

RACE AND CLASS PENALTIES IN CRACK COCAINE SENTENCING

By Michael Coyle*

Overview

After a decade of contentious debate regarding the federal sentencing disparities between crack cocaine and powder cocaine, a number of significant initiatives to reform current policy have recently emerged. These include legislation introduced in Congress and a series of hearings resulting in recommendations by the United States Sentencing Commission.

This briefing paper provides the background to these initiatives by surveying the differences between crack cocaine and powder cocaine as currently held by medical and other professionals. It also reviews the development of federal legislation that has created greater criminal penalties for crack than powder, and assesses recent developments in the effort to resolve these sentencing disparities.

Crack cocaine became prevalent in the mid-1980s and received massive media attention due in part to its exponential growth in the drug market. The explosive popularity of crack cocaine was associated with its cheap price, which for the first time made cocaine available to a wider economic class. In the wake of widespread media attention, crack was portrayed as a violence inducing, highly addictive drug that created a plague of social problems, especially in inner city communities.

With the media spotlight focusing on crack, Congress quickly passed federal sentencing legislation in both 1986 and 1988. This included mandatory sentencing laws based on the premise that crack cocaine was 50 times more addictive than powder cocaine. For good measure, Congress doubled that number and came up with a sentencing policy based on the weight of the drug an individual was convicted of selling. Thus, federal sentences for crack were constructed to relate to sentences for powder cocaine in a 100:1 quantity ratio. The result is that while a conviction for the sale of 500 grams of powder cocaine triggers a 5-year mandatory sentence, only 5 grams of crack cocaine are required to trigger the same 5-year mandatory sentence. Similarly, while sale of 5,000 grams of powder leads to a 10-year sentence, only 50 grams of crack trigger the same 10-year sentence. These laws remain in effect today.

The Difference Between Crack Cocaine and Powder Cocaine

Powder cocaine is made from coca paste, which is derived from the leaves of the coca plant. Crack cocaine is simply 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.¹

* Michael Coyle is a Research Associate with The Sentencing Project.

¹ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002.

Initially, crack cocaine was widely viewed as a social menace that was categorically different from powder cocaine in its physiological and psychotropic effects. However, these assumptions were more reflective of the prevalent panic and fear that arose out of the explosive growth of the crack market than conclusions of scientific investigation. While federal law has constructed a penalty structure that reflects these assumptions, only 14 states have adopted laws that distinguish between powder cocaine and crack cocaine in their penalty schemes, and only one (Iowa) utilizes the 100:1 quantity ratio of the federal system.

Over time, numerous studies have shown that the physiological and psychotropic effects of crack and powder are the same, and they 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 cocaine and powder cocaine.² 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.³

Violence and the Myth of the “Crack Baby”

While politicians in the capital debated policy, crack cocaine, like all illicit drugs, found its niche on the street. When crack hit the drug market in the 1980s it arrived as a technological innovation that made the “pleasures” of cocaine available to people who could not previously afford it in the expensive powder form. As Alfred Blumstein, of Carnegie Mellon University points out, crack cocaine, as an innovation, initially produced vigorous competition in the drug market.⁴ As with all illegal markets, crack distribution rights and boundaries were apportioned amongst competitors with the use of violence. In time the dust has settled, the markets have matured and the associated violence has significantly decreased.

Initially, the high violence associated with the maturation process of the crack market fostered a perception that the ingestion of crack instigated violent behavior in the individual user. However, studies have since shown otherwise. Charles Schuster, who argues that prolonged use of high doses of crack or powder can produce a form of paranoid toxic psychosis in which aggressive acts are more likely, also qualifies that he “know(s) of no evidence, however, that this is more likely to occur after the use of crack as opposed to powder cocaine.”⁵

In its May 2002 recommendations to Congress, the United States Sentencing Commission (the Commission) stated that the current penalties on crack are based on beliefs about the association of crack offenses with violence that have been shown to be inaccurate. 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 further, that both powder and crack

² Dorothy K. Hatsukami, and Marian W. Fischman, “Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?” *Journal of the American Medical Association*, November 20, 1996.

³ Testimony of Charles Schuster before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002.

⁴ Testimony of Alfred Blumstein before the United States Sentencing Commission, February 21, 2002.

⁵ Testimony of Charles Schuster, op. cit.

cocaine cause distribution-related violence. In a study of thousands of federally prosecuted cocaine cases, the Commission reports that, for FY 2000, weapon involvement for powder cocaine offenses was 25.4% and for crack cocaine offenses, 35.2%. The frequency with which weapons are actually used is much lower. For powder offenders the use rate is 1.2% and for crack offenders it is 2.3%, not a difference, the Commission argues, that justifies a 100:1 quantity disparity.⁶ The Commission also argues that the solution is not to encapsulate offenders in lengthy mandatory sentences that assume all crack offenders are violent. Rather, the commissioners suggest federal law should begin by assuming crack offenders are nonviolent and then apply new guidelines for increased punishment for violent offenses.

Crack cocaine was also initially widely viewed as a menace that was ravaging not only inner city adults but also innocent babies. The notion of the “crack baby” became common and was associated with the weak, shivering and inconsolable newborn (most often African American) infant, experiencing immediate and long-term effects of withdrawal from crack. Over time these descriptions have been interpreted in the medical field as the result of hysteria and not fact. Deborah Frank, a professor of Pediatrics at Boston University describes the “crack baby” as “a grotesque media stereotype (and) not a scientific diagnosis.”⁷ She also finds that in pregnant crack users the effects on the fetus are no different than for those who are pregnant and in poverty, or those using tobacco or alcohol, or those having poor prenatal care or poor nutrition. Finally, from her studies she concludes there is no evidence of increased risk of birth defects for women using crack during pregnancy, and that newborns of crack-addicted mothers have no withdrawal symptoms. The crack baby, it turns out, was a ghost.

Drug Quantities and Crack Cocaine Penalties

The federal sentencing laws Congress passed in 1986 and 1988 were designed in part with the purpose of hindering the crack cocaine drug trade. The intent of Congress was to impose a minimum ten-year prison sentence on a major trafficker (e.g. a manufacturer or head of organization distributing large drug quantities) and a minimum five-year sentence on a serious trafficker (e.g. a manager of a substantial drug-trade business).⁸ As such, the laws were constructed to respond to the quantity of drugs involved in the offense.

However, the weight numbers attached to the sentences via the Anti-Drug Abuse Act of 1986 fail to capture the different roles associated with 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, traffickers⁹ (see Table 1). The median crack cocaine street level dealer (comprising two-thirds of federal crack defendants) charged in federal court was arrested holding 52 grams of the substance, enough to trigger a 10-year mandatory sentence. For powder cocaine, the median street level dealer is charged with holding 340 grams of drugs, not enough even to trigger the 5-year sentence.

⁶ United States Sentencing Commission, op. cit.

⁷ Testimony of Deborah A. Frank, M.D. before the United States Sentencing Commission, February 21, 2002.

⁸ Testimony of Commissioner John R. Steer before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, May 11, 2000 (see <http://www.house.gov/reform/cj/hearings/00.05.11/SteerTestimony.htm>).

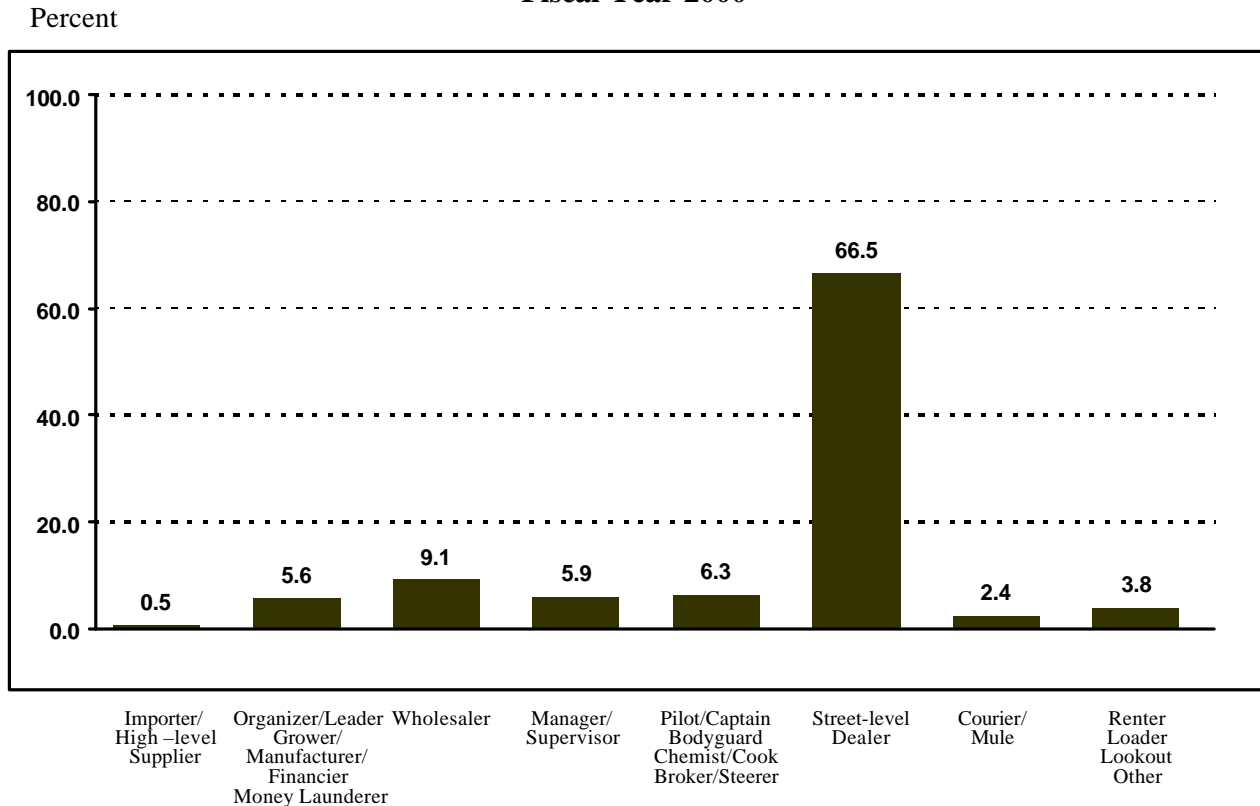
⁹ United States Sentencing Commission, op. cit., p. 45, Figure 10.

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

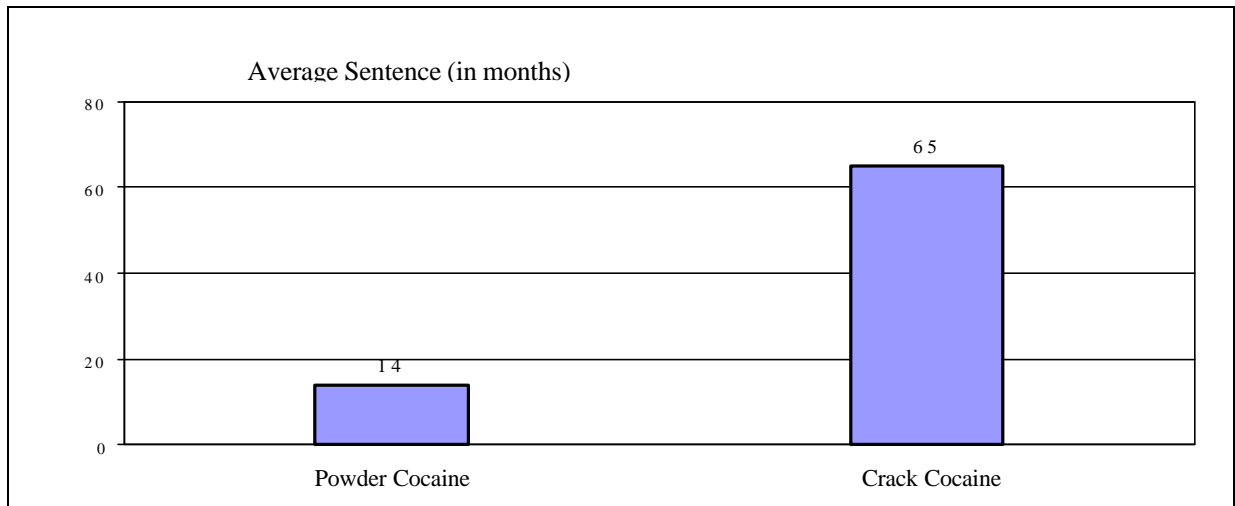
The results of these erroneous calculations have been dual. First, they have resulted in extremely severe prison terms for low-level crack offenders, who form two out of every three crack offenders (see Figure 1). Second, with mandatory minimum sentences focusing solely on quantities, offenders with different levels of culpability are often lumped together. As the Commission’s May 2002 report to Congress stipulates, “Contrary to the intent of Congress, the five and ten year minimum penalties most often apply to low level crack cocaine traffickers, rather than to serious or major traffickers” (see Figure 2).

Figure 1
Offender Function in Crack Cocaine Cases
Fiscal Year 2000



SOURCE: U.S. Sentencing Commission, 2000 Drug Sample.

Figure 2
Cocaine Sentences for Quantities Less Than 25 Grams



SOURCE: U.S. Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, March 17, 2002.

Some experts believe crack is more likely to be abused because of its brief high and low price. Charles Schuster argues that while research illustrates smoked crack and intravenous powder offer the same high, and that while the 100:1 ratio is indefensible, a ratio of disparity should be kept. The reason for this, he contends, is that crack cocaine has adverse public health and social consequences that are potentially greater than those for powder because of the ease with which crack can be smoked repeatedly. This ease, he argues, makes crack appealing to many who would not put needles into their bodies. Thus, “although individual risk may not vary between smoked crack and injected powder the numbers (of people) at risk of becoming addicted to crack may be significantly greater.” Consequently, his recommendation is a 3:1 ratio.¹⁰

Critics of the sentencing disparities between crack and powder have drawn other arguments. For example, Los Angeles federal Judge Terry Hatter argues that contrary to what is in place currently, penalties for powder should be higher than crack since the latter cannot be made without the former.¹¹ Professor Blumstein makes the same argument for a different reason. He believes that powder sentences should be higher than crack sentences because (a) powder trafficking has more offenders above the street level than crack trafficking (in federal powder offenses only 29% are street-level, whereas in federal crack offenses 66% are street-level), and (b) while only 37% of powder offenses are limited to neighborhood or city areas, 75% of crack offenses are limited to the same areas.

¹⁰ Testimony of Charles Schuster, op. cit.

¹¹ Neil A. Lewis, “Justice Department Opposes Lower Jail Terms for Crack.” *The New York Times*, March 20, 2002, Wednesday, Late Edition - Final, Section A, page 24, column 5.

The disparity between the two cocaines goes beyond the 100:1 quantity ratio. Crack is also the only drug that carries a mandatory prison sentence for first offense possession. For example, a person convicted in federal court of possession of 5 grams of crack automatically receives a 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 1 year in prison.

For most, the 100:1 sentencing ratio between crack and powder appears inexplicably extreme. Even many intimately involved with enforcing crack penalties find current federal law overly punitive and assert it inappropriately targets a drug population that consists primarily of addicts who possess or sell crack to support their own habit.¹²

Evolution of the Sentencing Disparity between Crack Cocaine and Powder Cocaine

In 1984 Congress created the United States 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 sentencing disparity, finding it to be unjustified by the small differences between the two forms of cocaine. The Commission advised equalizing (1:1) the quantity ratio that would trigger the mandatory sentences. The Commission also counseled that the federal sentencing guidelines should provide criteria other than drug type to determine sentence lengths, so that, for example, offenders engaging in violence would receive longer sentences than offenders who do not. Congress rejected the recommendations and refused to change the law, which marked the first time it did so in the Commission's history.

Two years later, in April 1997, the Commission once more recommended that the disparity between crack and powder cocaine be reduced, again by weight, this time providing Congress a range of 2:1 to 15:1 to choose from. The new recommendation was based on both raising the quantity of crack and lowering the quantity of powder required to trigger mandatory minimum sentences. Congress, however, again did not act on the recommendation. By the end of the year the Clinton Administration, which throughout the "tough on crime" political climate of the 1990s had supported Congress' rejections of the Commission's recommendations, signaled some agreement with the Commission's call for reform. Though not until the last year of his second term, President Clinton did endorse a 10:1 ratio to be arrived at by raising crack weight minimums and lowering powder ones. Congress, however, made no revisions.

In 2001-02 there has been a new thrust to reconsider crack cocaine policies. As evinced in its 2002 *Report to Congress*, which again calls for reducing sentencing disparities, the Commission conducted extensive studies and held three public hearings at which it received testimony from the medical and scientific communities, federal and local law enforcement officials, criminal justice practitioners, academics, and civil rights organizations. In addition, the

¹² Testimony of Charles J. Hynes before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002.

last year has seen the Drug Sentencing Reform Act of 2001 proposal, which in a like manner seeks to transform current crack cocaine federal sentencing policy. The bill, which has not yet been heard on the floor, was introduced by Senator Jeff Sessions (R-AL) and co-sponsored by Senator Orrin Hatch (R-UT), two leading conservative members of the Senate. The fate of this bill, along with that of the Commission's 2002 recommendations (see below), is yet to be determined.

In its May 2002 *Report to Congress*, the Commission unveiled a study of thousands of federally prosecuted cocaine cases sentenced between 1995 and 2000, expert testimony gathered from a series of public hearings and a survey of U.S. district and appellate judges. In the report the Commission unanimously affirmed that while a greater punishment for crack vs. powder is warranted, the disparity of 100:1 ratio is not appropriate. Specifically, the report recommends Congress:

- Increase crack weight minimums:
 - For the five-year mandatory sentence from 5 to 25 grams (a 20:1 ratio)
 - For the ten-year mandatory sentence from 50 to 250 grams (a 20:1 ratio)
- Repeal the mandatory minimum for simple possession of crack cocaine
- Direct the Commission to provide enhancements for a drug crime that involves a dangerous firearm, violence resulting in bodily injury, distribution to protected individuals/locations, repeat offenders, and importation of drugs by offenders who do not perform a mitigating role in the offense
- Maintain the powder trigger at present levels of 500 and 5,000 grams

The Commission argues that if adopted, the recommendations would narrow the difference between average sentences for crack and powder from 44 months to 12 months, and that the average crack sentence would change from 118 to 95 months and for powder from 74 to 83 months (see Figure 3).

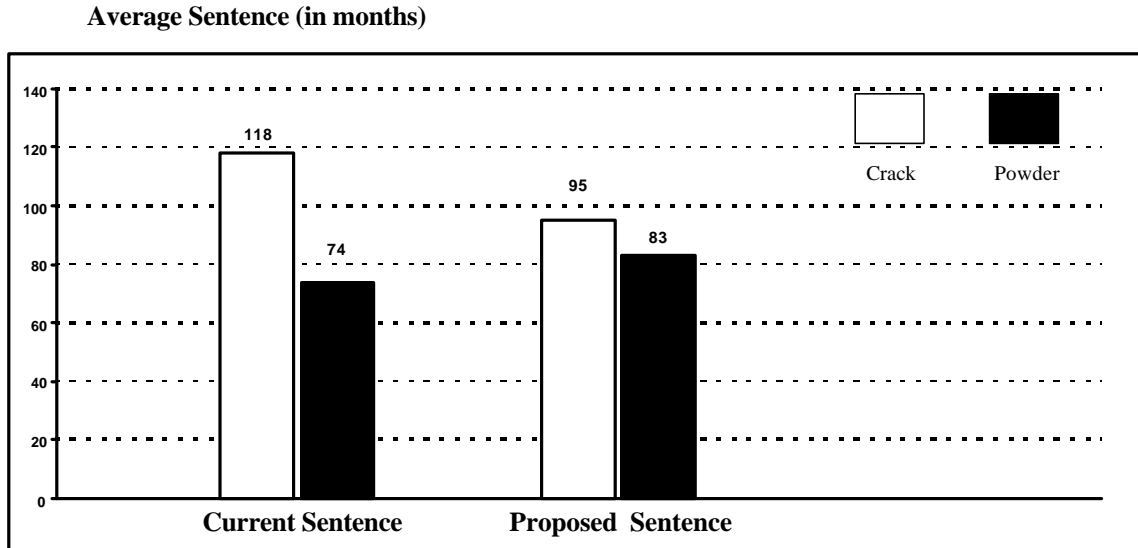
Race and Class in Crack Cocaine and Powder Cocaine Law and Enforcement

The failure of Congress to amend the sentencing disparities between crack cocaine and powder cocaine reflects a culture-wide set of misconceptions about crack – who uses it, who sells it, and what the consequences of its trade, such as violence, have been. Many have submitted that the disparities illustrate something much more disturbing, namely, a deeply embedded racist and classist undertone to our society's political, legal and law enforcement structure.

In its February 2002 testimony before the U.S. Sentencing Commission, the Leadership Conference on Civil Rights reports that despite similar drug use rates between minorities and whites, minorities are disproportionately subject to the penalties for both types of cocaine.¹³ Congress has not lacked this information, as the Commission has been reporting it for over a decade. Research on patterns of drug purchase and use demonstrates that overall drug users

¹³ Testimony of Wade Henderson before the US Sentencing Commission, February 25, 2002 (see <http://www.civilrights.org>).

Figure 3
Current and Proposed Sentences
Of All Major Drug Trafficking Offenders
Fiscal Year 2000



Assumes crack cocaine mandatory minimum of 25 grams and enhancements for weapons, bodily injury, prior drug felony, and importation (for powder and crack cocaine only).

SOURCE: U.S. Sentencing Commission, 2000 Datafile, USSCFY00 and the Commission’s Prison Impact Model.

report their main drug providers are sellers of the same racial or ethnic background as they are.¹⁴ Yet, as the Commission’s data shows, in the year 2000, of all federal crack defendants, 84% were black.

Most criminal justice analysts argue that racial disparities in arrest and imprisonment relate to demographics. Crack is usually sold in small quantities in open-air markets. Powder is more expensive and is usually sold in larger quantities behind closed doors in locations that are inherently private. In urban areas the “fronts” of crack use and sales are large metropolitan centers which gather the greater emphasis of law enforcement. Since minorities and lower income persons are most likely to inhabit these areas, they are therefore at greater risk of arrest for crack cocaine possession than are white and higher income powder offenders. The latter inhabit working class and upper-class neighborhoods where drug sales are more likely to occur indoors instead of the street sales of the urban neighborhoods that receive disproportionate (greater) attention from law enforcement. Though it is true that open-air drug sales are easier to observe than indoor drug sales, the current allocation of law enforcement resources results in a policing structure that is race and class imbalanced. Coupled with the harshly unequal penalties

¹⁴ Dorothy Lockwood, Anne E. Pottieger, and James A. Inciardi, “Crack Use, Crime by Crack Users, and Ethnicity,” in Darnell F. Hawkins, ed., *Ethnicity, Race and Crime*. New York: State University of New York Press, 1995, p.21.

between the two cocaine drugs, the result can only be described as a race and class oriented drug policy.¹⁵ Understandably, such law enforcement has been called evidence of racial profiling.¹⁶

Since the two forms of cocaine are pharmacologically indistinguishable, by dictating harsher sentences for possession of crack than for possession of powder, the law is more severely punishing the poor, who obtain the affordable form of cocaine (crack), than the affluent, who obtain the more expensive form of the same drug (powder). Were alcohol illegal, this would be the equivalent of imposing a higher punishment for the sale of a cheap jug of wine than for an expensive French wine.

The 100:1 quantity ratio in the federal system has been legally challenged as unconstitutional on the grounds that it denies equal protection or due process, and because the penalties constitute cruel and unusual punishment. However, courts have generally not responded positively to such a claim, not least because a “discriminatory intent” on behalf of lawmakers’ cannot be proven. Human Rights Watch, on the other hand, has not hesitated to describe federal crack sentencing policy as “an indefensible sentencing differential (that is) unconscionable in light of its racial impact.”¹⁷

Reforming the Crack Cocaine and Powder Cocaine Sentencing Disparity

In his 2002 testimony to the Commission, Deputy Attorney General Larry D. Thompson, the second-ranking official in the Department of Justice, argued that the current federal policy and guidelines for sentencing crack cocaine offenses are appropriate. Thompson claims that the high rate of persons of color affected by crack in inner city neighborhoods translates into a responsibility to protect minorities from drug sellers in their communities, and that hence stricter sentences for crack are not only justified but necessary. Ethan Nadelmann, executive director of the Drug Policy Alliance, a New York group that promotes alternatives to the war on drugs, says the government claims to be protecting minority communities but its harsher enforcement of crack has never worked out that way.¹⁸ As Charles J. Hynes, the District Attorney for Kings County in New York, sums up, “the simple fact is that although both populations have similar rates of drug abuse, minority drug defendants are serving substantially longer prison sentences than non-minority defendants.”¹⁹

While others, such as the International Association of Chiefs of Police, have joined the Department of Justice’s call for lowering powder cocaine weight minimums that trigger the mandatory sentences, none note how such an act will, again, mostly affect low-level defendants. The wisdom of such a move that would fill even more cells with low-level offenders serving long mandatory sentences at enormous public expense is questionable. As Federal Bureau of Prisons Director Kathy Hawk Sawyer has testified to Congress “70-some percent of our female

¹⁵ David S. Musto, *The American Disease: Origins of Narcotic Control*. New York: Oxford University Press, 1999. (See also, Michael Tonry, *Malign Neglect – Race, Crime and Punishment*. New York: Oxford University Press, 1995).

¹⁶ Testimony of National Council of La Raza before the US Sentencing Commission, February 25, 2002.

¹⁷ Testimony of Human Rights Watch before the United States Sentencing Commission, February 25, 2002 (see <http://www.hrw.org>).

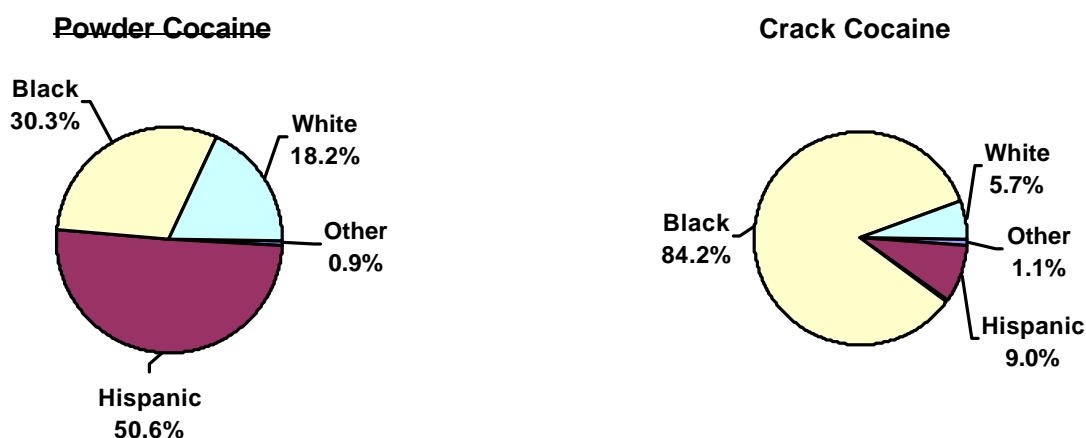
¹⁸ Neil A. Lewis, op. cit.

¹⁹ Testimony of Charles J. Hynes, op. cit.

populations are low-level, nonviolent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums.”²⁰

The American Civil Liberties Union has argued that lowering powder minimums under the current racially uneven enforcement patterns would have the effect of increasing the number of minorities in prison.²¹ Indeed, as the Commission’s 2000 report shows, even though the black proportion (30.3%) of powder cases is much lower than that for crack, most of the white defendants are ethnically Hispanic (50.6%) - which means the total minority proportion of powder cases is 81% (see Figure 4).²² Assuming law enforcement practices in the drug market remained the same, it would be the case that instead of decreasing disparities for African American and Hispanic communities, decreasing the amount of powder required to trigger minimum sentences would actually increase disparities.

Figure 4
Race/Ethnicity of Cocaine Offenders
Fiscal Year 2000



SOURCE: U.S. Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics.

²⁰ Testimony of Kathy Hawk Sawyer before the Subcommittee on the Departments of Commerce, Justice, and State, The Judiciary and Related Agencies of the Committee on Appropriations. Washington, D.C.: U.S. Government Printing Office: 2000.

²¹ American Civil Liberties Union, Press Release, March 19, 2002.

²² U.S. Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics.

The ACLU further claims congressional resistance to reform is based on ignorance and fueled by media hysteria, and accuses Congress of tying the hands of judges by forcing them to impose unfair and extraordinary harsh mandatory minimum sentences on low-level crack offenders. Senator Leahy also argues that to increase powder penalties to counteract imbalances created by levels set for crack when no sector of law enforcement has made the proposal that current cocaine law is not sufficient makes little sense.²³

Another argument has come from former White House Special Counsel and Professor of Law, George Mason University, William G. Otis. At a May 2002 hearing of the Subcommittee on Crime and Drugs of the Senate Judiciary Committee Professor Otis claimed that though the sentencing disparity should be addressed, this should not be done by increasing the minimum crack weights. His argument is that such a change will send the wrong message, namely that it is now less dangerous to consume or deal crack.²⁴ Professor Otis claimed a sentencing system should not be engineered with one eye to race and also argues that race disparities can work the other way: for example, blacks constitute only 1% of defendants sentenced for methamphetamine offenses.

In conclusion, the current 100:1 sentencing ratio communicates to minorities and the poor a message of inherit inequity in both the law and the courts. This message breeds discontent and creates cynicism about law enforcement, and is becoming a social fact of great consequence. As Wade Henderson of the Leadership Conference on Civil Rights argues, “The drug war will continue to lack credibility in minority communities until these sentencing laws are changed.”²⁵ The Commission’s 2002 report to Congress argues that even the perception of racial disparity is problematic because it fosters disrespect for and lack of confidence in the criminal justice system among the very groups Congress intended would benefit from the heightened penalties for crack cocaine offenses. The consequences are visible. As Charles J. Hynes, District Attorney for New York’s Kings County disclosed in his testimony to a hearing of the Judiciary Committee, in selecting jurists he and his prosecutorial colleagues are faced with the “fact (that) minorities believe overall that law is unfair towards minorities.”²⁶

Conclusion

In its May 2002 report to Congress the Commission reported that for FY 2000 a street-level dealer of crack on average received a sentence of 103.5 months – almost nine years. In comparison the mean maximum state prison sentence for all violent offenses is 100 months. While dramatic hyperbole has defined much of the history of crack cocaine and its prosecution, increasingly a sober and impartial assessment of drug sentencing is being called for.

The call for a new assessment of sentencing has come from diverse voices, and a plethora of useful ideas in need of immediate implementation have surfaced. The Leadership Conference on Civil Rights has asked Congress to review the interaction of mandatory minimum drug

²³ Statement of Senator Patrick Leahy before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002.

²⁴ Testimony of William G. Otis before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, May 22, 2002.

²⁵ Leadership Conference on Civil Rights, Press Release, May 22, 2002.

²⁶ Testimony of Charles J. Hynes, *op. cit.*

sentencing laws and the tactics and priorities of federal law enforcement agencies. The National Council of La Raza and the Mexican American Legal Defense and Education Fund have recommended turning the tide of drug use by investing in alternatives to punishment for first time, non-violent, low-level drug offenders. In his Drug Sentencing Reform Act of 2001 Senator Sessions has suggested a pilot program to remove federal nonviolent elderly offenders (65 and over) from prisons into home detention. Perhaps most interestingly, Alfred Blumstein asked the U.S. Sentencing Commission to urge Congress to sunset its mandatory minimum sentencing drug laws to enable the Commission to emerge with a careful, rational and deliberative structure. Professor Blumstein's idea responds to most legislators' fear of appearing "soft on crime" and the consequent difficulty they would have in voting for a repeal of any drug or crime law. With sunseting, such laws would have to be reconsidered after some period of time, and the ineffective ones left to quietly disappear in the absence of a strong reason to extend them.

Lastly, Congress would do well to consider District Attorney Charles J. Hynes' model of the Drug Treatment Alternative to Prison program (DTAP). This program takes chronic drug offenders who sell drugs to support their habit, a revolving door population in prisons, and subjects them to a 15 to 24 month rigorous, intensive residential drug treatment. The recidivism rate of its graduates at the end of their first post-treatment year is half the rate of eligible defendants who did not participate and were sentenced to state prison. Hynes contends that the program is saving the state of New York almost two million dollars a year. As he says, "it makes no sense to warehouse nonviolent drug abusers in prison... only to have them return to a life of crime and drugs when they are released to the community."²⁷ Indeed, few changes would have as great an impact on the drug war as legislative revisions aimed at mandating treatment alternatives for a drug population that consists primarily of addicts who possess or sell drugs to support their habit.

Drug policy is a critical aspect of today's criminal justice system as it constitutes a major feeder into the mostly African American and Latino prison/jail population of nearly two million people. What is at issue in considering the legislation of crack cocaine sentencing is proportionate punishment that will be free of racial, ethnic or class discrimination. As one Senator put it, the principles that guided the first acts of Congress on crack cocaine were at best uninformed. It remains to be seen whether Congress or the Bush Administration will accept more modest recommendations that will eliminate the race and class penalty of the drug war. Public opinion will ultimately be critical to influencing public policy on this often-emotional issue.

²⁷ Testimony of Charles J. Hynes, op. cit.