

NISKANEN C E N T E R

June 21, 2021

Chair Dick Durbin
711 Hart Senate Office Building
Washington, D.C. 20510

Ranking Member Chuck Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Hearing by the Senate Committee on the Judiciary Regarding the EQUAL Act and Federal Sentencing for Crack and Powder Cocaine

Chair Durbin, Ranking Member Grassley, and Honorable Members of the Committee,

My name is Michael Javen Fortner. I am a senior fellow at the Niskanen Center and assistant professor of political science at the City University of New York's Graduate Center. I study the development of crime policies in the United States and their consequences. My book *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment*, published by Harvard University Press in 2015, examined the role working- and middle-class African Americans played in the passage of mandatory minimum sentences in New York state. **On behalf of the Niskanen Center, I enthusiastically support the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act, which would eliminate the crack/powder quantity disparity of 18:1.** The origins of the crack/powder disparity are not what many progressive opponents claim them to be, but neither have the outcomes been what proponents intended.

Although some scholars attribute the disparity to a moral panic created by the death of famous athletes and sensationalized media accounts, crack use and trafficking generated real problems for urban black communities. As one Harlem resident recalled,

Crack was something else and I don't mean the drug itself...[What] I mean is what it did to the community, to the family. People couldn't trust their own kids. It was like prison. Nobody wanted to let their children leave the house because you never knew what was gonna be waiting outside.¹

An elderly resident put it this way:

The crack was the worst...[T]hat was the end. Those that could get git [left], well the rest, peoples like me, we just had to stay inside. Crackheads would steal

¹ Beverly Xaviera and Mindy Thompson Fullilove, "Crack Cocaine and Harlem's Health," in *Dispatches from the Ebony Tower: Intellectuals Confront the African American Experience*, ed. Manning Marable (New York: Columbia University Press, 2000), p. 130.

everything. You wouldn't even go outside soon as it got dark. It was worse than dope. Seemed like every other person or [their] children or somebody they [knew] was on crack.²

In July 1986, a few months before the passage of the Anti-Drug Abuse Act, the United Black Church Appeal, a coalition of African American religious and civic leaders, organized vigils and rallies across New York City to publicize the crack problem and pressure public officials to act. The Reverend Wendell Foster, an African American city councilman and the president of the United Black Church Appeal, declared, “We are engaged in a new form of genocide.” He added, “As devastating as drugs may be in the white community, they are 10 times worse in the black community.”³ Charles Hughes, African American president of Local 372, District Council 37 of the American Federation of State, County and Municipal Employees, hoped the rallies would send “a clear message to our elected officials” and demand “an end to the [heyday] that CRACK dealers have enjoyed until now.” He explained, “Penalties must replace profits for those who are trafficking in drugs and the [high-level] drug [kingpins] must be apprehended and brought to justice as well as [street-level] pushers.”⁴

New York City was not unique. Anti-drug campaigns emerged in black communities across the United States. Not only did Harlem’s U.S. Representative Charles Rangel help draft the broader bill; most members of the Congressional Black Caucus co-sponsored and voted for it. Additionally, historian David Farber reports that “none of the bill’s opponents cited the disparity in punishment for dealers of crack and powder cocaine as reason for their disapproval.”⁵

The ratio was a grave mistake. We know that now. In hindsight, relying on mandatory minimum sentences in general to solve the cocaine problem was a mistake. As one study found,

Despite harsher [Anti-Drug Abuse Act] penalties for crack compared to powder cocaine, there was no decrease in crack use following implementation of sentencing policies . . . Furthermore, there was no change in crack use following the [Fair Sentencing Act], but powder cocaine use decreased, despite no changes

² Id.

³ Gary Gately, “On City Street Corners, Night of Antidrug Vigils,” *New York Times*, July 22, 1986, B1.

⁴ “People vs. Crack,” and “Press Release: Plan Massive Rally Against Crack in Queens,” AFSCME, Local 420, Hospital Workers Records WAG. 215, Box 12, Folder 57, Robert. F. Wagner Labor Archives, Tamiment Library, New York University, New York, NY.

⁵ David Farber, *Crack: Rock Cocaine, Street Capitalism, and the Decade of Greed* (Cambridge: Cambridge University Press, 2019).

to powder cocaine sentences . . . suggesting that drug use is driven by factors not associated with sentencing policy.⁶

Another study, which examined the cost-effectiveness of mandatory minimum sentences at achieving reductions in cocaine consumption and cocaine-related crime, found that spending money enforcing mandatory minimum sentences reduces cocaine consumption less than either non-mandatory drug sentencing or treating heavy users.⁷

While ineffective at solving the problem, the crack/powder disparity did contribute to higher incarceration rates, particularly among African Americans. Prior to mandatory minimums for cocaine, African Americans only had an 11 percent higher average federal drug sentence than whites. Four years after the change, that ballooned to a 49 percent higher average sentence.⁸ According to the American Civil Liberties Union, “Under the 100:1 ratio, African American crack cocaine offenders were routinely given much harsher sentences than other cocaine offenders for comparable conduct.” The organization found that “by 2004, African Americans served virtually as much time in prison for a non-violent drug offense (58.7 months) as whites did for a violent offense (61.7 months).”⁹

Thus, the hastily conceived crack/powder disparity did more to imprison African Americans than it did to liberate their communities from the damage of drug addiction and the violence of drug trafficking. Despite the well-intentioned origins of the Anti-Drug Abuse Act, the pain and injustice caused by the ratio is unmistakable. The path forward is clear. In 2010, Congress wisely lowered the disparity from 100 to 1 to 18 to 1. Congress should finish this work, completely end the disparity, and restore a degree of equity to the criminal justice system.

⁶ Lauryn Saxe Walker & Briana Mezuk, “Mandatory minimum sentencing policies and cocaine use in the U.S., 1985–2013,” *BMC Int Health Hum Rights* 18, 43 (2018).

⁷ Jonathan P. Caulkins, et.al., “Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?” (Santa Monica, CA: RAND Corporation, 1997).

⁸ Deborah J. Vagins and Jesselyn McCurdy, “Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law” (Washington, D.C.: American Civil Liberties Union, 2008).

⁹ American Civil Liberties Union, *Dorsey v. U.S. and Hill v. U.S. - ACLU Amicus Brief* (Supreme Court of the United States, 2012).