

# ANTI-DRUG LEGISLATION AND THE RISING INCARCERATION OF WOMEN: RECOMMENDATIONS FOR FUTURE SENTENCING REFORM

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The Anti-Drug Abuse Acts of 1986 and 1988 led to a rapid increase in the number of incarcerated Americans. The rate of female incarceration has risen at a particularly high rate over the past 20 years. This article discusses the evolution of drug sentencing policy since 1986. It looks at characteristics of incarcerated women in order to understand how drug policy has influenced this population. The way women participate in the drug trade interacts with minimum sentencing laws to contribute to the rise in female incarceration. The article concludes with policy recommendations for a more equitable drug sentencing system.

The Anti-Drug Abuse Acts of 1986 and 1988 were enacted to crack down on drug-related crimes and to put more drug offenders behind bars.<sup>1</sup> These acts were a central part of America's War on Drugs. Garry Rolison and associates (2002) describe the War on Drugs as "a mythical drug war initiated in the Reagan era" (p. 132). In fact, drug abuse is a prevalent problem, but the current system does not address it in an effective way.

The Anti-Drug Abuse Acts introduced mandatory minimum sentencing for those who commit drug-related offenses, whether the defendants are high-level drug traffickers or low-level co-conspirators. These mandatory minimum sentences were statutory requirements that those convicted of drug offenses would receive minimum prison sentences based primarily on the type and quantity of drug involved in the offense. In theory, these acts would reduce the number of drug dealers and traffickers, thereby reducing the quantity of drugs available on the street and the crime associated with drug use. Despite these measures, 5 years later, in 1993, the U.S. had one of the highest rates of violent crime in the world (Feldman, 1993). In the same year, only 11.2 percent of

drug defendants were high-level dealers (U.S. Sentencing Commission, 1995), yet incarceration rates more than tripled between 1980 and 2000 (Travis, 2000). Although the number of people being incarcerated for drug-related offenses is steadily increasing, the drug problem is still prevalent, there has not been a significant decrease in rates of violent crime (Harrison and Beck, 2004), and a small proportion of those convicted of drug charges are high-level offenders (U.S. Sentencing Commission, 1995).

Investigating the trends in incarceration since adoption of the acts provides a strong indication as to where the laws went wrong. A particularly disturbing trend can be seen in women's incarceration rates, which have been increasing at a faster pace than those among men. This is especially true for drug offenses. Between 1990 and 1997, the number of women serving time for drug offenses nearly doubled while males serving for drug offenses increased by 48 percent (Van Wormer, 2001). Since 1990, there has been a 48 percent increase of women involved in the corrections system. This is despite the fact that the number of women in prison for violent crimes has decreased (Rolison et al., 2002).

This article examines incarceration rates and the way that women's participation in the drug trade makes them especially vulnerable to the War on Drugs. This effort seeks to evaluate how the policies adopted in the Anti-Drug Abuse Acts of 1986 and 1988 have affected female incarceration rates. The article also considers what makes women susceptible to these policies and attempts to identify which subsets of women are most affected. In light of recent changes to the sentencing laws, this article makes recommendations for future policy changes that will increase the effectiveness and equality of the U.S. drug laws and corrections system.

## HISTORY

The Sentencing Reform Act of 1984 (U.S. Public Law 98-473; 98 Stat. 1987) created the United States Sentencing Commission. The act originated in a liberal movement to limit the previously unchecked sentencing power of judges and reduce discrimination in criminal sentencing (Stith and Koh, 1993). Conservative interests allied themselves with this liberal movement to achieve their own goals of lengthening prison sentences and reducing the rehabilitative component of criminal sentencing (Weinstein, 2003).

The 1984 act ordered the commission to create the United States Sentencing Guidelines, which specify ranges for the lengths of sentences and raise the length of sentences for many classes of federal offenses.<sup>2</sup> With the

adoption of the guidelines, the balance of power shifted in sentencing from judges to the prosecutors, who have an enormous amount of control over a judge's sentencing decision (Weinstein, 2003). The prosecutor decides what charges to bring against a defendant and whether to put forth a motion to mitigate, or shorten, a sentence. The judge decides the sentence based on the offense and whether there is a minimum sentence for that crime, rather than his or her own discretion based on the facts of a case (Weinstein, 2003).

There are only two ways for the judge to mitigate the sentence, or provide what is termed a downward departure: a safety valve provision allows a modest sentence reduction if the offense is the defendant's first, and cooperation (termed substantial assistance) in the investigation or prosecution of others can also significantly reduce a sentence. The prosecutor decides whether or not to accept a defendant's cooperation and whether to make a motion giving the judge the opportunity to depart from guidelines on the basis of cooperation (Weinstein, 2003). Ian Weinstein (2003) finds that about half of downward departures occur because substantial assistance provided by the defendant results in the investigation or prosecution of others. More than one-third of sentences imposed are departures, and over half of these are substantial assistance departures (U.S. Sentencing Commission, 2002*b*).

The Anti-Drug Abuse Act of 1986 also specifies mandatory minimum penalties for those who traffic, import, or possess specified amounts of particular narcotics. The statutes permitted harsher sentences but not more lenient ones (Weinstein, 2003). Discrepancies in the treatment of offenses involving different narcotics by the Anti-Drug Abuse Acts have contributed to the increase in incarceration and the imbalance in the system. The mandatory minimum sentences for crack cocaine and cocaine hydrochloride offenses particularly highlight these inequities.

The 1986 act established 100-to-1 as the ratio of crack cocaine to cocaine hydrochloride, tying that ratio to sentencing requirements. For example, a first-time offender possessing 5 grams of crack cocaine (the equivalent of 50-200 doses) will get a minimum mandatory sentence of 5 years in prison. By contrast, he or she would have to possess 500 grams of cocaine hydro-chloride (the equivalent of more than 10,000 doses) to get the same sentence (Hatsukami and Fischman, 1996). The 1988 act mandated a minimum sentence of 5 years in prison for possession of 5 grams of crack cocaine and a maximum sentence of 1 year in prison for possession of cocaine hydro-chloride or another controlled substance (Hatsukami and Fischman, 1996).

## DRUG LAWS AND THE INCARCERATION OF WOMEN

The Anti-Drug Abuse Acts of 1986 and 1988 have been instrumental in putting an ever-growing number of people into prison for longer periods of time than ever before (Thevenot, 1999). About 60 percent of federal prisoners and 23 percent of those in state and local prisons are incarcerated for drug offenses (Thevenot, 1999). Between 1985 and 1990, the amount of time women served in prison increased by 40 percent (Kaplan and Sasser, 1996).

The Bureau of Justice estimates that, if incarceration rates remain the same, 6.6 percent of U.S. residents born in 2001 will be imprisoned at some time during their lifetime (Bonczar, 2003). This statistic is disturbing in and of itself, but the increase in incarcerated women is equally troubling. If rates of criminal behavior among women do not correspond with increases in incarceration, something has gone wrong with the system that sentences them to prison. Moreover, women's incarceration will also affect a generation of children. In 1991, for example, 67 percent of women in state prisons were parents of children under the age of 18 (Kaplan and Sasser, 1996). Approximately 70 percent of these women had custody of their dependent children before going to prison. By contrast, only 50 percent of imprisoned men had custody (Kaplan and Sasser, 1996). These statistics make clear the importance of determining the relationship between U.S. drug policy and the steady increase in the imprisonment of women.

## WOMEN'S PARTICIPATION IN THE DRUG TRADE

An investigation of the way women participate in the drug trade elucidates some of the reasons for the rise in female incarceration. Much of the rapid increase in the incarceration of women has to do with drugs. Stephanie Bush-Baskette (1998) finds that the number of women imprisoned for drug offenses rose 433 percent from 1986 to 1991. By contrast, the number of men incarcerated for drug offenses rose over the same period by 283 percent (Bush-Baskette, 1998). The differences between the way men and women participate in the drug trade have played a vital role in the increase of female imprisonment.

The profile of a female offender is very likely to include drug or alcohol abuse, even more so than that of a male offender. This likelihood plays an important role in the susceptibility of women to the current drug laws. Approximately 32.8 percent of incarcerated females are in prison for drug offenses. By contrast, 20.7 percent of males are in prison for drugs (Kaplan and Sasser, 1996). Female offenders are more likely than male offenders to

have a history of drug use, and twice as many of these women as men reported using a major drug daily during the month before their arrest (Kaplan and Sasser, 1996). Over 60 percent of female inmates reported alcohol-related problems (Kaplan and Sasser, 1996). A Bureau of Justice Statistics report finds that approximately one-half of female offenders in state prisons were using drugs, alcohol, or both at the time of the offense for which they were incarcerated (Greenfeld and Snell, 1999).

Many have theorized that women's roles as wives, girlfriends, and friends of drug traffickers have led them to receive sentences out of proportion with their crimes (Bush-Baskette, 1998; Van Wormer, 2001; Rolison et al., 2002). Among imprisoned women in the late 1990s who were sentenced under mandatory minimum laws, nearly half were convicted of conspiracy (Van Wormer, 2001). These women may support their husbands or friends in the drug trade by driving a getaway car or transporting narcotics but, if caught, they face a longer prison sentence than major drug traffickers (Van Wormer, 2001). This is due to the substantial assistance provisions in the drug laws. A higher level drug dealer can provide substantial assistance. For example, the dealer might identify a superior in the drug ring and receive a mitigated sentence. By contrast, a low-level accomplice, the role in which many women find themselves, generally has nobody to turn in and no knowledge to exchange. Such an individual is therefore ineligible for the substantial assistance provisions and receives the full minimum sentence based on the amount of drugs involved in the operation (Bush-Baskette, 1998; Van Wormer, 2001; Rolison et al., 2002). This is also inequitable on another level. Two people who commit the same act of conspiracy can receive different sentences, depending on the quantity of drugs involved. The relationship between the quantity of narcotics and the prison sentence is discussed later in this article.

It is also likely that inequity of power in the drug trade will bring many women down with their drug dealer boyfriends and husbands. Some male drug dealers will turn in their own wife or girlfriend in order to receive a downward departure; this is done whether she was involved in the drug deal or not (Thevenot, 1999; Van Wormer, 2001). According to a report by the Bureau of Justice Statistics, nearly 57 percent of women in state prisons have experienced physical or sexual abuse (Greenfeld and Snell, 1999). Because so many incarcerated women have suffered some form of abuse (physical, emotional, or sexual) at some time in their lives, betrayals by drug-involved partners may reflect a larger history of inequitable power structures in these women's relationships with others (Kaplan and Sasser, 1996; Van Wormer, 2001).

The laws' gender-neutral stance on sentencing has had detrimental effects on a vulnerable population. The Anti-Drug Abuse Acts were designed to target high-level drug traffickers, yet two-thirds of the federal crack cocaine offenders in 2000 were street-level dealers (U.S. Sentencing Commission, 2002a). It is clear that the acts have been ineffective in achieving their goals. They have instead created a larger problem by incarcerating those with the least power in the drug trade for disproportionately long periods of time.

#### DIFFERENCES IN THE INCARCERATION OF BLACK AND WHITE WOMEN

Despite the fact that the Black population represents about 12 percent of the general population in the United States, Blacks make up approximately 50-60 percent of those incarcerated (Rolison et al., 2002). For women, racial differences in incarceration rates are equally apparent. An African-American woman is 8 times more likely to be imprisoned than a European-American woman and twice as likely as a Latina woman (Van Wormer, 2001). Between 1986 and 1991, the number of Black women imprisoned for drug offenses increased by 828 percent. The increase among White females was 241 percent (Bush-Baskette, 1998).

Rolison and associates (2002) find that, in the early 1990s, Blacks were also more likely than Whites to be in prison for drug offenses. The likelihood that a Black person and a White person would be imprisoned for a violent crime was roughly the same. Therefore, Black women and men have not only been highly represented among incarcerated drug users, they are also more likely to be incarcerated for a drug offense than White men and women.

The differing treatment of crack and powder cocaine offenses has had a significant effect on the racial inequities in the prison population. In 1992, 91.4 percent of crack cocaine offenders were Black. In 2000, 84.7 percent of crack offenders were Black (U.S. Sentencing Commission, 2002a). Rolison and associates find that Black women are particularly affected by harsh sentences for crack cocaine offenses. They posit that this crackdown "criminalized a disproportionate number of Black women" (2002a, p. 139).

Mandatory minimum drug policies have led to sentences that are out of proportion with the severity of crimes. This is evident in the crack and powder cocaine example. In 2000, 74.5 percent of federal crack cocaine offenders were unarmed, and if they were armed, the weapons were rarely used. Only 2.3 percent of crack cocaine offenders used a weapon in the crime (U.S. Sentencing Commission, 2002a). Black women who were imprisoned for drug violations were found to be more likely to be crack dependent than Black women in

prison for violent offenses (Rolison et al., 2002). Statistics do not show a concrete connection between the use of crack cocaine and the perpetration of violence. Therefore, sentence lengths of 5 to 10 years for crack addicts are highly unjust.

In its 1995, 1997, and 2002 reports to Congress, the U.S. Sentencing Commission rejected the 100-to-1 ratio between crack cocaine and powder cocaine (U.S. Sentencing Commission, 1997, 2002*a*). In the Commission's 2002 report, it states, "The Commission firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act" (U.S. Sentencing Commission, 2002*a*, p. 91).

Originally, the 100-to-1 ratio was designed to address perceived differences in the abuse potential of the two forms of cocaine. Crack cocaine's abuse potential was believed to be greater than that of cocaine hydrochloride. Evidence shows that the differential treatment of these offenses may not be warranted, due to the similarities between the two forms of cocaine. Crack cocaine is made by mixing cocaine hydrochloride with an alkaline substance and then heating the mixture. This process forms rocks that are generally smoked (Hatsukami and Fischman, 1996). A study done by Hatsukami and Fischman finds that smoked crack cocaine and intravenously administered cocaine hydrochloride have similar tendencies to produce dependence and negative social and personal consequences (1996). Despite the potential of both forms of cocaine to produce similar negative consequences, crack and powder cocaine offenses still trigger different minimum sentences.

Therefore, despite evidence that crack cocaine is not significantly more addictive or violence-inducing than powder cocaine to warrant the difference in sentences (U.S. Sentencing Commission, 2002*a*), the mandatory minimum sentences nevertheless remain. As the incarceration rates of Black women and the demographics of crack offenders indicate, this system of disparate sentencing has had a disproportionate effect on the Black female population. The majority of these women are not receiving punishments that fit their offenses.

## RECENT DEVELOPMENTS

The Supreme Court recently declared the sentencing guidelines system to be a violation of the Sixth Amendment because it allowed judges to make factual findings that could increase sentences beyond the maximum decided by the jury (*U.S. v. Booker* [125 S. Ct. 738]; Greenhouse, 2005). In order to remedy this, the Court called for the guidelines to be advisory, rather than mandatory (Greenhouse, 2005). The effects of this step have yet to play out, but are likely

to be enormous. Several important legislators, including Senator Arlen Specter, the Chairman of the Senate Judiciary Committee, have already declared their intent to review the decision and work toward a new sentencing method (Hulse and Liptak, 2005).

#### POLICY RECOMMENDATIONS

One of the major goals of this article is to inform future decisions on sentencing methods by reviewing the effects the guidelines have had on the incarceration of women. The first recommendation is to change the sentencing discrepancy between crack and powder cocaine. Although the guidelines are now discretionary, a bias against users of crack cocaine versus powder cocaine users still exists. This is due in part to the differential treatment that these drug offenses receive in sentencing. In 1995, the U.S. Sentencing Commission suggested a 1-to-1 ratio between crack and powder cocaine, but even a 20-to-1 ratio would be significant step (U.S. Sentencing Commission, 1995). This change would increase the amount of crack cocaine involved in an offense before a mandatory minimum sentence could be triggered. A lower ratio would reduce the likelihood that someone only peripherally involved in a drug deal will be imprisoned for an extended period of time when a relatively small quantity of cocaine is involved. Reducing or eliminating the discrepancy between sentence lengths for crack and powder cocaine offenses may also start to even out the glaring inequities in the economic and racial demographics of the prison population.

Any future guidelines should also change the fact that substantial assistance is one of the few ways to receive a reduced sentence. This would restore the balance of power between prosecutors and judges. Currently, prosecutors have the ability to move for a downward departure, but judges are unable to take any action unless this motion has been made (Weinstein, 2003). Weinstein suggests a complete elimination of mandatory minimum sentencing. This is a reasonable option, but measures must be taken to ensure that judicial discretion does not become unchecked, as prosecutorial discretion currently is. A balance must be achieved between the different areas of the legal system. Perhaps this can be accomplished by greater use of review and appeal boards.

A final reform is necessary to reduce the effects of the Anti-Abuse Drug Acts and decrease the rate of incarceration. Specifically, the corrections system must evolve from one that emphasizes punishment to one that focuses on rehabilitation. Incarcerated women and men have a variety of problems that



are unlikely to go away during their imprisonment. These problems include substance abuse, mental illness, and poverty. With the right resources, inmates can begin to work on changing the circumstances that led to their incarceration.

## CONCLUSION

The mandatory minimum sentencing policies required by the Anti-Drug Abuse Acts of 1986 and 1988 have led to a massive incarceration of the American population. In particular, women have been imprisoned at an astonishing rate. These changes are due to the interaction of mandatory minimum sentencing laws with ways women participate in the drug trade. The inequality of sentencing for offenses involving crack cocaine and powder cocaine has also affected women, particularly Black women, by sending them to prison for longer, and in numbers that are disproportionately large compared to the corresponding rates among White women. In reforming U.S. drug policy and undoing the damage done by the Anti-Drug Abuse Acts, attention must be paid both to the populations affected by the policies and to the particular needs of these populations. Only in this way can we achieve a just criminal system that puts away offenders for a length of time proportionate to the offense committed and that protects the citizens who are most in need of society's help. ■

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## NOTES

<sup>1</sup>Unless otherwise specified, “Anti-Drug Abuse Acts” and “the acts” will refer in this article to the Anti-Drug Abuse Act of 1986 (U.S. Public Law 99-570; 100 Stat. 3207) and the Anti-Drug Abuse Act of 1988 (U.S. Public Law 100-690; 102 Stat. 4181).

<sup>2</sup>The Sentencing Reform Act of 1984 calls for the U.S. Sentencing Commission to submit annual amendments to the guidelines to Congress for approval. Once approved, the amendments

become law 180 days after the submission date. The guidelines were first submitted to Congress in 1987 (U.S. Sentencing Commission, 2004).

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