heritage.

Chapter Two addresses the unequal treatment of minorities in the exercise of prosecutorial discretion, focusing on charging decisions in drug cases and racial disparity in the administration of capital punishment.

Chapter Three reviews the issue of sentencing, and describes the role of Congress and other legislative bodies in shaping and implementing criminal justice policies that fall short of our commitment to equal treatment under the law.

Chapter Four discusses the judiciary's failure to redress obvious injustices by curbing access to and restricting the use of data that reflect the disparate impact on minorities of law enforcement and prosecutorial practices.

Chapter Five examines the disproportionately harsh treatment of minorities in the juvenile justice system, an area in which especially pronounced disparities pose ominous consequences for minority communities.

Chapter Six outlines the consequences of unequal treatment of minority Americans in the criminal justice system – for those caught up in the system, for their families and communities, and for society as a whole.

Chapter Seven outlines several proposals to ameliorate the racial disparities that dominate the criminal justice system today.

Neither in Chapter Seven nor elsewhere does this report propose less public safety or ineffective law enforcement. The issue is not whether to be *tough* on crime, but rather whether to be *fair* and *smart* in the course of being tough on crime. Contrary to the assertions of some politicians, it is entirely consistent with effective policing to treat citizens fairly and humanely. ***There is no contradiction between law enforcement and civil rights.***

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<sup>1</sup> The findings in this report are based principally on previous published research and existing government data bases. Because much of the existing evidence concerns the treatment of African-Americans in the criminal justice system, the report is necessarily more limited in its treatment of Hispanic Americans, and especially limited in its treatment of Native Americans, Asian Americans and other minorities. But there is enough data to support the report's conclusion that minorities other than African Americans are also subject to unequal treatment in the enforcement of criminal laws. This report recommends improved efforts to study the treatment of all minority groups in the criminal justice system.

The policies advocated in this report are designed to enhance public safety by re-examining current enforcement efforts that do more to breed crime than combat it. For example, our over-reliance on incarceration as a means of addressing social problems in the inner city harms these communities by reducing the stigma of a criminal conviction and by siphoning scarce resources from needed health and education programs. It may sound *tough* to advocate more prisons but it may sound *soft* to advocate changes in the sentencing laws that would permit non-violent drug addicts to receive treatment instead of warehousing. But the opposite is true. Politicians who advocate more of the same, tired, lock-'em-up nostrums are taking the easy way out. Those ones willing to confront the ineffectiveness and unfairness of current crime policies deserve to be called tough and courageous.

Regardless of how vigorously we choose to enforce our criminal laws, racial and ethnic neutrality is an imperative. Should two similarly situated but racially or ethnically different individuals – whether they be two innocent motorists or two marijuana dealers – be treated the same regardless of the color of their skin or their ethnic heritage? Our Constitution says that the answer to this question must be in the affirmative.

This report compiles and synthesizes a growing body of empirical evidence proving that our criminal justice system discriminates against minorities. But the goal of this report is not to identify intentional racism by criminal justice personnel. Overt bigotry is relatively rare, relatively easy to uncover, and, when uncovered, subject to public opprobrium. Although overt bigotry surely exists in pockets of the system, the report does not rest its condemnation of the criminal justice system on those grounds.

Instead, we seek to highlight a pervasive pattern of unequal treatment of black and Hispanic Americans throughout that process, and to describe the consequences of this pattern for our system of democratic government and for our people. Whether the unequal treatment we discuss is intentional is (almost) beside the point. Our civil rights laws are premised on the notion that disparate treatment of minority groups, whether identifiably intentional or not, is unacceptable given the guarantees of equality imbedded in our constitutional system.

As the Leadership Conference on Civil Rights celebrates its 50<sup>th</sup> Anniversary, it takes pride in its accomplishments and girds itself for the struggle ahead. Just as we worked together to meet the historic civil rights challenges of the late 20<sup>th</sup> Century, so the racial disparity that infects the criminal justice system demands our attention as a united movement today.

## Chapter I

### RACE AND THE POLICE

The disparate treatment of minorities in the American criminal justice system begins at the very first stage of that system: the investigation of suspected criminal activity by law enforcement agents. Police departments disproportionately target minorities as criminal suspects, skewing at the outset the racial composition of the population ultimately charged, convicted and incarcerated. And too often the police employ tactics against minorities that simply shock the conscience. The racial generalizations that inform policing strategies in America today undermine trust in the criminal justice system as a whole and perpetuate a vicious cycle of criminalization.

#### A. *Racial Profiling and the Assumptions that Drive It*

Some crimes are brought to the attention of the police by circumstances (e.g., a dead body) or by bystanders who witness it. But very often the police seek to uncover criminal activity by investigation. They patrol the streets looking for activity they think is suspicious, they stop cars for traffic violations in the hope of discovering more serious criminality<sup>1</sup> and they engage in undercover operations in an effort to uncover victimless crimes like drug trafficking and prostitution. Each of these police tactics involves the exercise of a substantial amount of discretion – the police decide who they consider suspicious, which cars to tail, what conduct warrants further investigation, and which neighborhoods are ripe for enforcement activity.

Unfortunately, that discretion is routinely exercised through the prism of race. The practice of racial profiling – that is, the identification of potential criminal suspects on the basis of skin color or accent – is pervasive.

For example, a growing body of statistical evidence demonstrates that black motorists are disproportionately stopped for minor traffic offenses because the police assume that they are more likely to be engaged in more serious criminal activity. This ironically labeled “driving while black” syndrome<sup>2</sup> has two deleterious effects. It causes a large number of innocent black drivers to be subjected to the hassle and humiliation of police questioning, and it results in a lopsided number of blacks being arrested for non-violent drug crimes that would not come to the attention of authorities but for the racially motivated traffic stop.

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<sup>1</sup> The Supreme Court found the practice of pretextual traffic stops to be constitutional in *Whren v. United States*, 517 U.S. 806 (1996).

<sup>2</sup> For extensive discussion of the “driving while black” phenomenon, see Angela J. Davis, “Race, Cops, and Traffic Stops,” 51 *U. Miami L. Rev.* 425 (1997); David A. Harris, “‘Driving While Black’ and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,” 37 *J. Crim. L. & Criminology* 544 (1997); David Harris, “The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters,” 84 *Minnesota L. Rev.* 265 (1999) (“Why ‘Driving While Black’ Matters”).

The practice is widespread:

- Under a federal court consent decree, traffic stops by the Maryland State Police on Interstate 95 were monitored. In the two year period from January 1995 to December 1997, 70 percent of the drivers stopped and searched by the police were black, while only 17.5 percent of overall drivers – as well as overall speeders – were black.<sup>3</sup>
- In Volusia County, Florida, in 1992, nearly 70 percent of those stopped on a particular interstate highway in Central Florida were black or Hispanic, although only 5 percent of the drivers on that highway were black or Hispanic.<sup>4</sup> Moreover, minorities were detained for longer periods of time per stop than whites, and were 80 percent of those whose cars were searched after being stopped.<sup>5</sup> The discriminatory treatment of minority drivers was duly noted by Volusia County Sergeant Dale Anderson, who asked a white motorist he had stopped how he was doing; the motorist responded “[N]ot very good,” to which Anderson responded, “Could be worse – could be black.”<sup>6</sup>
- A study of traffic stops on the New Jersey Turnpike found that 46 percent of those stopped were black, although only 13.5 percent of the cars on the road had a black driver or passenger and although there was no significant difference in the driving patterns of white and non-white motorists.<sup>7</sup>
- A Louisiana State Police Department training film specifically encouraged the Department’s officers to initiate pretextual traffic stops against “males of foreign nationalities, mainly Cubans, Colombians, Puerto Ricans, and other swarthy outlanders.”<sup>8</sup>
- In 1992, as part of a report by the ABC news program “20/20”, two cars, one filled with young black men, the other with young white men, navigated the same route, in the same car, at the same speed through the Los Angeles city streets on successive nights. The car filled with young black men was stopped by the police several times on their drive; the white group was not stopped once, despite observing police cars in their immediate area on no less than 16 separate occasions during the evening.<sup>9</sup>

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<sup>3</sup> David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (The New Press 1999) at 36 and n.66. See also “Why ‘Driving While Black’ Matters” at 280-81 and nn. 82-92.

<sup>4</sup> *Id.* at 36-37, nn. 69-70. See also Marc Mauer, *Race to Incarcerate* (New York, The New Press 1999) (*Race to Incarcerate*), p. 129 and n. 13.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 37 and n. 71 (citing Jeff Brazil and Steve Berry, “Color of Driver Is Key to Stops in I-95 Videos,” *Orlando Sentinel*, August 23, 1992, p. A1).

<sup>7</sup> *Id.* at 38.

<sup>8</sup> *Id.* at 41 and n. 82. The training film is not only racist, it is inaccurate because Puerto Ricans are, of course, American citizens.

<sup>9</sup> *Id.* at 25 and n. 29.

Even the United States government has facilitated racial profiling. The Volusia County highway interdiction program discussed above is part of a network of drug interdiction programs established and funded by federal authorities under the name "Operation Pipeline." And it was the Drug Enforcement Agency that encouraged New Mexico state police to use a "cocaine courier profile" one element of which was that "[t]he vehicle occupants are usually resident aliens from Colombia."<sup>10</sup>

Racial profiling is also carried out in forms other than pretextual traffic stops. Enforcement of the controlled substances laws, in general, seems premised on the bizarre perception that drug trafficking is exclusively a minority-owned business. Drug-courier profiles have regularly included race as an explicit element of suspicion. In sworn testimony, DEA agents have at various times in recent years stated their belief that most drug couriers are black females, and that being Hispanic or black was part of the profile they used to identify drug traffickers. In light of these perceptions, it is no surprise that a police officer working at the Memphis International Airport testified that approximately 75 percent of those stopped and questioned in the Airport were black, or that none of the three judges who arraigned felony cases in New York County could recall a single New York Port Authority drug interdiction case where the defendant was not black or Hispanic.<sup>11</sup>

The immigration law context furnishes further evidence of widespread racial profiling. A recent study by the National Council of La Raza identified a pattern of selective enforcement of U.S. immigration laws by INS and local officials, whereby individuals of identifiably Hispanic origin – including many who were American citizens, legal permanent residents, or otherwise lawfully in the United States – were targeted by the authorities and subjected to interrogation, detention, or arrest for suspected immigration violations.

One of many examples of such targeting was "Operation Restoration" in Chandler, Arizona, a joint endeavor of the Chandler Police Department and the U.S. Border Patrol. According to a study conducted by the Arizona Attorney General's office, local police and U.S. Border Patrol officials implementing Operation Endeavor "without a doubt . . . stopped, detained, and interrogated [Chandler residents] . . . purely because of the color of their skin."<sup>12</sup> Similarly, in Katy, Texas, the INS and officers from the Katy Police Department conducted a joint operation whereby they stopped and detained cars driven by individuals of "Hispanic appearance," conducted street sweeps in which Hispanics were the only ones targeted or questioned, and undertook searches of Hispanic residences.<sup>13</sup>

Overall, nearly three-quarters (73.5%) of all of those deported by the INS are of Mexican origin, according to INS statistics, even though Mexicans constitute less than half of all undocumented persons in the United States. Hispanics constitute approximately 60% of all

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<sup>10</sup> Gary Webb, "DWB: police stops motorists to check for drugs," *Esquire*, April 1, 1999, p.126.

<sup>11</sup> *No Equal Justice* at 49-50 and nn.106-108, 110-111.

<sup>12</sup> National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the 90's* (1999) (*The Mainstreaming of Hate*), p.26.

<sup>13</sup> *Id.* at 19.



undocumented persons, but well over 90% of those subjected to INS enforcement actions are Hispanic.<sup>14</sup>

Racial profiling is seemingly inconsistent with today's dominant law enforcement philosophy: community policing. But community policing is still a vague and elastic concept. At its best, community policing refers to a more diverse police force working with community institutions to prevent crime before it occurs. For example, Boston's anti-gang efforts have featured after-school programs for high-risk students and a constructive partnership between the police and crime prevention agencies. In places where the police have consciously integrated themselves into the fabric of the neighborhood, community policing deserves credit for helping to reduce crime rates.

But too often, community policing is just a label, a slogan to attract federal grant money and favorable headlines. In some jurisdictions, community policing means little more than giving street level officers wide discretion to "clean up" the communities they patrol by whatever means seem expedient. Thus, community policing may come to mean "quality of life" policing, under which the police adopt a zero-tolerance approach to minor violations of law. Such an ends-justify-the-means approach invariably works to the detriment of – and is disproportionately targeted at – black and Hispanic populations. Professor David Cole has pointed out that such an enforcement strategy "relies heavily on inherently discretionary police judgments about which communities to target, which individuals to stop, and whether to use heavy-handed or light-handed treatment for routine infractions."<sup>15</sup> According to Professor Angela Davis, "[t]he practical effect of this deference [to law enforcement discretion] is the assimilation of police officers' subjective beliefs, biases, hunches, and prejudices into law,"<sup>16</sup> and the evidence suggests that such discretion is exercised to the detriment of America's minorities. As Harvard Law School Professor and African-American Charles Ogletree has observed, "If I'm dressed in a knit cap and hooded jacket, I'm probable cause."<sup>17</sup>

Professor Ogletree's comment is echoed in the practices of the New York City Police Department, which in the late 1990's began to aggressively "stop and frisk" city residents. "Stop and frisk" entails the practice of temporarily detaining, questioning and patting down pedestrians based on an articulable suspicion that the detainee is involved in criminal activity. While "stop and frisk" is constitutional, it has not traditionally been used as a free-standing law enforcement strategy because in such a regime the discretion to choose who to stop is virtually unconstrained.

Predictably, black and Hispanic New Yorkers were disproportionately targeted for "stop and frisk" pat-downs. A December 1999 report by the New York State Attorney General found that of the 175,000 "stops" engaged in by NYPD officers from January 1998 through March 1999, almost 84 percent were of blacks and Hispanics, despite the fact that those groups comprised less than half of the City's population; by contrast, only 13 percent of stops were of

<sup>14</sup> 1996 Statistical Yearbook of the Immigration and Naturalization Service (1997).

<sup>15</sup> *No Equal Justice* at 44-45.

<sup>16</sup> Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," 67 *Fordham L. R.* 13, 27 (1998) ("Prosecution and Race").

<sup>17</sup> Ellen Goodman, "Simpson Case Divides Us By Race," *Boston Globe*, July 10, 1994, p.73 (quoting Charles Ogletree).

white New Yorkers, a group that comprises 43 percent of the City's population. Of the 10 police precincts with the most stops, seven were majority-black/Hispanic districts, and two of the majority-white districts were commercial districts whose census figures did not reflect the demographics for policing purposes, leaving only one majority-white precinct in the top 10. By contrast, of the 10 precincts with the lowest stop rates, all but two were majority-white.<sup>18</sup> The Attorney General also identified racial disparity in stop rates within white neighborhoods – in precincts that were approximately 90 percent white, more than 53 percent of the total stops were of blacks and Hispanics.<sup>19</sup> Thus, more stops occurred in majority-minority precincts, and more stops of minorities than of whites occurred even in majority-white neighborhoods.

The Attorney General also determined that stops of minorities were less likely to yield arrests than stops of white New Yorkers – the NYPD arrested one white New Yorker for every eight stops, one Hispanic New Yorker for every nine stops, and one black New Yorker for every 9.5 stops. The statistics were even more stark with respect to stops engaged in by the NYPD plainclothes Street Crimes Unit, which stopped 16.3 blacks and 14.5 Hispanics per arrest, but only 9.7 whites per arrest.<sup>20</sup> Given racially disparate overall stop rates, these statistics reveal that far more innocent minorities are subjected to stop and frisk tactics than innocent whites.

Some continue to defend racial and ethnic profiling by law enforcement as a rational response to patterns of criminal conduct. Such arguments rest implicitly or explicitly on two basic assumptions, each of which is flawed, pernicious, and divisive.

The first assumption is that minorities commit the majority of crimes, and that therefore it is a sensible use of police resources to focus on the behavior of those individuals. This attitude was epitomized by Carl Williams, Superintendent of the New Jersey State Police until his dismissal in March 1999, who stated in defense of racial profiling that “mostly minorities” traffic in marijuana and cocaine.<sup>21</sup> Superintendent Williams’ assumption, shared by many, is flatly incorrect with respect to those crimes most commonly investigated through racial profiling – drug crimes.<sup>22</sup> Blacks commit drug offenses at a rate proportional to their percentage of the United States population: Black Americans represent approximately 12 to 13 percent of the U.S.

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<sup>18</sup> *The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of New York From the Office of the Attorney General* (December 1999), pp. 94-100.

<sup>19</sup> *Id.* at 106.

<sup>20</sup> *Id.* at 111, 117.

<sup>21</sup> “Why ‘Driving While Black’ Matters” at 297. Superintendent Williams justified his statement by pointing out that when senior American officials went overseas to discuss the drug trade, they went to Mexico and not Ireland. *Id.*

<sup>22</sup> There is some evidence that violent crime rates are higher in black neighborhoods, for reasons involving the correlation between violence and poverty, and the reality that blacks in the United States are disproportionately poor. See generally, *Race to Incarcerate* at 163-170. In any event, racial profiling and drug courier profiles are employed to uncover non-violent drug crimes, not assaults, and therefore derive no legitimacy from violent crime rate statistics.

population, and, according to the most recent federal statistics, 13 percent of all drug users.<sup>23</sup> And for the past 20 years, drug use rates among black youths has been consistently lower per capita than drug use rates among white youths.<sup>24</sup>

Findings related to the “driving while black” phenomenon and other forms of racial profiling lead to the same conclusion. While black motorists were disproportionately stopped by Maryland State Police on I-95, the instances in which drugs were actually discovered in the stopped vehicles were the same per capita for black and white motorists. Similarly, a national study by the United States Customs Service revealed that while over 43 percent of those subjected to searches as part of the Service’s drug interdiction efforts were black or Hispanic, the “hit rates” for those groups per capita were lower than for white Americans.<sup>25</sup> And a recent report by the congressional General Accounting Office contains additional evidence: “For black female U.S. citizens were *nine times* more likely to be subjected to x-ray searches by U.S. Customs Officials than white female U.S. citizens, these black women were less than half as likely to be found carrying contraband as white females.”<sup>26</sup>

The baseless assumption that most criminals are members of minority races is accompanied by the second, equally flawed assumption that most minorities are criminals. The premise of racial profiling is that random checks of black or Hispanics are likely to yield an arrest for criminal activity. But there is no evidence to support that racist assumption. Even after being disproportionately targeted for stops and searches, most blacks and Hispanics are not arrested because the vast majority of those stopped are actually innocent of the conduct the police suspected they were engaged in. Less than 10 percent of all blacks are even arrested in a single year.<sup>27</sup> The vast majority of blacks and Hispanics – like the vast majority of whites – are law-abiding citizens.

For example, only nine of more than 1,000 stops in Volusia County, Florida in 1992, 70 percent of which were of black or Hispanic motorists, resulted in a ticket, much less criminal charges. And in Eagle County, Colorado, the Sheriff’s Department’s regular use of pretextual stops against minorities did not yield a single arrest for violation of the drug laws, although it did

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<sup>23</sup> Substance Abuse and Mental Health Services National Administration, U. S. Department of Health & Human Services, “National Household Survey on Drug Abuse, Preliminary Results from 1997” (1999), pp. 13, 58, Table 1A. While involvement in drug trafficking is harder to measure, a National Institute of Justice Report indicates that drug users tend to purchase from members of their own racial or ethnic background. Kenneth Riley, “Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities,” National Institute of Justice, United States Department of Justice (December 1997), p.1.

<sup>24</sup> “Why ‘Driving While Black’ Matters” at 296 (citing National Institute on Drug Abuse, “Drug Use Among Racial/Ethnic Minorities” (1997), pp. 64-66; Bureau of Justice Statistics, U.S. Department of Justice, “Drugs, Crime, and the Justice System” (1992), p.28).

<sup>25</sup> *Id.* at 295-296 (citing U.S. Customs Service, “Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998” (1998), p.1 (finding that 6.7% of whites, 6.3% of blacks, and 2.8% of Hispanics carried contraband)).

<sup>26</sup> U.S. General Accounting Office, *U.S. Customs Service: Better Targeting of Airline Passengers: Personal Searches Could Produce Better Results* (March 2000), p. 2.

<sup>27</sup> Statistical Abstract of the United States, Tables 12 and 358 (comparing 1997 statistics) (1999); see also “Developments in the Law – Race and the Criminal Process,” *101 Harv. L. Rev.* 1472, 1508 (1988).

result in a court settlement of \$800,000 in favor of the 400 black and Hispanic drivers who had been subjected to this offensive police tactic.<sup>28</sup>

Pretextual traffic stops and other manifestations of racial profiling essentially treat race as evidence of crime, targeting certain segments of the population as potential criminal offenders solely by virtue of their race. Thus, through racial profiling, America's law enforcement officials not only "racialize" crime by assuming most crimes are committed by minorities, they also "criminalize" race. In so doing, they place the primary burden of law enforcement on the backs of innocent minorities who are the victims of racial and ethnic stereotyping. Innocent minorities are harassed more than innocent white Americans, and wrongdoing by minorities is punished more harshly than wrongdoing by whites. Such unfair treatment of minorities breeds distrust and disrespect for law enforcement in those communities.

The harms caused by racial profiling extend beyond racial division and distrust. In effect, racial profiling becomes a self-fulfilling prophecy. As noted by Professor David Harris, a leader in identifying the "driving while black" phenomenon:

Because police will look for drug crime among black drivers, they will find it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals.<sup>29</sup>

And, indeed, this prophecy has come to pass. Despite the fact that, as noted earlier, blacks are just 12 percent of the population and 13 percent of the drug users, and despite the fact that traffic stops and similar enforcement strategies yield equal arrest rates for minorities and whites alike, blacks are 38 percent of those arrested for drug offenses and 59 percent of those convicted of drug offenses.<sup>30</sup> Moreover, more frequent stops, and therefore arrests, of minorities will also result in longer average prison terms for minorities because patterns of disproportionate arrests generate more extensive criminal histories for minorities, which in turn influence sentencing outcomes.<sup>31</sup>

### ***B. Violent Consequences of Race-Based Policing***

Police tactics based on racial assumptions are not only unfair to minorities; they actually place minorities in physical danger. In recent months, several highly publicized police shootings appeared to result from the police acting on unjustified racial generalizations.

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<sup>28</sup> *No Equal Justice* at 37-38 and n. 74.

<sup>29</sup> "Why 'Driving While Black' Matters" at 297.

<sup>30</sup> Bureau of Justice Statistics, United States Department of Justice, "Sourcebook of Criminal Justice Statistics 1997," at 338 (table 4.10), 422 (table 5.46). For further discussion of the war on drugs and its effect on minorities, see Chapter III.

<sup>31</sup> "Why 'Driving While Black' Matters" at 303. See also "Prosecution and Race" at 36 (noting that "[r]ace . . . may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect.")

Amadou Diallo was a young black man living in a predominantly minority neighborhood in New York City. On the night of February 4, 1999, Diallo was approached by four police officers as he stood by the front steps of his apartment building. He reached for his wallet to produce identification. The officers mistook this action as reaching for a weapon, and fired 41 gunshots, killing Diallo. Testifying in his own defense, one of the officers who had shot Diallo noted that “[t]he way he was peering up and down the block” had made the officers suspicious. “He stepped backward, back into the vestibule as we were approaching, like he didn’t want to be seen . . . and I’m trying to figure out what’s going on. You know – what’s this guy up to? I was getting a little leery, from the training, of my past experience of arrests, involving gun arrests.”<sup>32</sup>

Soon after the officers who shot Amadou Diallo were acquitted of criminal charges, a 26 year-old black man named Patrick Dorismond was also killed by the police. On March 16, 2000, Dorismond was trying to hail a cab on a midtown Manhattan street corner when he was approached by three undercover police officers who, without apparent reason to believe that Dorismond was a drug dealer, tried to buy drugs from him. Dorismond became angry, and in the ensuing fight Dorismond was shot and killed by a bullet from the gun of one of the police officers. The first response of New York City’s Mayor Rudolph Giuliani was not to express regret for the tragic death, or to determine why the police, without apparent predicate, undertook a sting operation of a young black man minding his own business. Rather, Mayor Giuliani cited Dorismond’s police record – which consisted of stale unsubstantiated charges and two convictions for disorderly conduct – to support the conduct of police, despite the fact that Dorismond was doing nothing wrong when the police approached him.<sup>33</sup>

Hispanics have also been the victims of violence associated with racial profiling. On April 25, 1997, a tortilla factory in Salt Lake City owned by Rafael Gomez, an American citizen, was the subject of a police raid in which 75 heavily-armed police officers brandished rifles and pistols, struck Gomez in the face with a rifle butt, pointed a gun at his six-year old son, ordered the 80 factory employees to lie down on the floor, and dragged Gomez’ secretary across a room by her hair. The raid, based on an anonymous tip, uncovered no illegal activity.<sup>34</sup>

In each case the questions linger: Would Diallo’s actions have generated suspicion if he had not been black, and would the officers who shot him have seen a gun where there was only a wallet if he had been white? Would the officers who approached Dorismond simply have left him alone, or walked away from a fight, if he had not been of Haitian descent? Would an anonymous tip about a white business owner been treated like the tip that caused an armed raiding party to descend on Rafael Gomez?

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<sup>32</sup> Howard Chua-Eoan, “Black and Blue,” *Time*, March 6, 2000, p.26.

<sup>33</sup> See William K. Rashbaum, “Undercover Police in Manhattan Kill an Unarmed Man in a Scuffle,” *New York Times*, March 17, 2000, p. A1; Eric Lipton, “Giuliani Cites Criminal Past of Slain Man,” *New York Times*, March 20, 2000, p. B1. Mr. Giuliani failed to note that the police officer whose gun had discharged bullets into Mr. Dorismond’s chest also had a police record. Joyce Purnick, “Right to Know What the Mayor Finds Relevant,” *New York Times*, March 20, 2000, p. B1.

<sup>34</sup> *The Mainstreaming of Hate* at 20.

There is little doubt that these tragedies were the consequence of a law enforcement culture that encourages suspicion of minorities. The same assumptions that lead police to engage in disproportionate stops of minority drivers and minority pedestrians led police to assume the worst about Diallo, Dorismond and Gomez. These cases made headlines in the cities in which they occurred. Countless incidents that do not result in death or wildly unsuccessful police raids occur every day and escape public notice. But they contribute to a well-grounded fear among minorities that the police will assume the worst about them, and on a dark street corner that assumption can be fatal.

### C. *Race and Police Misconduct*

The unequal treatment of minorities by law enforcement officials extends beyond the disproportionate use of police practices such as traffic stops and criminal profiles. Minority citizens are also the prime victims of police brutality and corruption. Such misconduct is unacceptable in any form, but it is doubly offensive when it flows from attitudes about race that are contrary to our commitment to equal justice and the rule of law.

Current events again provide evidence of race-motivated misconduct. At the very same time the acquittal of the NYPD officers in the Diallo case made headlines, authorities in Los Angeles were investigating a police corruption ring centered in the anti-gang unit of the Rampart division – a police station located in one of the city's poorest neighborhoods. The investigation has already revealed that officers in that unit manufactured evidence and perjured themselves to produce convictions, thousands of which could be affected by the revelations; routinely engaged in police brutality to intimidate their victims; participated in the drug trade; and used the Immigration and Naturalization Service to deport antipolice witnesses, in violation of Los Angeles city policy.<sup>35</sup> As part of their abuse of the immigration laws, the officers allegedly compiled a list of more than 10,000 Hispanics whom they believed to be deportable, effectively placing an entire community under suspicion on the basis of its racial composition.

General patterns of misconduct similar to the LAPD scandal have been revealed in New York, where the Mollen Commission uncovered widespread brutality and corruption in the Bronx directed largely at blacks and Hispanics, and in Philadelphia, where similar patterns of misconduct were found to persist in the predominantly black neighborhood of North Philadelphia. To name these cities is not to ignore the breadth of police abuse and misconduct that occurs throughout the nation. Indeed, in a 1991 poll, 59 percent of respondents believed that police brutality is common in some or most communities in the United States, and 53 percent of respondents believed that police are more likely to use excessive force against black or Hispanic suspects than against white suspects.<sup>36</sup> One of the most publicized instances of brutality has

<sup>35</sup> In one shocking revelation, two Rampart Division officers shot admitted gang member Javier Francisco Ovando in the legs and then planted a rifle on him to make it appear as though he had attacked the officers. Ovando, who was paralyzed, was wheeled into his trial on a gurney, and was excoriated there by the judge for jeopardizing the lives of two hero policemen. Ovando received 23 years in jail for his non-offense. Adam Cohen, "Gangsta Cops," *Time*, March 6, 2000, p. 32.

<sup>36</sup> *The Mainstreaming of Hate* at 15 and n.41. See also Julia Vitullo-Martin, "Fairness Not Simply A Matter of Black and White," *Chicago Tribune*, November 13, 1999 (citing recent poll by the Joint Center for Political and Economic Studies indicating that 56% of whites agree that police are far more likely to harass and discriminate against blacks than against whites).

been the Abner Louima case, in which two current and one former New York police officers were recently convicted of attempting to cover up another officer's assault on Louima, a black New Yorker, whom the officer had beaten and sodomized with a broken broomstick.

Practices like racial profiling and the actions uncovered by the Mollen Commission and in the Rampart investigations are related. First, they all proceed in large part from the twin misperceptions that (1) blacks and Hispanics commit most crimes, and (2) most blacks and Hispanics commit crimes – misperceptions that have justified everything from pretextual traffic stops to the entirely unjustified beatings and abuse of innocent individuals.<sup>37</sup> Second, both profiling and police misconduct contribute to the belief – shared to one degree or another by Americans of all races and ethnicities – that the police do not treat black and Hispanic Americans in the same manner as they do white Americans, and that the promise of fair treatment enshrined in the Constitution have limited application when police confront a black or brown face.

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<sup>37</sup> Indeed, many instances of police brutality against minorities begin with a misperception on the part of law enforcement officials – based purely on race -- that a particular individual of color is a criminal suspect. For instance, in 1988, Joe Morgan, the (black) Hall of Fame baseball player, was approached at Los Angeles International Airport by a police officer who said he was conducting a drug investigation. The officer's sole basis for approaching Morgan was that another black man who was a suspected drug dealer had stated that he was traveling with another man who "looked like himself" – i.e., black. When the officer asked Morgan for identification and accused him of traveling with a person suspected of selling drugs, and Morgan objected, the officer threw Morgan to the ground, handcuffed him, put his hand over Morgan's mouth and nose, and escorted him to a interrogation room, where Morgan was cleared of any wrongdoing. *No Equal Justice* at 24-25. Hispanics can point to similar experiences. In October 1994, in Lincoln, Nebraska, Francisco Renteria was escorting his mother home from a laundromat when he was accosted by University of Nebraska police dispatched to investigate a crime. Mistaking Renteria for the suspect, they fatally beat him, despite the fact that the only match between Renteria and the dispatcher's description of the suspect was that the suspect was a "Hispanic male." *The Mainstreaming of Hate* at 17.

## Chapter II

### RACE AND PROSECUTORIAL DISCRETION

Racial profiling and other enforcement strategies begin the insidious process by which minorities are disproportionately caught up in the criminal justice system. But such disparities do not end at the point a suspect is arrested. At every subsequent stage of the criminal process -- from the first plea negotiations with a prosecutor, to the imposition of a prison sentence by a judge -- the subtle biases and stereotypes that cause police officers to rely on racial profiling are compounded by the racially skewed decisions of other key actors. This chapter examines the role of the prosecutor in perpetuating racial inequality in our criminal justice system.

Prosecutors occupy a central role in American criminal justice. They represent the public in the solemn process of holding accountable those who violate society's rules. That task carries with it substantial unchecked discretion. The threshold decision of whether to bring charges against a suspect, and, if so, which charges are appropriate, is almost never subject to review by a court. The subsequent decision to enter into a plea agreement is reviewable at the margins because courts may reject plea agreements under certain circumstances. But in practice, prosecutors decide who will be granted the leniency that a plea bargain represents.

Prosecutorial discretion is most dramatically exercised in the area of sentencing. Traditionally, sentencing has been a judicial prerogative, but, as will be explained, the advent of mandatory minimum sentencing laws and sentencing guideline systems has shifted in large measure the power to determine punishment from judge to prosecutor. Even where judges retain ultimate authority to impose sentence, a prosecutor's sentencing recommendation will carry great weight. Prosecutors today enjoy more power over the fate of criminal defendants than at any time in our history.<sup>38</sup>

Regrettably, the evidence is clear that prosecutorial discretion is systematically exercised to the disadvantage of black and Hispanic Americans. Prosecutors are not, by and large, bigoted. But as with police activity, prosecutorial judgment is shaped by a set of self-perpetuating racial assumptions.

#### A. *The Decision to Prosecute*

The first and most basic prosecutorial decision is whether to pursue a particular criminal case at all.<sup>39</sup> Prosecutors have the authority to decline prosecution altogether, or to authorize diversion, under which completion of drug treatment or community service results in the

<sup>38</sup> Bennett L. Gershman, "The New Prosecutors," 53 *U. Pitt. L. Rev.* 393, 448 (1992) ("The American prosecutor, owing to a variety of social and political factors, has emerged as the most pervasive and dominant force in criminal justice."). See also "Prosecution and Race" at 20-25 (noting the "extraordinary, almost unreviewable, discretion and power of prosecutors" and the necessity of such discretion, but also that "[t]he deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application.").

<sup>39</sup> "Prosecution and Race" at 21-22 and nn. 28-33.



dismissal of the charges. But such displays of prosecutorial mercy appear to be exercised in a manner that disproportionately benefits whites.

In 1991 the *San Jose Mercury News* reviewed almost 700,000 criminal cases from California between 1981 and 1990 and uncovered statistically significant disparities at several different stages of the criminal justice process. Among the study's findings was that 26 percent of whites, as compared to only four percent of minorities, won "interest of justice" dismissals, in which prosecutors dropped a criminal case entirely. Moreover, the study found that 26 percent of white defendants charged with crimes providing for the option of diversion received that benefit, while only 14 percent of similarly situated blacks and 11 percent of similarly situated Hispanics were placed in such programs.<sup>40</sup>

Related to the decision to decline prosecution is the decision to charge a defendant in state or federal court. This choice is presented when jurisdiction over the crime resides concurrently in state and federal court, as in many drug cases. The police may make an initial decision of whether to bring the evidence to state or federal prosecutors (a discretionary call that may itself be influenced by racial considerations), but the authority to determine that a defendant will be federally prosecuted rests with federal prosecutors. Typically they will decline to prosecute the defendant in federal court if the case does not seem "serious" enough or if the defendant does not seem to pose a significant threat to public safety. Obviously these are not scientific judgments – rather they are exercises of discretion informed by predictions, hunches and preconceptions, some of which are racially tinged.

The decision of whether to prosecute a drug case in federal court has important consequences for the defendant because federal sentences are notoriously harsher than state sentences. Parole was abolished in the federal criminal justice system in 1987, and federal drug convictions frequently result in lengthy, mandatory sentences. Moreover, if the prosecutor includes in the indictment charges carrying mandatory penalties and then refuses to permit a plea to other charges, the defendant has no opportunity to undergo drug treatment as an alternative to imprisonment, since federal law does not offer judges that option.

According to the United States Sentencing Commission, federal courts in 1990 sentenced drug traffickers to an average of 84 months in prison, without possibility of parole. By contrast, state courts in 1988 sentenced drug traffickers to an average *maximum* sentence of 66 months, resulting in an average time served of only 20 months.<sup>41</sup> Thus, the decision of a federal prosecutor to prosecute a suspected drug offender, rather than letting the case proceed in state court, can result in a prison term that is years longer than the sentence that would likely accompany state prosecution.

That the prosecutorial decision to bring charges in federal court, or leave the case to the state system, is often exercised to the detriment of America's minorities is best demonstrated by statistics on crack cocaine prosecutions. In 1986 Congress enacted harsh mandatory minimum

<sup>40</sup> Christopher Schmitt, "Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price," *San Jose Mercury News*, December 8, 1991 (*Mercury News Report*), p. 1A.

<sup>41</sup> United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995), p. 138 and nn. 186-188.

penalties for these offenses. From 1988-1994, hundreds of blacks and Hispanics – but no whites – are prosecuted by the United States Attorney’s office with jurisdiction over Los Angeles County and six surrounding counties.<sup>42</sup> The absence of white crack defendants in federal court could not be ascribed to a lack of whites engaged in such conduct: during the 1986-1994 period, several hundred whites were prosecuted in California state court for crack offenses.<sup>43</sup>

National statistics tell the same story: From 1992-1994, approximately 96.5 percent of all federal crack prosecutions were of non-whites. A 1992 U.S. Sentencing Commission Report determined that *only* minorities were prosecuted for crack offenses in over half of the federal judicial districts that handled crack cases. And during that period, in New York, Texas, California, and Pennsylvania combined, eight whites were convicted of crack offenses; the number of white crack defendants convicted in Denver, Boston, Chicago, Miami, Dallas and Los Angeles combined was zero, compared to thousands of convictions of black and Hispanic crack offenders.<sup>44</sup>

These discrepancies are remarkable because the crack epidemic knew no racial bounds. Despite stereotypes perpetuated by the media and popular culture, government statistics show that more whites overall used crack than blacks. According to the National Institute on Drug Abuse, between 1991 and 1993 whites were twice as likely to have used crack nationwide than blacks and Hispanics combined. Crack use was somewhat more concentrated in minority communities, but in Los Angeles, for example, whites comprised more than 50 percent of those who had ever used crack, and about one-third of those who could be termed “frequent users.”<sup>45</sup>

The exercise of prosecutorial discretion in favor of white crack defendants and against black crack defendants is illustrated by the parallel cases of two men – one white, the other black – charged with cocaine trafficking in Los Angeles. Stephen Green, a black man, was arrested with 70 grams of crack and sentenced in federal court to 10 years in prison – the mandatory minimum federal sentence for selling more than 50 grams of crack. Daniel Siemanowski, a white man, was arrested with 67 grams of crack, and was also therefore eligible for the 10-year mandatory sentence. But he was tried and convicted in state court, and received a jail sentence of less than a year.<sup>46</sup>

Federal law enforcement authorities have disputed that the wide discrepancy in federal crack prosecutions reflects differential treatment based on race, arguing that authorities target high-volume traffickers of whatever race. But since it is empirically true that more whites than non-whites used crack during this period, this argument presumes that whites largely bought

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<sup>42</sup> Dan Weikel, “War on Crack Targets Minorities Over Whites,” *Los Angeles Times*, May 21, 1995, p. A1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* See also United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policies* at xi (Blacks and Hispanics accounted for 95.4 percent of crack cocaine distribution offenses in 1993).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

their crack from non-whites. Studies, however, suggest the contrary – that drug users tend to purchase their drugs from individuals of the same race as the user, and that drug *seller* racial breakdowns are similar to drug *user* racial breakdowns.<sup>47</sup> Of course some suburban residents drive into the inner city to buy drugs on the street, and of course those open-air street markets present an easy enforcement target for the police. But most drug deals occur behind closed doors, in offices and in private homes that the police don't patrol. Just because most of the dealers hawking crack vials on the street corner were not white in the late 1980's does not mean whites did not participate aggressively in the crack distribution network.

In any event, the reality is that many black defendants prosecuted in federal court are not high-volume traffickers. According to Los Angeles federal district judge J. Spencer Letts, "those high in the chain of drug distribution are seldom caught and seldom prosecuted."<sup>48</sup> Instead, federal prosecutorial efforts have focused predominantly on low-volume dealers and low-level couriers who happen to be black and Hispanic.<sup>49</sup> U.S. District Court Judge Consuelo B. Marshall observes: "We do see a lot of these [crack] cases and one does ask why some are in state court and some are being prosecuted in federal court . . . and if it's not based on race, what's it based on?"<sup>50</sup>

#### **B. Plea Bargaining and Charging Decisions**

Once a prosecutor decides to bring charges against an individual, plea negotiations present the next opportunity for a prosecutor to grant some degree of leniency to a defendant, or to insist on maximum punishment.<sup>51</sup> Prosecutors have virtually unlimited discretion to enter into an agreement by which the defendant will plead guilty in exchange for the dismissal of certain charges or a reduced sentence, and once again the exercise of discretion is characterized by racially disparate results.<sup>52</sup>

The *San Jose Mercury News* report discussed above revealed consistent discrepancies in the treatment of white and non-white criminal defendants at the pretrial negotiation stage of the criminal process. During 1989-1990, a white felony defendant with no criminal record stood a

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<sup>47</sup> K. Jack Riley, "Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities," National Institute of Justice, United States Department of Justice (December 1997), p.1. Director of National Drug Control Policy Barry McCaffrey has also observed that youths purchasing drugs tend to purchase from members of their own race. Patricia Davis and Pierre Thomas, "In Affluent Suburbs, Young Users and Sellers Abound," *Washington Post*, December 14, 1997, p. A20.

<sup>48</sup> Weikel at A1.

<sup>49</sup> Data analyzed by the U.S. Sentencing Commission reveals that nationwide, more than 94.5 percent of federal crack defendants in 1992 were either low- or middle-volume dealers or couriers, and only 5.5 percent were high-volume dealers. U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* at 172.

<sup>50</sup> Weikel at A1.

<sup>51</sup> Most criminal cases end in a plea bargain. See Rebecca Hollander-Blumoff, "Getting to 'Guilty': Plea Bargaining as Negotiation," 2 *Harv. Negotiation L. Rev.* 115, 117 n.7 (discussing studies showing that as much as 90 percent of all criminal cases end in plea bargains).

<sup>52</sup> See "Prosecution and Race" at 23-25 and nn. 41-59 (discussing importance of, and prosecutorial discretion inherent in, charging decisions and plea bargaining).

33 percent chance of having the charge reduced to a misdemeanor or infraction, compared to 25 percent for a similarly situated black or Hispanic. Between 1981 and 1990, 50 percent of all whites who were arrested for burglary and had one prior offense had at least one other count dismissed, as compared to only 33 percent of similarly situated blacks and Hispanics. Blacks charged with a single offense received sentencing enhancements in 19 percent of the cases, whereas similarly situated whites received such enhancements in only 15 percent of the cases.<sup>53</sup>

Over the course of 700,000 cases, these discrepancies establish a clear pattern of unfair treatment for thousands of black and Hispanic criminal defendants. The extent of disparate treatment in individual cases can be stark indeed. Consider the fates of two individuals – one black, one white (unnamed in the *Mercury News* report) – each charged with four criminal counts: three counts of burglary, and one count of receiving stolen property. Neither man had been to jail before. Neither had used a weapon in the offense. Drugs were involved in neither crime. Both men entered into plea bargains. But the black man was required to plead guilty to all four criminal charges and received an eight-year sentence. The white man was permitted to plead guilty to a single burglary charge and received a sentence of 16 months.<sup>54</sup>

Statistics from other jurisdictions confirm that prosecutorial discretion may result in disparate treatment of minorities and whites. The State of Georgia has a “two strikes, you’re out” law, under which a life sentence may be imposed for a second felony offense. Under the Georgia scheme, the State’s district attorneys have unfettered discretion to seek this penalty. As of 1995, life imprisonment under the “two strikes” law had been imposed on 16 percent of eligible black defendants, while the same sentence had been imposed on only one percent of eligible white defendants. Consequently, 98.4 percent of those serving life sentences under Georgia’s “two strikes, you’re out” regime are black.<sup>55</sup>

Statistics in federal court mirror the experiences in these states. A United States Sentencing Commission report found that, for comparable behavior, prosecutors offered white defendants plea bargains that permitted the imposition of sentences below what would otherwise be the statutory minimum more often than they offered such deals to blacks or Hispanic defendants.<sup>56</sup> Moreover, federal prosecutors have sole authority to grant a departure below the

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<sup>53</sup> *Mercury News Report* at 1A.

<sup>54</sup> *Id.*

<sup>55</sup> *No Equal Justice* at 143. The Georgia Supreme Court initially held that these statistics presented a prima facie case of discrimination, and invalidated the “two strikes, you’re out” statute. *Stephens v. State*, 1995 WL 116292 (Ga. 1995). The court, however, reversed itself less than two weeks later upon being presented with a petition signed by all of Georgia’s 46 district attorneys claiming that the court’s approach, because it would apply to so many other areas of prosecution, such as the death penalty, would “paralyze the criminal justice system” in Georgia. *No Equal Justice* at 143 (citing *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995)).

<sup>56</sup> *Race to Incarcerate* at 139. The Justice Department contends that these disparities were due to legally relevant case-processing factors. *Id.* (citing Dale Parent, et al., National Institute of Justice, *Mandatory Sentencing* (January 1997), at p.4).

mandatory minimum level based on substantial assistance to authorities, another means by which leniency may be offered to some defendants and not others.<sup>57</sup>

### C. *Bail*

Another turning point in the criminal justice process, one that can mean the difference between freedom and incarceration for criminal defendants, is the bail determination. While the decision to set bail is ultimately a judicial function, prosecutors play an important role in determining whether a criminal defendant will be released on bail or detained in jail prior to trial by recommending detention or release to the court.

A New York State study examined the extent to which black and Hispanic criminal defendants were treated differently from similarly situated white criminal defendants with respect to pretrial detention, and concluded that statewide, minorities charged with felonies were detained more often than white defendants charged with felonies. Indeed, the study found that 10 percent of all minorities held in jail at felony indictment in New York City, and 33 percent of all minorities held in jail at felony indictment in the rest of New York State, would be released before arraignment if minorities were detained as often as comparably situated whites.<sup>58</sup>

Another study reviewed bail determinations for criminal defendants in New Haven, Connecticut, and concluded that the bail rates set for black criminal defendants exceeded those set for similarly situated white criminal defendants. In short, the study concluded, lower bail rates could have been set for black defendants without incurring the risk of flight that bail rates are designed to avoid.<sup>59</sup> And federal statistics indicate that while non-Hispanics are likely to be released prior to trial in 66 percent of cases, Hispanics are likely to be released in only 26 percent of their cases.<sup>60</sup>

Bail status not only determines whether the defendant is to be incarcerated before trial, it also bears on the likelihood of conviction. Although jurors are not supposed to know whether the defendant has been jailed before trial, they can often discern the defendant's bail status and are more likely to convict a defendant who has already been incarcerated.<sup>61</sup> Here again, one racial disparity begets disparity further along in the justice system.

<sup>57</sup> 18 U.S.C. § 3553(e). Similarly, the federal sentencing guidelines require a prosecutor to certify substantial assistance before the court may depart below the applicable guideline range. United States Sentencing Guidelines, Section 5K1.1.

<sup>58</sup> Office of Justice Systems Analysis, New York State Division of Criminal Justice Service, "Disparities in Processing Felony Arrests in New York State, 1990-1992" (September 1995) (*New York Felony Study*), pp. v-vi, xi.

<sup>59</sup> Ian Ayres and Joel Waldfogel, "A Market Test for Race Discrimination in Bail Setting," 46 *S. Cal. L. Rev.* 987 (1994).

<sup>60</sup> Bureau of Justice Statistics, United States Department of Justice, *Compendium of Federal Justice Statistics* (January 1999), p.25.

<sup>61</sup> *See generally* Bail Reform Hearings, 1982: Hearings on S. 1554 Before the Subcomm. on

#### D. The Death Penalty

Thirty-eight states and the federal government authorize capital punishment. In each of those jurisdictions it is the prosecutor who makes the critical decision of whether or not to seek death. That decision is guided somewhat by statutory aggravating and mitigating factors, but many of these factors, such as the heinousness of the crime, are subjective. Judges and juries may eventually reject a prosecutor's request that the death penalty be imposed, but prosecutors alone decide whether death is an option.<sup>62</sup>

The importance of race as a factor in the imposition of capital punishment is well documented. First, the evidence reveals disparity in the application of the death penalty depending on the race of the *victim*. Individuals charged with killing white victims are significantly more likely to receive the death penalty than individuals charged with killing non-white victims. Of numerous studies of death penalty outcomes reviewed by the congressional General Accounting Office (GAO), 82 percent found that imposition of the death penalty was more likely in the case of a white victim than in the case of a black victim.<sup>63</sup> One of the most thorough death penalty studies, conducted by Professors David Baldus, Charles Pulaski, and George Woodworth, found that defendants charged in Georgia with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing black victims.<sup>64</sup> The Baldus study also found that more than 50 percent of those sentenced to death for killing a white person would not have received the death penalty had they killed a black person.<sup>65</sup> According to the GAO, the effect of the victim's race on the sentencing outcome appears to be particularly pronounced at the earlier stages of the judicial process, such as the prosecutor's decision to charge the defendant with a capital offense and his decision to proceed to trial rather than plea bargain.<sup>66</sup>

Second, while some of the evidence concerning the death penalty reveals that the race of the defendant alone does not result in unwarranted disparity,<sup>67</sup> other evidence is to the contrary. It is at least true that the race of the defendant, when *combined with the race of the victim*, yields significant disparities in the application of the death penalty. The Baldus study concluded that

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Constitutional Rights of the Senate Comm. on the Judiciary, 97th Cong., 1<sup>st</sup> Sess. (1982) (statement of Professor Daniel Freed).

<sup>62</sup> "Prosecution and Race" at 24 and nn. 49-51.

<sup>63</sup> U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (1990) (GAO Study), p. 5 (noting that "[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.").

<sup>64</sup> David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74 (fall 1983) (Baldus Study), pp. 661-753.

<sup>65</sup> *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987) (Brennan, J., dissenting) (citing Baldus study).

<sup>66</sup> GAO Study at 5.

<sup>67</sup> The Baldus study concluded that black defendants were only 1.1 times more likely to receive the death penalty than white defendants. See also GAO Study at 6 ("The evidence for the influence of the race of defendant on death penalty outcomes was equivocal").

blacks who killed whites were sentenced to death 22 times more frequently than blacks who killed blacks, and seven times more frequently than whites who killed blacks. Again, this discrepancy appears in large part to be based on the exercise of prosecutorial discretion. In Georgia, prosecutors sought the death penalty in 70 percent of the cases involving black defendants and white victims, while seeking the death penalty in only 19 percent of the cases involving white defendants and black victims, and only 15 percent of the cases involving black defendants and black victims.<sup>68</sup>

In short, black defendants charged with killing white victims were the group most likely to receive the death penalty. Until 1991, when Donald "Pee Wee" Gaskins, a white man, was executed in South Carolina for the murder of a black victim, no white person had been executed for the murder of a black person since the Supreme Court's 1976 decision in *Furman v. Georgia* holding that capital punishment is not necessarily unconstitutional. In all, since 1976, only 11 whites have been executed for the murder of a black victim, while 145 blacks have been executed for the murder of a white victim,<sup>69</sup> and 80 percent of those currently on death row are there for killing a white person.<sup>70</sup> And the Baldus Study revealed that of the seven individuals executed in Georgia between 1976 and 1986, all were convicted of killing whites, and six of them were black, despite the fact that of all homicides in Georgia during that period, only 9.2 percent involved black defendants and white victims, and 60.7 percent involved black victims.<sup>71</sup>

Still other studies indicate that capital punishment is disproportionately applied on the basis of the race of the criminal defendant, irrespective of the race of the victim. Professors Baldus and Woodsworth, co-authors of the groundbreaking Georgia study, conducted a statistical analysis of the death sentence in Philadelphia between 1983 and 1993, and concluded that for similar crimes, black defendants were almost four times more likely to receive the death penalty as white defendants, and that 38 percent of black defendants sentenced to death would not have been so sentenced had they been white.<sup>72</sup>

Statistics on the imposition of the federal death penalty are similarly disturbing. In 1988, Congress enacted the first federal death penalty provision in the aftermath of *Furman*. The 1988 law authorized the death penalty for murders committed by those involved in certain drug trafficking activities under 21 U.S.C. §848.

From 1988 to 1994, 75 percent of those convicted of participating in a drug trafficking criminal enterprise under 21 U.S.C. §848 were white. However, of those who were the subjects

<sup>68</sup> *McCleskey v. Kemp*, 481 U.S. at 327 (Brennan, J., dissenting) (citing Baldus study).

<sup>69</sup> Death Penalty Information Center, "Race of Defendants Executed Since 1976," [DPIC website, www.essential.org/dpic](http://www.essential.org/dpic), accessed March 15, 2000.

<sup>70</sup> David Cole, "Race, Life and Death," *Washington Post*, January 11, 2000, p. A17.

<sup>71</sup> *McCleskey v. Kemp*, 481 U.S. at 327 (Brennan, J., dissenting) (citing Baldus Study).

<sup>72</sup> Richard C. Dieter, "The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides," *Death Penalty Information Center* (June 1998), p. 5 (citing Philadelphia study). See also David C. Baldus, Richard C. Dieter, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, "Racial Discrimination in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia," 83 *Cornell L. Rev.* 1638 (1998).

of death penalty prosecutions under that law in the same period, 89 percent were Hispanic or black (33 out of 37) and only 11 percent (four out of 37) were white.<sup>73</sup> And, indeed, the first defendant scheduled to be executed under the 1988 law is Hispanic.

A congressional subcommittee studied the application of the 1988 law and concluded that “some of the death penalty prosecutions under [21 U.S.C. §848] have been against defendants who do not seem to fit the expected ‘drug kingpin’ profile,” including, in several cases, “young inner-city drug gang members and relatively small-time traffickers,” or individuals who committed murder at the behest of a higher-up who received a lesser sentence.<sup>74</sup>

Under federal procedures, the personal written authorization of the Attorney General is required before a capital prosecution may proceed. Thus, the application of the federal death penalty involves the exercise of prosecutorial discretion at the highest levels of the United States Government. Nobody suggests that the current Attorney General or her predecessors who authorized federal death penalty prosecutions are or were motivated by impermissible racial factors. But this act of prosecutorial decision-making, like others at all levels of government, is subject to institutional and community pressures that may have racial overtones.

As an empirical matter, it is undeniable that prosecutors exercise their discretion in ways that have racially disproportionate impacts, even if their intent is race-neutral. Such unfairness may ultimately be more dangerous than explicitly racist behavior, since it is harder to detect (both by victim and perpetrator) and harder to eradicate than the blatant racism most Americans have learned to reject as immoral.<sup>75</sup> In any event, prosecutorial decision-making, in tandem with police tactics, contribute to the criminalization of race and the racialization of crime, a vicious cycle that is having a devastating effect on minority communities throughout the nation.

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<sup>73</sup> Staff Report by the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, “Racial Disparities in Federal Death Penalty Prosecutions 1988-1994,” 103<sup>rd</sup> Congress, 2d Sess. (March 1994), p. 2. As the Staff Report noted, “[a]lthough the number of homicide cases in the pool that the U.S. Attorneys are choosing from is not known . . . the almost exclusive selection of minority defendants for the death penalty, and the sharp contrast between capital and non-capital prosecutions under [21 U.S.C. §848] indicate a degree of racial bias in the imposition of the federal death penalty that exceeds even pre-*Furman* levels.” *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See “Prosecution and Race” at 34.



**Chapter III****Race, Sentencing and the "Tough on Crime" Movement**

Sentencing is arguably the most important stage of the criminal justice system. While policing strategies help determine who will be subjected to the criminal process in the first place, and prosecutorial choices help determine who will be granted leniency from the full force of the law, sentencing is where those earlier decisions bear fruit.

No one who has ever visited a prison and seen human beings locked in cages like animals can ever be unmindful of the enormity of society's decision to deprive one of its members of his or her liberty. The decision to sentence a convicted criminal to prison has, until recently, been viewed as a profound responsibility, one entrusted solely to impartial judges. Increasingly, however, sentencing has become mundane and mechanistic, a decision effectively controlled by legislators, prosecutors and sentencing commissioners. This change in the culture of sentencing has had disastrous consequences for minorities in the United States.

*A. A Brief History of U.S. Sentencing Policy*

In the late 18<sup>th</sup> and early 19<sup>th</sup> century, federal and state laws typically set mandatory penalties for violations of law. But more enlightened penological views soon gained favor, and judges were granted discretion to sentence offenders to a range of punishments depending upon the severity of the crime and the character of the defendant.

At several points in this century, most recently in the mid-1980's, Congress and many state legislatures have enacted laws to deny judges sentencing discretion. These laws establish a minimum penalty that the judge must impose if the defendant is convicted of particular provisions of the criminal code. Mandatory sentencing laws are generally premised on the view that punishment and incapacitation, not rehabilitation, is the primary goal of the criminal justice system.

While they deprive judges of their traditional authority to impose just sentences, such mandatory minimum sentencing laws are not truly mandatory because they provide opportunities for prosecutors to grant exceptions to them. As described in the preceding chapter, prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. And, as also noted earlier, under federal law only the prosecutors may grant a departure from mandatory penalties by certifying that the defendant has provided "substantial assistance" to law enforcement.

Mandatory minimum laws embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the

sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.

At the same time that mandatory sentencing laws came back into vogue in the mid-1980's, a separate movement to establish sentencing guidelines gained favor. Guidelines are a middle ground between unfettered judicial discretion and mandatory penalties. These laws, such as the Sentencing Reform Act of 1984 at the federal level, establish a centralized commission to set a presumptive sentencing range and to enumerate sentencing factors that a judge must consider. But they permit judges to depart upward or downward based on unusual factors in an individual case.

Interestingly, some supporters of civil rights championed mandatory sentencing and guideline sentencing as an antidote to perceived racial disparities in sentencing.<sup>76</sup> But the evidence is clear that minorities fare much worse under mandatory sentencing laws and guidelines than they did under a system favoring judicial discretion. By depriving judges of the ultimate authority to impose just sentences, mandatory sentencing laws and guidelines put sentencing on auto-pilot. Discretionary decisions of law enforcement agents and prosecutors engaged in what Justice Cardozo called "the competitive enterprise of ferreting out crime"<sup>77</sup> are more likely to disadvantage minorities than judicial discretion.

The mandatory sentencing movement reached its apex in the mid-1990's when Congress and many states adopted so-called "3 strikes, you're out" laws. Under these statutes, defendants with two prior criminal convictions can be sentenced to life in prison, even if their third "strike" is for relatively minor conduct. Some states, such as Georgia, have enacted even harsher "2 strikes" laws. But again, these mandatory laws are typically invoked by prosecutors who have substantial discretion in choosing which defendants to single out for grossly disproportionate punishments. Once the "3 strike" or "2 strike" statute is invoked, there is often nothing a judge can do to ameliorate the harsh punishment that the legislature has authorized the prosecutor to demand.

The final policy development that has transformed sentencing in the last two decades is the abolition of parole in the federal system and in many states. Indeterminate sentencing, in which parole boards exercised discretion to release defendants from prison based on rehabilitation and good behavior has been discarded in favor of "truth-in-sentencing." Sentencing is now generally mandatory, determinate and harsh, a volatile mix that has led to dramatically increased prison populations.

One reason sentencing has become uniformly harsher across the country is that the federal government, which previously led only by example, has in recent years established significant financial incentives for states to model their sentencing laws on the federal model.<sup>78</sup>

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<sup>76</sup> See generally Kate Stith & Steve Y. Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," 28 Wake Forest L. Rev. 223 (1993).

<sup>77</sup> *Johnson v. United States*, 333 U.S. 10 (1948).

<sup>78</sup> The Violent Crime Control Act of 1994 authorizes prison construction grants to states that "increase the average prison time actually served or the average percent of sentence served by persons convicted of a . . . violent crime." 42 USC § 13703 (2000). In the same vein, a bill recently passed by the House of Representatives

The federal criminal code is notoriously irrational and the federal sentencing system is a patchwork of overly simple mandatory minimums and overly complex sentencing guidelines. Nonetheless, many states have tailored their sentencing systems to congressional specifications, contributing to the headlong rush to incarcerate.

**B. *The Result of Tough-on Crime Sentencing Policies***

Some politicians treat sentencing policy as an opportunity for demagoguery, but the combined effect of the various sentencing laws enacted in the past two decades is anything but rhetorical. In 1972, the populations of federal and state prisons combined were approximately 200,000. By 1997, the prison population approached 1.2 million, an increase of almost 500 percent. Similar developments at the local level led to an increase in the jail population from 130,000 to 567,000. Thus, America now houses some 2 million people in its federal and state prisons and local jails.<sup>79</sup>

Prison and jail populations have not only swelled in the last 20 years, they have also changed in character. As a result of the nation's current "War on Drugs" which began in the early 1980's, an increasingly large percentage of those incarcerated are charged with or convicted of non-violent drug crimes.

Between 1980 and 1995, the number of state prison inmates who had committed drug crimes increased by more than 1000 percent. Whereas only one out of every 16 state inmates was a drug offender in 1980, one out of every four in 1995 was a drug offender. By the middle of the 1990's, 60 percent of federal prison inmates had been convicted of a drug offense, as opposed to 25 percent in 1980. If local and county jail inmate populations are included in the calculation, there are now some 400,000 federal and state prison inmates – almost a quarter of the overall inmate population -- serving time or awaiting trial for drug offenses.<sup>80</sup> Drug offenders accounted for more than 80 percent of the total growth in the federal inmate population – and 50 percent of the growth of the state prison population – from 1985 to 1995.<sup>81</sup>

The chances of receiving a prison sentence after being arrested for a drug offense increased by 447 percent between 1980 and 1992. The number of state prison drug sentences between 1985-1995 increased 331 percent, and represented more than half of the overall increase in state sentences meted out during that period. The effect of drug sentences on the federal system is even more pronounced. The number of federal drug sentences imposed between 1985 and 1995 increased 478 percent, and accounted for 74 percent of the total increase in federal

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authorizes grants to states that enact mandatory minimum sentencing laws for certain gun crimes. See H.R. 4051 (passed House on April 13, 2000).

<sup>79</sup> *Race to Incarcerate* at 19-20.

<sup>80</sup> Marc Mauer, "The Crisis of the African-American Male and the Criminal Justice System," Written Testimony Before the U.S. Commission on Civil Rights, April 15-16, 1999 (Mauer Civil Rights Commission Testimony), p. 8 (citing data from the Bureau of Justice Statistics, U.S. Department of Justice).

<sup>81</sup> Christopher J. Mumola & Allen J. Beck, "Prisoners in 1996," Bureau of Justice Statistics, United States Department of Justice (June 1997) (Mumola & Beck), p.11; *Race to Incarcerate* at 32.

sentences during that period.<sup>82</sup> Similarly, the *length* of sentences for drug offenses dramatically increased: Drug offenders entering federal prison in 1986 served an average term of almost 60 months; drug offenders entering federal prison in 1997 were expected to serve an average term of more than twice that length, 66.2 months.<sup>83</sup>

An overly punitive crime control strategy is unwise and ineffective for many reasons, most beyond the scope of this report. But one of the chief failings of undue reliance on imprisonment to solve social problems is that this approach results in serious racial disparities. The “tough on crime” movement of the past several decades have led to incarceration rates for minorities far out of proportion to their percentage of the U.S. population.

### C. *Racially Disparate Sentencing Outcomes*

One of the most thorough studies of sentencing disparities was undertaken by the New York State Division of Criminal Justice Services, which studied felony sentencing outcomes in New York courts between 1990 and 1992.<sup>84</sup> The State concluded that one-third of minorities sentenced to prison would have received a shorter or non-incarcerative sentence if they had been treated like similarly situated white defendants. If probation-eligible blacks had been treated like their white counterparts, more than 8000 fewer black defendants would have received prison sentences in that two year period, resulting in a five percent decline in the percentage of blacks sentenced to prison as a percentage of the entire sentenced population.<sup>85</sup> In short, the study found, blacks are sentenced to prison more frequently than whites for the same conduct.

Other sentencing data is consistent with the New York findings. Nationwide, black males convicted of drug felonies in state courts are sentenced to prison 52 percent of the time, while white males are sentenced to prison only 34 percent of the time. The ratio for women is similar – 41 percent of black female felony drug offenders are sentenced to prison, as compared to 24 percent of white females. With respect to violent offenses, 74 percent of black male convicted felons serve prison time, as opposed to only 60 percent of white male convicted felons. With respect to all felonies, 58 percent of black male convicted felons, as opposed to 45 percent of white men, served prison sentences.<sup>86</sup>

Some of these aggregate statistics do not control for a defendant’s prior criminal record, but even that is not a neutral basis for comparison because racial profiling, prosecutorial discretion and juvenile justice decision-making make minorities more likely to acquire a criminal record than their white counterparts. And at least one study that examined only defendants without criminal records found that Hispanics and blacks with no prior record were

<sup>82</sup> *Race to Incarcerate* at 32-33, 151-52 (citing Allen J. Beck and Darrell K. Gilliard, “Prisoners in 1995,” Bureau of Justice Statistics, U.S. Department of Justice (August 1995), p.13).

<sup>83</sup> William J. Sabol & John McGready, “Time Served in Prison by Federal Offenders, 1986-1997,” Bureau of Justice Statistics, U.S. Department of Justice (June 1999), p.5, Table 2.

<sup>84</sup> See Chapter II, n.21.

<sup>85</sup> *New York Felony Study* at 43.

<sup>86</sup> Jodi M. Brown & Patrick A. Langan, “State Court Sentencing of Convicted Felons, 1994,” Bureau of Justice Statistics, U.S. Department of Justice (March 1998) (Brown & Langan), p. 24, table 2.10.

disproportionately likely to be sentenced to prison than white defendants with no prior record. Indeed, Hispanics were twice as likely as whites to draw a prison term as opposed to probation, a fine or time in a county jail.<sup>87</sup>

Racial disparities can be found not only in the fact of incarceration, but in the length of prison or jail time served. According to a Justice Department review of state sentencing, whites who serve time for felony drug offenses serve shorter prison terms than their black counterparts: An average of 27 months for whites, and 46 months for blacks. These discrepancies are mirrored with regard to non-drug crimes. Whites serve a mean sentence of 79 months for violent felony offenses; blacks serve a mean prison sentence of 107 months for these offenses. Whites serve a mean sentence of 23 months for felony weapons offenses, blacks serve a mean sentence of 36 months for these offenses. Overall, whites serving state prison sentences for felony conduct nationwide in 1994 served a mean time of 40 months, as compared to 58 months for blacks.<sup>88</sup>

#### D. *Minority Incarceration Rates*

The choice of legislatures to target drug crimes for "tough on crime" legislation has had a disproportionate impact on America's minorities.<sup>89</sup> As the overall prison population has increased because of the war on drugs, so too has the percentage of minority Americans as a proportion of the overall prison (and drug offender) population. From 1970 to 1984, whites generally comprised approximately 60 percent of those admitted to state and federal facilities, and blacks around 40 percent. By 1991, these ratios had reversed, with blacks comprising 54 of prison admissions versus 42 percent for whites.<sup>90</sup> Other minority groups have also been affected by this trend: Hispanics represent the fastest growing category of prisoners, having grown 219 percent between 1985-1995.<sup>91</sup> The percentage of Asian-Americans in prison has also grown: their percentage of the *federal* prison population increased by a factor of four from 1980 to 1999.<sup>92</sup>

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<sup>87</sup> *Mercury News Report* at 1A.

<sup>88</sup> Brown & Langan at 21, table 2.7.

<sup>89</sup> Anti-drug efforts in America have always had a racial tint. Indeed, while America has experienced an alternating tolerance and intolerance of drug use, during those periods where intolerance has been the norm, "drug use becomes associated . . . with the lower ranks of society, and often with ethnic and racial groups that are feared or despised by the middle class." Daniel Kagan, "How America Lost its First Drug War," *Insight* 8 (November 20, 1989). Thus, "[e]arlier in this century, although mainstream women were the model category of opiate users, images of Chinese opium smokers and opium dens were invoked by opponents of drug use" and led to the enactment of federal anti-drug legislation. Michael Tonry, "Race and the War on Drugs," *1994 U. Chi. Legal Forum* 25, 39 (1994). And "imagery linking Mexicans to marijuana use was prominent in the anti-marijuana movements that culminated in the Marijuana Tax Act of 1937" and state anti-marijuana laws. *Id.* See generally David Musto, *The American Disease: Origins of Narcotic Control* (Oxford University Press, 1987). The current drug war, in which inner-city blacks have become the archetypal users of crack, the archetypal drug of today's drug epidemic, is simply the latest chapter in this ongoing American story.

<sup>90</sup> Michael Tonry, "Racial Disparities Getting Worse in U.S. Prisons and Jails," in Michael Tonry and Kathleen Hatlestad eds., *Sentencing Reform in Overcrowded Times* (Oxford University Press, 1997) ("Tonry & Hatlestad"), p. 223 (citing Bureau of Justice Statistics data).

<sup>91</sup> Mumola & Beck at 9.

<sup>92</sup> Jungwon Kim, "Lost Time," *A.*, June/July 1999, p. 35 (citing Federal Bureau of Prisons Statistics).

The changing face of the U.S. prison population is due in large measure to the war on drugs: In 1985, the number of whites imprisoned in the state system actually exceeded the number of blacks. Between 1985 and 1995, while the number of white drug offenders in state prisons increased by 300 percent, the number of similarly situated black drug offenders increased by 700 percent, such that there are more than 50 percent more black drug offenders in the state system than white drug offenders.<sup>93</sup>

Because the overall number of imprisoned drug offenders has increased, and the number of minorities as a percentage of that population has increased, far more minorities than whites are serving time for drug offenses as a percentage of their respective prison populations. As of 1991, 33 percent of all Hispanic state prison inmates, and 25 percent of all black state prison inmates, were serving time for drug crimes, as compared to only 12 percent of all white inmates.<sup>94</sup> By contrast, in 1986, only seven percent of black inmates, and eight percent of white inmates, had been convicted of drug crimes.<sup>95</sup> In other words, the chances are far better that an imprisoned black or Hispanic is serving time for a drug crime than it is that an imprisoned white is serving time for a drug crime.

Minorities are disproportionately disadvantaged by current drug policies. As we have seen, it is not because minorities commit more drug crimes, or use drugs at a higher rate, than white Americans. Drug use rates per capita among minority and white Americans are similar, a fact which, given the Nation's demographics, means that many more whites use drugs than do minorities. Moreover, as noted earlier, studies suggest that drug users tend to purchase their drugs from sellers of their own race.<sup>96</sup>

Rather, the disproportionate effect of the war on drugs on minorities results from three factors: First, more arrests of minorities for drug crimes; second, overall increases in the severity of drug sentences over the past 20 years; and third, harsher treatment of those minority arrestees as compared to white drug crime arrestees. All three of these factors are direct results of the "tough on crime" movement.

As noted, while blacks constitute approximately 12 percent of the population, as well as a similar percentage of U.S. drug users, they constitute 38 percent of all drug arrestees.<sup>97</sup> Given the demographics of the United States, therefore, far more blacks than whites per capita are arrested for drugs, and overall increases in arrests affect more blacks per capita than whites. Indeed, by 1989, with the war on drugs in full force and overall drug arrests having tripled since 1980,<sup>98</sup> blacks were being arrested for drug crimes at a rate of 1600 per 100,000, while whites

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<sup>93</sup> *Race to Incarcerate* at 152-153 (citing Mumola & Beck).

<sup>94</sup> Mauer Civil Rights Testimony at 8 (citing Bureau of Justice Statistics data).

<sup>95</sup> Michael Tonry, "Drug Policies Increasing Racial Disparities in U.S. Prisons, in *Tonry & Hatlestad* at 232.

<sup>96</sup> See Chapter I, n.23.

<sup>97</sup> *Id.*

<sup>98</sup> Marc Mauer & Tracy Huling, "One in Three Black Men is Ensnared in the Justice System," in *Tonry & Hatlestad* at 246.

were being arrested at one-fifth the frequency per capita -- 300 per 100,000.<sup>99</sup> The statistics in certain United States cities were even more eye-catching: In Columbus, Ohio, black males accounted for 11 percent of the total population, and for 90 percent of the drug arrests.<sup>100</sup> In Jacksonville, Florida, black males comprise 12 percent of the population, but 87 percent of drug arrests.<sup>101</sup>

Why were minorities the primary targets of law enforcement officials waging the war on drugs? Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes will prompt a disproportionate number of investigations, and therefore, arrests of minorities. Drug arrests are easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods, so the insistence of politicians on more arrests results in vastly more arrests of poor, inner-city blacks and Hispanics.<sup>102</sup>

Blacks are not only targeted for drug arrests. They are also 59 percent of those *convicted* of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74 percent of those *sentenced to prison* for a drug offense. Thus, blacks are disproportionately subject to the drug sentencing regimes adopted by Congress and state legislatures. And these sentencing regimes, across all levels of government, increasingly provide for more and longer prison sentences for drug offenders.

Mandatory minimums such as "three strikes" laws result in the extended incarceration of non-violent offenders who, in many cases, are merely drug addicts or low-level functionaries in the drug trade. Indeed, in the first two years after enactment of California's "three strikes, you're out" law, more life sentences had been imposed under that law for marijuana users than for murderers, rapists, and kidnapers combined.<sup>103</sup> An Urban Institute study examining 150,000 drug offenders incarcerated in state prisons in 1991 determined that 127,000 of these individuals -- 84 percent -- had no history of violent criminal activity, and half of the individuals had no criminal record at all.<sup>104</sup> Data from the federal system reveals the same trend. More than half of those sentenced to federal prison in 1992, after the enactment of mandatory minimum sentences for drug offenders, were drug traffickers: of those, 62 percent were considered "low-risk," based

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<sup>99</sup> Michael Tonry, "Drug Policies Increasing Racial Disparities in U.S. Prisons," in *Tonry & Hattestad* at 233, 235.

<sup>100</sup> Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge University Press 1996), p. 82 (citing Sam Vincent Meddis, "Is the Drug War Racist?" *USA Today*, July 23-25, 1993, p. 2A).

<sup>101</sup> *Id.* (citing J.G. Miller, *Duval Jail Report*, filed with the United States District Court for the Middle District of Florida, Jacksonville, Florida, June 1993).

<sup>102</sup> *Id.*

<sup>103</sup> *No Equal Justice* at 147 (citing Christopher Davis, Richard Estes, and Vincent Schiraldi, "'Three Strikes': the New Apartheid," Report of the Center for Juvenile and Criminal Justice (March 1996)).

<sup>104</sup> *Race to Incarcerate* at 157 (citing James P. Lynch & William J. Sabol, *Did Getting Tough on Crime Pay?* (Urban Institute, 1997)).

on a lack of prior criminal histories.<sup>105</sup> Yet these low-risk traffickers were expected to serve an average of 51 months in prison, as compared to 17 months for similarly situated federal prisoners who had been sentenced prior to the enactment of mandatory minimums.<sup>106</sup>

While three strikes laws and mandatory minimums limit judicial discretion to reduce prison sentences, they do not reduce prosecutorial discretion over charging and plea negotiations – decisions which will determine whether strict sentencing laws apply. For example, Georgia District Attorneys sought life sentences for 16 percent of black criminal defendants eligible for such sentences under the State's "two strikes, you're out law," which provided for the imposition of a life sentence for a second drug offense. By contrast, Georgia prosecutors sought a life sentence in only one percent of the eligible cases involving white defendants. The result was that 98.4 of those serving life terms under the Georgia statute were black. Similarly, as of 1996, blacks made up 43 percent of Californians sentenced to prison under the State's "three strikes you're out" law, despite comprising only seven percent of the total State population.<sup>107</sup>

Much of the discrepancy at the federal level is the result of differences in the federal sentencing of drug offenses involving crack and powder cocaine. These disparities, enacted into law as part of the Anti-Drug Abuse Act of 1986, arise from the different thresholds for the imposition of mandatory minimum prison sentences for crack and powder cocaine dealers. In short, federal law imposes mandatory 5-year federal prison sentences on anyone convicted of selling 5 grams or more of crack cocaine, and 10-year mandatory sentences for selling 50 grams or more of crack. But in order to receive the same mandatory 5- and 10-year sentences for selling powder cocaine, a defendant must be convicted of selling 500 and 5000 grams of powder cocaine.

Studies have shown that blacks and whites convicted of federal powder cocaine offenses go to jail for approximately the same length of time; so too do blacks and whites convicted of crack cocaine offenses. The problem is that, as we have seen, few whites are prosecuted for crack offenses in federal court, and are instead prosecuted in state systems that may not impose mandatory minimum penalties for crack offenses. Indeed, in 1993, 95.4 percent of those convicted for federal crack distribution offenses were black or Hispanic.<sup>108</sup> This despite the fact that, as discussed in Chapter II, the majority of crack users in the United States in that period were white.<sup>109</sup> By contrast, almost one third (32 percent) of those convicted of federal powder

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<sup>105</sup> *Id.* at 156 (citing Miles D. Harer, "Do Guideline Sentences for Low-risk Traffickers Achieve Their Stated Purposes?" *Federal Sentencing Reporter* 7.1 (1994)).

<sup>106</sup> *Id.*

<sup>107</sup> *No Equal Justice* at 143, 148.

<sup>108</sup> See Chapter II, p. x, n.7.

<sup>109</sup> *Id.* at pp. 3-4. See also United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995), p. xi.



cocaine distribution offenses in 1993 were white.<sup>110</sup> The crack/powder sentencing disparity, combined with the almost-exclusive federal targeting of blacks and Hispanics for crack-related crimes, means that minorities in general serve longer sentences for similar drug crimes than do whites. Combined with the far greater drug arrest rates for blacks than whites, and the general reliance on mandatory minimums for drug crimes, these longer sentences ensure that federal prisons house a disproportionately large number of minorities.

The crack/powder cocaine divide has not escaped the attention of policymakers, although it has escaped resolution. In 1995, the United State Sentencing Commission recommended to Congress that the sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds, noting both the inequality inherent in these differences and the cynicism they engendered toward America's criminal justice system.<sup>111</sup> In response, President Clinton proposed, and Congress passed, legislation rejecting the Commission's proposed changes and concluding 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."<sup>112</sup> The Commission has since revisited the issue and has recommended a reduction, not an elimination, in the current 100-to-1 disparity, noting again that "[t]he current penalty structure results in a perception of unfairness and inconsistency."<sup>113</sup>

#### *E. The Lighter Side of Drug Policy*

The federal and state policies enacted as part of the war on drugs suggest that America is of one mind when it comes to drug policy: Users and sellers of drugs should be punished, and the punishments should be severe. Yet this approach is in fact not the uniform response to drug-related activity. Indeed, when it comes to drug use in affluent, largely white communities, the model is rather different.

The experience of Milwaukee, Wisconsin, provides an example of the cynicism that often accompanies U.S. drug policy. The predominantly white suburbs that encircle Milwaukee have all passed marijuana possession ordinances, whereby an individual found in possession of marijuana is ticketed, as if for a parking offense, but not charged with a crime. The City of Milwaukee, by contrast, charges marijuana possession as a crime, having rejected a proposed marijuana possession ordinance in the mid-1980s. As a result of these discrepancies, the Wisconsin Correctional Service concluded, non-whites were being charged with drug offenses

<sup>110</sup> United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at xi. Interestingly, Minnesota, whose sentencing regime includes a crack/powder divide similar to that appearing in federal law, had similar breakdowns: 96.6 of those charged with possession of crack cocaine were black, while 80 percent of those charged with possession of powder cocaine were white. *No Equal Justice* at 142. The Minnesota Supreme Court ultimately struck down the crack/powder divide on equal protection grounds. *State v. Russell*, 477 N.W.2d 886, 891 (Minn. 1991). The Minnesota legislature responded by increasing penalties for powder cocaine sales to equal those for crack sales.

<sup>111</sup> United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995) at 192 ("[S]entences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness").

<sup>112</sup> Pub. L. No. 104-38, 109 Stat. 334 (October 30, 1995).

<sup>113</sup> United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997), p.8.

13 times more frequently than whites.<sup>114</sup> Moreover, authorities in the Milwaukee suburbs generally issued tickets to residents of those suburbs, but typically transported non-residents including many blacks, downtown for criminal prosecution.<sup>115</sup>

Affluent predominantly white suburban communities have long recognized that the drug war need not be fought only on the incarceration front. Alternatives such as drug treatment and education are mainstays of white, middle-class efforts to eradicate the scourge of drugs from their neighborhoods. They are also, coincidentally, a more efficient and economical approach to fighting crime generally. The Rand Corporation has estimated that investing an additional \$100 million in drug treatment programs would reduce by fifteen times more serious crime than enacting more mandatory sentences for drug offenders.<sup>116</sup> When it comes to the presence of drugs in inner-city areas populated by minorities, the response of policymakers is very different indeed.

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<sup>114</sup>Jim Stigl, "Drug Laws Seen as Factor in Racial Crime Disparities," *Milwaukee Journal Sentinel*, Aug. 3, 1997, p. 1.

<sup>115</sup>*Id.*

<sup>116</sup>Jonathan P. Caulkins, et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or Saving Taxpayers' Money*, Rand, Santa Monica, 1997, p. xxiv.

#### Chapter IV

### WILLFULL JUDICIAL BLINDNESS

In this era of mandatory sentencing laws and sentencing guidelines, judges have less authority to affect the outcome of criminal cases through the exercise of judicial discretion. Still, courts bear significant responsibility for the injustices suffered by minorities in our criminal system. In the face of the overwhelming racial disparities created by policing tactics, prosecutorial decision-making and unjust sentencing laws, courts have generally declined to examine or redress racial inequality in the criminal justice system, and have made it harder for litigants to expose such flaws.

The Supreme Court's consideration of capital punishment disparities in *McCleskey v. Kemp*<sup>117</sup> exemplifies the judiciary's unwillingness to look behind the exercise of discretion by other criminal justice decision-makers. McCleskey, sentenced to death in Georgia, presented statistical evidence from the Baldus Study, discussed in Chapter II, that individuals charged with killing white victims were far more likely to be sentenced to death than individuals charged with killing black people. Had the victim in McCleskey's case been black instead of white, with all other factors remaining constant, there was a 59 percent chance he would have received a sentence other than death.<sup>118</sup> Such statistical evidence raised serious doubts that the death penalty in Georgia was administered in a fair and racially neutral manner, as required by the Constitution.

By a 5-4 vote, the Court upheld McCleskey's death sentence. It found that while the statistical evidence cast doubt on the fairness of the Georgia death penalty in general, the evidence did not speak to whether capital punishment was unfairly applied to McCleskey himself. In order to justify overturning his death sentence, the Court held, McCleskey would need to demonstrate that his specific sentence was tainted by racial considerations, which he could not do. Responding to McCleskey's claim that his death sentence was arbitrary and therefore "cruel and unusual punishment," the Court found that although McCleskey's death sentence may have been arbitrary, the degree of arbitrariness was "constitutionally acceptable," given the discretion traditionally afforded prosecutors and juries in the seeking and imposing of the death penalty.

*McCleskey* "may be the single most important decision the Court has ever issued on the subject of race and crime"<sup>119</sup> because it signaled the Court's unwillingness to confront statistical evidence of racial unfairness in the criminal justice process. The requirement that McCleskey and future defendants demonstrate that racial bias infected their case specifically is almost always an impossible test. In setting the bar so high, the Court declared, in effect, that systemic racial bias

<sup>117</sup> 481 U.S. 279 (1987)

<sup>118</sup> *McCleskey v. Kemp*, 481 U.S. at 325 (Brennan, J., dissenting) (citing Baldus study).

<sup>119</sup> *No Equal Justice* at 137.

does not offend the Constitution. The Court candidly expressed concern that overturning McCleskey's sentence on the grounds he presented would have opened the door to challenges based on other statistical disparities in the criminal justice system. But that concern is our concern – the criminal justice system is awash in racial disparities. As Justice William Brennan's dissent stated, the Court's decision "seem[ed] to suggest a fear of too much justice."<sup>120</sup>

The Court's reasoning in *McCleskey* and its "fear of too much justice" have been adopted in other cases where a law enforcement practice has been challenged on grounds of racial disproportionality. The Georgia Supreme Court, for example, having invalidated the State's "two strikes, you're out" law on the grounds that it was disproportionately applied to blacks, reversed itself two weeks later after receiving a brief signed by all 46 of the State's District Attorneys. In it, the District Attorneys contended that the Court's initial decision could undermine Georgia's entire criminal justice system, an implicit admission that charging and sentencing outcomes in Georgia are racially skewed. The State Supreme Court's decision reversing itself relied almost exclusively on *McCleskey*.<sup>121</sup>

In *United States v. Armstrong*,<sup>122</sup> the Supreme Court raised the bar for challenging systemic racial bias even higher. In *McCleskey* the Supreme Court had held that a defendant claiming unfair sentencing or selective prosecution based on race must demonstrate that his case was handled differently from similar cases involving defendants (or in the case of the death penalty, victims) of other races. Of course much, if not all, of the information bearing on this question will be in the hands of law enforcement officials themselves. But in *Armstrong*, the Court put this information out of the reach of defendants.

Armstrong was prosecuted for a crack cocaine offense in Los Angeles. He sought to make an issue of the manifestly disparate treatment, discussed earlier, of white and black crack defendants in that jurisdiction. But the Court held that efforts to obtain records from the U.S. Attorney's office to prove selective enforcement could not proceed absent a threshold "colorable basis" for the charge of selective prosecution.<sup>123</sup> Of course, the government's files were necessary to make that colorable showing, but the Court held that a defense attorney's affidavit alleging the absence of federal prosecutions of white crack offenders was simply "hearsay."<sup>124</sup> Under the Catch-22 reasoning of *McCleskey* and *Armstrong*, claims of selective prosecution and other claims alleging bias in law enforcement practices remain "available in theory, but unattainable in practice."<sup>125</sup>

As difficult to prove as selective prosecution is the claim that a prosecutor, in violation of the Sixth Amendment, used race-based peremptory challenges against prospective jurors. In

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<sup>120</sup> *McCleskey v. Kemp*, 481 U.S. at 339 (Brennan, J., dissenting).

<sup>121</sup> See Ch. II, n. 18.

<sup>122</sup> 517 U.S. 456 (1996).

<sup>123</sup> *U.S. v. Armstrong*, 517 U.S. at 468.

<sup>124</sup> *Id.* at 470.

<sup>125</sup> *No Equal Justice* at 160.

*Batson v. Kentucky*,<sup>126</sup> the Supreme Court held that such race-based challenges violated the Constitution by denying a defendant equal protection of the law, but also held that mere statistical evidence of racial discrimination in the use of jury strikes was insufficient in the face of the prosecutor's post-hoc, non-racial explanations. In reversing a subsequent decision finding a prosecutorial rationale unconvincing, the Court noted that any racially-neutral explanation was sufficient as long as the trial judge believed it.<sup>127</sup> In such an environment, even a case where a prosecutor struck 20 of 21 prospective black jurors did not state a *Batson* claim where a racially-neutral, post-hoc rationalization was available to the prosecutor.<sup>128</sup> And such an explanation is always available: "If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar exams are too easy."<sup>129</sup>

Judicially-created obstacles, based on a variety of legal doctrines, also prevent challenges to racially-tinged police tactics. For example, in *City of Los Angeles v. Lyons*,<sup>130</sup> the Supreme Court rejected the efforts of a black man to seek an injunction preventing the Los Angeles Police Department's use of chokeholds during routine traffic stops. Lyons had been pulled over by the police because his car had a burned-out taillight. After the police officers ordered Lyons out of the car, spread his legs, subjected him to a patdown search, they applied a chokehold on him that, among other things, permanently damaged his larynx and caused him to lose consciousness.

The Supreme Court held that Lyons lacked standing to obtain an injunction against the police procedure because he could not demonstrate that he would ever again be subjected to a chokehold by the LAPD under these circumstances. In so ruling, the court overlooked evidence that the LAPD had applied the chokehold on 975 occasions over 5 years, and that application of the chokehold had resulted in 16 deaths, 12 of which were of blacks.<sup>131</sup> The Court also overlooked Lyons' claim that, as a black man, he faced a heightened risk of being subjected to the practice in the future – a claim that, given the prevalence of both racial profiling and police brutality against minorities, was hardly unreasonable. The Court set a standard that would make it nearly impossible for any black victim of police misconduct to prevail in seeking that such conduct be enjoined:

Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized police officers to act in such a manner.<sup>132</sup>

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<sup>126</sup> 476 U.S. 679 (1986).

<sup>127</sup> *Purkett v. Elam*, 514 U.S. 765 (1995).

<sup>128</sup> *No Equal Justice* at 121.

<sup>129</sup> *Id.* at 122 (quoting Sheri Lynn Johnson, "The Language and Culture (Not to Say Race) of Peremptory Challenges," 35 *Wm. & Mary L. Rev.* 21, 59 (1993)).

<sup>130</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>131</sup> *Id.* at 115-116 (Marshall, J., dissenting).

<sup>132</sup> *Id.* at 105-106.

Other Supreme Court decisions regarding discriminatory police practices are discouraging as well. In both *O'Shea v. Littleton*<sup>133</sup> and *Rizzo v. Goode*<sup>134</sup> the Court held that cases seeking to halt law enforcement discrimination could only proceed upon a showing by the plaintiffs that (1) the plaintiff would face a situation that would bring about the discriminatory treatment again, and (2) the discriminatory action would be certain to occur in that situation.<sup>135</sup> Where an officer has discretion to utilize a particular law enforcement tactic, it is virtually impossible to satisfy this standard. Since most police tactics are discretionary, they are shielded from judicial scrutiny.

The Court's treatment of pretextual traffic stops further forecloses challenges to law enforcement practices that disproportionately burden blacks and Hispanics. In *Whren v. United States*<sup>136</sup>, the Court held that a purely pretextual traffic stop, one based on no specific evidence of additional criminal activity, is perfectly permissible. Indeed, the Court held that even if a reasonable officer would not have stopped the car in question, the mere existence of a traffic offense constituted probable cause for the stop. As one judge wrote in a dissent criticizing such reasoning: "Given the 'multitude of applicable traffic and equipment regulations' in any jurisdiction, upholding a stop on the basis of a regulation seldom enforced opens the door to . . . arbitrary exercises of police discretion."<sup>137</sup> In effect, by approving the unfettered exercise of police discretion in the enforcement of the traffic laws, the Court in *Whren* has put the "driving while black" syndrome beyond constitutional inquiry.<sup>138</sup>

One very recent district court decision reaches a different conclusion about traffic stops and may present new opportunities for challenging racial profiling on constitutional grounds. In *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, the court struck down the practice of asking drivers about their immigration status during routine traffic stops. The Court found that the practice was based on impermissible racial stereotyping.<sup>139</sup>

Unfortunately, it is more customary for courts to uphold the exercise of police and prosecutorial discretion against challenges of racial unfairness, and in doing so courts often turn

<sup>133</sup> 414 U.S. 488 (1974).

<sup>134</sup> 423 U.S. 362 (1976).

<sup>135</sup> *O'Shea* involved allegations of a law enforcement conspiracy in Cairo, Illinois, to deprive minorities of their rights and freedoms in retaliation for their involvement in civil rights demonstrations and peaceful boycotts. *Rizzo* involved allegations of widespread police misconduct toward minorities directed at the Philadelphia police force, headed by the notorious then-Mayor Frank Rizzo.

<sup>136</sup> 517 U.S. 806 (1996).

<sup>137</sup> *United States v. Botero-Ospina*, 71 F.3d 783, 790 (10<sup>th</sup> Cir. 1995)(Seymour, C.J., dissenting)(citations omitted).

<sup>138</sup> For examples of cases upholding pretextual stops on the grounds used by the Supreme Court in *Whren*, see *United States v. Harvey*, 16 F.3d 109, 113 (6<sup>th</sup> Cir. 1994) (upholding a stop in which an arresting officer testified that he had stopped the car in part because "there were three young black male occupants in an old vehicle") (Keith, J., dissenting); *United States v. Roberson*, 6 F.3d 1088, 1092 (5<sup>th</sup> Cir. 1993)(upholding a stop of a black motorist for changing lanes without signaling on an open stretch of highway).

<sup>139</sup> N.D. Ohio, No. 3:96CV7580 (April 20, 2000) (Carr, J.)

a blind eye to the manner in which police carry out their duties in minority communities. The Supreme Court's recent decision in *Illinois v. Wardlow*<sup>140</sup> is illustrative. There, the Court considered whether an individual's flight from the police, by itself, furnished a sufficient basis for an investigative stop of that individual. While the Court wisely declined to adopt the view that such flight always furnishes sufficient grounds for an investigative stop, it noted that flight from a police-patrolled area may by itself furnish grounds for a stop in certain circumstances, and upheld the stop and consequent conviction of Wardlow, a black man stopped in a high-crime Chicago neighborhood. The Court insisted that "[a]llowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business . . ."<sup>141</sup> It took Justice Stevens, concurring in the Court's unwillingness to adopt a bright line rule but dissenting from its upholding of Wardlow's conviction, to acknowledge the realities of minority life in America:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.<sup>142</sup>

The courts have upheld not only the exercise of police and prosecutorial discretion; they also have upheld laws that cause discriminatory results, such as the powder/crack sentencing laws and guidelines. Numerous federal courts have been asked to review this sentencing disparity on equal protection grounds. These challenges have been consistently rejected by courts relying on the Supreme Court's holding in *McCleskey* that mere statistical disparities are insufficient to prove intentional discrimination against minorities.<sup>143</sup>

The judiciary's use of evidentiary thresholds and procedural barriers to foreclose challenges to racially-based law enforcement has preserved and sustained a criminal process that provides, for too many Americans, "too little justice." Particularly disturbing is the courts' emphasis on intentional discrimination: "[t]he main problem with this intent-focused analysis is that it is backward-looking. Although perhaps adequate in combating straightforward and explicit discrimination as it existed in the past, it is totally deficient as a remedy for the more complex and systemic discrimination that African-Americans [and other minorities] currently experience."<sup>144</sup> The judicial decisions on race and the criminal justice system afford few

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<sup>140</sup> 120 S. Ct. 673 (January 12, 2000).

<sup>141</sup> *Id.* at 676.

<sup>142</sup> *Id.* at 680-681 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

<sup>143</sup> See *No Equal Justice* at 142 and n. 27 (citing cases).

<sup>144</sup> "Prosecution and Race" at 33.

remedies for anything but the most blatant (and generally outdated) forms of racial and ethnic discrimination.



## Chapter V

### RACE AND THE JUVENILE SYSTEM

The racial disparities that characterize criminal justice in America affect young people deeply, and cause minority youth to be over-represented at every stage of the juvenile justice system. But juvenile justice deserves separate consideration in this Report because it plays an especially destructive role in the lives of minority communities.

Juvenile justice was conceived as a way to intervene constructively in the lives of teenagers in order to steer them away from the adult criminal justice system. Juvenile courts were established throughout the United States in the early 1900's based on the recognition that children are different than adults: while children may violate the law, they remain uniquely suited to rehabilitation. It has long been recognized as counterproductive to label children as criminals, because the description becomes self-fulfilling. But for many black and Hispanic children, juvenile justice serves as a feeder system into adult courts and prisons. The mindless cycle by which so many blacks and Hispanics are branded as criminals begins in the juvenile justice system.

Racially skewed juvenile justice outcomes have dire implications, because the whole point of the juvenile justice system is to head off adult criminality. For example, one pillar of the juvenile justice system is the segregation of children from adult prisoners. Placing more black and Hispanic teenagers in adult prisons where they will come into contact with career criminals serves to incubate another generation of black and Hispanic criminals.

In the last decade, juvenile justice policy has increasingly blurred the distinctions between children and adults. Many states and the federal government have adopted laws that permit, encourage, or require youthful offenders to be tried as adults and ultimately transferred into adult prison populations. This ongoing erosion of the juvenile justice system we have known for a century is disastrous for juvenile offenders in general, but minority youths suffer most from this policy shift because they already bear the brunt of racially skewed law enforcement.

For example, minority youths are disproportionately targeted for arrest in the war on drugs. In Baltimore, Maryland, 18 white youths and 86 black youths were arrested for selling drugs in 1980. One decade later, juvenile drug sale arrests had increased more than 100 percent overall, and the almost 5-to-1 racial disparity that existed a decade earlier had become a 100-to-1 disparity: white youths were arrested 13 times for selling drugs in 1990 – *less* than in 1980 – while black youths were arrested 1304 times, an 1400 percent increase from 1980.<sup>145</sup>

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<sup>145</sup> *No Equal Justice* at 145 (citing National Center on Institutions and Alternatives, *Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (September 1992)).

These figures reflect the broader national experience: From 1986 to 1991, arrests of white juveniles for drug offenses decreased 34 percent, while arrests of minority juveniles increased 78 percent.<sup>146</sup> All this despite data suggesting that drug use rates among white, black, and Hispanic youths are about the same, and that drug use has in fact been lower among black youths than white youths for the last couple of decades.<sup>147</sup> Similar disparities appear in relation to non-drug-related crimes. While a National Youth Survey found that the ratio of violent crimes committed by black and white male youths was approximately 3:2, the ratio of arrests for violent crimes between these two groups was approximately 4:1, according to data from the FBI.<sup>148</sup> In California, from 1996-1998, Hispanic youth were more than twice as likely, and black youth more than six times as likely, to be arrested for a violent offense than white youth.<sup>149</sup> In short, whatever the age of the offender, "black illegal activity is more likely to lead to attention by the criminal justice system."<sup>150</sup>

Over-representation of minority youths in the juvenile justice system increases after arrest. As a general matter, minority youths tend to be held at intake, detained prior to adjudication, have petitions filed, be adjudicated delinquent, and held in secure confinement facilities more frequently than their white counterparts.<sup>151</sup> For example, in 1995, 15 percent of cases nationwide involving white juveniles resulted in detention, while 27 percent of cases involving black juveniles resulted in detention, even though whites comprised 52 percent, and blacks only 45 percent, of the entire juvenile caseload.<sup>152</sup>

These conclusions based on national statistics were very recently reaffirmed in a report released by the Youth Law Center and prepared by researchers from the National Council on Crime and Delinquency. The report found substantial over-representation of minorities at all stages of the juvenile justice system, and noted that three out of every four youths admitted to adult prisons were minorities, despite the fact that the majority of juvenile arrests involved whites.<sup>153</sup>

The experiences of individual states are equally dismaying. Disproportionate confinement of young Hispanics has been documented in each of the four states with the largest Hispanic youth populations -- Arizona, Texas, New Mexico, and California. In Ohio in 1996,

<sup>146</sup> *Id.* (citing American Bar Association, *The State of Criminal Justice* (February 1993)).

<sup>147</sup> "Why 'Driving While Black' Matters" at 295 and n. 132.

<sup>148</sup> *Race to Incarcerate* at 163-165.

<sup>149</sup> Mike Males & Dan Macallair, "The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California," Justice Policy Institute (February 2000) (*The Color of Justice*), pp. 3-4. Asian-Americans too were more likely to be arrested than whites for similar crimes. *Id.*

<sup>150</sup> *Race to Incarcerate* at 165.

<sup>151</sup> See Carl Pope, "Racial Disparities in the Juvenile Justice System," in *Tonry & Hallestad* at 240-244 (surveying studies of race and the juvenile justice system and concluding that studies are "far more evident in the juvenile justice system than in the adult system").

<sup>152</sup> Andrew Blum, "Jail Time By the Book: Black Youths More Likely to Get Tough Sentences Than Whites, Study Shows," *American Bar Association Journal*, May 1999, p.18

<sup>153</sup> Eileen Poe-Yamagata and Michael Jones, "And Justice for Some: Differential Treatment of Minority Youth in the Justice System (April 2000) at 1, 3.

minorities represented 43 percent of the juveniles held in secure facilities, despite representing only 14.3 percent of the overall state juvenile population.<sup>154</sup> Similarly, in Texas in 1996, minority youths represented 80 percent of those juveniles held in secure facilities, while representing only 50 percent of the overall state juvenile population.<sup>155</sup> A 1990 Florida study determined that “when juvenile offenders were alike in terms of age, gender, seriousness of the offense which promoted the current referral, and seriousness of their prior records, the probability of receiving the harshest disposition available at each of several processing stages was higher for minority youth than for white youth.”<sup>156</sup>

Black, Hispanic, and Asian-American youths are far more likely to be transferred to adult courts, convicted in those courts, and incarcerated in youth or adult prison facilities than white youths. A recent study of Los Angeles County juvenile justice trends carried out by the Justice Policy Institute (JPI) is revealing. Under California law, an under-18 youth may be prosecuted either in juvenile court or adult court, and may be sentenced either to a prison term in a California Youth Authority (CYA) facility, from where he may be transferred to an adult facility at age 18, or given probation. The JPI study concluded that while minority youths are five times more likely than white youths to be transferred to a CYA facility by a juvenile court (a disturbing disparity in and of itself), they are 10 times more likely to be placed in CYA facilities by an adult criminal court. The study further found that although minority (black, Hispanic, and Asian) youths comprised 75 percent of California’s juvenile justice population, they comprised almost 95 percent of all cases found “unfit” for juvenile court and transferred to adult court. Cases involving Hispanic youth alone accounted for 59 percent of the cases deemed “unfit” for juvenile court. By contrast, cases involving white juveniles, who make up 24 percent of California’s overall juvenile population, were transferred to adult court only 5 percent of the time. Black, Hispanic and Asian youths in California are six, 12, and three times more likely, respectively, to be transferred to adult court.<sup>157</sup>

The disproportionate number of minority transfers to adult court could not be explained by the commission of more, or more serious, crimes by minority youths. The JPI study found a 2.8-to-1 violent arrest ratio between minority and white youths – that is, for every white youth arrested for a felony, 2.8 minority youths were arrested. But after the felony arrest stage, the likelihood of minority youths being transferred to adult court as compared to white youths increased to 6.2-to-1. The ratio of adult court prison *sentences* increased even further: Minority youths arrested for violent crimes were seven times more likely overall to receive prison sentences from adult courts than white youths arrested for similar crimes. The numbers for black youth were particularly stark. As compared to a white youth who committed a violent crime, a black youth was 18.4 times more likely to be sentenced to prison by an adult court (Hispanics were 7.3 times more likely, and Asian-Americans 4.5 times more likely, than whites to be

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<sup>154</sup> *The Color of Justice* at 2 (citing Donna Hamparian & Michael Leiber, *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report* (Community Research Associates 1997) (“Hamparian & Leiber”), p.9).

<sup>155</sup> *Id.* (citing Hamparian and Leiber, at 9).

<sup>156</sup> *Id.* (citing Donna Bishop & Charles Frazier, “A Study of Race and Juvenile Processing in Florida.” Report Submitted to the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990)).

<sup>157</sup> *The Color of Justice* at 3, 7.

sentenced to a CYA facility by an adult court).<sup>158</sup> The JPI report concludes that “the discriminatory treatment of minority youth arrestees accumulates within the justice system and accelerates measurably if the youth is transferred to adult court.”<sup>159</sup>

The increasingly severe treatment of minority youths in the California justice system has dramatically changed the composition of the State juvenile prison population. Whereas white youths made up 30 percent of the CYA population in 1980, in 1998, they comprised 14 percent. In the next several years, Hispanic youths are expected to comprise 65 percent of the CYA population.

The trend is indeed continuing in California. On March 7, 2000, that state’s voters approved Proposition 21, the “Gang Violence and Youth Crime Prevention Act,” a measure first proposed during his term of office by former Republican Governor Pete Wilson and supported by current Democratic Governor Gray Davis. Proposition 21 permits prosecutors to charge youthful offenders as adults without obtaining the approval of a juvenile court judge, and imposes longer, sometimes mandatory, sentences on a broader range of crimes committed by juveniles. Membership in a gang, for example, carries with it a mandatory 6-month term. At the same time, Proposition 21 eliminates certain early intervention programs.

The consequences of Proposition 21 are staggering. California taxpayers have voted to spend an additional \$1 billion for prison construction at a moment when youth violence is declining throughout the state. They have also voted to incarcerate 15 and 16 year olds in adult prison, despite the fact that teenagers incarcerated in adult facilities are five times as likely to be raped, twice as likely to be beaten, and eight times as likely to commit suicide as adults in those facilities.<sup>160</sup> Given the demonstrable racial disparity in juvenile justice, there is little question that the impact of Proposition 21 will fall largely on minority youth. Hispanic and black youthful offenders will be more likely to be transferred to adult court, to be incarcerated in adult facilities, and to receive lengthy and/or mandatory prison terms than white offenders.

Several national trends parallel the California experience: “Tough on crime” juvenile justice policies are in vogue, and minority youths are the primary targets of these policies.

First, the overall under-18 population in state prisons is increasing. In 1985, 3400 youths were admitted to state prisons; by 1997, the number was 7400, more than double the prior total. This increase was more pronounced than the increase in arrests during that time. For every 1,000

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<sup>158</sup> *Id.* at 4-7.

<sup>159</sup> *Id.* at 8.

<sup>160</sup> Evelyn Nieves, “California Proposal Toughens Penalties for Young Criminals,” *New York Times*, March 6, 2000, pp. A1, A15 (quoting Kathryn Dresslar, senior policy advocate at the Children’s Advocacy Institute, University of California, San Diego).

arrests for violent crimes by under-18's, 33 youths were incarcerated in 1997, as compared to 18 in 1985.<sup>161</sup>

Second, the number of cases transferred from juvenile courts to adult courts has increased 70 percent in a decade, from 7200 in 1985 to 12,300 in 1994.<sup>162</sup> The prison terms served by these youths has also increased, from a mean minimum term in 1985 of 35 months to a mean minimum term in 1997 of 44 months.<sup>163</sup> Contrary to contentions that this development reflects a surge of violent criminal activity by America's youth, approximately two-thirds of the youths prosecuted in adult court in 1996 were charged with nonviolent offenses.<sup>164</sup> Yet overall, in 1998, nearly 18,000 youths spent time in adult prisons, and approximately 20 percent of these youths were mixed in with the adult population.<sup>165</sup>

Third, minority youths make up the majority of those youths in the state prison system. In 1997, Hispanic and black youths made up 73 percent of the overall under-18 state prison population, a 10 percent increase from 1985 figures.<sup>166</sup>

Fourth, the disparity between the numbers of minority and white youths in state prisons is increasing, especially for drug offenses. In 1985, the number of black youths held in state prisons for drug offenses was 1.5 times greater than the number of white youths imprisoned for the same offenses. By 1997, the number of black juvenile drug offenders in state prisons was over 5.3 times greater than the number of imprisoned white juvenile drug offenders.<sup>167</sup>

Finally, minority youths are involved in an increasing number of the cases transferred from juvenile to adult court: the number of cases involving white youths that were transferred from juvenile to adult courts increased approximately 50 percent between 1985-1994; transferred cases involving black youth increased almost 100 percent, and are now approximately half of all transferred cases, despite the much smaller percentage of black youth in the overall juvenile population.<sup>168</sup> And cases involving black juveniles were almost twice as likely to be transferred

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<sup>161</sup> Kevin J. Strom, "Profile of State Prisoners under Age 18, 1985-97," Bureau of Justice Statistics, U.S. Department of Justice (February 2000) (Strom), pp.1, 4-5. Many of these youthful offenders are disabled, with such conditions as attention deficit hyperactivity disorder, learning disabilities, and post-traumatic stress disorder. Indeed, in Arizona, studies have identified 42 percent of all youthful offenders as disabled; similar studies have revealed 60 percent of youthful offenders in Maine and Florida to be disabled. Peter E. Leone and Sheri Meisel, "Improving Education Services for Students in Detention and Confinement Facilities," National Center on Education, Disability, and Juvenile Justice (December 20, 1999), p.2 and n. 20.

<sup>162</sup> Jeffrey A. Butts, "Delinquency Cases Waived to Criminal Court, 1985-1994," Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (February 1997) (Butts), p. 1.

<sup>163</sup> Strom at 7, Table 7.

<sup>164</sup> Mara Dodge, "Regrettable Regression in the Way We Treat Young Criminals," *Washington Post*, August 29, 1999, p. B02.

<sup>165</sup> *Id.*

<sup>166</sup> Strom at 3.

<sup>167</sup> Strom at 5, Table 5.

<sup>168</sup> Carol J. DeFrances & Kevin J. Strom, "Juveniles Prosecuted in State Criminal Courts," Bureau of Justice Statistics, U.S. Department of Justice (March 1997) p. 5, Table 5.

to adult criminal court as cases involving white juveniles, principally because of the relatively large number of transferred (nonviolent) drug cases involving black juveniles.<sup>169</sup>

Ill-conceived efforts to facilitate the transfer of juveniles into the adult justice system have not been limited to the state level. For the past several years, Congress has considered legislation that would permit U.S. Attorneys to prosecute youths as adults for certain offenses, require states to take the same approach with respect to their juvenile offenders, and mandate that states collect data bearing on racial disparities in their juvenile systems. If such legislation is enacted, the federal government will be able to claim shared responsibility for the transformation of our juvenile justice system into the breeding ground for a class of young, disaffected career criminals.<sup>170</sup> This class will consist largely of minority youths, yet federal legislation would discourage collection of information bearing on the racial disparities that characterize juvenile justice systems nationwide.

Federal policy toward juveniles already disproportionately impacts some minority groups. Because crimes committed on Indian reservations often fall within federal jurisdiction, Native American youths who engage in minor criminal conduct that ordinarily would be prosecuted in state court instead face federal prosecution and federal penalties that, as described, are often far harsher than those imposed in state court. For this reason, approximately 60 percent of youths in federal custody are Native American.<sup>171</sup> Disabled children are also disadvantaged in the juvenile justice system because they may lose their statutory entitlement to individualized education programs upon being transferred to adult facilities.

Passage of the federal juvenile justice legislation currently under consideration will extend these disparities to other minority groups, and will serve as a self-fulfilling prophecy. The fear of crime by minority youths will lead to policies that breed crime by minority youths, and that will justify even more aggressive efforts to bring minorities under criminal justice control. Meanwhile, efforts to examine the race-based disparities that pervade juvenile justice in America languish.

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<sup>169</sup> Butts at 2.

<sup>170</sup> The decision to funnel more juveniles into the adult prison system will make even more regrettable Congress' decision in the 1994 crime bill to deny Pell education grants to criminals, and will further entrench these juveniles lack the tools necessary for integration into mainstream, law-abiding society.

<sup>171</sup> Steven R. Donziger ed., *The Real War on Crime: The Report of the National Criminal Justice Commission (1997)*, p. 104.

## Chapter VI

### THE CONSEQUENCES OF TOO LITTLE JUSTICE

Concerns about racial disparity in criminal justice are not new. Authors as diverse as public health scholar Deborah Prothrow-Stith and former New York City Judge Bruce Wright called attention to the problem a decade ago.<sup>172</sup> But the crisis has grown dramatically worse in the years since the problem was first identified.

Today it is beyond debate that America's minorities are treated unfairly within the criminal justice system. Innocent minorities are detained and interrogated more often than innocent whites. Minorities who violate the law are more likely to be targeted for arrest, less likely to be offered leniency and are subject to harsher punishment when compared to similarly situated white offenders. Each successive measure of unequal treatment compounds the prior disparities. Meanwhile minority youths face similar inequities, and are therefore more likely than white youths to be transformed by government policies into career criminals.

There is a self-perpetuating, cyclical quality to the treatment of black and Hispanic Americans in the criminal justice system. Much of the unfairness visited upon these groups stems from the perceptions of criminal justice decision-makers that (1) most crimes are committed by minorities, and (2) most minorities commit crimes. Although empirically false, these perceptions cause a disproportionate share of law enforcement attention to be directed at minorities, which in turn leads to more arrests of blacks and Hispanics. Disproportionate arrests fuel prosecutorial and judicial decisions that disproportionately affect minorities and result in disproportionate incarceration rates and prison sentence lengths for those minorities. The accumulated effect is to create a prison population in which blacks and Hispanics increasingly predominate, which in turn lends credence to the misperceptions that justify racial profiling and "tough on crime" policies.

There are innumerable consequences to this vicious cycle of inequality -- for incarcerated minorities, for their families and communities, and for the continued legitimacy of the criminal justice system.

#### A. *The Lost Generation and Their Families*

The United States has the second highest incarceration rate in the world, behind only Russia. Two million people are housed in American prisons. Although they comprise less than a quarter of the U.S. population, black and Hispanic Americans make up approximately two-thirds of the total U.S. prison population. The percentage of prisoners who are black is four times that of the percentage of blacks in the U.S. population (49 percent to 12 percent); the percentage of prisoners who are Hispanic is almost twice that of the percentage of Hispanics in

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<sup>172</sup> Deborah Prothrow-Stith, *Deadly Consequences* (Harper Collins, 1991); Bruce Wright, *Black Robes, White Justice* (Lyle Stuart, Inc., 1987).

the U.S. population (17 percent to 10 percent).<sup>173</sup> In order to grasp the enormity of these facts, consider that:

- In 1995, almost one in three black males aged 20-29 was on any given day under some form of criminal supervision – either in prison or jail, or on probation or parole.<sup>174</sup>
- As of 1995, one in fourteen adult black males was in prison or jail on any given day.<sup>175</sup>
- A black male born in 1991 has a one in three chance of spending time in prison at some point in his life. A Hispanic male born in 1991 has a one in six chance of spending time in prison.<sup>176</sup>
- There are more young black men under criminal supervision than there are in college.<sup>177</sup>
- For every one black male that graduates from college, 100 black males are arrested.<sup>178</sup>

These statistics confirm what is already evident to many: Black and Hispanic America have lost a generation of males to the criminal justice system. Statistical projections suggest that future generations of minority males will be lost unless our criminal justice polices are reformed.

The rate at which young minorities are relegated to lives of crime and incarceration serves to negate many of the hard-fought gains of the civil rights movement. During the last half of the 20<sup>th</sup> century, black Americans and other minorities struggled to win the right to equal opportunity in employment, housing, education and public accommodations. These rights are meaningless to hundreds of thousand of minority prisoners and are largely unavailable to hundreds of thousands of minority ex-convicts. The ability of minorities to enjoy the fruits of the civil rights struggle is compromised by the racial disparities of the criminal justice system.

Perhaps the most precious of the civil rights victories was the right to vote. In a democracy such as ours, the franchise is the fundamental engine of change, the primary means of ensuring the responsiveness of elected officials to public concerns. Yet in 46 states and the District of Columbia, convicted adults in prison are stripped of the right to vote. Thirty-two states also disenfranchise felons on parole, while 29 states disenfranchise felons on probation.

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<sup>173</sup> Mauer Civil Rights Commission Testimony at 2 (*citing* Bureau of Justice Statistics data).

<sup>174</sup> *Id.* (*citing* Marc Mauer & Tracy Huling, "Young Black Americans and the Criminal Justice System: Five Years Later," the Sentencing Project (October 1995)).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *No Equal Justice* at 141.

<sup>178</sup> *Id.* at 5 (*citing* Henry Louis Gates, Jr., "The Charmer," *The New Yorker*, April 29/May 6 1996, p. 116).



And 14 states even disenfranchise for life ex-felons who have fully serve their prison terms.<sup>179</sup> Many of those who lose the right to vote are convicted of relatively minor, non-violent crimes. In some states, an offender who receives probation for a single sale of marijuana, or for shoplifting, may be permanently disenfranchised.

Because of the disproportionately high percentage of convicted black criminals, these laws have a disproportionate effect on blacks, renege on the guarantees of the Fourteenth Amendment and the Voting Rights Act. As a consequence of disenfranchisement laws, 1.4 million black men – 13 percent of the entire adult black male population – are denied the right to vote. In two states, 31 percent of all black men are permanently disenfranchised. In five states, approximately one in four men are currently disenfranchised. And given current rates of incarceration, in states with the most restrictive voting laws, 40 percent of black men are likely to be permanently disenfranchised in upcoming years.<sup>180</sup> Disenfranchisement laws furnish another example of the disproportionate and lingering effects of criminal justice policies on minorities.<sup>181</sup>

The massive incarceration of black and Hispanic males also has a destabilizing effect on their communities. It skews the male-female ratio in those communities, increases the likelihood that children will not be raised by both parents, and contributes to the fragmentation of inner city neighborhoods that renders the crime-race linkage a self-fulfilling prophecy. In too many communities involvement in the criminal justice system is so common that the criminal law has lost its stigmatizing effect. Jail can, and has, become a badge of honor through overuse of criminal sanctions.<sup>182</sup>

These ripple effects of imprisonment on family and community are especially acute when the prisoner is a woman. Black women are incarcerated at a rate seven times greater than white women. The 417 percent increase in their incarceration rates between 1980 and 1995 is greater even than the increase for black men.<sup>183</sup> Three fourths of the women in prison in 1991 had children, and two-thirds had children under 18.<sup>184</sup> More mothers in prison therefore means fewer

<sup>179</sup> Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project (October 1998) (*Disenfranchisement Laws*), p.1.

<sup>180</sup> *Id.*

<sup>181</sup> Felony convictions bring with them numerous other collateral consequences under state and/or federal law, such as ineligibility to serve in government jobs or hold government licenses; ineligibility to enlist in the armed forces; ineligibility for jury service; ineligibility for various kinds of professional licenses, and ineligibility for government benefits. See Office of the U.S. Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey (1996) at 7. Mere arrests can result in eviction from public housing. In the immigration context, a felony conviction, or even certain kinds of misdemeanor convictions, can lead to deportation. 8 U.S.C. § 1227(a)(2). And one study of the impact of imprisonment on future earnings concluded from a sample of youth incarcerated in 1979 that wages subsequent to release from prison declined 25 percent between 1979-1987. The study attributed some of this decline to recidivism, and some to the negative effects of the original incarceration. *Race to Incarcerate* at 182 (citing Freeman, "The Labor Market," in Wilson & Petersilia, eds., *Crime* (ICS Press, 1995), p.188)).

<sup>182</sup> Mark Silk, "Solutions to Youth Crime Discussed: Black Prosecutors Look at Alternatives to Incarceration," *Atlanta Constitution*, July 26, 1994, p. C4 (quoting New York City Assistant District Attorney Rhonda Ferdinand).

<sup>183</sup> *Race to Incarcerate* at 185. One-third of female inmates were incarcerated for drug offenses. *Id.*

<sup>184</sup> *Id.*

mothers caring for their children, a trend that further exacerbates the deterioration of minority communities and family structures.

No community that loses one-third of its men and many of its women is strengthened by that development. A community that is already beset by economic and social problems of the magnitude facing inner city neighborhoods simply cannot afford this loss.

**B. *Effects on the Justice System Itself***

The effects of racial disparities in the justice system extends beyond prisoners and prisoners' families. That inequality ultimately affects all Americans because it compromises the legitimacy of the system as a whole, undermines its effectiveness and fosters racial division.

Persistent inequality in the justice system gives minorities good reason to distrust the system, and to refuse to cooperate with it. Such lack of cooperation can take many forms, each of which has a corrosive effect on the system's strength and continued viability.

***Cooperation of Victims and Witnesses.*** To be effective, police and prosecutors need the cooperation of those who are victimized by criminal conduct. Minorities are disproportionately victimized by crime. Black Americans are victimized by robbery at a rate 150 percent higher than whites. They are the victims of rape, aggravated assault, and armed robbery at a rate 25 percent greater than whites. And homicide is the leading cause of death among young black males.<sup>185</sup> It is in the interest of minority communities to support the fight against crime. Yet the perception that the criminal justice system is not on their side leads many black and Hispanic Americans – as well as other groups with historically tense relationships with the police, such as gays -- to not report criminal activity. This is as true, if not more so, for *witnesses* of crime as it is for victims of crime. Minorities are often reluctant to assist in a criminal investigation because they view law enforcement authorities as hostile, or at least indifferent, to their concerns.

In 1993, Isham Draughn was shot in the back of the head in Richmond, Virginia, in the back of the McDonalds where he worked as a security guard. He had been trying to make an arrest in the middle of an unruly crowd of several hundred. No member of the crowd came forward to assist the investigation.<sup>186</sup>

In March 1996, Des Moines, Iowa police had to drop a murder investigation because no witnesses were willing to confirm the identity of the individual the police suspected of the murder. Reverend Keith Ratliff, president of the local NAACP, explained this lack of cooperation on the grounds that police officers were not viewed as "friends and co-workers in the inner city because of the historic treatment of minorities and poor whites."<sup>187</sup>

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<sup>185</sup> *No Equal Justice* at 5 (citing John Hazan & Ruth Peterson, "Criminal Inequality in America," in J. Hagan & R. Peterson, *Crime & Inequality* (Stanford Univ. Press, 1995)).

<sup>186</sup> *Id.* at 169 (citing Donald P. Baker, "Execution-Style Slaying in Richmond Spurs Gun Debate," *Washington Post*, January 25, 1993, p. D3).

<sup>187</sup> *Id.* (citing Tom Alex, "Why Case Against Two Cousins Unraveled," *Des Moines Register*, April 5, 1996, p.1).

In July 1997, 58 deaf and mute Mexicans were found living in virtual slavery in New York City. They had been smuggled into the United States, and then forced by their smugglers into a life of servitude, where they were beaten, raped, traded, and repelled by stun guns. Neighbors of the Mexicans witnessed some of the abuse, but did not alert law enforcement, in part because they were concerned that the police would turn the Mexicans over to INS, and in part because they did not think the police would take them seriously. One neighbor said, "[w]e speak with an accent, we can hardly make ourselves understood. They are not going to come here just because we call and complain about something that is happening to us."<sup>188</sup>

Fear of immigration-related law enforcement has a detrimental effect on the willingness of many Hispanics to cooperate with the police and other government agencies. There is little doubt that Hispanics communities are undercounted in the census, for example, because some residents fear identifying themselves to government authorities.

In short, out of hostility to, distrust of, or simply lack of faith in law enforcement, minorities may decline to participate in crime prevention and reporting, thereby weakening the justice system.<sup>189</sup> That syndrome has direct adverse consequences for minority communities which, after all, are beset by especially high rates of victimization.<sup>190</sup>

That this distrust is shared by a large number of minorities in the United States has enormous implications for our democracy. But an equally ominous development is that cynicism about the fairness of the criminal justice system is spreading beyond minority communities to the country as a whole. A 1995 Gallup Poll found that 77 percent of black Americans and 45 percent of white Americans believe the criminal justice system generally treats blacks more harshly than whites, and a majority of both white and black Americans surveyed last year believe that racial profiling by the police is widespread in their communities.<sup>191</sup> The criminal justice system faces a growing national crisis of confidence.

**Minorities and the Jury System.** The current Deputy Attorney General, Eric Holder, is black. He is also a former United States Attorney for the District of Columbia. Looking back on his years as a front-line prosecutor trying numerous cases before predominantly minority juries, Holder observed: "There are some folks who have been so seared by racism, so affected by what

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<sup>188</sup> Joel Najar, "The Impact of Immigration Enforcement by Local Police on the Civil Rights of Latinos" (National Council of La Raza, July 29, 1998, on file with authors) at 10 (quoting Mirta Ojito, "Neighbors' Response to Trouble is Silence," *New York Times*, July 21, 1997, at B5).

<sup>189</sup> Jerome Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge University Press 1996), p. 127 (citing Benjamin A. Holden, "Harsh Judgment: Many Well-Off Blacks See Injustice at Work in King, Denny Cases," *Wall Street Journal*, August 10, 1993, p. A1).

<sup>190</sup> See generally, Bureau of Justice Statistics, "Criminal Victimization 1998" (August 25, 1999).

<sup>191</sup> *No Equal Justice* (citing 1995 poll); Kevin Robbins, "In Gallup Poll, Most Say They Believe Racial Profiling is Common," *St. Louis Post Dispatch*, December 9, 1999, p. A4. See also Dan Barry and Marjorie Connelly, "Poll in New York Finds Many Think Police are Biased," *New York Times*, March 16, 1999, p.A1 (stating that less than 25 percent of New Yorkers surveyed believe that police treat blacks and whites equally).

has happened to them because they are black, that even if you're the most credible, upfront black man or woman in law enforcement, you're never going to be able to reach them."<sup>192</sup>

Perceptions of racial injustice manifest themselves in three ways when it comes to the issue of minorities as jurors. First, many minorities, when requested for jury duty, simply do not show up. In Chicago, 60 percent of residents of black neighborhoods did not even respond to calls for jury duty, as compared to eight percent of residents in white neighborhoods.<sup>193</sup> Given the constitutional guarantees of trial by a jury of a defendant's peers, the failure of minorities to appear for jury duty has enormous implications for minority *defendants* and for the legitimacy of the jury system.

Second, those minorities that do appear for jury duty may have such strong preconceptions about the justice system that they simply will not accept the testimony of police witnesses or the arguments of prosecutors. In some jurisdictions it may be difficult for a prosecutor to obtain a conviction predicated on uncorroborated police testimony. And even if jurors believe the prosecution's case, they may engage in the practice of jury nullification. Deputy Attorney General Holder recalls that when he served as a Washington, D.C. trial judge, it was not uncommon for drug possession prosecutions to result in hung juries because a single juror decided that "I just was not going to vote to send another young black man to prison" (Holder's words).<sup>194</sup> Jury nullification, which is also gaining legitimacy in civil rights scholarship,<sup>195</sup> is a troubling development for law enforcement officials.

***The Moral Authority of the Law.*** We have seen how perceptions underlying racial inequality in our criminal justice system are self-fulfilling. The belief that minorities commit more crimes than whites, and that most blacks commit crimes, leads to an allocation of law enforcement resources that results in disproportionate arrests and convictions of minorities. These perceptions are self-fulfilling in another way: racial inequalities in law enforcement erode the moral authority of the criminal law in the eyes of minority citizens and may lead them to commit more crimes. As Professor David Cole has written: "[W]here people view criminal justice procedures as unfairly biased, they will be especially likely to consider the law illegitimate, and therefore less likely to comply with the law." In some minority communities,

<sup>192</sup> *No Equal Justice* at 170 (citing Jeffrey Rosen, "One Angry Woman," *The New Yorker*, February 28/March 3 1997, pp. 54, 60).

<sup>193</sup> *Id.* at 170 and n.6. In explaining this phenomenon, Standish Wills, Chair of the Chicago Conference of Black Lawyers, stated: "[B]lack people, to a great extent, don't have a lot of faith in the criminal justice system." *Id.*

<sup>194</sup> *Id.* (citing Jeffrey Rosen, "One Angry Woman," *The New Yorker*, February 28/March 3 1997, pp. 54, 60).

<sup>195</sup> See, e.g., Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," *105 Yale L.J.* 677 (1995). The reaction of minority jurors is undoubtedly further heightened by the fact that the overwhelming majority of prosecutors are white. For example, one study has shown that in the 38 states that have the death penalty, only 2 percent of all prosecutors are black or Hispanic, while 97.5 percent are white. Richard C. Dieter, "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," *Death Penalty Information Center* (June 1998), pp. 12-14.

the criminal law, “[r]ather than being viewed as the voice of the community’s mores . . . is likely to be perceived as the forcible imposition of one community’s values on another.”<sup>196</sup>

### C. *Health and Economic Effects*

**Public Health Consequences.** Often overlooked are the public health consequences of rising incarceration rates. As a result of prison overcrowding and the lack of suitable health care, tuberculosis spread rapidly in the early 1990s. In New York City, where a particularly virulent, multi-drug resistant form of the disease broke out, 80 percent of known cases were traced to prisons.<sup>197</sup> Moreover, the rate of HIV infection in the prison population is now 13 times that of the non-prison population.<sup>198</sup> Given the number of individuals incarcerated, and the constant interchanges between the prison and outside population, these developments signal a public health crisis that has dire consequences for prisoners and non-prisoners alike. And because minorities are disproportionately represented among prisoners, these public health effects are felt most sharply in minority communities.

**Prisons vs. Schools.** Rapid increases in incarceration rates require increased construction of facilities in which to house prisoners. More than half of the prisons in use today in the United States were built in the last twenty years. The Bureau of Prisons is the largest arm of the Justice Department.<sup>199</sup> The 1994 crime bill alone included \$8 billion in funding for new state prison construction. Funding for prison construction not only edges out funding for alternative crime-fighting strategies, such as prevention and treatment programs, it also edges out funding for many other priorities, within and outside the justice system. More money for prisons means less money for schools, libraries, youth athletic programs, literacy programs and many other programs that might do more to reduce crime than lengthy incarceration.

Minority communities, which are often important beneficiaries of social spending, therefore feel the sting of criminal justice twice. They are victimized by racially skewed enforcement strategies and then deprived of needed funding for schools and community development. Once again the system is self-perpetuating, because the paucity of quality education and jobs can bear directly on rates of criminality in minority communities.

**Economic Implications.** Racial disparities in the criminal justice system have a direct, adverse impact on the economic health of minority communities. Less directly, these disparities are a drag on the continued economic health of the nation as a whole. The United States is experiencing rapid demographic changes as the Hispanic, Asian and black populations grow more rapidly than the white population. Already, California is a “majority minority” state. Racial and ethnic minorities will necessarily constitute a larger share of the country’s labor force

<sup>196</sup> *No Equal Justice* at 172, 175.

<sup>197</sup> *Race to Incarcerate* at 181 (citing Paul Farmer, “Cruel and Unusual: Drug-Resistant Tuberculosis as Punishment,” in Vivien Stern and Rachel Jones eds., *Sentenced to Die? The Problem of TB in Prisons in East and Central Europe and Central Asia* (Penal Reform International, 1999)).

<sup>198</sup> *Id.* at 182 (citing Dorothy E. Merianos, James W. Marquart and Kelly Damphousse, “Examining HIV-Related Knowledge among Adults and Its Consequences for Institutionalized Populations,” *Corrections Management Quarterly*, 1, 4 (1997), p. 85).

<sup>199</sup> *Id.* at 11.

as well. Future prosperity, not to mention the solvency of the Social Security and Medicare systems, increasingly is dependent on the productivity of the minority population. The challenge of maintaining productivity with a diminishing pool of skilled workers is exacerbated if huge numbers of minorities are removed from the workforce and incarcerated. As education and training programs in prisons are slashed, many of these prisoners will emerge without the skills they need to compete in a high-tech, global economy. That is both their problem – and ours.

***D. Loss of National Ideals.***

The final – and perhaps most important – consequence of a racially divided criminal justice system is the hardest to quantify. Our national self-image, against which we judge both ourselves and other nations around the world is of a land in which all people are created equal under God, and each is entitled to fair treatment before the law. We have often failed to live up to this goal, but have never given up the struggle to attain it. The inequities detailed in this report demonstrate that we have fallen short. The constitutional promise of equal protection under law has been broken.

Our failure to bridge the racial divide, and to meet the exacting standards set for us by the Founding Fathers, not only does damage to our own self-image; it also damages our role as leader in the fight for international human rights. In particular, many of the discriminatory practices that characterize the criminal justice system – from racial profiling to the crack/powder sentencing divide – may well constitute violations of the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),<sup>200</sup> which condemns laws and practices that have invidious discriminatory impact, regardless of intent. The United States has declined to make the CERD self-executing, which means that in the absence of legislation granting the rights conferred by the Convention, CERD is without legal effect in the United States. The combination of the United States’ reluctance to confer the rights guaranteed by CERD on its own citizens, combined with its failure to eradicate practices which violate the guarantees therein, surely damage our government’s credibility when it seeks to lead the charge against racism and intolerance abroad.

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<sup>200</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969). 140 Cong. Rec. S7634-35 (June 24, 1994).

## Chapter VII

## RECOMMENDATIONS

If the American criminal justice system were a corporation, it would be found to violate the civil rights laws so extensively that it might well be shut down. But for several reasons, racial inequality in the criminal justice system cannot be eradicated easily.

First, there actually is no single American criminal justice system. The federal government, each state and many localities operate independent court systems, and there are thousands of discrete law enforcement agencies throughout the United States. Unlike some other civil rights battles, criminal justice reform is a state-by-state challenge.

Second, little or no *de jure* racial discrimination remains in the criminal law (although the different federal sentencing schemes for crack and powder cocaine comes close). Instead, racial disparities emerge from deeply rooted, self-fulfilling stereotypes and assumptions. A complex network of laws, policies, priorities and practices perpetuate the racially skewed outcomes described in this report. It is difficult enough to get to the source of the problem, much less change it.

Third, efforts to reform criminal justice policies are politically perilous – no office holder wants to be labeled “soft on crime,” and measures to make crime policy more rational and equitable are uniquely susceptible to such demagoguery. Crime rates have declined in recent years, a phenomenon that has more to do with demographics and the strength of the economy than the racially tainted policing strategies and sentencing initiatives of recent years.<sup>201</sup> But mayors, police chiefs, legislators – even Presidents – love to take credit for safer streets and are loath to tinker with a winning electoral formula.

Still, efforts to redress racial biases in criminal justice are beginning to take root, and a growing number of courageous politicians are willing to challenge criminal justice orthodoxy. For example:

- Racial profiling is under growing scrutiny. Legislation requiring police officers to compile racial statistics on traffic stops was debated in 20 state legislatures last year, and passed in Connecticut and North Carolina.<sup>202</sup>
- Flaws in the administration of the death penalty have led to calls for reform. Republican Governor George Ryan has announced a moratorium on executions in Illinois because of that State’s “shameful record of convicting innocent people and putting them on death row.” Meanwhile, legislation to improve capital punishment

<sup>201</sup> See generally *Race to Incarcerate* at 81-100 (discussing “the prison-crime connection”).

<sup>202</sup> Matthew Mosk, “Weeding Out Officers Who Single Out Drivers: Md. Senate Debates Anti-Profiles Bill,” *Washington Post*, April 6, 2000, at B01. Similar federal legislation has been introduced by Rep. Conyers (D-MI) with bipartisan support. See H.R. 1443, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (April 15, 1999). See also Rep. Asa Hutchinson (R-AR), “What Actions Should Congress Take to Prevent Racial Profiling? Racial Profiling Endangers Justice,” *Roll Call*, February 7, 2000.

procedures, including better collection of data regarding racial disparities, commands bipartisan support in Congress.<sup>203</sup>

- Mandatory sentencing laws have been ameliorated in Michigan and Utah, and legislation to repeal federal laws has been introduced.<sup>204</sup>

The recommendations set forth below build on these encouraging trends. But even this ambitious agenda is too limited. Purging the criminal justice system of racial inequality requires a fundamental shift in crime and drug policy in the United States, and demands that policymakers and front line police officers abandon deeply ingrained racial stereotypes and assumptions.

### **Recommendation One:**

#### ***Build Accountability into the Exercise of Discretion by Police and Prosecutors.***

Just as racial disparity begins with discretionary decisions by front-line law enforcement personnel, so should remedies begin there.

We do not advocate that discretion be eliminated from the criminal justice system. That goal would be unattainable and unwise. Criminal laws are written in broad terms, and experienced law enforcement officials, both police and prosecutors, must retain the authority to apply the laws in individual cases with wisdom and common sense. A criminal justice system that did not delegate some discretion to those who enforce the laws would yield even harsher, less rational results than the current system. As our unfortunate experience with mandatory sentencing proves, discretion is a key ingredient of justice.

The problem with discretion in today's criminal justice system is that it is exercised without meaningful accountability. While law enforcement discretion must be preserved, the type of unchecked, unreviewable discretion that police and prosecutors currently wield breeds racial disparity and resentment.

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<sup>203</sup> The Innocence Protection Act is co-sponsored in the Senate by Sens. Patrick Leahy (D-VT) and Gordon Smith (R-OR) and in the House of Representatives by Reps. William Delahunt (D-MA) and Ray LaHood (R-IL) -- to require additional procedural safeguards, such as the preservation of DNA evidence and post-conviction review of that evidence -- in order to avoid executing the innocent. See S.2073, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (February 10, 2000); H.R. 4167, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (April 4, 2000). Section 404 of these bills mandates the collection of statistics about racial outcomes in the imposition of the death penalty, including jury selection. Unfairness in the death penalty has also been highlighted recently by religious broadcaster Pat Robertson and columnist George Will. Associated Press, "Robertson Backs Death Penalty Moratorium," *New York Times*, April 9, 2000, at A25; George Will, "Innocent on Death Row," *Washington Post*, April 6, 2000, at A23.

<sup>204</sup> See Time Magazine, *A Get-Tough Policy That Failed*, February 1, 1999. Legislation to repeal federal mandatory minimums was introduced by Rep. Edwards (D-CA) in the 102<sup>nd</sup> Congress and by Rep. Washington (D-TX) on behalf of many members of the Congressional Black and Hispanic Caucuses in the 103<sup>rd</sup> Congress. In the current Congress, Rep. Waters (D-CA) has introduced legislation to repeal federal mandatory sentencing laws in drug cases. See H.R. 1681, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (March 23, 1999).



**A. *Improve Police Accountability.***

The credibility gap between minority Americans and front-line law enforcement is yawning, and it widens with every new report on racial profiling and every new account of police brutality. Closing this gap requires the following mechanisms to improve police accountability:

- The development of national standards for accrediting law enforcement agencies. No such national standard currently exists, leading to a patchwork of law enforcement guidelines throughout the nation. The national standards should include specific guidance on traffic stop procedures; the use of force; and interaction between police officers and multi-cultural communities. The standards should *expressly prohibit racial profiling of any kind*.
- Improved training of current and incoming police officers to bring police departments into compliance with the national standards.
- The passage of federal legislation requiring federal and state law enforcement officials to gather data on traffic stops and other interrogation situations associated with racial profiling, such as INS enforcement activities and airport/drug courier inquiries. Such data should be disseminated publicly.
- Expanded authority and resources for police oversight agencies such as the Civil Rights Division of the Justice Department to investigate and punish misconduct, including racial profiling, brutality and corruption.<sup>205</sup>

**B. *Improve Prosecutorial Accountability.***

The improper exercise of prosecutorial discretion, like law enforcement discretion, has a disproportionate impact on minorities and should also be subjected to greater public scrutiny. We recommend passage of federal legislation requiring the collection and publication of data by each U.S. Attorney's office and each State prosecutor's office regarding the charging and sentencing practices and outcomes in those offices, and the racial impact of those outcomes. Thus, for each case, the prosecutor should be required to document the race of the victim and defendant, the basis for the initial charging decision, the basis for the prosecutor's bail recommendation, each plea offer made, accepted or rejected, and the basis for the prosecutor's sentencing recommendation.<sup>206</sup>

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<sup>205</sup> Many of the measures outlined above are included in H.R. 3981, the Law Enforcement Trust and Integrity Act of 2000, introduced by Rep. John Conyers (D-MI) on April 15, 2000. *See also* n.3, above (discussing legislative efforts to uncover racial profiling).

<sup>206</sup> *See* "Prosecution and Race" at 54-56 (advocating racial impact studies of prosecutorial practices). It is important to note, however, that until the Supreme Court departs from its holding in *McCleskey* that discriminatory *intent* is necessary to invalidate discriminatory law enforcement practices, even in the face of statistical evidence of racially discriminatory effect, data collection will continue to have limited utility in the

Requiring the collection of such data would heighten prosecutors' sensitivity to the racial effects of their decisions. Publication of this data would enable the public to hold prosecutors accountable for the improper exercise of discretion. For example, requiring prosecutors to publish information regarding their charging practices would enable a criminal defendant to allege selective prosecution to surmount the discovery hurdles erected by the Supreme Court in *United States v. Armstrong*. And because 43 states hold popular elections for State Attorneys General, and 95 percent of chief prosecutors are elected at the county and municipal level, publication of racial impact studies would also enhance electoral accountability for these public officials.<sup>207</sup>

**Recommendation Two:**

***Improve the Diversity of Law Enforcement Personnel.***

Much of the hostility between minority communities and the police can be traced to the under-representation of minorities in law enforcement. In too many neighborhoods, the police are seen as an occupying force rather than a community resource. Police departments and prosecutors' offices should redouble their efforts to recruit minorities. Police departments should encourage, and perhaps require, that officers live in the cities they patrol.

Diversification requires adequate funding and well-targeted recruitment efforts. We recommend that the federal government condition grant programs to state and local law enforcement agencies on efforts by those agencies to implement minority recruitment and hiring practices.

**Recommendation Three:**

***Improve the Collection of Criminal Justice Data Relevant to Racial Disparities.***

As in other areas of American life, we need to be more conscious of racial issues in criminal justice in order to achieve a color-blind criminal justice system eventually. The collection of racial data is essential to identify flaws in current policies and devise the means to redress them.

Many of the data sets generated by government agencies and private researchers concerning race and criminal justice take account of the experiences of African-Americans and whites, but do not include statistics on Hispanics, Asian-Americans or Native Americans.

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fight against discriminatory law enforcement practices. Congress could effectively overrule *McClesky* by passing a broad version of the Racial Justice Act that Senator Kennedy and others proposed in the early 1990's to address racial disparities in capital punishment. See generally 137 Cong. Rec. S 8263; 102nd Cong. 1st Sess. (June 20, 1991).

<sup>207</sup> *Id.* at 57.

recommend that all major minority groups be included in future data collection efforts, at least where such empirical evidence would be statistically significant.

The juvenile justice system is one area in which the federal government already requires states to collect data regarding the disparate racial effects of their policies. The juvenile justice reform legislation now pending in Congress would eliminate this requirement. The data collection requirement in current law should not be repealed, and indeed should be expanded to address gaps in our understanding of the effect of juvenile justice policies on minority communities.

**Recommendation Four:**

***Suspend Operation of the Death Penalty.***

As currently implemented, capital punishment is a racist undertaking. The decision of who will live and who will die depends, in significant measure, on the race of the defendant and the race of the victim. This is due both to flawed procedures such as the appointment of incompetent lawyers for indigent defendants, as well as to racial attitudes and stereotypes that cannot be easily overcome.

The Leadership Conference on Civil Rights opposes capital punishment. But even those who do not believe that death penalty statutes should be repealed altogether should agree on the need for a nationwide moratorium on application of the death penalty while flaws in death penalty procedures are studied and remedies are proposed. During this period there should be a comprehensive review of the effects of race on capital sentencing outcomes.<sup>208</sup>

**Recommendation Five:**

***Repeal Mandatory Minimum Sentencing Laws.***

Although sometimes conceived as a means to combat unwarranted racial disparity in sentencing, mandatory minimum sentencing laws are, in fact, engines of racial injustice. They have filled America's prisons to the rafters with thousands of non-violent minority offenders. They deprive judges of the ability to consider mitigating circumstances about the offense or the offender, an exercise of judicial discretion that can help redress racial bias at earlier stages of the criminal justice system. Particularly egregious are "three strikes" or "two strikes" mandatory sentencing laws that impose long and irreducible prison terms for even the most minor criminal conduct. These demagogic policies have resulted in a mushrooming prison population and in the disproportionate incarceration of minorities.

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<sup>208</sup> See n. 3, above.

The repeal of mandatory minimum sentencing laws would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

**Recommendation Six:**

***Reform Sentencing Guideline Systems.***

Were mandatory minimums sentencing laws to be repealed, sentencing in the federal system and many state systems would be carried out pursuant to sentencing guidelines. The problem is that the guideline systems are often based on and therefore infected by the racial disparities in current sentencing statutes.

For example, the disparate treatment of crack and powder cocaine offenders in the federal system has been carried over from the Controlled Substance Act to the sentencing guidelines manual. The 100-1 ratio between the amount of powder cocaine and the amount of crack cocaine needed to trigger the statutory mandatory penalty is found in the drug equivalency table in the guidelines as well. So even after the statute is changed, it is necessary to revisit and redress unfairness in the guidelines as well.

Few policies have contributed more to minority cynicism about the war on drugs than the crack/powder cocaine disparity. If anti-drug efforts are to have any credibility and force, especially in minority communities, these penalties must be equalized as the U.S. Sentencing Commission initially proposed.

**Recommendation Seven:**

***Reject or Repeal Efforts to Transfer Juveniles into Adult Justice System.***

Perhaps no criminal policy is more destructive to our nation than one that extends incarceration and punishment-based crime approaches to children. Laws that shun rehabilitation of youthful offenders in favor of their transfer into the adult criminal justice system are inconsistent with a century of U.S. juvenile justice policy and practice, are applied disproportionately to minority youth, and threaten to create a permanent underclass of undereducated, untrained, hardened criminals. Forty-three states have such laws on the books, and both Houses of Congress have passed crime legislation containing provisions that undermine the traditional goals of juvenile justice. These federal proposals should be abandoned, the recently enacted juvenile justice referendum in California should be reconsidered, and other laws that encourage treating non-violent juvenile offenders as adults should be repealed.

**Recommendation Eight:*****Improve The Quality of Indigent Defense Counsel in Criminal Cases.***

Many of the racially disparate outcomes in the criminal justice system are attributable to inadequate lawyering. To be sure, there are some obstacles that even the finest lawyer cannot overcome, such as the combination of a mandatory sentencing law and an obstinate prosecutor. But other inequities can be exposed and perhaps reversed through aggressive advocacy by defense counsel.

Unfortunately, many minority defendants depend on indigent defense services provided by the state. The lawyers who perform this role are often very dedicated and hard-working, but under-compensated and overwhelmed with a caseload that precludes vigorous advocacy on behalf of individual defendants. The problem is not with the lawyer; the problem is with a system that inadequately funds this vitally important component of the criminal process.

We recommend a systematic review of indigent defense services in the United States in order to inject new resources and effect significant improvements. We support, for example, title II of the Leahy-Smith Innocence Protection Act (S. 2073)<sup>209</sup> which would establish federal standards for the appointment of competent counsel in death penalty cases.

**Recommendation Nine:*****Repeal Felony Disenfranchisement Laws and Other Mandatory Collateral Consequences of Criminal Convictions.***

Disenfranchisement laws are antithetical to democracy and disproportionately affect minorities, eroding the important gains of the civil rights era. They also violate international law – specifically, Article 25 of the International Covenant on Civil and Political Rights.<sup>210</sup> These laws should be abolished, and other collateral consequences of criminal convictions such as eviction from public housing and restrictions on student loans should be reviewed and, in any event, not mandatorily imposed. Criminal sentences, including collateral consequences such as disenfranchisement, should be tailored to the nature of the crime and the circumstances of the offender and should impose no more punishment than is necessary to achieve public safety, deterrence and rehabilitation.

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<sup>209</sup> See n. 3, above.

<sup>210</sup> Disenfranchisement Laws at 20-22.

**Recommendation Ten:*****Restore Balance to the National Drug Control Strategy.***

As noted in Chapter 3, the massive increases in incarceration, including minority incarceration rates, are largely attributable to the war on drugs. Even if each of the criminal justice recommendations already proposed were adopted, we would be left with a national drug control strategy that seeks to combat drug abuse by locking up addicts. As we have seen, that policy has inevitable and disastrous consequences for minority communities.

Thirty years ago, during the Nixon Administration, there was recognition that drug abuse was a medical problem as well as a criminal justice challenge.<sup>211</sup> Even at the height of the crack cocaine epidemic during the Bush Administration, there was lip service paid to the concept of a balanced drug strategy, one that dedicated substantial resources to treatment, prevention, education and research as a necessary complement to interdiction and law enforcement. But today, demand reduction efforts are on the back burner as Congress debates spending \$1.7 billion to fight drug traffickers in the Andean Region and the Clinton Administration proposes funding for 17 new prisons in fiscal year 2001.

The current strategy not only inspires racial disparities; it is also ineffective in achieving its goals. Even General Barry McCaffrey, Director of the Office of National Drug Control Policy, stated in 1997: “[I]f measured solely in terms of price and purity, cocaine, heroin, and marijuana prove to be more available than they were a decade ago.”<sup>212</sup>

Fundamental critiques of the drug war are available elsewhere.<sup>213</sup> For purpose of this report, it suffices to say that the United States needs a more balanced drug strategy, one that adequately supports treatment, prevention, education, research and other efforts to reduce the demand for drugs. The current strategy places far too much reliance on the criminal justice system to solve a problem that is at least in part a public health problem. The result has been an experiment in mass incarceration that has devastated minority communities without discernable benefit.

### *Conclusion*

Racial disparities in the criminal justice system are one manifestation of broader racial divisions in America. Many of the perceptions and prejudices that give rise to inequities in criminal justice are the same prejudices that have been with us since the founding of the Republic. Not until those underlying prejudices are shattered will true equality for all Americans, in all facets of life, have been achieved.

<sup>211</sup> See Michael Massing, *The Fix* (Simon & Schuster, 1998).

<sup>212</sup> Barry McCaffrey, *The National Drug Control Strategy* (Office of National Drug Control Policy, 1997), p.21.

<sup>213</sup> See, e.g., Elliot Currie, *Reckoning* (Hill and Wang, 1993); Massing, *The Fix*, supra.

The criminal justice arena is an especially critical battleground in the continued struggle for civil rights. Current disparities in criminal justice threaten fifty years of progress toward equality. The Leadership Conference on Civil Rights cannot tolerate an America in which over one million blacks and Hispanics are in prison, in which the juvenile justice system has become a conveyer belt carrying minority youths into careers of crime, and in which minorities are explicitly targeted by law enforcement because of the color of their skin or their ethnic heritage.

Criminal justice reform is a civil rights challenge that can no longer be ignored.

Mr. MICA. I would like to thank all of our witnesses for their testimony and participation and again their patience in coming before us both this morning and this afternoon.

First of all if I may, Ms. Rosmeyer, I think we all are in great sympathy with you for the plight of your daughter. It appears that when mandatory minimum went into effect for her offense, she was harshly penalized and it appears that the safety valve change, I guess that we did in 1994, left many people, as you testified, who were not given the opportunity of that safety valve any opportunity for rehearing.

Did you testify that there are about 1,000 left?

Ms. ROSMEYER. About 1,000 left in prison.

Mr. MICA. There were originally 3,000.

Ms. ROSMEYER. 5,000, approximately 5,000.

Mr. MICA. It is a difficult situation and unfortunately your daughter got caught in it.

I think you are aware of the provisions of the safety valve and those requirements, as I understand, and we had testimony today, are not discretionary; they are mandatory as far as application. Do you think that they are adequate?

Now, I want to separate you from your daughter's situation. I know that you would like to see that retroactive, but what we have in place, is that adequate?

Ms. ROSMEYER. The safety valve?

Mr. MICA. Yes.

Ms. ROSMEYER. Well, it is only going to affect the safety valve at this point with the retroactivity, obviously it will affect the 1,000 individuals left. You are talking about presently, going forward?

Mr. MICA. I know your position, but we now have in place this mechanism for mitigating circumstances—

Ms. ROSMEYER. Yes, I am in agreement with the safety valve as it is now.

Mr. MICA. I just heard some testimony by Mr. Henderson about several instances of racial disparity in, I guess, sentencing and prosecution. I think you cited Columbus, OH and Jacksonville; is that correct?

Mr. HENDERSON. Yes, sir.

Mr. MICA. Has your organization complained to the Department of Justice or asked for investigation of these cities or areas, jurisdictions where there is such a discrepancy?

Mr. HENDERSON. Well, Mr. Chairman, our organization has written to the Attorney General, actually to President Clinton over a year ago with respect to the broader issue of racial profiling. In that letter we did not cite the specific examples of Columbus, OH and Jacksonville, FL at that time. The report which we published was only recently published last week.

But I can assure you we will be following up both with the Attorney General and in correspondence to the President himself, follow-up to these disparities that we have documented.

Mr. MICA. It seems to me where we have had incidents, even in the area that I live in, central Florida, we have had a sheriff who is very active in going after drug traffickers and there were charges of disparity. There was a State investigation; there was a Department of Justice investigation.



We had it investigated from stem to stern and I am wondering why, if you have, and your statistics are correct, instances where there is such a disparity, that we do not have the Department of Justice reviewing those instances. I thought that was part of our oversight responsibility as a Federal law enforcement agency.

Mr. HENDERSON. Mr. Chairman, I think you raise an excellent point. Certainly the concerns which we have documented in this report with regard to the appearance of racial profiling—in fact, really more than the appearance, the actual fact of racial profiling in incidents that have helped to create the disparities we have documented—we think is a serious problem and we think it is one that the Department of Justice does have a responsibility to examine thoroughly.

I think one of the problems we have encountered is that the law enforcement community, broadly defined, has resisted accepting responsibility for racial profiling as an enforcement technique that they employ in carrying out their own responsibilities. That is to say many communities deny the existence of racial profiling in terms of their official response to the problems that we have identified.

Certainly we think that the disparities which we have helped to unearth and the disparities of such wide magnitude as reflected in our report raise serious presumptions about inherent unfairness in the way the system operates.

We are not contending, I should point out, that in every instance the disparity results from intentional discrimination or some widespread bigotry that could be rooted out by dismissing someone who happens to be in a leadership position. We think that the problem is really systemic and we think that the way to root it out is to, of course, confront it, to have the problem identified, accepted as a real problem, and to have prescriptive steps taken to resolve it, and we are pressing the Department of Justice to do a more vigorous job in bringing these issues to light.

I should note that recently in the city of Los Angeles the Civil Rights Division has noted that because of apparently a widespread pattern of police misconduct, that it is contemplating bringing action in that community and is, in fact, in negotiation now, I gather, with city officials to address those problems. That is the kind of step that we hope the department will take not just in Los Angeles but in other communities where this evidence is unearthed.

Mr. MICA. Thank you.

We are getting hit by the buzzer again, with votes. I am going to yield the balance of the time to the ranking members, Mrs. Mink.

Mrs. MINK. Thank you very much. All three of you raised some very profound and provocative questions about the current system that we operate under.

Knowing the general climate of Congress in wanting to find easy answers to very complicated questions, they plunged into this whole area of mandatory sentencing as perhaps one way of demonstrating their vehement objection against the whole problem of drug abuse in our society. But each of us, in our own offices, have had innumerable examples of the terrible injustice that has occurred because of the way in which mandatory minimums are set.

Now, noting again the reluctance of Congress to admit they were wrong and need to correct these wrongs with any degree of rapidity, I ask this question in the sense of some sort of an intermediary step, just short of any repeal or rescission of what we have done.

Is there any thought that perhaps if we allow the courts to enter into this judgment area, once the individual has been arrested and sentenced, arrested and brought to trial, if we allowed in the same context to have the judge pass judgment as to the fairness and equity of the mandatory sentence? Is that workable or is that just throwing more sop to the whole situation?

Mr. MOFFITT. Mr. Moffitt for the NACDL.

There are several things that we would suggest. No. 1, the discretionary call in the system as to whether or not a sentence ought to be reduced below the mandatory minimum, that should be vested in the judiciary and not in the prosecutor.

Mrs. MINK. Well, if we take that absolute statement that we cannot live with mandatory sentencing at all, my suggestion is that leaving mandatory sentencing to some extent in the hands of the prosecutor but allowing the courts, upon motion by the attorneys in question, to review the equity of that situation, given our testimony here where the person who was the one who instigated this activity gets off with just a couple of months and her daughter gets 10 years; on the face of it, it is so inequitable. Couldn't we find some way to—

Mr. MOFFITT. Certainly that would be an improvement. That would certainly be an improvement in a system which you have also—

Mrs. MINK. Well, you know, in Congress we deal with incrementals.

Mr. MOFFITT. I understand.

Mrs. MINK. And I wondered whether that little incremental would be of any help at all.

Mr. MOFFITT. Certainly my constituency would take any help that Congress would be willing to give it under these circumstances, but you also have to understand that under I believe it is Title VIII, 28 U.S.C. 993, when the mandatory minimum sentences were passed, many other things were passed along with them. For instance, the socioeconomic status of a particular defendant cannot be taken into account as a sentencing factor any longer.

So all the things that traditionally were issues that judges normally took into consideration when they imposed sentences, many of those, by statute, have been taken away. So we would ask that some of those, judges be allowed again to exercise some discretion in the sentencing area.

When you speak about the safety valve, one of the problems with the safety valve you heard this morning is that something as innocuous perhaps as a DWI can affect a person's eligibility for the safety valve. Something as innocuous as the codefendant's possession of a firearm can affect eligibility for the safety valve. So it might not be that this particular accused had a firearm; it might be that someone in the conspiracy had a firearm and that will affect that person's eligibility for the safety valve.

So the safety valve needs to be less restrictive than it is currently for it to have a larger impact. And particularly in areas, mi-

minority areas, where people get small arrests that affect their prior record, any small conviction affects eligibility for the safety valve. That is why the safety valve sometimes does not have the impact on minority communities that it was intended when you initially passed it.

So those are issues that can be dealt with that are incremental in change and I would ask that they be looked at and discussed. Further, I do have some remarks that are written and I would ask that they be made a part of the record.

Mr. MICA. Without objection.

Mrs. MINK. Could I have a unanimous consent request. Our colleague Maxime Waters has a statement and I ask unanimous consent that it be inserted in the record.

Mr. MICA. Without objection, Ms. Waters' entire statement will be made part of the record.

[The prepared statement of Hon. Maxine Waters follows:]

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 MEMBER OF CONGRESS  
 36TH DISTRICT, CALIFORNIA  
 CHIEF DEPUTY WHIP  
 COMMITTEE:  
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**Statement of Representative Maxine Waters**  
 before the  
**Subcommittee on Criminal Justice, Drug Policy, and Human Resources**  
**House Committee on Government Reform**  
 May 11, 2000

America has a drug problem. In the past year, 24 million Americans have used an illicit drug. Of that figure, 18 million of these Americans are white, 3 million are African American, and 2 million are Hispanic. Despite what we know about who is using drugs, 96% of federal crack-cocaine defendants are African American or Hispanic. Although African Americans are only 11% of the nation's drug users, they comprise almost 37% of those arrested for drug violations, over 42% of those in federal prisons for drug violations, and almost 60% of those in state prisons for drug felonies.

However, the disparate application of mandatory minimum drug sentences presents an even bigger problem -- the apparent racial application of federal criminal justice laws. For example, in 1986, before the mandatory minimums for crack cocaine offenses became effective, the average federal offense for African Americans was 11% higher than whites. Following the implementation of mandatory drug sentencing laws, the average drug offense sentence for African Americans was 49% higher than whites.

The disparity in sentencing between crack cocaine and powder cocaine further undermines the notion of a color-blind justice system. Our criminal justice system sanctions the mandatory minimum sentence of 5 years for 5 grams of crack-cocaine, with no possibility of parole. While in comparison, it takes the possession of 500 grams of powder-cocaine to result in the same sentence. Why do we have a system that disproportionately sentences crack cocaine offenders - a drug which is often sold in the open drug markets of inner cities, and yet provides leniency for the powder cocaine offender - largely considered the drug of the rich, wealthy, and famous?

I have introduced, H.R. 1681, the "Major Drug Trafficking Prosecution Act of 1999, to correct the misguided policy of mandatory minimum drug sentences. This is the first bill to repeal mandatory minimum sentences since 1994. It is time to give our judges the discretion to take into consideration first-time offenses, special considerations, intent, or any other factors that may be considered for sentencing.

Principally, H.R. 1681, is intended to curb prosecutions of low-level drug offenders in federal court. The bill would require that prosecutors obtain the written approval of the Attorney

General before prosecuting certain drug offenses in federal court. Thus, federal prosecutors would use their limited resources to go after big-time dealers and let the states handle the prosecution of small amounts. According to the U.S. Sentencing Commission, only 5.5% of all federal crack defendants, and 11% of federal drug defendants are high-level dealers. Although they were designed to target the drug kingpins, 55% of all federal drug defendants are low-level offenders, such as mules or street-dealers.

Additionally, H.R. 1681 eliminates the mandatory minimum sentences for simple possession (including the notorious five-year mandatory for possession of five grams of crack), distribution, manufacturing, importation and other drug-related offenses.

Finally, H.R. 1681 would strip current statutory language that limits the courts' power to place a person on probation or suspend the sentence. This is crucial for first-time non-violent offenders who are the majority of people arrested under these harsh laws. These offenders would better benefit from treatment services to address their addiction. Mandatory minimums have not actually reduced sentencing discretion. Rather, control has merely been transferred from judges to prosecutors who have the discretion to decide whether to reduce a charge, whether to accept or deny a plea bargain, whether to reward or deny a defendant's "substantial assistance" or cooperation in the prosecution of someone else, and ultimately, to determine what the final sentence will be.

Supporters for the elimination of the mandatory minimum drug sentences come from all sides of the political spectrum. Conservatives, such as Stuart Taylor, have praised H.R. 1681 and called the mandatory-minimum sentences "legally irrational and morally bankrupt." Even Chief Justice William Rehnquist of the Supreme Court and Justice Anthony Kennedy have discredited the mandatory-minimum laws. Other conservatives who have voiced their opposition to mandatory minimum drug sentencing laws include Arianna Huffington, Glenn Loury, and criminologist Don Huilio.

Mandatory minimum drug sentences are resulting in the disproportionate lengthy incarceration of young African American and Hispanic men with histories of untreated addiction and several prior drug-related offenses. In addition, these sentences are contributing to the unprecedented incarceration of women. From 1986 (the year mandatory sentencing was enacted) to 1996, the number of women sentenced to state prison for drug crimes increased ten fold and has been the main element in the overall increase in the imprisonment of women. Ninety-five percent of female arrests from 1985 to 1996 were drug related and over 80% of female prison inmates are incarcerated as a result of their association with abusive boyfriends. Simply put, mandatory-minimum drug sentences, conspiracy laws, and the other misguided federal drug laws are destroying lives and they are destroying families.

Moreover, mandatory minimum drug sentences are forcing states to absorb the staggering cost of constructing additional prisons to accommodate increasing numbers of prisoners. This so-called "tough on crime" mentality has meant that governments at the federal, state and local

levels have shifted their commitment from education to incarceration. For example, the California state government expenditures on prisons increased 30% from 1987 to 1995, while spending on higher education decreased by 18%.

Accordingly, it is time for this nation to recommit itself to serving the public by providing services that offer hope and opportunity. The "lock'em up and throw away the key" approach has been an abysmal failure. We must restore integrity to the criminal justice system and find more constructive approaches to address drug abuse and its associated trade.

Mr. HENDERSON. Mr. Chairman, may I respond to Mrs. Mink's request for interim steps that might be taken?

Mr. MICA. Yes, go right ahead. I think we have a moment or two left.

Mr. HENDERSON. I think there are three things that I would recommend as short-term steps toward improving this problem. I do believe the Federal Government has an obligation to show leadership in this area and to lead by example.

Certainly I think that over the last 2 years in particular, the problem of racial profiling has been highlighted and documented extensively. It exists; it is a problem; it should not be tolerated. I think the President could issue an Executive order banning the use of racial profiling in Federal law enforcement agencies. I think it would make a major step toward putting the imprimatur of the Federal Government against that policy and it would certainly encourage States and local law enforcement agencies to reflect on the use of this policy carefully.

Second, I think that the Department of Justice should be encouraged to review its support for mandatory minimum sentencing. I was surprised and, in fact, troubled by the testimony of the Department of Justice witness at your hearing today, which announced the Department's support for these policies, and I think they should be encouraged and we will do so, make an effort to do so, to review these issues and to hopefully adopt a more enlightened policy.

And third, the U.S. Sentencing Commission, which testified through Commissioner Steer here today, at least the Commissioner expressed his concern about the use of mandatory minimums and seemed to suggest that the Commission itself would have trouble supporting such provisions.

We know, for example, that the Commission issued a report in 1991 that made clear its opposition to the use of mandatory minimums. We would hope that that report could be updated with new additional research and information and presented to the Congress with its findings for review. And certainly this committee is in a position to ask the U.S. Sentencing Commission to provide an update on its 1991 report and we would certainly encourage you to do that, as well.

Mr. MICA. Thank you. Thank each of you for your participation, for your testimony.

Ms. ROSMEYER. Could I say one more thing, please?

Mr. MICA. Very quickly.

Ms. ROSMEYER. Yes, very quickly.

I want to just clarify what I said earlier because I am new at this and they are not, so I am going to clarify myself.

With respect the safety valve, I feel it should be broader because of exactly what Mr. Moffitt was saying—the fact that the smallest of incidents in someone's life takes that ability away—no safety valve.

Mr. MICA. Thank you for clarifying.

Ms. ROSMEYER. Thank you.

Mr. MICA. And if any of you wish to submit additional testimony or remarks for the record, we are, by unanimous consent request,

leaving the record open for 2 additional weeks, and we welcome again submissions to be made part of the record.

Unfortunately, our time has expired but I do thank you. I appreciate your being with us.

There being no further business to come before the subcommittee, this meeting is adjourned.

[Whereupon, at 3:02 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]



**Response of Commissioner John R. Steer**

- 1. As Sentencing Commission vacancies no longer exist and the Commission is fully engaged in considering sentencing practices, please identify topics that are likely to receive greatest attention by the Commission and whether drug mandatory minimums represent a priority.**

**Response:** The Commission recently met and adopted a preliminary list of priorities for the guideline amendment cycle ending May 1, 2001. The issues the Commission has tentatively identified as priorities for this guideline amendment cycle are: (1) certain economic crimes, particularly fraud, theft, and tax offenses; (2) money laundering; (3) counterfeiting of bearer obligations of the United States; (4) further response to the Protection of Children from Sexual Predators Act of 1998; (5) firearms; (6) nuclear, chemical, and biological weapons, and related national security issues; (7) payment to, or the receipt by, federal employees of unauthorized compensation and related offenses; (8) offenses implicating the privacy interests of taxpayers; (9) the resolution of a number of conflicts among the circuit courts on sentencing guideline issues; and (10) the implementation of any crime legislation enacted during the second session of the 106<sup>th</sup> Congress requiring a Commission response. As is customary, the Commission has published a notice in the *Federal Register* requesting public comment through July 7, 2000, on the preliminary list of priorities. We will finalize our priorities after considering the public comment.

With regard to drug mandatory minimums specifically, the Commission is likely to focus on two areas in the short term. First, the Commission is likely to study the operation of the safety valve and explore whether it should be expanded modestly and, if so, how best to do so. Second, the Criminal Law Committee of the Judicial Conference of the United States has requested the Commission to consider updating its 1991 Special Report to Congress, Mandatory Minimum Penalties in the Federal Criminal Justice System. The Commission also plans to continue its statutory duty to monitor and report on the operation of the guidelines, particularly in light of the approaching 15<sup>th</sup> anniversary of their inception in 2002.

2. **In the views of the Commission or its staff, what have been the greatest problems associated with mandatory minimum sentences in recent years? Is the Commission or its staff of the opinion that Congress, the elected branch of government, should not on occasion benchmark penalties for very serious crimes through the use of mandatory minimums? Explain.**

**Response:** Allow me to respond to the second part of the question first. As I stated during my testimony, the Commission fully recognizes that Congress is the ultimate arbiter of federal sentencing policy and certainly can make the judgment that, notwithstanding the existence of presumptively mandatory sentencing guidelines, statutory mandatory minimum penalties are necessary and appropriate for certain categories of offenders. Moreover, the Commission tries to mesh these two systems as best we can whenever Congress makes the judgement that mandatory minimum penalties are needed. Our hope is that any such judgment by Congress will be made in full consideration of the benefits of using the more finely tuned sentencing guidelines as an alternative approach. In any event, as I hope the data we presented at the hearing indicates, we have a growing body of information and expertise to assist members of Congress in their consideration of alternative penalty approaches, and we are anxious to work with Congress to achieve the most fair and effective sentencing policy that we can.

With regard to the second part of the question, the sentencing guidelines and mandatory minimum sentences have in common important objectives. For example, both seek to provide appropriately severe and certain punishment for serious criminal conduct. However, mandatory minimums are both structurally and functionally at odds with the guidelines. Perhaps the greatest problems with mandatory minimums concern their over-breadth, issues of proportionality, and inconsistency of application.

With respect to their breadth, whereas the guidelines provide a substantial degree of individualization in determining the appropriate sentencing range, mandatory minimums typically focus on only one or two indicators of offense seriousness (*e.g.*, the type and quantity of controlled substance involved in a trafficking offense), and perhaps one indicator of criminal history (*e.g.*, whether the defendant at any time was previously convicted of a felony drug offense). Moreover, mandatory minimums block operation of guideline factors – in particular a defendant’s reduced role in the offense and acceptance of responsibility – that might otherwise appropriately reduce the sentence below the applicable mandatory minimum. The result of this narrow, tariff-like approach is that defendants who are markedly dissimilar in their level of participation in the offense and in objective indications of post-offense reform may receive the same sentence, thereby compromising sentencing proportionality and introducing the possibility of unwarranted disparity, two primary concerns leading to the passage of the Sentencing Reform Act.

Legislative history suggests that when Congress enacts a mandatory minimum, proponents usually intend that the prescribed statutory minimum will apply uniformly to serious

offenders who commit that crime. Practical experience in sentencing under the constructs of mandatory minimums has shown, however, that the legislated minimums often apply more broadly to less serious offenders than Congress seems to have contemplated. This is particularly the case when a mandatory minimum is made equally applicable to completed substantive offenses and inchoate conspiracy offenses, as I indicated in my testimony in describing problems with the drug trafficking mandatory minimums.

Perhaps most important, the deterrent effect and increased incapacitation that Congress intends to result from mandatory minimums often is undermined by inconsistency in their application. In general, a mandatory minimum penalty becomes applicable only when the prosecutor elects to charge and the defendant is convicted of the specific offense carrying the mandatory sentence. The manner in which prosecutorial discretion is exercised in charge selection, filing of informations to trigger certain mandatory minimums, plea bargaining, and the making of motions for sentence reduction based on a defendant's substantial assistance in the investigation of other crimes, determine the extent and consistency with which statutory minimum sentences actually are applied. To the extent that prosecutors do not pursue mandatory minimums in every case in which the underlying statutes otherwise would require, the expected certainty of mandatory minimum penalties is underachieved, which undercuts both the promise to the public and the deterrent and incapacity effectiveness. In contrast, because the guidelines use a modified real offense approach, which requires the court to assess offense conduct regardless of the particular offense charged, and because they require a less stringent preponderance of the evidence standard to determine the applicability of sentencing enhancements, the guidelines may provide greater certainty of punishment than mandatory minimums.

3. **What role has the Commission performed in developing new sentencing options that might promote or require drug treatment? Is this within the authority of the Commission? Is the Commission actively considering the development of a more extensive array of sentencing options and graduated sanctions? Explain.**

**Response:** The Commission's current sentencing policies regarding drug or alcohol abuse as an offender characteristic are stated principally in policy statement 5H1.4. This policy statement expresses the following: (1) drug or alcohol dependence or abuse is not to be considered a mitigating factor that would warrant a more lenient sentence than proscribed under the applicable guidelines; (2) defendants with substance abuse problems who are incarcerated pursuant to the guidelines also should be sentenced to a term of supervised release, with a required condition of participation in an appropriate substance abuse program; and (3) defendants with substance abuse problems who are sentenced to probation should be required to participate in an appropriate treatment program as a condition of probation. Commission pronouncements outlining mandatory and recommended conditions of probation and supervised release implement and expand upon the policies. See USSC §§5B1.3(a)(3),(5),(b),(c)(7),(8),(10),(d)(4); 5D1.3(a)(2),(4),(b),(c)(7),(8),(10),(d)(4). Additionally, the Commission's sentencing options permit community confinement in a treatment or rehabilitation center in appropriate cases (see §5F1.1), and participation in the Bureau of Prisons' shock incarceration (boot camp) program in appropriate cases (see §5F1.7).

We have noted a renewed interest for increasing programs to provide for successful reentry into society. On the whole, however, the sentencing policies developed by the Commission to date allow needed drug or alcohol abuse treatment in cases identified by the sentencing judge, but these policies do not mitigate the otherwise applicable guideline punishment because of a defendant's substance abuse problem.

The Commission is not now actively considering additional sentencing options in this area, other than possibly to recommend some modest modifications of the safety valve applicable to low level, non-violent drug traffickers, as indicated above.

4. **Having lacked clear leadership for an extended period, is the Commission now back at full force and receiving adequate resources to accomplish its mission? Do you foresee significant obstacles to performing Commission responsibilities in the future? Explain.**

**Response:** Although it is correct that there is a full complement of commissioners after an unfortunate, 13-month absence of voting commissioners, the agency continues to suffer severe staffing shortages and budgetary repercussions resulting from the long delay in appointing new voting commissioners. The agency instituted a *de facto* hiring freeze during the period in which there were no voting commissioners and now has a staffing level 20 percent lower than it had previous to the departure of commissioners to perform its many important statutory duties. Because of the substantial uncertainty as to the budgetary requirements of the Commission throughout the appropriations process for fiscal year 2000, Congress greatly reduced the agency's operating budget to its lowest appropriations level since fiscal year 1994. As a result, the agency does not have adequate funding to fill several key positions and restore necessary staff levels to carry out its statutory responsibilities.

The Commission's low staffing levels prohibit the agency from fulfilling in an efficient manner many of its statutory duties, such as conducting research related to sentencing and crime, and providing specialized guideline training and technical assistance to federal judges, prosecutors, probation officers, and defense attorneys. For example, the Commission processed 28,000 cases sentenced under the guidelines in 1991 with a staff of 35 employees devoted to this task. Currently the agency processes over 55,000 cases annually, but can afford to dedicate only 25 employees to the task. If the Commission does not receive sufficient funding to enable it to increase its capacity in this area, it will be forced to use less reliable statistical sampling instead of its current practice of collecting data on every case sentenced under the guidelines. In addition, the research and automation skills necessary to maintain and analyze a comprehensive national sentencing database has caused the Commission to experience a pay parity problem in recruitment and retention. The candidates filling these positions demand and obtain significantly higher salaries in the private sector. Perhaps more problematic, the Commission's ability to implement new crime legislation in a timely and thorough manner will be seriously jeopardized without adequate funding.



U.S. Department of Justice

Federal Bureau of Prisons

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Washington, DC 20534

June 23, 2000

The Honorable John L. Mica  
Chairman, Subcommittee on Criminal  
Justice, Drug Policy and Human Resources  
Committee on Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This is in response to follow-up questions from the  
May 11, 2000 hearing on Drug Sentencing Policies and Practices.

1. **Explain the effectiveness of Bureau of Prisons (BOP) drug treatment programs, including how effectiveness is measured. Describe the basic features of BOP's most successful programs. How many and what percentage of inmates successfully complete drug treatment in prison or before release?**

The BOP's residential drug treatment program was designed for inmates with drug abuse and dependency disorders. The program is intended to assist prisoners with serious dependency problems and prepare them to avoid future substance abuse and related criminal activity. Currently, the BOP operates 47 residential drug treatment programs, with a combined annual capacity of over 12,000 participants. Program participants are housed together in a separate unit of the prison that is reserved for drug treatment programs. The programs average 9 months in duration, and provide a minimum of 500 hours of drug abuse treatment. The program places responsibility for change on the individual by demanding compliance with the rules and regulations of treatment, encouraging the inmate to accept "ownership" of the norms of treatment, and motivating the inmate to make a firm commitment to positive change. Residential treatment typically is provided within the last two years of an inmate's sentence,

close to the inmate's release to the community. This ensures continuity with the inmate's community transitional drug abuse program, which includes six months of Community Corrections Center (halfway house) placement with drug treatment.

We are required by law to provide residential drug treatment to all eligible inmates, and resources have been requested by the Administration and appropriated by Congress to provide sufficient treatment beds. Since implementation of the program, 49,200 inmates have graduated from the program, and in Fiscal Year 1999, 10,816 inmates participated in the programs. As of April, 2000, over 84 percent of inmates who enrolled in the program during Fiscal Year 1999 had successfully graduated (the final Fiscal Year 1999 classes will not graduate until June, 2000). Inmates with drug abuse and dependency diagnoses are strongly encouraged to participate in the residential program (for inmates who have drug abuse histories but do not participate in the residential drug program, we offer non-residential drug programming. For inmates who do not have drug abuse diagnoses but need to enhance their understanding of the role drugs play in their lives, we offer drug abuse education classes. These programs are outlined in greater detail below). Ninety-two percent of inmates who qualify for residential treatment volunteer to participate. In order to further encourage the remaining eight percent into treatment, we will soon begin a pilot in three BOP institutions that will impose various additional negative consequences on inmates who refuse treatment. The consequences include: abbreviated CCC placement, lowest pay grade for work, and no social furloughs.

Once a residential drug treatment program graduate is transferred from an institution to a Community Corrections Center (halfway house or CCC), he or she is required to continue participation in treatment. During the inmate's time in a CCC, drug treatment is provided through community-based providers whose treatment regimen is similar to the BOP's, ensuring consistency in treatment and supervision. BOP staff monitor inmate compliance with the inmates' individualized treatment plan and ensure the inmate remains drug-free by monitoring his or her progress and requiring regular urinalysis testing. Transitional treatment and monitoring is critical in assisting inmates in making a successful, drug-free transition during their first few months within the community. In Fiscal Year 1999, the community transitional drug abuse program provided treatment for 7,386 inmates.

In 1998, the BOP's Office of Research and Evaluation completed the interim report for a study of the effectiveness of the residential drug abuse treatment program (see attached copy

of study results). Results revealed that the program has a beneficial impact on the ability of inmates to remain drug- and crime-free upon release from confinement. The study, conducted with funding and assistance from the National Institute on Drug Abuse, finds that inmates who completed treatment were 73 percent less likely to be re-arrested within 6 months of release from custody than those who were not treated. Similarly, inmates who completed the residential drug abuse treatment program were 44 percent less likely to use drugs within 6 months of release from custody than inmates who did not receive such treatment. Finally, the results show that program graduates had a lower incidence of misconduct while incarcerated than did a comparison group of individuals who did not participate in the program. The reduction in the incidence of misconduct among treatment graduates was 25 percent for men and 70 percent for women.

The findings are all the more encouraging because the first 6 months of an offender's release back to the community are particularly difficult. It is during that period that inmates are most vulnerable to a return to the lives they led prior to entering prison. This study indicates that residential drug abuse treatment assists inmates during this initial reintegration into the community. The results of the final report, based on a 3-year follow-up, will help us determine whether the positive effects continue beyond this initial period.

In addition to the 47 residential programs and the follow-up community transitional drug abuse programming, non-residential drug counseling is available in every BOP institution. This treatment is available for inmates diagnosed with drug problems who are unable or not interested in participating in one of the BOP's residential units. In these programs, a licensed psychologist develops an individualized treatment plan based on a thorough assessment of the inmate. In Fiscal Year 1999, 6,535 inmates participated in non-residential drug abuse treatment programs.

The BOP also offers a 30 to 40 hour drug abuse education program in every institution. This program provides information on the physical, social, and psychological impact of alcohol and drugs, and introduces inmates to the variety of treatment programs available in the BOP. Inmates with a judicial recommendation or drug-related instant offense or violation are required to participate in the drug abuse education program, while all others are also encouraged to volunteer. In Fiscal Year 1999, 12,202 inmates participated in the drug abuse education course.



2. Provide estimates of the length and costs of drug treatment in the federal prisons, differentiating between drug treatment provided in prisons and halfway houses (or other community facilities).

In FY 2000 our enacted budget for BOP drug treatment programming was \$34.5 million. Of that amount, we estimate that 20 percent will be used for programs in Community Corrections Centers (halfway houses). We estimate that 12,400 inmates will participate in residential drug treatment programs (500 hours in duration), 6,800 inmates will participate in non-residential drug treatment programs (duration varies based upon individual need), 15,000 inmates in drug education programs (30 to 40 hours in duration) and 7,900 inmates in community transitional drug abuse treatment (no longer than six months in duration).

3. Describe the drug testing requirements and programs at BOP. Some states, such as Pennsylvania, reportedly have practically eliminated prison drug use through extensive drug testing. Is this true of BOP? Some state correctional systems reportedly have used both hair and urine analysis (for long and short-term detection). Is BOP using both? Explain. Provide any internal reports or summaries that describe the extent of illegal drugs being smuggled into BOP prisons. Describe these problems and what actions are being taken.

The BOP has a rigorous urine surveillance and narcotic identification program within our institutions. Among other things, we conduct urine tests on randomly drawn samples of the inmate population. Each month we test ten percent of inmates at high security facilities, five percent at medium security facilities, and three percent at low and minimum security facilities. The BOP does not have an internal report or summary of drug smuggling into the institutions. However, through urine surveillance we know that approximately one percent of the randomly tested inmates test positive for illicit substances, with those testing positive receiving appropriate sanctions through our disciplinary hearing process. We also conduct urinalysis tests of inmates suspected of using drugs based upon their behavior.

Last year, the Pennsylvania Department of Corrections conducted a pilot project examining the efficacy of hair analysis for detection of illegal narcotics. Based upon their research, we are reviewing this new technology but it does not appear appropriate for application within the BOP. One concern with

widespread use is due to the cost; each hair analysis kit costs \$85.00, while each urine analysis kit costs \$8.61. In calendar year 1999, the BOP used approximately 145,000 urinalysis kits.

The BOP has also conducted pilot program and demonstration projects to evaluate the use of emerging technologies upon drug interdiction within our institutions. The Office of National Drug Control Policy provided \$6 million to support a joint initiative between the states and the BOP that is known as the Drug Free Prison Zone Project. The BOP used \$1.6 million of this funding to purchase and install ion spectrometry systems at 28 prisons (we used other funding to purchase 7 more units so that virtually all medium and high security federal prisons are equipped with ion spectrometry).

Ion spectrometry is a technology that can detect minute traces of illegal substances on persons and surfaces. This technology has been successfully deployed by several state corrections systems and by the U.S. Customs Service as a drug interdiction measure. The BOP tests an average of 25.88% of the visitors coming into an institution. The average number of positive hits have been 2.59% of those tested.

The BOP has also piloted a sweat patch drug detection device. The sweat patch is a collection device that absorbs non-volatile components of sweat including drugs and is designed to monitor drug use over a consistent and longer time frame than is practical with traditional urine testing. The patch costs approximately \$25.00. The BOP piloted this technology last year at three halfway houses. The patch was successful in detecting illicit drug use. However, existing regulations do not permit us to take any disciplinary action against inmates for drug use except based on urinalysis drug testing. We are working with the Department of Justice to revise the rules language to cover all types of drug testing methods.

Finally, the BOP has piloted the use of rapid test cups. Rapid screen drug detection cups are urine sampling containers with lids and internal testing devices that provide preliminary test results within five to seven minutes. Rapid detection cups provide positive and negative test results for five major drugs to include THC, cocaine, opiates, PCP, and amphetamine. However, the test cups yielded an unacceptably high number of false positive test results. Because of our findings and those of other government agencies that on-site cups are not as accurate as the manufacturer claims, the BOP does not wish to pursue this method of drug testing.

When an inmate is suspected of introduction of narcotics into an institution, our Special Investigative Supervisors begin to investigate the allegations by conducting enhanced monitoring of the inmate and his or her living quarters, property, mail, telephone calls, and visitation. Confirmed cases of introduction of narcotics are referred to the Federal Bureau of Investigations (FBI) for consideration for referral for prosecution on new charges. The institution also imposes administrative disciplinary sanctions upon the guilty party, including loss of good time, disciplinary transfer, disciplinary segregation (up to 60 days), withholding of statutory good time, and loss of privileges (e.g., visiting, telephone, commissary). Inmates found guilty of introduction of narcotics are also tracked for enhanced overall monitoring via our internal tracking system, and required to undergo increased, regular urine surveillance.

4. Describe the highlights of any studies that have been performed to predict future drug sentencing impacts on BOP. Is BOP adequately preparing for these predicted impacts? Is BOP satisfied that prison population treatment needs are being met? If not, have additional resources been requested? Explain.

The BOP and DOJ frequently conducts prison impact assessments to evaluate the impact of draft or proposed legislation upon our future inmate population and resource needs. These assessments utilize data from a variety of sources. For example, the Administrative Office of the United States Courts provides the BOP with regular updates on federal indictments and convictions which serve as valid leading indicators of future admissions to facilities operated by, or under contract with, the BOP. While the results of these assessments may indicate a potential change in our need for resources, the BOP does not base requests for resources upon legislation until that legislation is enacted. We feel that this is more fiscally responsible than requesting appropriations that may not be needed because legislation was not enacted.

We have recently conducted impact assessments for the following crack/powder cocaine and methamphetamine proposals.

**Crack/Powder**

- **5/50 Ratio for Five Year Mandatory Minimum Threshold**  
(Analysis conducted during the 105<sup>th</sup> Congress. S. 146 and Abraham Amendment to H.R. 833). We estimate that over five years, this proposal would result in the incarceration of

5,529 additional federal with a cumulative cost of \$794 million. Over ten years the increase would total 9,163 inmates with a cumulative cost of \$1.9 billion.

Methamphetamine

- **Methamphetamine Tracking Penalty Enhancement Act** (Analysis conducted during the 105<sup>th</sup> Congress; identical legislative language introduced as S. 486 in the 106<sup>th</sup> Congress). We estimate that over five years, this proposal would result in the incarceration of 473 additional federal inmates resulting in a cumulative cost of \$10.2 million. Over ten years the increase would total 1,607 inmates with a cumulative cost of over \$178 million.

I trust this information is helpful to you. Please do not hesitate to contact me if you would like additional information regarding any of these issues.

Sincerely,

*Thomas R. Kane*

Thomas R. Kane  
Assistant Director  
Information, Policy and  
Public Affairs

cc: The Honorable Patsy Mink  
Ranking Minority Member