

## The Cocaine Sentencing Disparity

There is a gross injustice occurring in the United States that needs to be addressed. Persons taking part in what is essentially the same illegal act of drug use are being sentenced vastly differently. There is a large disparity in the mandatory minimum criminal sentencing for the trafficking and possession of crack cocaine and powder cocaine. In 1986 and 1988 two federal sentencing laws were passed that established a 100:1 quantity ratio between the amount of crack cocaine and powder cocaine that would prompt mandatory jail sentences<sup>1</sup>. A person found with 500 grams of powder cocaine will likely receive a 5-year prison sentence. A person found with just 5 grams of crack cocaine will serve the same sentence. This policy is unfair to crack cocaine offenders and must be rewritten.

The federal government argues that the addictive nature of crack cocaine and violence associated with its sale are valid justification for the sentencing disparity. These explanations provide no compelling reason to create the enormous difference in mandatory minimum jail sentences for nearly identical drugs. There are also blatant racial undertones in this policy. The large majority of people sentenced for crack cocaine trafficking or possessions are black while the majority of users are, in fact, white<sup>2</sup>. Powder cocaine offenders are much more racially integrated with roughly equal parts white, black and Hispanic. Thus, this policy is creating a racial divide in the number of minorities sent to prison and it is obvious that the sentencing procedures are racially

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<sup>1</sup> The Sentencing Project. "Crack Cocaine Sentencing Policy: Unjustified and Unreasonable." <http://www.sentencingproject.org/pdfs/1003.pdf>, 1.

<sup>2</sup> Webb, Gary, "Flawed Sentencing the Main Reason for Race Disparity," *Mercury News*, 20 Aug 1996.

biased. It is time to equalize the sentencing of users or dealers found with either crack or powdered cocaine, and recognize the severe consequences present with any drug use regardless of who uses what drugs and where they primarily use them. I will show how the differences in crack and powder cocaine are negligible (especially when accounting for the large difference in sentencing), how this policy is racially motivated and why it should be changed to put crack and powdered cocaine dealers and users on the same level under the law.

To understand why there is a difference in dealing crack versus powder cocaine under the law we must first understand the differences between crack and powder cocaine. Both crack and powder cocaine are derived from the South American coca plant. The cocaine is extracted from the plant and dried in a paste of cocaine sulfate. Finally, the cocaine is treated chemically to form a salt known as cocaine hydrochloride, which is a white crystalline powder. This is powder cocaine. Crack cocaine is derived from cocaine hydrochloride by treating the salt with baking-powder to form a rock which can then be smoked (heating up this rock creates a crackling sound, hence the name “crack”)<sup>3</sup>. The psychotropic and physiological effects of crack and cocaine are, in fact, the same. Both crack and powder cocaine are stimulants, which induce feelings of alertness, euphoria, control and liveliness and they suppress hunger, boredom and fatigue. The body uses up energy reserves to give the user this feeling, which is why users often feel very sluggish, lethargic and depressed when they come down from the high and have depleted their

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<sup>3</sup> Weil, Andrew, Winifred Rosen. *From Chocolate to Morphine*. New York: Houghton Mifflin Company, 1993, 45.

energy stores<sup>4</sup>. The main difference between these two forms of the drug is the method of administering each one into the body.

Powder cocaine is typically snorted into the nostrils where it is absorbed through the mucus membranes of the nose and delivered to the bloodstream. This creates a 15 to 45 minute high<sup>5</sup>. Crack cocaine is smoked and inhaled into the lungs, where it enters the bloodstream via the lung walls. This method allows faster absorption of the drug and will allow for a more intense high that is shorter than that obtained from snorting cocaine. It will last usually between 5 and 15 minutes. Thus, the physical differences between the two versions of the drug are minimal (smoking crack can lead to some respiratory problems and snorting the powder can affect the nasal membranes as well). At best, based upon the length of the high, crack cocaine is roughly three times as intense as powder cocaine. However, they produce the same effects in the body and are therefore both classified under the same drug schedules. The major concern cited by the government in creating its sentencing policy is the level of addictiveness of each type of cocaine<sup>6</sup>. Cocaine is a highly addictive drug. The body craves more when it comes down because of the feelings of depression and sluggishness associated with the absence of the drug. It is argued that crack cocaine, giving the user a more intense high, is more addictive than the powdered form, which provides a reason for the increased sentence time.

While it may be true that crack cocaine is somewhat more addictive than powder cocaine, this provides no rational basis for a 100:1 ratio in sentencing. There is no real way of quantifying addictiveness and the level of addictiveness is different for every user.

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<sup>4</sup> Weil. *Chocolate*, 46.

<sup>5</sup> Hatsukami, DK. "Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?" <http://cocaine.org/crack/index.html>, 13.

<sup>6</sup> Sentencing Project, *Crack Cocaine*, 2.

Some will try one of both of the forms once or twice and never use again. For some, addiction will set in with ease and harm them, regardless of the form of cocaine they use. There are no absolutes when it comes to drug addiction yet the policy relies on this very assumption. If addiction is an argument for harsher sentencing then the judiciary and the policy-makers are quantifying the addictive nature of crack at 100 times more than that of powder cocaine. This figure has no physical basis and, although, many experts may agree that, on the whole, crack can prove more addictive creating a 100:1 ratio based on this is simply unethical and unfair to users who happen to buy crack cocaine instead of the powdered form. I firmly believe, however, that the government is using the addictive nature of cocaine as a guise for their true motivations for creating the sentencing disparity. Addictiveness is a weak argument as both drugs are admittedly highly addictive, and this fact is different in every user and unquantifiable.

Crack is often portrayed as a violence inducing substance. The stereotypical crack user is a poor black urbanite who will use any means necessary to get his next fix. Powder cocaine, on the other hand, is seen as an upper-class white drug used by businessmen and clubbers. This distinction has led policy-makers to justify their sentencing recommendations by labeling crack traffickers and users as volatile and violent, more so than powder cocaine dealers. In fact, in May 2002 the US Sentencing Commission alerted congress that much of the violence associated with crack is inaccurate<sup>7</sup>. In the fiscal year 2000 25.4% of powder cocaine cases were linked with weapons involvement and only 35.2% of crack cocaine cases were linked. The weapons

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<sup>7</sup> Coyle, Michael. "Race and Class Penalties in Crack Cocaine Sentencing," The Sentencing Project. <http://www.sentencingproject.org/pdfs/5077.pdf>, 4.

were only used in 1.2% of powder cocaine offenses and 2.3% of crack cocaine crimes<sup>8</sup>.

While there is more weapon use related to crack cocaine cases it is certainly not 100 times more, proving the excessive nature of the sentencing policy.

It is unfair to use this fact as a reason for increasing 100 fold the sentences handed to users with crack. It is the judiciary's duty to punish crack users for their possession of crack, not for the possibility of violence. It is completely unfair that a poor non-violent mother would be sent to jail much longer for buying 5 grams of crack to feed her addiction, than for buying 5 grams of powder cocaine which she could not afford. Why should she be punished for the violence of others she in no way supports? It is unjust to base a practice as serious as jail time on a perceived stereotype for which all users cannot be proven to uphold. The United States court system is set up to put the burden of proof on the prosecution. Thus, the prosecution should have the responsibility for proving violence. The current sentencing policy, however, gives a free pass to the prosecution to charge addicted crack users with violence they did not commit while not holding the same standard to offenders using powder cocaine, also a violence causing addictive drug.

Congress claims that crack cocaine is both more addictive and violence inducing than its powdered cousin. Under these claims, they feel that a sentencing disparity is warranted to more harshly punish crack cocaine users and peddlers. Their claims are outrageous and discriminatory towards crack users. The same drug should receive the same punishment. Even so, I have shown how a higher addiction rate does not justify a 100:1 ratio and how charging crack users with violence ingrained in their convictions goes against the American justice system and treats innocent people unfairly, especially

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<sup>8</sup> Coyle, "Race", 4.

in respect to their powder cocaine counterparts. In other words, powder and crack cocaine are not sufficiently distinguishable to justify the 100:1 ratio. The reasons congress puts out are simply a cover for the true motivations; racism, elitism and a general unwillingness to rehabilitate instead of incarcerate.

There racial disparity present among persons convicted of possession or trafficking of crack cocaine is obscene and is only aided by the 100:1 ratio. According to a report published by *The Sentencing Project* about 2/3 of crack cocaine users are white or Hispanic. However, crack cocaine convictions for possession in 1994 were handed primarily to blacks. The defendants in 1994 were 84.5% black, 10.3% white and 5.2% Hispanic. For the offense of trafficking the defendants were 88.3% black, 4.1% white and 7.1% Hispanic. For powder cocaine, in 1994, the defendants of possession were 26.7% black, 58% white and 15% Hispanic, and for trafficking, the defendants were 27.4% black, 32% white and 39.3% Hispanic<sup>9</sup>. It is hard to look at these figures without questioning the racial motives behind the sentencing policy.

This trend has not gone unnoticed in the United States courts. Several challenges to the sentencing policy have been made on constitutional grounds. Arguments have been set forth that the 100:1 quantity ratio denies equal protection and due process, constitutes cruel and unusual punishment, and that the policy is vague under the terms of the constitution<sup>10</sup>. Unfortunately, these arguments have failed in federal appellate court. In the case *United States v. Armstrong*, a motion was granted for dismissal of a case against four black defendants convicted of crack offenses. The motion was upheld by the district and circuit court after it was found that all 24 crack cocaine cases decided in Los Angeles

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<sup>9</sup> Sentencing Project, Crack Cocaine, 2.

<sup>10</sup> Sentencing Project, Crack Cocaine, 3.

in 1991 involved blacks<sup>11</sup>. Unfortunately, the federal prosecutor refused to comply with the motion and the Supreme Court backed his decision. On the state level there has been some support as the Minnesota Supreme Court struck down their 10:3 quantity ratio on the grounds that it was unconstitutional under their equal protection clause.

Unfortunately, in this country we have stereotyped inner-city blacks as poor, violent, drug users who are a threat to society. These same stereotypes peg poor blacks as prime candidates for crack cocaine use as it is cheaper than the powdered version. Thus, to keep the violent addicts of the street the government struck using the very crack that kept the users poor. The presence of racism is especially striking when we take note of the fact that 2/3 of crack cocaine users are white or Hispanic. If this is so, then the defendants for possession of crack cocaine should roughly be 66% white or Hispanic. Whites and Hispanics make up only 15.5% of the defendants, though. There is no doubt that policy makers are targeting negative stereotypes and the police are carrying out orders to remove the stereotypes from the streets. Because of the policies and racist undertones the crack users are kept in jail much longer than their rich, white counterparts using powder cocaine.

Prisoners are not only incarcerated as a form of punishment, but as well as for reform and rehabilitation. In the case of cocaine sale and use, prison is supposed to prevent the dealers from selling, rehabilitate the addicts by cutting them off from their source and reform both parties. However, the government is not doing much in terms of helping the users fight their addictions. In 1991, 24.5% of inmates in state prisons and 15.7% in federal prison were receiving treatment for their addictions. In 1997, those

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<sup>11</sup> Sentencing Project, Crack Cocaine, 3.

figures had dropped to 9.7% in state prisons and 9.2% in federal prisons<sup>12</sup>. The policy that is meant to deter and rehabilitate is actually worsening the condition. These inmates are being unfairly incarcerated for extensive amounts of time. They are actually receiving less help than they need as time goes on.

There is also evidence that drug use actually increases in prison<sup>13</sup>. Because of the close quarters within which inmates live and the stress and depression associated with prison, many inmates will turn to drugs to ease their suffering. An Irish study of prison inmates and drug use reported that 20% of drug users actually began their use while incarcerated<sup>14</sup>. Incarceration approaches uselessness if there is no reform of the prisoners when they leave. It is even less useful if they start using drugs or increase their use in the prisons. And because the crack users are sentenced for much longer than powder cocaine offenders they have a much longer period within which they can become even more addicted to the drug and unhealthy. This is unacceptable and must be dealt with, firstly by reducing the sentencing guidelines and prisons must then, also be reformed.

Several reasons have been given for the justification of the 100:1 ratio and they have all proven unfit as validation for the program. It is an unfair, racist program, which provides no efforts for reform and even hurts offenders chances for recovery. What then, should be done to fix these problems? There have been many efforts over the years urging congress to reduce the 100:1 quantity ratio and treat crack offenders fairly and equally with powder cocaine offenders. The United States Sentencing Commission was established in 1984 to develop sentencing guidelines to recommend to congress for

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<sup>12</sup> The Sentencing Project. "Drug Policy and the Criminal Justice System," <http://www.sentencingproject.org>, 5.

<sup>13</sup> Canadian HIV/AIDS Legal Network. "Mandatory Minimum Sentences for Drug Offences: Myth vs. Reality." [http://www.aidslaw.ca/Media/backgrounders/Backgrounder\\_20Apr06.pdf](http://www.aidslaw.ca/Media/backgrounders/Backgrounder_20Apr06.pdf), 1.

<sup>14</sup> Canada, "Mandatory" 1.

federal crimes. Part of their mission was to reduce egregious sentencing disparities. In 1995, the commission recommended to equalize the 100:1 ratio. Congress rejected their recommendation, which was the first congressional rejection of any recommendation from the sentencing commission, and President Bill Clinton signed the rejection into law<sup>15</sup>. The commissions study advised congress to lower the ratio to at most 20:1 in their original report and has since recommended this or lesser ratios several times; all have been rejected by congress.

Congress will not listen to the heavily researched recommendations set forth in a report by a committee they created. There are clearly bigger issues at stake here, such as the racism and class issues discussed above. The ratios suggested by the committee still gave congress the power to punish crack offenders more harshly than powder cocaine defendants. The recommendations support the unfairness and excessive nature of the 100:1 quantity ratio and looks to equalize how offenders of the substances are viewed under the law. In 1997, the sentencing committee recommended a 5:1 ratio by weight and in 2002 the commission recommended increasing the amount of crack triggering a five-year mandatory minimum sentence from 5 grams to at least 25 grams. Along with this, they urged congress to repeal any mandatory minimum sentences for simple crack cocaine possessions<sup>16</sup>. This commission has thoroughly done its research, producing several detailed reports on the reasoning behind its recommendations. It is time for congress to listen sincerely to the commission's findings and treat crack cocaine offenders fairly.

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<sup>15</sup> Sentencing Project, Crack Cocaine, 4.

<sup>16</sup> Sentencing Project, Crack Cocaine, 4.

Congress cannot be entirely faulted, however, for their unwillingness to shift their views on this issue. The United State Sentencing Commission has been altering their recommendations since their creation and there are crucial matters at stake, especially in the area of public safety. Thus, a policy needs to be created that will be fair to both the crack and powder cocaine users as well as the concerned members of congress. I have designed a policy that I feel accomplishes both of these goals. It is not flawless, but it provides a great foundation and good meeting grounds for both sides. The 100:1 ratio needs to be brought down. It is unjustified and grossly out of proportion. A more reasonable ratio for trafficking is 3:1 and for possession, 1:1 by quantity. This is a much fairer ratio and still allows for the notion of addiction and violence because of the dealers to be included. The 3:1 ratio for dealers allows prosecutors to put away the source of the crack longer. Cutting off the sources will help alleviate the addiction and the 3:1 ratio is fair because crack is more addictive and there is a bit more violence associated with it. However, the mandatory minimum quantity of crack triggering jail time should be increased from 5 grams to 25 grams. This prevents simple addicts from over-serving jail time and equalizes the playing field for crack and powder cocaine users. Finally, to allow for punishment of dangerous and violent crack related crimes, the policy should include jail time increases for any cases involving the possession or use of a weapon at the discretion of the federal prosecutor. Thus, public safety concerns can be taken care of as violent offenders will be imprisoned for longer periods of time and simple addicts will not have to suffer because of the violent offenders' mistakes. This proposed policy is fair to both sides and also allows for some discretion by the prosecution side to protect the safety of the public.

The current sentencing policy is unfair and unproductive. People using the same drug are being treated unequally by a factor of one hundred. Minor differences between crack cocaine and powder cocaine in no way warrant a factor of 100 difference in sentencing. The supposed addictive and violent nature of crack cocaine provide no justification. The racist undertones are much too prevalent to ignore. The legislative history has not established itself quite yet, but there are certainly precedents alleging to government acceptance of a racist system. There have been several recommendations by the United States Sentencing Commission to lower the 100:1 ratio and equalize how crack and powder cocaine users are viewed under the law. Congress has been unwilling to listen to the well researched testimony of the commission and by doing this is only supporting the racism and unfairness present in the policy. I have proposed a new policy that is both fair and strict. It will allow addicts to reform and punish violent traffickers. It is time to reform this policy and treat crack cocaine offenders fairly.

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