

The Criminal Record



U.S. District Judge William K. Sessions (left) and former U.S. District Judge and Professor of Law Paul G. Cassell.

Mandatory Minimums and the Crack/Powder Sentencing Disparity

The United States' incarceration system presents a challenging social crisis. This is true both in terms of overall numbers and rates of persons incarcerated and in terms of the disproportionate number of people of color (specifically African Americans and Hispanic Americans) incarcerated.

As of June 2006 there were over 2.2 millions Americans incarcerated in the nation's prisons and jails. This constitutes a 500% increase in the number of people incarcerated in the U.S. since 1972, at a rate that is 5-8 times higher than the incarceration rates of other industrialized nations. African Americans constitute 900,000 of the total 2.2 million incarcerated and as of 2001, one in six American black men were incarcerated. In 2005, Hispanics comprised 20% of the

state and federal prison population and incarceration rates for Hispanics are more than double those for non-Hispanic whites.¹ These increases do not reflect increases in the incidence or seriousness of crime; rather, they result from specific and deliberate policy choices made by state and federal lawmakers.

The Anti-Drug Abuse Acts of 1986 and 1988 are examples of policy decisions that have led to massive growth in prison populations in general and to racial

disproportion in prisons in particular. The 1986 Act² instituted mandatory penalties for crack cocaine sales that have been characterized as the harshest in history. The law established drastically different penalty structures for crack and powder cocaine sales, based on the understanding that crack cocaine was more dangerous than powder cocaine and posed a greater threat to public safety. This is what has come to be known as the 100-to-1 sentencing disparity.

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A NEWSLETTER OF THE STANFORD CRIMINAL JUSTICE CENTER: Stanford's vehicle for promoting and coordinating the study of criminal law and the criminal justice system, including legal and interdisciplinary research, curriculum development, and preparation of law students for careers in criminal law.

Director's Note



As the Fall 2007 quarter dawns, we at the Stanford Criminal Justice Center (SCJC) find ourselves both expanding our work on sentencing and corrections policy and turning our attention in some interesting and challenging directions. One of these new directions relates to diversion courts. We have formed a partnership with the Fresno County Superior

Court to conduct a process and outcome evaluation on their new juvenile behavioral health court – helping them learn about what works, what does not, and what they can do to help the youth of the county who suffer from mental health problems avoid becoming entangled in the criminal justice system. Another new direction involves DNA collection – we have been asked to participate in a working group tasked with crafting a policy that would permit the collection of DNA in ways that do not compromise our civil liberties and privacy rights.

We have also added a special section to *The Criminal Record* entitled *Focus on the Students: Notes from Stanford's Criminal Law Society*. Our hope is that this section will appear in every issue and will provide our colleagues in criminal justice law and policy with a glimpse into the many activities our criminal law students are engaged in. This issue of *Focus on the Students* lists all of the Stanford Law students who worked in criminal law or criminal justice policy over the summer of 2007 and describes their experiences. We are very proud of our students' accomplishments and are pleased to devote a section of *The Criminal Record* to their work.

As noted, we are also expanding our more established work, especially in the field of sentencing and corrections policy. Since our last newsletter we have hosted two meetings of *The Stanford Executive Sessions on Sentencing and Corrections*, both of which are described in great detail in this issue. In addition, as our feature article explains, we recently had the privilege of hosting then U.S. District Judge Paul Cassell and current U.S. District Judge William K. Sessions (also the Vice Chair of the U.S. Sentencing Commission) in a joint public lecture on mandatory sentencing and the crack/powder cocaine disparity, thus expanding our already-extensive work in sentencing policy to cover two of the most salient issues in federal sentencing policy today.

As usual, this issue of *The Criminal Record* will also include information about conferences we have attended, events we have hosted at Stanford, announcements, and upcoming events. We hope you enjoy reading the Fall 2007 issue of *The Criminal Record* as much as we have enjoyed writing it.

Kara Dansky

Executive Director, Stanford Criminal Justice Center

ANNOUNCEMENTS

The SCJC is pleased to announce the arrival of our 2007-2008 Research Fellow, David Ball (J.D. '06). As a fellow at the SCJC, David will draft policy proposals for ways in which information technology can be used to promote "best practice" policies and outcome tracking in California criminal justice state and county agencies.



The SCJC was awarded a Faculty Grant for Undergraduate Research from Stanford University's Vice Provost for

Undergraduate Education (VPUE). The goal of this program is to allow individual faculty members and research center affiliates to support undergraduates' participation in their current research and scholarly projects. With the support of the VPUE Faculty Grant, the SCJC was able to hire Peter Squeri, a Stanford senior who worked for the SCJC during the summer of 2006. Peter was instrumental in the development of The Stanford Executive Sessions on Sentencing and Corrections by researching the foundations of California sentencing and corrections, attending the March and June 2007 Executive Sessions meetings, and drafting the reports from the Sessions.

“I have had a wonderful experience working at the SCJC. Both Bob and Kara have been wonderful mentors who I both respect tremendously as intellectuals and also enjoy being around.”

Peter Squeri (VPUE Faculty Grant for Undergraduate Research 2007 recipient).



Focus on the Students:

Notes from Stanford's Criminal Law Society

The Criminal Law Society is Stanford Law School's student organization devoted to supporting and promoting interest in criminal law at the law school. CLS organizes numerous workshops, speakers, and other criminally minded activities, but it's most proud of its members, who devote countless hours serving the public through work in the criminal justice system. In the summer of 2007, CLS students had tons of experience working on criminal law issues. Here are just a few examples:

MICAH BLOCK '09 worked this summer at the US Attorney's Office in San Jose, CA. He carried his own misdemeanor caseload and appeared in federal court on behalf of the United States, wrote research memos and motions to help Assistant US Attorneys with their felony cases, and managed the petty offense calendar (prosecuting minor infractions on federal enclaves). He reports that the San Jose branch office is small, extremely collegial, and a great place to be a summer clerk!

ANDREW BRUCK '08 worked this summer at the Department of Justice, Criminal Division. Andrew worked in the Public Integrity Section, which handles political corruption and election crimes prosecution. The work mostly involved legal writing and research, but he also had the opportunity to attend arraignments, plea hearings, and sentencings and to assist the DOJ attorneys in obtaining warrants and overseeing undercover federal investigations.

ANDREW CANTOR '08 worked this summer at the Department of Justice, Fraud Division. At the start of the summer he spent most of my time on political corruption cases. Over the whole summer, though, he got exposure to a wide variety of other types of fraud prosecution, including the Foreign Corrupt Practices Act (international bribes), health care fraud, and public benefits fraud.

THOMAS NOSEWICZ '08 worked this summer at the Federal Defenders of New York. He assisted in investigations, legal research and writing for indigent defendants being prosecuted in the Southern District of New York.

JESSICA OATS '09 returned at the end of the summer to the Southern Center for Human Rights in Atlanta, Georgia, where she worked before enrolling at SLS. While there she assisted with investigation and defense of capital cases.

ERIN E. SCHANNING '09 worked this summer at the Department of Justice, Criminal Division. Erin worked in the Office of Policy. Her work focused on researching and developing policy on federal sentencing guidelines as well as the Federal Rules of Criminal Procedure.

LAUREN SCHULMANN '09 worked this summer at the San Francisco Public Defender's Office. She interviewed and met regularly with clients, wrote and filed motions, conducted legal research, wrote memoranda, and worked with expert witnesses. She spent at least half of her time either in jail or in court. Her internship culminated with conducting two preliminary hearings on her own, during which she cross-examined witnesses in court.

CAITLIN WEISBERG '08 worked this summer at the Defenders Association of Philadelphia. She interviewed clients and represented clients at arraignments, bench warrant hearings, and alternative rehabilitative dispositions. She also researched criminal law issues and helped attorneys prepare for trial.

The Stanford Executive Sessions on Sentencing and Corrections

The Executive Sessions forum is an innovative type of policy working group, the purpose of which is to bring together the key public, academic, and organizational leaders in the field of sentencing and corrections policy in a spirit of cooperative movement toward reform of the sentencing and corrections systems in California.

The *Stanford Executive Sessions on Sentencing and Corrections* includes leaders from the California Department of Corrections and Rehabilitation, the California Correctional and Peace Officers Association, the legislature, the judiciary, academia, county agencies, and nonprofit groups. We believe that the Stanford Executive Sessions provides an ideal forum and structure for the transformation of research into policy and practice, and are grateful to The Pew Charitable Trusts Public Safety Performance Project and the Vera Institute of Justice for their support of our work.

The second Executive Sessions meeting, held in June 2007, was entitled *California Corrections Reform: State/Local Partnerships* and focused on four topics:

- (1) the current status of California corrections reform, especially in the wake of Assembly Bill 900, "The Public Safety and Offender Rehabilitation Act of 2007";
- (2) the establishment of state-local funding partnerships to control crime and corrections costs;

- (3) the importance of fortifying rehabilitation services, probation, and jails; and
- (4) the prevention of recidivism through the establishment of reentry facilities and community partnerships.

The complete report can be found on our website: <http://www.law.stanford.edu/program/centers/scjc/>.

The third Executive Sessions meeting, held in September 2007, was entitled *The Role of the Judiciary in Shaping Sentencing Law and Policy* and focused on the role of the California judiciary in sentencing and in the sentencing reform movement. The meeting convened California judges with academics and judges from other states who have been influential in developing sentencing law and policy in their states. The goal was to enable state judges to share their views – and see what, if any, consensus they might reach – on a series of questions related to the future of sentencing in California. A complete report of the third Executive Sessions meeting is forthcoming.



Top to bottom: Professor Robert Weisberg, Stanford Law School; Carole D'Elia, Project Manager, Little Hoover Commission; James Tilton, Secretary, California Department of Corrections and Rehabilitation

The SCJC Hosts the American Bar Association Death Penalty Representation Project

In August 2007, the SCJC hosted the ABA Death Penalty Representation Project's annual recruitment event for the state of California. Created in 1986, the Death Penalty Representation Project raises awareness about the lack of representation available to death row

inmates, addresses the urgent need for counsel by recruiting competent volunteer attorneys, and provides these attorneys with the training and assistance they need to provide competent representation for their clients. The Project also works for systemic changes in the

criminal justice system that would assure those facing death are represented at all stages of the proceedings – from trial through clemency – by qualified, adequately compensated counsel. Stanford Law Professors Pam Karlan and Larry Marshall described their own experiences with capital representation and encouraged several local attorneys to consider taking capital cases.

Evaluating the Fresno Juvenile Behavioral Health Court

The Fresno Superior Court has asked the SCJC to conduct a process and outcome evaluation of its first juvenile behavioral health court. The purpose of the court is to provide evidence-based interventions for youth with identified mental health problems and ensure coordinated case management of youth receiving mental health services while involved in the justice system. The SCJC will be conducting extensive interviews and focus group meetings with all of the players in the system (offenders, family members, court staff, judges, probation officers, defense attorneys, and service providers); evaluating program processes according to subjective and objective criteria; and analyzing data in order to evaluate program outcomes. We are pleased to have the assistance of Salena Copeland (JD '07) in this endeavor.

Workgroup: California's Authorization of the Taking of DNA of Arrested Individuals

In January 2009, under Proposition 69, California law enforcement officials will begin to take the DNA of any individual arrested for a felony offense and certain misdemeanors even if the person is never charged or convicted. The DNA profiles of arrested individuals will also be uploaded to the national Combined DNA Indexing System (CODIS).

The permanent retention of DNA from innocent people poses significant threats to individual privacy and autonomy. Furthermore, as Blacks and Latinos are disproportionately targeted at arrest due to racial profiling, the implementation of Proposition 69's arrestee provisions will serve to exacerbate this problem. It is imperative that criminal justice and racial justice advocates in the state of California and nationwide engage in a dialogue about the expanded uses of DNA by law enforcement.

The Center for Genetics and Society, the ACLU of Northern California, and the Council for Responsible Genetics have invited the SCJC to participate in a working group whose purpose is to formulate strategic approaches to addressing California's DNA collection laws. The workgroup is a collaborative effort designed to find ways of encouraging the development of a progressive yet precautionary approach to genetic technologies that does not sacrifice our civil and human rights. The workgroup held its first meeting in September 2007.

Undergraduate Seminar: The History of Punishment and Sentencing in California (Fall 2007)

Stanford University's sophomore seminars aim to personalize education for students considering a major, encourage a spirit of mentorship between students and faculty, and provide a small-group introduction to a specific area of a department's or program's curriculum.

This course examines the history of California's approach to punishing and sentencing criminal offenders, beginning with passage of its first criminal statute in 1850 and continuing through present day sentencing and prison reform efforts.

For much of the 20th century, California lead the nation in developing thoughtful approaches to handling criminal offenders and in 1976 became one of the first states to enact a determinate sentencing law. In the last thirty years, however, California's determinate sentencing structure has developed into a complicated set of inconsistent and incoherent sentencing laws, and today California's sentencing system is widely regarded as a disaster.

This course traces the history of California's criminal sentencing system in an attempt to uncover possible explanations for this remarkable evolution. Students study various relevant periods in California's history, including the indeterminate sentencing era and the lead-up to the enactment to the Determinate Sentencing Act, as well as major developments in California's sentencing system, such as the enactment of the Three Strikes Law in 1994. Students are also introduced to and required to evaluate various reform efforts currently underway.



Former U.S. District Judge and Professor of Law Paul G. Cassell (right) and U.S. District Judge William K. Sessions.

Mandatory Minimums

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The 1988 Act³ instituted a mandatory penalty of five years in prison upon conviction of simple possession of five grams of crack cocaine.⁴

The law's effect on the disproportionate number of African Americans in United States prisons is staggering. On average, sentences imposed in crack cocaine offenses are three years longer than for offenses involving powder cocaine, two years longer than sentences imposed for methamphetamine, and four years longer than sentences imposed for heroin.⁵ African American drug defendants have a 20 percent greater chance of being sentenced to prison than white drug defendants, despite the fact that rates of drug use and sales are equal across racial categories.⁶ African Americans now serve virtually as much time in prison for drug offenses (58.7 months) as whites do for violent offenses (61.7 months).⁷ Moreover, because mandatory minimum penalties focus on the quantity of drugs involved rather than on offender culpability, defendants with different levels of culpability are given the same harsh sentences. This means that the harshness of mandatory minimum sentencing is felt primarily by offenders

with the lowest degree of culpability.⁸

This year the United States Sentencing Commission took action by amending the federal sentencing guidelines to lower guideline sentences for crack cocaine offenses.⁹ However, the Commission does not have the authority to repeal the mandatory minimum penalties for crack cocaine sentences. There are currently six bills before the United States Congress addressing this issue and the Sentencing Commission recommended in May of 2007 that Congress take action this year to remedy this gross disparity.¹⁰ In addition, the U.S. Supreme Court has accepted certiorari in the case of *Kimbrough v. United States*,¹¹ a crack cocaine possession case in which a federal judge imposed a below-guidelines sentence, stating that the sentence called for under the guidelines was higher than necessary to do justice in the case.

On September 6, 2007, the SCJC had the privilege of hosting former U.S. District Judge and Professor of Law Paul G. Cassell and U.S. District Judge William K. Sessions in a public address focusing on the issues of mandatory sentencing and the crack/powder disparity. Professor Cassell explained some of the many reasons why mandatory penalties are inconsistent with

principles of justice and fairness in sentencing and why judges, rather than prosecutors, should be the ones to determine the length and seriousness of an offender's punishment. Judge Sessions traced the history of federal sentencing policy and highlighted the efforts of the U.S. Sentencing Commission (of which he is Vice Chair) to remedy the crack/powder sentencing disparity.

The event was co-sponsored by the The Stanford Federalist Society, The Stanford Black Law Students Association, and The Stanford Criminal Law Society. A video reproduction of the event can be found on our website (<http://www.law.stanford.edu/program/centers/scjc/>).

¹ All statistics are taken from United States Department of Justice's Bureau of Justice Statistics, 2006 Report.

² Pub. L. No. 99-570, 100 Stat. 3207 (1986).

³ Pub. L. No. 100-690, 102 Stat. 4181 (1988).

⁴ The penalty for simple possession of any quantity of any other controlled substance (other than drugs specifically used in order to perpetrate a sexual assault) by a first time offender is a *maximum* of one year in prison.

⁵ The Sentencing Project, *Federal Crack Cocaine Sentencing* (July 2007).

⁶ United States Sentencing Commission, *Report to Congress: Federal Cocaine Sentencing Policy* (May 2007).

⁷ United States Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics* (2003).

⁸ *The Sentencing Project, Federal Crack Cocaine Sentencing* (July 2007).

⁹ See United States Sentencing Commission, *Report to Congress: Federal Cocaine Sentencing Policy* (May 2007).

¹⁰ See id.

¹¹ *United States v. Kimbrough*, 174 Fed. Appx. 798, 799 (4th Cir. 2006), cert. granted by *Kimbrough v. United States*, 127 S. Ct. 2933 (2007).

The 2007 California Judicial Symposium on Public Safety, Sentencing and Corrections

In June 2007, the SCJC's Faculty and Executive Directors attended the 2007 California Judicial Symposium on Public Safety, Sentencing and Corrections, hosted by California's Administrative Office of the Courts. The conference's primary audience was California jurists, although several academics, program administrators, and practitioners attended as well. The purpose of the conference was to update participants on the state of California sentencing and corrections, and to initiate a discussion in California on the role of the judiciary in this area. Conference topics included: sentencing systems in other states; the roles of sentencing commissions in other states; the rates and costs of crime, incarceration, recidivism, and corrections in California and other states; state and community corrections systems throughout the United States; parole, post-release supervision, and re-entry initiatives in California and other states; the use of evidence-based practices in reducing recidivism; and the use of sentencing information systems to optimize a jurisdiction's use of sentencing and corrections data to control crime and incarceration. Judge Roger Warren and the AOC did an outstanding job of organizing and presenting this material.

The 2007 State Legislative Network Conference of the National Association of Criminal Defense Lawyers

In July 2007, the SCJC's Executive Director served on a sentencing policy panel at the NACDL's annual state legislative network conference. The subject of her presentation was the role of academic institutions in building consensus for reform. The other two panelists were John Van de Kamp, former California Attorney General, and Barbara Tombs, Director of the State Sentencing Policy Project at the Vera Institute of Justice.

The 2007 Annual Meeting of The National Association of Sentencing Commissions

The National Association of Sentencing Commissions consists of representatives of state sentencing commissions and the U.S. Sentencing Commission. Each year the group meets to share their experiences, highlight sentencing reform efforts that have succeeded, note sentencing reform efforts that have failed, and take in the most up-to-date information concerning sentencing reform across the country. This year the SCJC's Faculty Director participated in a panel on the subject of post-release supervision. The Executive Director participated in a panel on the subject of California sentencing reform and directed a roundtable on reentry policies. The Executive Director was also elected to serve on the organization's Executive Committee.

The 2007 Convention of the State Bar of California

In September 2007, SCJC Faculty Director Robert Weisberg addressed the State Bar of California at its annual convention on the topic of *Sentencing in California in a Post-Cunningham World*. Along with Justice Steven Perren of the California Court of Appeal, Deputy Attorney General Larry Daniels, and Contra Costa Public Defender David Coleman, he addressed the future of case law and legislation in California as it faces the fall-out from the Supreme Court's decision in *California v. Cunningham*. In that 2007 case the Supreme Court of the United States held the "triad" structure of California sentencing unconstitutional under *Blakely v. Washington*, the dramatic 2004 case that extended the right to jury trial to many sentencing questions previously left to post-jury judicial decision. A key issue examined at the panel was the scope (and even the viability) of the doctrine making proof of prior convictions an exception to the *Blakely* principle.

Upcoming SCJC Events

December 7, 2007

The Stanford Executive Sessions on Sentencing and Corrections (this meeting is closed to the public and press).

January 25, 2008

8:30 a.m. to 5:30 p.m.

Stanford Law School, Room 180

The Evolving Role of Victims in the Criminal Justice System (this symposium is open to the public and students are encouraged to attend).

About *The Criminal Record*

The Stanford Criminal Record is produced by the staff of the Stanford Criminal Justice Center.

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The Stanford Criminal Record is published quarterly and issues are available on our website. Articles, letters, and photos are welcome. Please send them to:

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