



Criminal Justice Primer

Policy Priorities for the 111th Congress

2009

The Sentencing Project's *Criminal Justice Primer for the 111th Congress* provides an overview of nine policy priorities in criminal and juvenile justice reform that address issues of reentry, sentencing, racial disparity and crime prevention.

For more than 20 years, The Sentencing Project's goal has been to ensure that concerns about public safety are met with solutions that will effectively address crime. Our organization provides the public and policymakers with insightful research and analysis on incarceration, drug policy, racial disparity, felony disenfranchisement, juvenile justice and many other justice issues. All of our reports and briefings are available online at www.sentencingproject.org.



514 10th Street, NW
Suite 1000

Washington, D.C. 20004

Ph: 202-628-0871

Fax: 202-628-1091

www.sentencingproject.org

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Criminal Justice

Support Full Funding for the Second Chance Act

In April 2008, President George W. Bush signed the Second Chance Act (P.L. 110-199) which authorizes \$330 million over two years to expand assistance for people currently incarcerated, those returning to their communities after incarceration, and children with parents in prison. The Second Chance Act seeks to promote public safety by reducing recidivism. Presently, two-thirds of formerly incarcerated people are rearrested within three years after release. In 2007, 725,000 people were released from state and federal prisons, an increase of 20% since 2000. Millions more people were released from local jails. The services to be funded under the Second Chance Act include:

- Mentoring programs for adults and juveniles leaving prison;
- Drug treatment during and after incarceration, including family-based treatment for incarcerated parents;
- Education and job training in prison;
- Alternatives to incarceration for parents convicted of non-violent drug offenses;
- Supportive programming for children of incarcerated parents; and
- Early release for certain elderly prisoners convicted of non-violent offenses.

As of February 1, 2009, no money has been appropriated to carry out this Act. State and local governments burdened by the unprecedented growth in jail and prison populations need these important resources to ensure public safety. The sustained high rates of recidivism are a key reason prison populations continue to increase nationally and financially burden state and local governments. In February, Congress will begin working on the appropriations bills for fiscal year 2010. Full funding of the Second Chance Act is critical.

Americans Support Second Chances

In 2006, Zogby International conducted a poll for the National Council on Crime and Delinquency, entitled *Public Attitudes toward Rehabilitation and Reentry*.¹ The poll found 80% of the American voting public believe job training and drug treatment is “very important” to a person’s successful reintegration into society after incarceration. Strong majorities also believe mental health services, mentoring and housing are “very important.” All of these services would be supported by funding made available through the Second Chance Act. Seventy-eight percent of the voting public, according to the Zogby poll, supported passage of the Second Chance Act.

Reform Federal Crack Cocaine Sentencing

After two decades of contentious debate regarding the federal sentencing disparities between crack cocaine and powder cocaine, unprecedented momentum to reform current policy has emerged. In 2007 the United States Sentencing Commission lowered the sentencing guidelines for crack cocaine offenses and recommended that Congress finally address the lengthy mandatory minimum sentences for low-level crack cocaine offenses. The U.S. Supreme Court ruled that judges may consider the excessive nature of penalties for crack cocaine offenses for purposes of sentencing defendants below the recommended sentencing guidelines. Seven crack cocaine sentencing reform bills were introduced during the 110th Congress, including bills in the Senate and House of Representatives that would equalize penalties for crack and powder cocaine offenses without increasing mandatory sentences. In 2009, President Obama declared that “the disparity between sentencing crack and powder-based cocaine is wrong and should be completely eliminated.” The likelihood of legislative reform in the 111th Congress is the strongest it has ever been.

Over the last two years, newspapers across the country have published commentary highlighting the bias associated with federal crack penalties and the federal government’s concentrated prosecution of street-level dealers of crack cocaine, instead of drug kingpins and importers. The overwhelming consensus among federal judges, the civil rights community and legal experts is that now is the time for reform. This briefing paper provides background on the cocaine sentencing debate, explores the racial impact of the crack sentencing disparity, clarifies the misperceptions regarding crack addiction, and offers recommendations for eliminating unfairness in crack cocaine sentencing.

Origins of Federal Cocaine Sentencing Policy

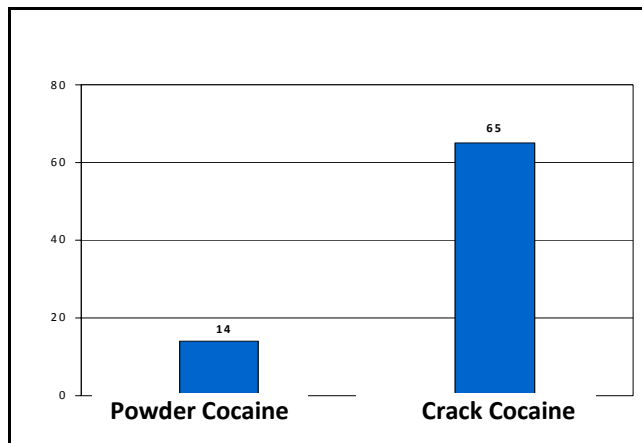
Crack cocaine became prevalent in the 1980s and received extensive media attention, due in part to its exponential growth in the drug market. The popularity of crack cocaine was associated with its cheap price, which for the first time made cocaine available to a wider economic class. Crack is made by taking powder cocaine and cooking it with baking soda and water until it forms a hard rocky substance. These “rocks” are then broken into pieces and sold in small quantities.

Public concern about crack cocaine addiction and its accompanying violent drug market spread quickly. Newscasters used words like “crisis” and “epidemic” - later shown to be exaggerated - to describe the impact of crack. The drug was considered a social menace more dangerous than powder cocaine in its physiological and psychotropic effects. The political hysteria that ensued led Congress to pass the Anti-Drug Abuse Act of 1986. The law’s mandatory penalties for crack cocaine offenses were the harshest ever adopted for low level drug offenses and established drastically different penalty structures for crack and powder cocaine. The result is that defendants convicted with just five grams of crack cocaine, the weight of less than two sugar packets and a quantity that yields about 10 to 50 doses, are subject to a five-year mandatory minimum sentence. The same five-year penalty is triggered for the sale of powder cocaine only when an offense involves 500 grams, 100 times the minimum quantity for crack, which yields between 2,500 and 5,000 doses.² Similarly, while the sale of 5,000 grams of powder, which can yield up to 50,000 doses, subjects defendants to a 10-year sentence, the same mandatory sentence is triggered by selling only 50 grams of crack, which produces about 100 to 500 doses.

The mandatory sentencing structure which continues today results in average sentences for crack cocaine offenses that are three years longer than for offenses involving powder cocaine. As seen in Figure 1 below, crack cocaine sentences for quantities less than 25 grams are far more severe than for powder cocaine offenses, 65 months compared to 14 months. Sentences for crack cocaine are also nearly two years longer than for methamphetamine and four years longer than for

heroin. Crack cocaine is also the only drug that carries a mandatory prison sentence for a first-time possession offense. A person convicted in federal court of simple possession of 5 grams of crack is subject to a mandatory five-year prison term while a person convicted of possessing 5 grams of powder will probably receive a probation sentence. In fact, the maximum sentence for simple possession of any other drug, be it powder cocaine or heroin, is one year in prison

Figure 1: Cocaine Sentences for Quantities Less Than 25 Grams: Average Sentence (in Months)



SOURCE: U.S. Department of Justice, [Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties](#), March 17, 2002.

Drug Quantities and Crack Cocaine Penalties

The federal sentencing laws Congress passed in the 1980s were intended to impose tough sentences on high-level drug market operators, such as manufacturers or heads of organizations distributing large quantities of narcotics, and serious traffickers with a substantial drug-trade business.³ However, the weights attached to the sentences failed to capture the different roles within the crack trade. As research from the Commission has shown, the 5

grams of crack set by Congress as the trigger for a five-year mandatory sentence is not a quantity associated with mid-level, much less serious, traffickers.⁴ The median drug quantity for a crack cocaine street level seller charged in federal court (comprising two-thirds of federal crack defendants) in 2000 was 52 grams, enough to trigger a 10-year mandatory sentence. For powder cocaine, the median quantity for a street level dealer was 340 grams, not enough even to trigger the 5-year sentence.

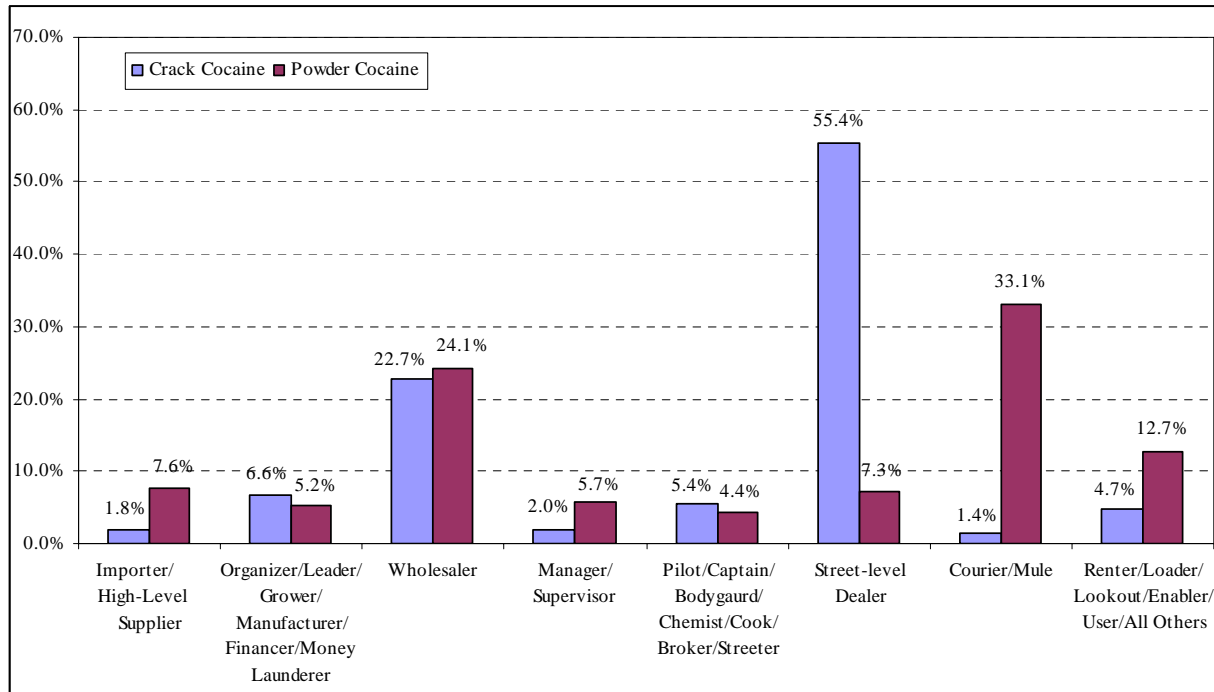
Table 1: Median Street Level Dealer Drug Quantities and Mandatory Minimums

Drug	Median Drug Weight	Applicable Mandatory Minimum
Crack Cocaine	52 grams	10 years
Powder Cocaine	340 grams	none

These skewed calculations have resulted in two serious consequences. First, they have led to extremely severe prison terms for low-level crack offenses, which represent more than 60 percent of federal crack defendants (see Figure 2). Second, with mandatory minimum sentences focused solely on

quantities, defendants with different levels of culpability are often lumped together. The unfortunate reality, according to the Commission, is that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”⁵

Figure 2: Defendant Function in Crack/Powder Cocaine Cases



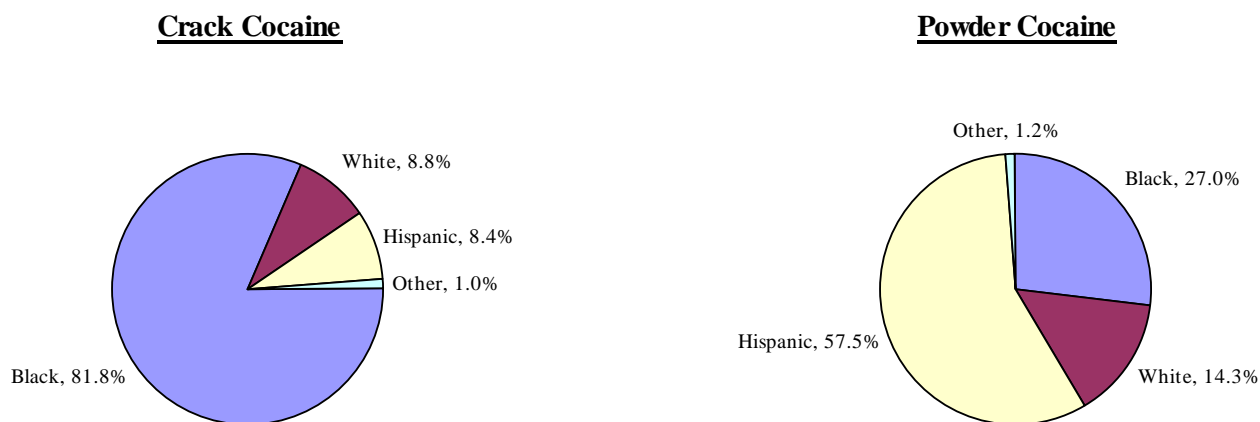
SOURCE: U.S. Sentencing Commission, 2005 Drug Sample.

Racial Impact of Crack Sentencing

Government data demonstrate that drug use rates are similar among all racial and ethnic groups. For crack cocaine, two-thirds of users in the U.S. are white or Hispanic.⁶ Furthermore, research on drug market patterns demonstrates that drug users

generally purchase drugs from sellers of the same racial or ethnic background.⁷ Despite these facts, people of color are disproportionately subject to the penalties for both types of cocaine. Indeed, 81.8 percent of crack cocaine defendants in 2006 were African American (see Figure 3).⁸

Figure 3: Race/Ethnicity of Cocaine Defendants



SOURCE: U.S. Sentencing Commission 2006 Datafile, USSCFY06.

African American drug defendants have a 20 percent greater chance of being sentenced to prison than white drug defendants.⁹ Between 1994 and 2003, the average time served by African Americans for drug offenses increased by 62 percent, compared to an increase of 17 percent for white drug offenders.¹⁰ Moreover, African Americans now serve virtually as much time in prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).¹¹ As a result, the Commission reported 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.”¹² Moreover, these inequities have substantial consequences for the way in which the African American community views the criminal justice system. According to the Commission’s report to Congress, even “[p]erceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system....”¹³

Legislation that seeks to reduce the sentencing disparity between crack and powder cocaine by lowering the powder weight necessary to trigger a mandatory minimum, as has been proposed in some bills, would still have the effect of incarcerating large numbers of people of color in prison. According to data from the Commission, though the proportion of black defendants in powder cases is lower than for crack cases, the majority of powder defendants are

Hispanic (see Figure 3). Therefore, decreasing the amount of powder required to trigger a mandatory sentence would exacerbate the disparity for Hispanics.

Crack Myths

Violence

Initially, the violence associated with the crack market fostered a perception that crack use instigated violent behavior in the individual user. In its May 2002 recommendations to Congress, the Commission stated that the crack penalties were based on beliefs about the drug’s association with violence which had been shown to be inaccurate. In fact, its 2007 report notes a decline in associated violence, such as bodily injury or threats, for both crack and powder cocaine charges.¹⁴ The Commission concluded that the violence associated with crack is primarily related to the drug trade and not to the effects of the drug itself, and that both powder and crack cocaine cause distribution-related violence, as do all drug markets. From an analysis of federally prosecuted cocaine cases, the Commission reported that, for 2005, a substantial majority of both powder cocaine offenses (73%) and crack cocaine offenses (57.3%) did not involve a weapon.¹⁵ Indeed, the frequency with which weapons are “accessible, possessed, or used by the offender” is extremely low, 0.8% of powder cases and 2.9% of crack cases.¹⁶

Child Development

The notion of the “crack baby” became common in the 1980s and was associated mostly with African American infants who experienced the effects of withdrawal from crack. Over time, the medical field determined the effects of crack on a fetus had been overstated.¹⁷ Deborah Frank, a professor of Pediatrics at Boston University describes the “crack baby” as “a grotesque media stereotype [and] not a scientific diagnosis.”¹⁸ Indeed, she found the negative effects of crack use on the fetus are similar to the negative effects of tobacco or alcohol use, poor prenatal care or poor nutrition on the fetus.

Addictiveness

Over time, numerous studies have shown that the physiological and psychotropic effects of crack and powder are the same, and the drugs are now widely acknowledged as pharmacologically identical. For example, a 1996 study published in the *Journal of the American Medical Association* finds analogous effects on the body for both crack and powder cocaine.¹⁹ Similarly, Charles Schuster, former Director of the National Institute on Drug Abuse and Professor of Psychiatry and Behavioral Sciences, found that once cocaine is absorbed into the bloodstream and reaches the brain its effects on brain chemistry are identical regardless of whether it is crack or powder.²⁰

U.S. Sentencing Commission Calls for Reform

In 1984 Congress created the U.S. Sentencing Commission to develop federal sentencing guidelines that would, among other goals, reduce unwarranted sentencing disparity. In 1994, as part of the Omnibus Violent Crime Control and Law Enforcement Act, the Commission was directed to study the differing penalties for powder and crack. After a yearlong study the Commission recommended to Congress a revision of the crack/powder 100:1 quantity disparity, finding it to be unjustified by the small differences between the two forms of cocaine. The Commission advised equalizing the quantity ratio that would trigger the mandatory sentences. The Commission also recommended that the federal sentencing guidelines consider factors other than drug quantity to determine sentence lengths. Congress rejected the Commission’s recommendations - the first time it did so in the Commission’s history.

Two years later, in April 1997, the Commission once more recommended that the quantity disparity between crack and powder cocaine be reduced, this time providing Congress a range of 2:1 to 15:1 from which to choose. The new recommendation was based on both raising the quantity of crack and lowering the quantity of powder required to trigger a mandatory minimum sentence. Congress, however, again did not act on the recommendation.

In 2002 there was a new movement to reconsider crack cocaine policies. The Commission’s *Report to Congress*, which again called for reducing sentencing disparities, documented the conclusions of an extensive body of research, as well as testimony presented at three public hearings by medical and scientific professionals, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations. This time the Commission proposed to Congress a 20:1 quantity disparity between offenses involving powder and crack cocaine without adjusting the penalties for powder cocaine. No reform was taken up by Congress.

The Commission renewed its commitment to resolving the sentencing controversy in 2006. It held another public hearing to assess whether the differences in punishment for crack and powder cocaine offenses were justified in light of any recent developments. The Commission heard testimony from the Department of Justice, law enforcement, medical and drug treatment professionals, academics and advocacy organizations. At the hearing, Commissioners expressed concern that the current crack cocaine law was ineffective at targeting the upper echelon of drug distributors. According to United States Attorney R. Alexander Acosta’s testimony, the highest level cocaine trafficking took place almost exclusively in the powder form. This was affirmed by Joseph Rannazzisi of the Drug Enforcement Administration, who noted that crack cocaine sellers are at the lowest end of the powder cocaine distribution chain. Acosta testified that the Administration’s top priority for drug enforcement was the highest level leaders in the drug market, but Commissioner Judge Ruben Castillo pointed out that only 7% of federal cocaine cases involve high-level traffickers.

In May 2007, the Commission released its fourth report detailing findings from the hearing and recommended modification to the 100:1 quantity

ratio. The Commission called on Congress to raise the crack cocaine quantities that trigger the five-year and ten-year mandatory minimum sentences in order to focus penalties on serious and major traffickers and to repeal the simple possession mandatory minimum. The Commission cautioned against any reduction in the quantity trigger for the powder cocaine mandatory minimum, "as there is no evidence to justify such an increase in quantity-based penalties for powder cocaine offenses."²¹

The Commission also proposed an amendment to decrease the guideline sentences for crack cocaine offenses. It was estimated by the Commission that the amendment would reduce crack sentences by 15 months on average and reduce the size of the federal prison population by 3,800 in 15 years. The amendment went unchallenged by Congress and took effect November 1, 2007. One month later, after holding a hearing and receiving public comment from over 30,000 individuals and organizations, the Commission voted to make its guideline reduction retroactive. The decision, effective March 2008, made an estimated 20,000 persons in prison eligible to apply for a sentence reduction. As of December 8, 2008, approximately 12,000 people have been granted a sentence reduction averaging two years. All releases are subject to judicial review.

While the 2007 sentencing guideline adjustments provided relief to crack cocaine offenders, the Commission noted that the changes were "only a partial step in mitigating the unwarranted sentencing disparity that exists between Federal powder and crack cocaine defendants....Only Congress can provide a comprehensive solution to a fundamental unfairness in Federal sentencing policy."

Congress Proposes Reform

Bipartisan support for crack cocaine sentencing reform first emerged in 2001 when Senator Jeff Sessions (R-AL) introduced the Drug Sentencing Reform Act. That proposal would have raised the crack trigger amount for the five-year mandatory minimum to 20 grams from 5 grams, but would have lowered the trigger threshold for powder cocaine to 400 grams from 500 grams. Although falling short of the scale of reform advocated by many, the legislation set an important precedent of Republican

support for reducing unfairness in crack cocaine sentencing.

In the 110th Congress several new legislative proposals for crack sentencing reform were introduced. In addition to Senator Sessions' proposal first introduced in 2001, Senators Orrin Hatch (R-UT) and Joseph Biden (D-DE) also introduced bills that either reduce or eliminate the sentencing disparity between crack and powder cocaine. While Sen. Hatch's bill, like Sen. Sessions', calls for a 20:1 ratio, he achieved this end by raising the five-year mandatory minimum quantity trigger for crack cocaine to 25 grams and leaving the powder cocaine level untouched at 500 grams. Sen. Biden advocated raising the crack cocaine quantity triggers to those of powder cocaine, thereby eliminating the disparity. Both bills would eliminate the simple possession mandatory minimum.

In the House of Representatives, Rep. Sheila Jackson Lee (D-TX) introduced the companion to Senator Biden's *Drug Sentencing Reform and Kingpin Trafficking Act of 2007*. Since the mid-1990s Rep. Charles Rangel (D-NY) has introduced his own cocaine equalization bill, the *Crack-Cocaine Equitable Sentencing Act*. The legislation had bipartisan support, as did Rep. Jackson Lee's bill. Moreover, Rep. Robert Scott (D-VA) introduced a bill that not only eliminates the cocaine disparity but also the mandatory minimum sentences associated with cocaine offenses.

Conclusion

Public interest in federal crack cocaine sentencing is at an all time high. The Commission's action to reduce the sentencing guidelines for crack offenses fueled reform momentum, as did the U.S. Supreme Court decision in *Kimbrough v. United States*. In a 7 to 2 ruling, the Court said a federal district judge's below-guideline sentencing decision based on the unfairness of the 100 to 1 quantity disparity between powder and crack cocaine was permissible. Regional and national news outlets universally applauded these decisions and called on Congress to make mandatory sentences for crack cocaine offenses fairer.

Congress's failure to address the mandatory minimum sentences for crack cocaine in the 111th Congress would be troubling on two counts. First, a significant racial disparity in prosecutions and confinement has persisted for too long. Along with disproportionate law enforcement practices that target blacks, the crack sentencing policies have resulted in more than 80 percent of crack cocaine defendants being African American despite the fact that a majority of crack cocaine users in the U.S. are white or Hispanic.

Second, the crack law fails as an effective drug strategy by inappropriately targeting low-level offenders. While the federal courts are intended to focus on high level drug operations, more than 60 percent of federal crack cocaine defendants have only low-level involvement in drug activity, such as street-level dealers, couriers or lookouts. This pursuit of low-level offenders diverts resources away from the most troublesome contributors to the illegal drug market, drug kingpins and importers. As noted by the Commission in its report to Congress in

1997, "federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year mandatory minimum penalty for crack cocaine too low."²²

The misinformation and hysteria that clouded the public debate on crack cocaine has done a disservice to developing responsible sentencing policy, while exacerbating the tragic racial disparities that plague our prison system. Two decades later, a new consciousness about the impact of the war on drugs, the costs of incarceration to urban communities and the effectiveness of drug treatment has emerged. Restoring fairness to the cocaine sentencing structure requires Congress to equalize the penalties for crack and powder offenses without increasing the current mandatory sentences. Harsh mandatory drug penalties have not protected communities or reduced drug addiction. Now is the time for new ideas about sentencing. An important first step to address the need for reform begins with correcting the inequity in crack cocaine penalties.

Support Analysis of Racial and Ethnic Disparity in the Federal Justice System

A fair system of justice is a cornerstone of our legal system and guaranteed by our Constitution. The influence of bias and disparate treatment in this system is unacceptable, and should be guarded against through a review and evaluation of racial and ethnic disparity in federal prosecutions. *The Justice Integrity Act*, sponsored in the 110th Congress by Sens. Biden, Specter, Cardin, Kerry, Murkowski and Reps. Cohen, Brady, Ellison and McCollum would address the racial and ethnic disparities that exist within the criminal justice system. The Act is intended to develop data that will disclose certain factors:

- If disparities are attributable to criminal justice policies and practice;
- If any policies and practices that produce disparities are justified as appropriate responses to criminal behavior;
- If disparities may be attributable in whole or in part to discrimination or unconscious bias.

Racial and Ethnic Disparity

For more than two decades the proportion of racial and ethnic minorities entangled within the criminal justice system has grown exponentially. Minority populations comprise two-thirds of persons convicted of offenses in federal courts,²³ and nearly three-quarters of federal prisoners are either black or Hispanic.²⁴ Decisions made by U.S. Attorneys about who they will prosecute and the types of offenses they prioritize for enforcement may impact this disparity. For example:

- U.S. Attorneys declined to prosecute 26% of cases brought to them by law enforcement; the discretion used by prosecutors in these decisions has not been assessed.²⁵

- Drug offenses comprise the most commonly prosecuted offenses in U.S. district court²⁶; despite similar rates of drug use among most racial and ethnic groups, arrests for drug offenses are concentrated in communities of color.
- African Americans serve about the same time in federal prison for drug offenses (58.7 months) as whites serve for violent offenses (61.7 months).²⁷

Examining the Disparity

The Justice Integrity Act establishes a pilot program with the purpose of reducing the perception of and remedying any racial or ethnic bias that exists in the administration of federal criminal justice. Ten U.S. Attorneys designated by the Attorney General will implement the pilot program in their respective districts. The U.S. Attorneys will each appoint and chair an advisory group with the following responsibilities:

- Gather data with respect to racial and ethnic disparities in prosecution in the district.
- Seek to determine the causes of racial and ethnic disparities in the district.
- Ensure, to the extent possible, that law enforcement priorities and initiatives, charging and plea bargaining decisions, and sentencing recommendations are not influenced by racial or ethnic stereotyping, and that facially neutral laws or policies are applied without actual or unconscious bias.

The advisory group will produce a report on its findings and recommend a plan to reduce unjustified racial and ethnic disparities. At the end of five years, the Attorney General would then produce a comprehensive report on the results of the pilot programs in all ten districts.

U.S. District Judge for the District of Columbia Reggie Walton has voiced a concern of many, that differential treatment of minorities in the criminal justice system is eroding respect for the law. The result may be a reluctance to participate in juries or to vote for conviction where the defendant is a

minority, or an unwillingness to take on a partnership role with police to identify and root out criminal behavior. He notes that while “fundamental fairness” in the criminal justice system is obviously crucial, “the perception of fairness . . . is just as important, and . . . we should be able to go to all parts of our citizenry and represent to them that we have a system that’s treating them fairly.”²⁸ Given these concerns, a review and evaluation of racial and ethnic disparity in federal prosecutions is appropriate in order to gain insight into the unwarranted disparities that may exist in the prosecutorial decision-making process.

Reinstate Federal Voting Rights for People Returning from Prison

Voter eligibility requirements in federal elections vary widely across the country for people with felony convictions. State laws range from no restrictions on voting to permanently denying voting rights upon conviction. The current patchwork of state voting laws means that a person's right to vote in federal elections is determined simply by where he or she chooses to call home. *The Democracy Restoration Act*, sponsored by Sen. Russ Feingold and Rep. John Conyers, would standardize rules in federal elections and ensure voting fairness. People who are no longer in prison, and live alongside the rest of us, deserve the right to vote.

Consequences of State Felony Disenfranchisement Policies

- An estimated 5.3 million Americans, or 1 in 41 adults, have currently or permanently lost their voting rights as a result of a felony conviction.²⁹
- Among those disenfranchised, 74% are currently living in the community.
- In 10 states, a conviction can result in lifetime disenfranchisement.
- 11 states disenfranchise more than 10% of their African American population.
- 1.4 million African American men, or 13% of black men, are disenfranchised; a rate seven times the national average.

Grounds for Federal Voting Rights Expansion

- Voting is linked with reduced recidivism; a study shows that, among those who have been previously arrested, 27% of non-voters were rearrested, compared with 12% of voters.³⁰
- 8 in 10 Americans believe that persons who have completed their sentence should have

their right to vote restored.³¹ About two-thirds support voting rights for persons on felony probation and parole,³² including Rhode Island voters who in November 2006 endorsed a ballot measure that restored voting rights to people upon release from prison.

- Since 1997, 19 states have taken steps to reform disenfranchisement laws, resulting in more than 760,000 people regaining the right to vote.³³
- While disenfranchisement laws have existed for more than a century, in the post-Reconstruction period some Southern legislatures tailored their statutes with the intent of silencing the political voice of newly emancipated slaves. Today, unwarranted disparities in the criminal justice system contribute to the significant racial disparity in rates of felony disenfranchisement.

The Constitution grants Congress authority to enact legislation that expands voting rights to people with felony convictions under two sources: (1) the Election Clause of Article I, section 4, combined with Congress's power to regulate federal elections; and (2) Congress's enforcement powers under the Fourteenth and Fifteenth Amendments.³⁴

At a time when a record number of Americans are being released from prison, denying the vote to millions of people living in the community, working, and raising their families, counters efforts for successful reintegration. Voting promotes public safety because people who vote are more likely to feel connected to their communities and to avoid falling back into crime. *The Democracy Restoration Act* would restore a strong and healthy democracy by granting federal voting rights to citizens upon release from prison.

Support Federal Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities

Racial and ethnic disparity within the justice system stems from a variety of factors, one of which is adoption of sentencing practices whose racial/ethnic impact could have been foreseen. A racial and ethnic impact statement can provide crucial information to policymakers and practitioners about the potentially racially disparate impact of proposed legislation before it becomes law. A racial impact statement ensures that policymakers are equipped with all available information regarding the potential outcome of a policy change, so that they can make sound evidence-based decisions.

Racial Disparity in the Criminal Justice System

- Nearly 1 in 3 young black males in the United States is under correctional supervision on any given day.
- One of every three black males born today can expect to spend time in a state or federal prison if current trends continue.
- African Americans comprise 13% of the national population and 14% of regular drug users, yet 34% of drug arrests and 53% of persons sentenced to prison for a drug offense.

Racial Impact Statements: What Do They Do?

The underlying premise of racial impact statements is that policies frequently have unintended consequences that are best addressed prior to their adoption, when lawmakers and practitioners can take appropriate action. They are modeled on fiscal and environmental impact statements, which are routinely applied in regard to proposed state and federal policy initiatives.

Racial Impact Statements: How Do They Work?

Two states, Iowa and Connecticut, passed laws in 2008 creating a process whereby racial impact statements will be prepared in conjunction with certain criminal justice legislation. When criminal justice legislation is introduced that has the potential to impact the population of persons on probation, in prison, or on parole, legislative committee members can request that a racial impact statement be prepared that outlines the effect on racial and ethnic minorities. Agencies that are ideally situated to prepare the statements include sentencing commissions, budget and fiscal agencies, or departments of corrections. A disproportionate racial or ethnic impact does not preclude adoption of proposed legislation, but is one of a number of elements that lawmakers consider when debating criminal justice policy.

Racial Impact Statements: How Can They Help?

In 1986, Congress amended federal cocaine sentencing policy with the Anti-Drug Abuse Act, which punished low-level offenses for crack cocaine more severely than powder cocaine. While this legislation was race neutral, the experience since then has shown that more than 80 percent of federal prosecutions for crack cocaine have been of African Americans, a figure that is grossly disproportionate to their rate of use of the drug. Analysis of law enforcement patterns at the time, which were targeted in communities of color, would likely have revealed these sentencing disparities prior to the passage of the law. This would have been critical information for lawmakers at the point during which they deliberated potential policy responses to address crack cocaine abuse.

Juvenile Justice

Reauthorize a Strong Juvenile Justice and Delinquency Prevention Act

Each year in the United States there are 2.2 million juvenile referrals to the police,³⁵ 1.7 million delinquency cases handled by the juvenile courts,³⁶ and, on any given day, more than 90,000 juveniles are held in secure confinement.³⁷ In addition, 7,500 youth are held in adult jails awaiting trial in criminal court.³⁸ At the back end of the system, about 200,000 youth and young adults age 24 and under leave secure juvenile or adult correctional facilities and return to their communities each year. All of these youth fall under the care of juvenile justice systems.

The belief that at-risk and delinquent youth require special federal attention led to the creation of the Office of Juvenile Justice and Delinquency Prevention in 1974, as well as the Juvenile Justice and Delinquency Prevention Act (JJDP), which provides grants to states to assist with juvenile delinquency prevention and intervention programs. Currently, eligibility for these grants is provided to states that comply with the four core requirements of the Act:

- **Jail Removal Provision:** That young offenders should not be housed pre-trial with adult offenders;
- **Sight and Sound Provision:** That, in the few circumstances where juveniles *are* housed with adult offenders, such as when they have been transferred to the adult system and are awaiting trial in criminal court, they should be separated by sight and sound from adult offenders;
- **Deinstitutionalization of Status Offenders:** That status offenders (juveniles charged with an offense that would not be illegal if committed by an adult, such as truancy from

school) are not held in detention, except in the event of a valid court order or Interstate Compact exception; and

- **Disproportionate Minority Contact:** That states address disproportionate minority contact among juveniles who come into contact with the juvenile justice system.

As the 111th Congress considers the reauthorization of the JJDP this year, it is imperative to strengthen its provisions surrounding DMC, separation of juveniles and adults, and deinstitutionalization of status offenders.

Racial and Ethnic Disparities Must be *Reduced*, not Merely Addressed

Youth of color have much more frequent contact with the justice system than white youth. Black youth account for 16% of the youth population, but represent 28% of juvenile arrests, 37% of the detained population, 38% of those in residential treatment, and 58% of youth committed to state adult prison.³⁹

For the past 20 years, the JJDPA has instructed states to merely *address* DMC rather than to *reduce* DMC. States have not been offered nearly enough direction or guidance on what an effective DMC reduction strategy would include. As a result, in most states and localities racial and ethnic disparities have remained the same; in many jurisdictions they have actually worsened over this period. To remedy this, legislators should strengthen the DMC-related language in the JJDPA by requiring that states take the following steps in order to be in compliance with the DMC core requirement:

1. Establish coordinating bodies to oversee efforts to reduce disparities;
2. Identify key decision points in the system and the criteria by which decisions are made;
3. Create systems to collect local data at every point of contact youth have with the juvenile justice system (disaggregated by such descriptors as race, ethnicity, and offense);
4. Develop and implement plans to address disparities that include measurable objectives for change;
5. Publicly report findings; and
6. Evaluate progress toward reducing disparities.

Strengthen Provisions Regarding Housing Youth with Adult Offenders

On any given day, 7,500 youth are held in adult jails because of loopholes in two of the core protections relating to youth who are transferred to the adult system. Strengthening language to the *sight and sound* and *adult jail removal* core requirements should include a wholesale restriction against the commingling of youth with adults for those youth transferred to the adult system for trial. Numerous studies demonstrate that housing youth with adults is very problematic and leads to increased instances of sexual assault, physical assault, and suicide. Special provisions should be required to ensure that states have appropriate facilities to hold youth separately from adults.

Status Offenders Should Not be Detained

Despite the intent of the JJDPA to remove juveniles from institutions when they are charged with only status offenses, the detention of status offenders is still permitted under the Valid Court Order exception⁴⁰ in most states. As a result, a one-day count in 2006 found that 4,700 youth were held in detention under this exception. Juvenile detention is an inappropriate response to problematic behavior that is not criminal. The VCO exception should be removed. A third of status offense cases are due to truancy from school. Instead of detention, which greatly exacerbates academic problems, evidence-based responses such as Positive Behavioral Interventions and Supports are effective in addressing the educational and social needs of youth who are chronically truant.⁴¹

Juvenile justice is undergoing many significant reforms throughout the nation; effective, promising, and innovative early intervention and prevention programs are being developed and implemented. These work best when they are community-based programs. Congress can support these encouraging interventions and programs through passing a strong JJDPA reauthorization this year.

End Juvenile Life without Parole (JLWOP)

The United States is the only country in the world that sentences juveniles to life without parole, which places us in violation of several international treaties. The federal government and 45 states allow life without parole sentences for juvenile offenders who commit certain crimes and there are currently 1,765 individuals serving such sentences. Seventy-three of the juveniles were 13 or 14 years old when they committed their crime.⁴²

The racial disparity that exists at each stage of the criminal justice system is also present among youth sentences to JLWOP. Nationwide, 57.6% of juveniles serving life without parole are African-American and in the federal system, 25 of the 26 youth serving life sentences without the possibility of parole, or 96.2%, are black.

Most youth who end up serving the rest of their natural life in prison have been engaged in serious, violent crimes. Certainly these crimes warrant punishment and steps should be taken to ensure public safety. However, life sentences are unnecessarily cruel and excessively costly to the community. Moreover, the deterrent effect of severe punishments for young people has not been established: knowledge of a life sentence among juveniles engaging in serious crimes does not change their likelihood of committing LWOP-eligible offenses. For violent offenders who have taken lives or who pose a serious threat to public safety, incapacitation as a means of assuring public safety is a legitimate and compelling concern at sentencing. Long sentences may still be just punishment for the crime, but all juveniles should be given the opportunity for parole at some point in their sentence.

While many of the LWOP sentences are given to those who committed murder, as many as 25% of current JLWOP sentences are associated with the felony murder rule. The felony murder rule applies to youth present during the commission of a felony that resulted in a homicide, but who did not commit the murder themselves.⁴³

Research suggests that youth are categorically less culpable than adults, lack the maturity to fully understand the implications of their actions, and are capable of turning their lives around in a positive direction. Youth and adolescents are also much more vulnerable to peer pressure in their developing years; thus they may go along with activities that they know are wrong because they lack the judgment or confidence to separate themselves from it. In 2005, the U.S. Supreme Court acknowledged these realities in its historic decision to overturn the death penalty for juveniles.⁴⁴

Many state and federal laws recognize that juveniles are not simply little adults. For example, the right to vote is not granted until age 18 because it is believed that the maturity to exercise this right is not achieved until that age. This belief also supports laws which place age restrictions on the purchase of alcohol and tobacco, or joining the military. Similarly, youth have historically been viewed as less capable of aiding in their defense in criminal court.

Those seeking the elimination of juvenile life without parole do not advocate guaranteed release of these offenders, only that a parole hearing be granted. There is mounting support to abolish JLWOP laws in select states, but leadership is needed at the federal level. Sentences that close the door on rehabilitation and second chances are cruel and misguided.

Enact Evidence-Based Strategies to Reduce Youth Gang Involvement and Crime

Successful strategies to combat youth violence and gang-related activity have long eluded lawmakers who too often rely on enacting longer sentences for young people instead of implementing evidence-based and promising prevention and intervention programs that stop violence before it happens.

Youth PROMISE Act

Children are our most precious resource and by providing the care and services they need while they are young we can improve their chances for success. Research documents that youth at risk of offending frequently demonstrate an array of predictable behaviors that, when addressed early on, can prevent delinquency. Some of these behaviors include association with negative peers, discipline problems in school, and poor academic performance or skipping school altogether. Neighborhoods confronted with juvenile crime are better served by prevention-based efforts that focus on keeping youth in school, developing prosocial relationships with peers, avoiding drugs and alcohol, and reducing membership in gangs. The Office of Juvenile Justice and Delinquency Prevention's (OJJDP) Gang Violence Reduction Program highlights the success of prevention and early intervention strategies for eliminating gang problems in its analysis of interventions over a three-year period.⁴⁵

The Youth PROMISE Act demonstrates a refreshing approach to juvenile crime prevention because of its reliance on what is known about children, crime, and gangs. The Youth PROMISE Act advances a constructive approach to address youth crime by providing for a broad array of programs that have been demonstrated to reduce the likelihood of joining a gang as well as to reduce delinquency. Specific components of the legislation include:

- Establishing a federal advisory panel that sets standards to evaluate juvenile delinquency and criminal street gang prevention and intervention programs, and identifies communities with the greatest need for assistance;
- Supporting community councils that plan strategies to address youth crime with improved indigent defense delivery systems, court personnel trainings, and enhanced services for early childhood development, child protection and safety, adolescent job training, education, housing, health care and substance abuse treatment;
- Creating a National Center for Proven Practices Research;
- Aiding the hiring and training of law enforcement officers as youth-oriented police; and
- Expanding victim and witness protection for juveniles.

The Youth PROMISE Act presents a forward-thinking approach with an emphasis on research-driven measures to prevent crime and gang involvement. Investment in our youth today will produce savings for the future because of reductions in violence, crime, incarceration and other criminal justice costs.

Alternative Proposals

Despite widespread public endorsement of the Youth PROMISE Act among child welfare, mental health, and juvenile justice experts and advocates, lawmakers are still faced with competing proposals to reduce gang membership and gang-related crime. Other legislative initiatives include solutions that have not been demonstrated to work; in some cases, they may even amplify a gang problem. For instance, gang experts Malcolm Klein and Irving Spergel warn that gang suppression efforts to reduce gang activity and involvement are likely to actually backfire because "...suppression tactics intended to make youth 'think twice' about gang involvement may instead reinforce gang cohesion, elevating gang's importance and reinforcing an 'us versus them' mentality."⁴⁶ Gang suppression efforts have not been demonstrated to reduce gang activity or membership.⁴⁷ Overemphasis on criminal justice and lengthy incarceration, including life without parole in some circumstances, is out of step with what research demonstrates to be effective: more prevention and early intervention at the community level.

Definitions of gang members or gang crimes should not be broadened in such a way as to draw more youth into the system based on non-criminal behavior. It is well-established that young people

associate in peer groups; youth crime is more frequently carried out in groups rather than alone.⁴⁸ Legislation cannot be so vague as to include all group behavior as gang behavior because it will inadvertently draw more youth into the federal system.

Racial and ethnic disparities continue to mount in prisons and jails around the country. African American youth are transferred to the adult system much more frequently than white youth. Although black youth represent only 16% of the youth population, they represent 37% of cases transferred to criminal court and 58% of cases admitted to adult state prisons.⁴⁹ Legislation that leads to the unwarranted federal prosecution of more youth will simply worsen racial and ethnic disparities. Moreover, legislation which calls on law enforcement to provide an unspecified "prediction" of levels of gang crime activity could have especially negative consequences for communities of color.

In contrast to overly punitive and reactive alternatives to youth crime problems, the Youth PROMISE Act invests resources targeted at at-risk youth *before* they engage in delinquency by providing the guidance and supports they need to live healthy, productive lives.

Support Youth Reentry After Detention

Each year, approximately 200,000 individuals who are younger than 24 years old exit the juvenile justice system; many of them have spent the better part of their teenage years in and out of confinement.⁵⁰

Youth exiting the system are at a high risk of reoffending and returning to the system if adequate structures are not in place to support their transition by providing them with the skills and services necessary to lead a law-abiding life. Sixty-two percent of youth eligible for reentry services—that is, confined youth—have previously been in custody. Among this group, 40% have been confined 5 or more times.⁵¹ Because of multiple placements, many children have been in the system for as much as a third of their adolescent years.

Many youth in trouble interact with positive adult role models for the first time in the juvenile justice setting. After their release, they frequently return to communities marked by poverty, dysfunctional home lives and/or elevated area crime rates. To keep them from reengaging in crime, youth transitioning from juvenile and criminal justice systems should be immersed in aftercare programming that offers healthy alternatives to offending and which both promotes and provides the necessary skills for youth to reclaim their lives.

Considering that recidivism rates are as high as 70% in some localities, much greater attention is needed to the group of youth who exit secure confinement to ensure they are given the best possible chance at leading a delinquency-free life upon their return to the community.

Plans are rarely in place to support youth as they exit confinement and reintegrate back into their family, peer group, school, and community. This gap in

services contributes greatly to reoffending. Many youth do not have the necessary skills for independent living, and also lack awareness of, or access to, aftercare services and programs. It is no surprise that so many young offenders fail to complete school or find work, become homeless, or reoffend, only to return to secure confinement. Studies of homeless youth demonstrate the connection between youth homelessness and contacts with the juvenile and criminal justice systems. In a recent survey of homeless youth between the ages of 10 and 17, the Wilder Research Center found that 46 percent had been in a correctional facility, and of those, 44 percent exited into an unstable housing situation.⁵²

Reentry services and aftercare to youth exiting juvenile justice facilities reduces recidivism and supports their successful reintegration back to families and communities. By fostering improved family relationships and functioning, reintegration into school, and mastery of independent life skills, youth build resiliency and positive development to divert them from harm and delinquent behaviors.

An enhanced focus on aftercare services for youth is critical because it means better outcomes for youth and improved public safety for all. The juvenile justice system should not abandon our children at this critical stage of their lives.

Youth exiting confinement face significant individual and environmental obstacles which place them in danger of reoffending and returning to the system:

Individual Level Barriers to Reentry

- Many youth in custody report having severe mental health problems including major depression (59%), anxiety (61%), hallucinations (17%), and/or suicidal

tendencies (27%).⁵³ These youth will require substantial mental health care upon release if reoffending is to be avoided.

- Related, many youth who are released from secure confinement are eligible for Medicaid but their membership has been terminated due to their incarceration, despite their legal right to stay enrolled and pleas from the Centers for Medicare and Medicaid to temporarily suspend rather than terminate these enrollments.⁵⁴
- Many youth have substance abuse problems: approximately two thirds of youth exiting the system acknowledge regular drug use.⁵⁵
- More than half of incarcerated youth did not complete the 8th grade, and many have unaddressed learning disabilities. What is more, youth leaving secure custody may be disinclined to reenroll in school. A study in New York found that two thirds of youth leaving formal custody did not return to school upon their release.⁵⁶
- Many youth come from parentless or single parent homes: 26% of youth were not living with either parent when they entered custody, and 19% were living with only one parent;

Environmental Barriers to Reentry

- Youth who are over 18 years old upon release lose their entitlement to public services such as education. Aside from cost issues, youth may encounter additional difficulties in school reenrollment because they are likely to be viewed as having discipline problems.⁵⁷ These potential barriers to success need to be resolved before release from secure confinement.
- Youths in the juvenile justice system commonly come from abusive and/or neglectful home environments. There is a presumed high risk of release to these same homes after incarceration, which threatens their chances for staying on track. Juvenile justice systems rarely prepare or advise on post-release housing arrangements for youth exiting the system, and too little is known about their living arrangements upon release.

Priorities for Youth Reentry Legislation

Before youth leave detention, plans should be in place to prepare them and their community for their return. The Juvenile Justice and Delinquency Prevention Act should address youth reentry explicitly and call on states to have structures in place to support the transition to the community.

At a minimum, policies should be enacted that ensure that discharge planning and procedures are completed in a timely fashion and do not delay a juvenile's release from custody. In addition, state cooperation should be secured through federal provision of technical assistance to local grantees on utilizing federal funds for reentry services and programs. Specifically, states should be held responsible for:

- Developing a pre-discharge written case plan for each youth released from custody that articulates plans for education, housing, mental health/substance abuse treatment, medical care, and employment.
- Tracking outcomes for all youth released from custody, including, but not limited to: family reunification, housing, education, employment, substance abuse, abuse or neglect, victimization, and recidivism.
- Ensuring that Medicaid benefits are suspended but not terminated during detention; and
- Ensuring that Medicaid benefits are reinstated promptly after detention release.

Endnotes

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- ³ Testimony of Commissioner John R. Steer before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, May 11, 2000.
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- ⁹ USSC, *Fifteen Years of Guidelines Sentencing* (Nov. 2004), p. 122.
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- ²² USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, (April 1997), p. 7.
- ²³ *Compendium of Federal Justice Statistics, 2003* (Oct. 2004), Table 4.5, p. 65.
- ²⁴ *Ibid.*, Table 7.10, page 108.
- ²⁵ *Ibid.*
- ²⁶ *Ibid.*, Table 2.2.
- ²⁷ *Ibid.*, Table 7.16, p. 112.
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