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Breakthrough in U.S. Drug Sentencing Reform

The Fair Sentencing Act and the Unfinished Reform Agenda

By Kara Gotsch, The Sentencing Project

In August 2010 U.S. President Barack Obama signed into law the Fair Sentencing Act, legislation that limits the harsh punishments that were enacted during the 1980s for low-level crack cocaine offenses. At the Oval Office signing ceremony Obama was joined by Democratic and Republican congressional leaders who had championed reform.

That day the President's press secretary, Robert Gibbs, told a reporter, "I think if you look at the people that were there at that signing, they're not of the political persuasions that either always or even part of the time agree. I think that demonstrates ... the glaring nature of what these penalties had ... done to people and how unfair they were."¹

Gibbs was referring to the five- and ten-year mandatory minimum sentences prescribed under federal law for defendants caught in possession for personal use or with the intent to sell as little as five grams of crack cocaine. The drug penalties were the harshest ever adopted by Congress and were set at the height of the nation's "war on drugs," a time of significant concern — and misunderstanding — about crack cocaine.

The Fair Sentencing Act was welcomed by civil rights and community activists, but the compromise measure fell short of the changes they had sought for two decades. The new law

reduces but does not eliminate a sentencing disparity that disproportionately impacts African Americans and entangles too many low-level drug offenders in the federal criminal justice system.

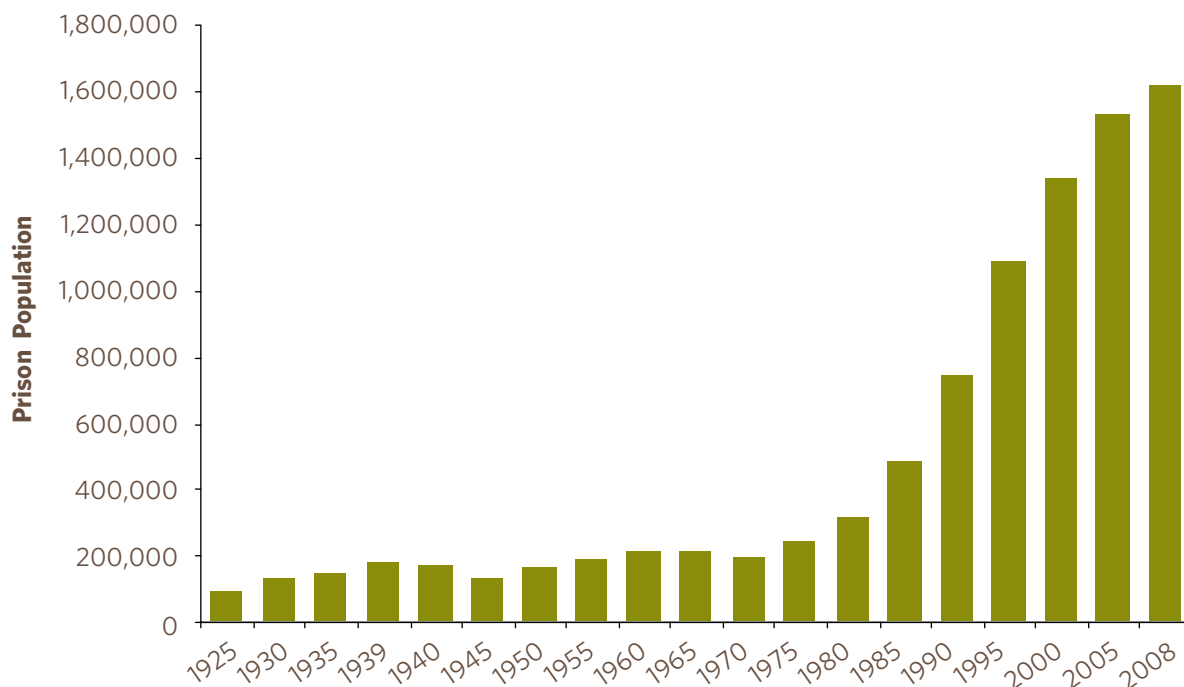
At the same time, the bipartisan cooperation that led to passage of the Fair Sentencing Act was historic at a time when intense partisan wrangling over a broad range of issues on Capitol Hill dominated debate and stymied action. Hopefully, the efforts to pass the Fair Sentencing Act will contribute to a broader movement to address disproportionate punishment and ensure a fairer justice system.

Mass Incarceration and Drug Sentencing

The United States leads the world in incarceration with 2.3 million people confined in federal and state prisons and local jails. This nation's "war on drugs" over the last three decades, more than any other single factor, has fueled this historic incarceration boom. The number of people behind bars for drug offenses has increased more than 12-fold since 1980. About half a million people are incarcerated for a drug offense today, compared to an estimated 41,000 in 1980.²



FIGURE 1: STATE AND FEDERAL PRISON POPULATION, 1925–2008



Source: The Sentencing Project, at <http://www.sentencingproject.org/template/page.cfm?id=107>

Figure 1 shows trends in the size of the U.S. prison population, representing state and federal prisoners, over the last 80 years. Until the late 1970s the number of prisoners had remained relatively flat for nearly a half century. Even as the country's overall population grew by 55 percent from 1940 to 1970, the number of prisoners nationwide remained around 200,000. But by the 1980s the prison population began to climb and has continued to increase ever since. What changed in the 1980s were political initiatives responding to the emergence of a new drug, crack cocaine, in urban and minority communities. Public fears, amplified by sensationalist media accounts, created a political climate that favored promises to get “tough” on drugs by stiffening drug offense penalties.

The Anti-Drug Abuse Acts of 1986 and 1988, signed by President Ronald Reagan, instituted hefty mandatory minimum sentences for drug offenses, including mandatory penalties for crack cocaine offenses that were the harshest ever adopted for low-level drug offenses. Defendants possessing as

little as five grams of crack cocaine were subject to a mandatory minimum sentence of five years in prison. Defendants with at least 50 grams were subject to a ten-year mandatory minimum sentence. The severity of crack cocaine penalties was especially striking when compared to powder cocaine, a chemically similar substance. For powder cocaine, the threshold amounts to trigger the five- and ten-year mandatory sentences were 100 times greater than for crack (e.g., 500 grams instead of five grams and five kilograms instead of 50 grams). This huge gap became known as the 100-to-1 sentencing disparity.

The uneven approach to federal cocaine sentencing was quickly adopted by many state governments, some of which enacted policies even more extreme than those being set at the federal level. For example, in 1989, Missouri adopted a 75-to-1 sentencing disparity between crack and powder cocaine, whereby someone convicted of selling six grams of crack cocaine faces the same prison term — a ten-year mandatory minimum — as a person who

sells 450 grams of powder cocaine. In 1990 Oklahoma set a 6-to-1 quantity-based sentencing disparity that required a ten-year mandatory minimum sentence for possessing five grams of crack cocaine and 28 grams of powder cocaine.

Consequences of U.S. Drug Laws

According to Congress's legislative history, the federal drug sentences enacted during the 1980s were intended to impose stiff penalties on drug "kingpins" and high-level drug traffickers. However, research conducted by the U.S. Sentencing Commission, an independent judicial body created by Congress in 1984, found that the quantities for crack cocaine offenses were set too low to accomplish the objective of punishing high-level traffickers. Moreover, the mandatory minimum structure which took away judicial discretion at sentencing failed to differentiate between defendants' roles and culpability. In 2002 the Sentencing Commission warned that crack cocaine penalties "apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility."³

Figure 2 identifies the most common offender functions among federal crack and powder cocaine

defendants sentenced in 2005. That year, low-level crack cocaine offenders, such as street-level dealers, lookouts, and couriers, comprised 61.5 percent of the 5,033 individuals charged and sentenced for crack offenses in federal court.⁴

The increased incarceration of drug offenders stemming from the 1980s policy changes represented the most significant source of growth in the federal prison system. In 1980 the 4,749 prisoners convicted of drug offenses constituted one-quarter of the federal prison population.⁵ By 2009 over half of sentenced prisoners (95,205) were incarcerated for drug offenses.⁶ The accompanying cost to house federal prisoners has also increased to \$6 billion, up 1,700 percent since 1980.⁷ Despite this enormous investment, federal prisons are operating at 35 percent above capacity.⁸ Double and triple bunking is commonplace, as is the utilization of non-housing areas for sleeping quarters.

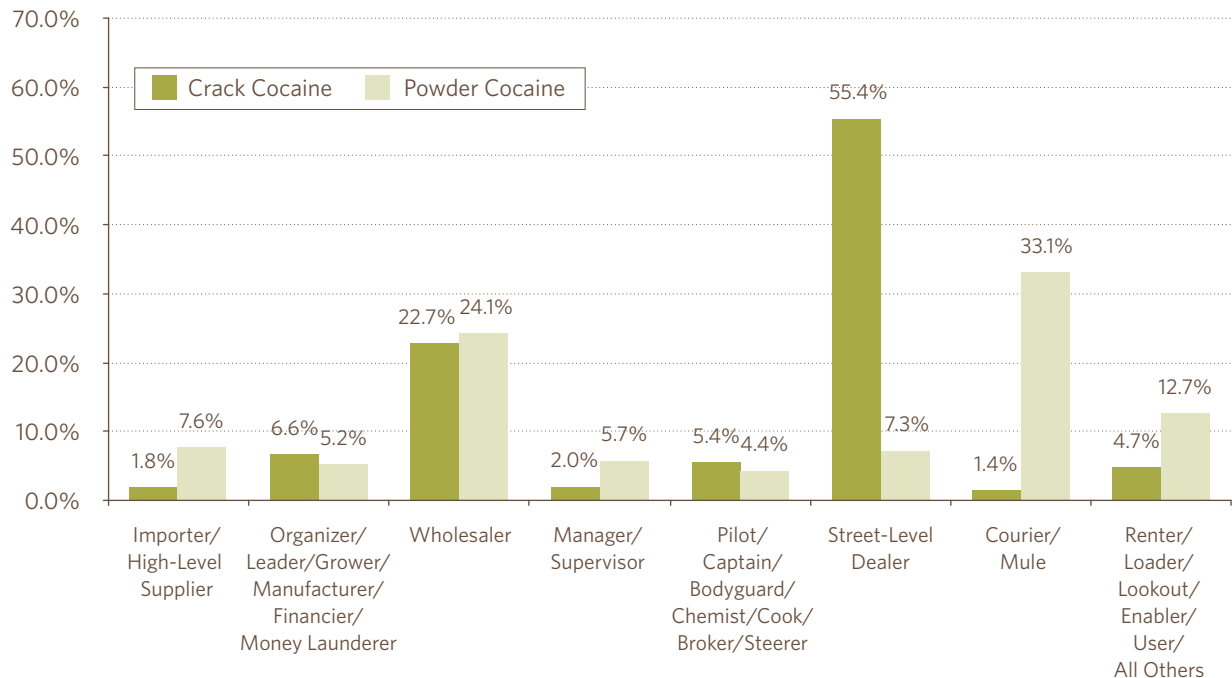
In addition to the disproportionately severe penalties associated with federal crack cocaine offenses, which tended to be low-level and non-violent, the impact of the sentencing disparity has fallen disproportionately on African Americans. U.S. government research indicates that the prevalence of drug use is similar across racial and ethnic groups.

DRUG LAW'S REAL LIFE CONSEQUENCES

Eugenia Jennings from Alton, Illinois, was sentenced to nearly 22 years in federal prison in 2001 for distribution of crack cocaine. U.S. District Judge G. Patrick Murphy told her at sentencing that the government had failed her. "When you were a child and you had been abused, the government wasn't there. When your stepfather abused you, the government wasn't there. When your stepbrother abused you, the government wasn't there. But, when you get a little bit of crack, the government's there."⁹

Judge Murphy's frustration stemmed from the inordinately long prison sentence he was bound to give Ms. Jennings despite her difficult and tortured childhood — she ran away from home to escape abuse but found only drug addiction to comfort her. The sentence was the result of her conviction for selling about 13 grams of crack cocaine, the weight of a few sugar packets. Her two earlier convictions for selling small quantities of crack cocaine classified her as a "career criminal," which subjected her to a stiff mandatory penalty. If her crime had involved powder cocaine rather than crack, she might have been eligible to leave prison to care for her three young children as much as ten years earlier. Despite changes to the law to reduce sentences for low-level crack cocaine offenses, Ms. Jennings remains in federal prison today.

FIGURE 2: DEFENDANT FUNCTION IN CRACK COCAINE VS. POWDER COCAINE CASES, 2005



Source: United States Sentencing Commission, 2005 Drug Sample.

An estimated two-thirds of all crack cocaine users are white or Hispanic,¹⁰ and surveys of users suggest that they generally purchase their drugs from sellers of the same racial and ethnic background.¹¹ Nevertheless, 79 percent of federal crack cocaine defendants in 2010 were African American.¹² Generally, African Americans are more likely to be sentenced to prison, and once there, serve more time for a drug offense, than are white drug defendants charged with comparable offenses.¹³

The obvious racial disparity associated with federal crack cocaine cases prompted the Sentencing Commission to declare in 2004 that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”¹⁴ The significance of the racial disparity associated with crack cocaine sentencing contributed to a negative perception of the U.S. justice system in communities of color.¹⁵ Indeed, Federal Judge Reggie Walton testified before Congress that jurors in his courtroom had refused

to convict guilty defendants because “they were not prepared to put another young black man in prison knowing the disparity existed between crack and powder in those ... cases.”¹⁶ Judge Walton believed the perceived racial injustice associated with crack cocaine sentences was ample justification for reform.

Political Context for Reform

Many factors contributed to the political atmosphere that finally enabled this long-debated sentencing reform to move forward in 2010. Most important was a convergence of views among the President, lawmakers, sentencing and legal experts, civil rights and community activists, and just about every prominent newspaper editorial board in the country, that the 100-to-1 cocaine sentencing disparity was unjust and required immediate reform.

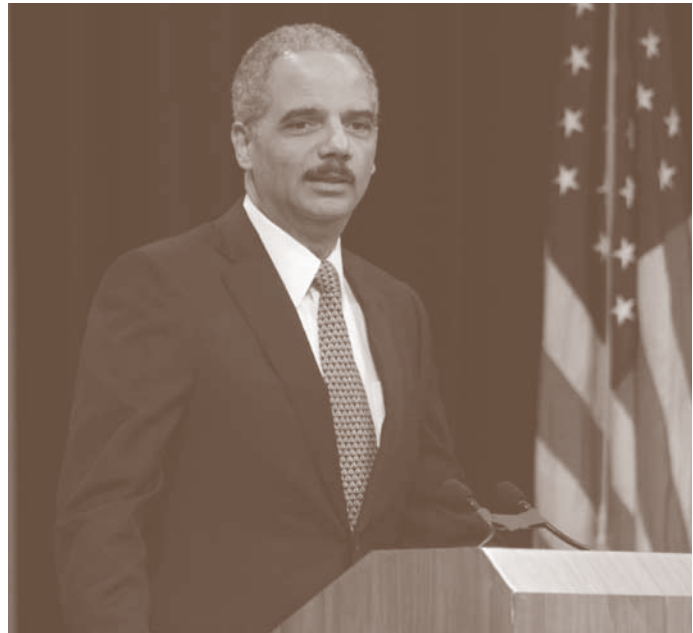
For example, over the course of 12 years the Sentencing Commission issued four reports to Congress on the consequences of crack cocaine sentencing policy, and each time urged reform.

The Fair Sentencing Act reduces but does not eliminate a sentencing disparity that disproportionately impacts African Americans and entangles too many low-level drug offenders in the federal criminal justice system.

After its 2007 report, the Commission proposed an amendment to the U.S. Sentencing Guidelines that would lower the recommended sentencing range for crack cocaine offenses, a guideline which judges consult when making sentencing decisions. The changes to the guidelines went into effect on November 1, 2007, thereby reducing the average crack cocaine sentence by 15 months. The mandatory minimums set by Congress did not change and judges were required to uphold the mandatory sentences unless narrow circumstances allowed for a departure.

In December 2007, after holding a hearing and receiving comments from over 30,000 individuals and organizations, the Sentencing Commission voted to make its crack cocaine sentencing guideline amendment retroactive. This proved to be very controversial among some Republican lawmakers on the Judiciary Committees in the Senate and the House of Representatives, as well as with then-Attorney General Michael Mukasey, who warned of a resulting violent crime wave if retroactivity was broadly applied. However, federal law gives the Commission the authority to make guideline reductions retroactive without requiring congressional approval, and the Commission's December 2007 vote stood. As of April 2011, 16,433 people in prison had been granted a sentence reduction (averaging 26 months). The Commission's analysis of recidivism among those released due to the 2007 retroactivity amendment shows rates of recommitments to prison after release (30.4 percent) consistent with recidivism rates for those crack cocaine offenders released prior to the availability of the sentence reduction benefit (32.6 percent).¹⁷

The Sentencing Commission's advocacy around crack cocaine sentencing reform was critical to emboldening Congress to finally take steps to change the harsh mandatory minimum penalties. First, the Commission's extensive research and data collection provided an important factual foundation, serving both to educate lawmakers and to provide community activists with ammunition for reform. Second,



U.S. Attorney General Eric Holder, November 2009.

PHOTO: RYAN J. REILLY

since the Commission is comprised of sentencing experts, including federal judges and lawyers, its recommendations enjoyed widespread credibility. Both Democratic and Republican lawmakers considered the Commission a reliable source of information and analysis.

In addition to the contributions of the Sentencing Commission, a committed and effective advocacy coalition had developed many years earlier to educate Congress and the public about the tragic consequences of this extreme sentencing policy. Civil rights organizations like the National Association for the Advancement of Colored People (NAACP), the American Civil Liberties Union (ACLU), and criminal justice reformers including The Sentencing Project had been calling for elimination of the sentencing disparity since the Sentencing Commission issued its first report to Congress on this topic in 1995. A reinvigorated campaign brought together a progressive constituency that employed aggressive lobbying strategies over a period of several years,

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including national lobby days in Washington, DC, call-in days designed to flood Capitol Hill offices with calls for reform from constituents, and ongoing media coverage featuring stories of those incarcerated under the harsh sentencing regime. Over time, the coalition broadened to also encompass legal organizations, faith-based groups (including Christian conservatives), and law enforcement.

In response to this pressure, legislation to address the crack cocaine sentencing disparity had been introduced in every congressional session for over a decade. But little progress was made. The breakthrough finally came in 2009, when Senator Dick Durbin (D-Illinois) introduced his bill to eliminate the crack cocaine sentencing disparity. As Chairman of the Senate Judiciary Committee's Subcommittee on Crime, Durbin held a hearing that featured testimony by Assistant Attorney General Lanny Breuer in favor of eliminating the sentencing disparity. Breuer's statement marked the first time since 1986 that any administration had endorsed the elimination of the disparity. This position, which was then repeated publicly numerous times by Attorney General Eric Holder, sent an important message to the Democratic Congress that sentencing reform was a priority for the Obama administration. During Obama's campaign for president he had endorsed the elimination of the disparity, and after his election the issue was highlighted on the White House website as an important civil rights priority.

After many months of negotiations in the Senate, Durbin's legislation, the Fair Sentencing Act, was brought before the Senate Judiciary Committee where a compromise version was approved. The compromise quickly passed through the Senate under unanimous consent,¹⁸ and a few months later it was approved by voice vote¹⁹ in the House. The resulting legislation reduced the 100-to-1 disparity to 18-to-1. The five-year mandatory minimum was now triggered when a defendant possessed for distribution at least 28 grams (1 ounce) of crack cocaine. (Previous Sentencing Commission reports had defined a mid-level operator in the drug trade as someone who sold an ounce of crack cocaine in a single transaction.) The penalty

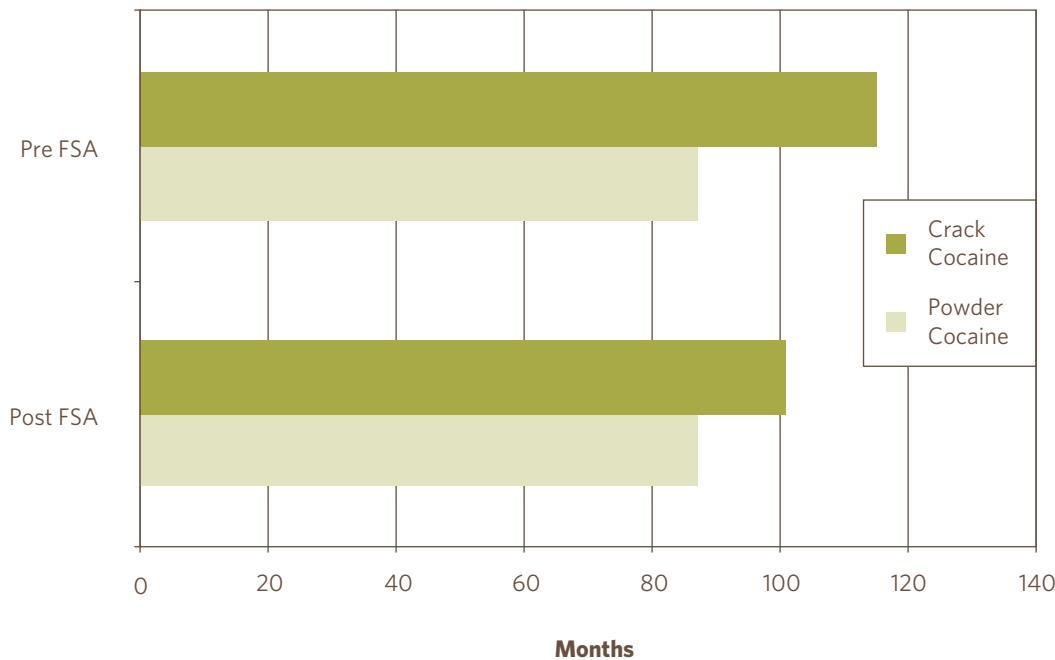
triggers for powder cocaine remained unchanged, but the legislation also increased financial penalties and raised the sentencing guidelines for cases in which a defendant uses violence or is the leader of a drug operation. Senator Jeff Sessions (R-Alabama), a longtime conservative leader, supported narrowing but not eliminating the sentencing disparity. Senator Sessions and others on the Senate Judiciary Committee, both Republican and Democrat, refused to support legislation that treated the two forms of cocaine the same, indicating the persisting influence of long-held misconceptions about crack cocaine.

Bittersweet Victory

Passage of the Fair Sentencing Act in 2010 marked the first time in 40 years that Congress eliminated a mandatory minimum sentence. The bill struck the five-year mandatory minimum sentence for simple possession of five grams of crack cocaine, the only commonly abused drug to trigger a mandatory sentence for mere possession. Under federal law, a conviction for possession of other drugs would likely result in probation rather than a prison sentence.

The last time Congress had approved any kind of sentence reduction occurred 16 years earlier, when it created a "safety valve" that allowed judges to avoid a mandatory minimum sentence if a defendant met certain criteria, including being charged with a non-violent offense and having a minimal criminal record. Slow progress in achieving federal sentencing reform signals how risky most politicians still consider drug and crime issues to be. By supporting a proposal to lessen penalties, many in Congress feared they would be leaving themselves vulnerable in the next election. Political cover was essential, including clear bipartisan support and avoiding a roll call vote, which would specifically identify a Member of Congress with a vote in favor of the sentence reductions. Despite the political hesitance, both Republicans and Democrats spoke in favor of the Fair Sentencing Act and those who eventually sponsored the legislation in the Senate encompassed some of the more conservative and more liberal members of each party.²⁰

FIGURE 3: AVERAGE SENTENCES FOR CRACK COCAINE AND POWDER COCAINE OFFENSES



Source: United States Sentencing Commission, 2009 Sourcebook of Federal Sentencing Statistics and Prison Impact Model, FY2009 Datafile

Figure 3 shows the expected decline in sentencing length for crack cocaine offenses since passage of the reform. Each year an estimated 3,000 people will benefit from the sentencing changes, resulting in an average reduction of two years for those impacted. The Sentencing Commission estimates that in ten years the overall federal prison population will decline by 3,800 people as a result of the reform.²¹

The advocacy coalition that helped advance the Fair Sentencing Act had sought the complete elimination of the sentencing disparity. While most members of the coalition endorsed the compromise legislation, coalition members remain committed to ending the disparity. Despite the sentencing improvements, the new quantity triggers will still entangle people far less consequential in the drug markets than the major traffickers that the federal government claims to prioritize in its enforcement. This continued pursuit of low-level offenders absorbs resources that would be better directed at apprehending more troublesome contributors to the illegal drug trade, including large-volume operators and distribution organizations that are particularly

violent, or linked to especially violent suppliers in other countries.

The reform coalition has also sought application of the new law to people sentenced under the discredited 100-to-1 disparity. The Fair Sentencing Act did not account for retroactivity, and many thousands of people in prison are still enduring excessive sentences handed down under the old law. The stories of people incarcerated weighed heavily on the reform debate. It would be cruel if their long history of injustice would now be forgotten by policymakers.

While the new law became effective in August 2010, the final sentencing guidelines that will implement the sentencing scale will take effect on November 1, 2011. At the same time, and as a result of a unanimous decision by the Sentencing Commission reached in June 2011, the new guidelines will apply to people currently incarcerated for a crack cocaine offense. The Sentencing Commission estimates that 12,000 people will benefit from a sentence reduction averaging 37 months.²² Applications for a sentencing guideline reduction



PHOTO: PETE SOUZA

President Barack Obama talks with Members of Congress after signing the Fair Sentencing Act in the Oval Office, August 3, 2010.

are reviewed by a federal court and the expedited releases will take place over 30 years.

Some law enforcement officials and many Republican members of the House and Senate Judiciary Committees urged the Commission to vote against retroactivity of the guidelines with claims that moving average sentences from 13 years to 10 years would result in increased crime and violence. However, Commissioners received public comment from over 40,000 citizens and organizations in support of retroactivity. Moreover, recent data on recidivism among crack cocaine offenders found no likelihood of increased rates of reincarceration resulting from shorter prison terms. Attorney General Holder testified at a Commission hearing in June 2011 in support of retroactivity, saying “[E]nsuring a fair and effective criminal justice system ... requires the retroactive application of [the crack cocaine] guideline amendment.”²³ The Obama administration’s support for retroactivity boosted public attention and interest in the Commission decision, although the

Administration endorsed a more limited application than what the Commissioners eventually instituted.

Moreover, after many months of pressure from the reform community, Attorney General Holder reversed course on the Justice Department’s directive to federal prosecutors on cases not yet sentenced for crack cocaine offenses committed prior to the Fair Sentencing Act’s passage on August 3, 2010. For almost a year, federal prosecutors contested arguments by defense counsel and some judges that those newly sentenced crack cocaine defendants could not benefit from the mandatory minimum changes enacted by Congress if their conduct occurred prior to the Act. After numerous rulings against the Justice Department’s position and with several appellate court cases pending, Holder issued a new directive in July 2011 that “pipeline” cases would now benefit from the reduced sentencing structure.

Additional options are available to better address the sentencing disparities for those incarcerated, including bipartisan legislation introduced by House

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members Representatives Bobby Scott (D-Virginia) and Ron Paul (R-Texas) in June 2011, the Fair Sentencing Clarification Act. This legislation would apply the new quantity triggers for the crack cocaine mandatory minimums for all conduct committed prior to the August 2010 enactment of the Fair Sentencing Act, regardless of the defendant's sentencing date. Given the strong opposition to the law by the current House Judiciary Chair, Representative Lamar Smith (R-Texas), near-term success for this legislation is unlikely. A final opportunity for retroactive relief lies with President Obama and his constitutional authority to grant prisoner commutations. But the likelihood of this option is small given that the President did not issue a single commutation in the first half of his term.

Building Momentum

In the United States, most law enforcement activity is conducted by state and local governments; only a fraction of cases are pursued at the federal level. Drug offenders constitute 18 percent of state prisoners, and overall rates of incarceration for drug offenses are at an all time high.²⁴ Moreover, among those incarcerated in state prison for a drug offense, six in ten persons have no history of violence or high-level drug selling activity.²⁵ The consequences of mass incarceration brought on by the “war on drugs” persist at all levels.

Fortunately, 2009 saw the first decline in the overall state prison population in almost 40 years. The changes at the state level are linked to new policies enacted to curb corrections growth and spending by investing in alternatives to incarceration, limiting time served in prison and enhancing reentry services to curb rates of prisoner recidivism. Progress in stabilizing prison growth at the state level is in marked contrast to the federal prison system which has increased at 2.5 times the rate of state prisons since 2000, 4.1 percent vs. 1.5 percent.²⁶

State policy reform may be a model for the federal criminal justice system, which endures many of the same crowding and budget burdens as the states. Passage of the Fair Sentencing Act was an important

first step for the federal criminal justice system but it is a long way from advancing a broad agenda to significantly impact the size of its corrections population and to ensure justice for all.

Efforts are underway among the advocacy community to build upon the sentence reduction embraced by the Fair Sentencing Act and to capitalize on the reform movement that has been gaining momentum at the state level. For example, during the federal deficit debates of 2011, a letter sent to Capitol Hill — calling for sentencing reforms that would stop the growth of the federal prison system and reduce costs — was supported by 80 organizations, including the American Correctional Association, Drug Policy Alliance, United Methodist Church, National Organization for Women, and Leadership Conference on Civil and Human Rights. Reforms outlined included:

- ▶ making retroactive congressional reforms to crack cocaine sentencing;
- ▶ enhancing elderly prisoner release programs;
- ▶ expanding time credits for good behavior; and
- ▶ eliminating mandatory minimum sentences for drug offenses.

In 2011 the Obama administration proposed recalculating prisoner time credits for good behavior by increasing time off by seven days to 54 days per year. The administration also proposed a program to earn 60 days off of a prisoner's sentence for participation in rehabilitative programs. For example, prisoners working at least 180 days in the prison industries programs, which maintain government contracts to produce items like furniture, solar panels, and clothing, could receive up to 60 days per year off their sentence. Both provisions have been incorporated into bipartisan legislation that was approved by the Senate Judiciary Committee in July 2011.

With the changes in the makeup of Congress resulting from the November 2010 elections, the prospects for advancing a broader sentencing reform agenda are uncertain. Representative Lamar Smith (R-Texas) was the only Member of Congress to speak in opposition of the Fair Sentencing Act. In January

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Inmates in crowded conditions at California State Prison, Los Angeles.

PHOTO: AP / CALIFORNIA DEPARTMENT OF CORRECTIONS

2011 he became Chairman of the House Judiciary Committee; any substantive criminal justice reform initiatives in the House of Representatives will be considered by his committee first.

At the same time, some of Representative Smith's Republican colleagues have been vocal about the need for change. For example, a prominent Subcommittee Chairman on the House Appropriations Committee, Frank Wolf (R-Virginia), has applauded state-level reform efforts to reduce incarceration levels and promote rehabilitation. Representative Wolf has also expressed interest in examining some of these efforts for federal implementation.

A new awareness of the problems that plague the American criminal justice system is clearly emerging. After taking office, President Obama's national drug policy director, a longtime police

official, rejected use of the term "war on drugs." It was a promising beginning and the administration's support for reforming crack cocaine sentencing was consistent with the rhetoric. After decades of adding and escalating mandatory minimum sentences, Congress and the White House finally stepped away from the cycle of ever-harsher penalties. Given the United States' role as the principal architect and major proponent of a global drug control system that has emphasized "zero-tolerance" and criminal sanctions, the passage of the Fair Sentencing Act is a milestone not only for U.S. policy, but also for reform advocates in other countries.

Still, the drug war is deeply entrenched politically and institutionally. Achieving a more profound shift in the nation's approach to drugs will require sustained progress in reforming drug sentencing laws to ensure fair and proportionate penalties, building on the success of the Fair Sentencing Act. A more humane and effective approach to drugs will also require progress on a broader reform agenda, including:

- ▶ strengthening funding for evidence-based prevention and treatment;
- ▶ mainstreaming harm reduction interventions such as needle-exchange programs;
- ▶ re-investing in the communities that have been hardest hit by drug abuse and by the drug war;
- ▶ more selectively targeting enforcement to discourage drug market violence; and
- ▶ embracing innovative community corrections systems that can provide effective alternatives to incarceration.

How policymakers choose to respond will depend on the persuasiveness of the arguments for reform and the commitment of the advocacy community to advancing the change.

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