



The Crack & Powder Cocaine Disparity: Tackling Hard Questions

In 1986, Congress passed the Anti-Drug Abuse Act, which created a disparity between federal penalties for crack cocaine and powder cocaine offenses, despite the two substances being nearly identical drugs. Regarding the disparity, former Republican congressman and California attorney general Dan Lungren admitted years later, "We didn't really have an evidentiary basis for it."¹

Decades later, Congress has an opportunity to remove the unfair and unnecessary sentencing disparity with the EQUAL Act (S. 524, H.R. 1062). As the legislation proceeds, a number of challenging questions regarding cocaine crimes and sentencing have emerged. This document seeks to answer those questions with data-based evidence and by looking to the states for examples.

Is there greater violence associated with crack cocaine than powder cocaine?

First, federal drug trafficking cases overall are overwhelmingly nonviolent. Each year, an extremely small number of these cases involves threats or use of violence, and less than one in five involves weapon possession. In FY 2020,

- Only 1.2 percent of 15,877 drug trafficking sentences were enhanced because a person used or threatened violence
- Only 17 percent of federal drug trafficking sentences were enhanced for weapon possession.²

Second, for crack offenses specifically, violence has dropped over time. Myriad studies have shown that violence associated with crack cocaine in the 1980's was caused by rapid expansion of drug markets and competition over previously unestablished territories. As markets stabilized in later decades, violence associated with crack cocaine trafficking plummeted.³

While gun possession rates are higher in crack cases, this is, ironically, because many people sentenced for crack offenses are low-level offenders, not the large-scale traffickers Congress intended to target with mandatory minimums. A greater percentage of federal crack cocaine sentences have been enhanced due to gun possession than powder cocaine sentences (39.3% compared to 19.6% in 2020).⁴ However, this is likely due to a significant difference in the roles of those convicted for each drug.

¹ 156 Cong.Rec. H6202 (July 28, 1986).

² USSC, Use of Guidelines and Special Offense Characteristics: Guideline Calculation Based, FY 2020, at 28 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use_of_SOC_Guideline_Based.pdf.

³ Alfred Blumstein, The Notorious 100: I Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance, Federal Sentencing Reporter (October 2003), <http://graphics8.nytimes.com/images/blogs/freakonomics/pdf/BlumsteinFedSentencing.pdf>.

⁴ USSC, Quick Facts: Crack Cocaine Trafficking Offenses FY2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY20.pdf; USSC,



Because of the need for self-protection, street-level dealers are the most likely to carry a firearm compared to importers, leaders, managers, or couriers.⁵ In 2016, 45% of people convicted of crack cocaine offenses were street-level dealers, compared to just 10.2% of powder cocaine convictions.⁶ Disparate mandatory minimum thresholds for crack and powder cocaine contribute to these disparate conviction populations. The median base offense level in 2020 crack cocaine cases corresponds to 28-112 grams, compared to 3.5-5 kilograms for powder cocaine offenses.⁷ People sentenced for crack offenses are not kingpins.

Finally, the sentencing guidelines already allow courts to enhance sentences for violence and weapon possession. The crack-powder sentencing disparity adds a double punishment for this conduct, but does it indiscriminately – people convicted of crack offenses get harsher sentences regardless of whether they are actually violent. This is unjust and wastes public safety resources on long sentences for people who are not using violence. Enhancements for violence and weapons should be applied based on the role and behavior of individuals through specific guideline sentence modifications rather than addressing the issue by proxy through disparate treatment of different forms of the same drug.

Should lawmakers be concerned about slightly reducing sentences for crack cocaine-related offenses during a drug overdose epidemic?

No. The overdose epidemic has been a nationwide tragedy that has impacted far too many families. By far the biggest driver of overdose deaths in recent years have been opioids, including fentanyl. Overdose deaths resulting from just cocaine (i.e., absent any opioid) made up 5.5% of overdose deaths in 2019, while opioid involvement accounted for 70.6% of overdose deaths.⁸ This crisis requires a bold response but maintaining an unrelated inequality in sentencing for a drug that is not the primary driver of the epidemic is neither appropriate nor necessary.

Will ending the disparity cause an increase in drug use or related crimes?

No. Research has found that changes to federal mandatory minimum sentencing have not impacted crack cocaine use or trafficking supplies. Usage rates of crack cocaine were unchanged following the creation of the 100:1 crack/powder disparity in 1986, and usage did not increase following the Fair Sentencing Act of 2010, which reduced the disparity to 18:1.⁹ The U.S.

Quick Facts: Powder Cocaine Trafficking Offenses FY2020, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Powder_Cocaine_FY20.pdf.

⁵ Alfred Blumstein, Testimony to the USSC (Feb. 2002) https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20020225-26/20020225_Testimony.pdf.

⁶ USSC, Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System (Oct. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.

⁷ USSC, *supra* note 2.

⁸ National Institute on Drug Abuse, Overdose Death Rates (Jan. 2021), <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates>.

⁹ Lauryn Saxe Walker & Briana Mezuk, Mandatory Minimum Sentencing Policies and Cocaine Use in the U.S., 1985–2013, National Institute of Health (November 29, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6267913/>

Sentencing Commission found that harsher penalties for crack cocaine have not demonstrated a deterrent effect on cocaine trafficking, nor a change in the supply of cocaine.¹⁰

Drug use and crime have not risen in states which have eliminated crack/powder sentencing disparities in recent years. Six states have eliminated existing sentencing disparities since 2005. In each instance, elimination of the disparity was associated with a subsequent decrease in drug crime:

- Connecticut eliminated its disparity between crack and powder cocaine in 2005. The average number of arrests for drug violations fell by 3.6% in the years after equalizing their sentencing schemes.¹¹ Five years later, drug violation arrests had fallen by an additional 50%.¹²
- Ohio also eliminated its disparity in 2005, and saw a 48.6% decrease in cocaine crimes between 2004 and 2014.¹³
- South Carolina changed its sentencing laws in 2010 to eliminate a crack/powder disparity. In the five years prior to elimination, drug offense arrest rates in the state averaged 83.54 per 10,000 people. The five years following elimination saw that number drop to 72.6 – a decrease of 13.1%.¹⁴
- California, which eliminated their crack/powder sentencing disparity in 2014, has seen a 33.5% decrease in the rate of arrests for dangerous drugs from 2015 to 2020.¹⁵ The average rate of all felony arrests over that period also decreased 34.6% when compared to the five years prior to California’s disparity elimination.¹⁶
- Maryland eliminated its disparity in 2016, and subsequently saw drops in drug sales, manufacture, and possession. The state saw a 34.4% decrease in sales and manufacture arrests for opium and cocaine (which the state groups in data reporting) and a 30.6% decrease in possession arrests.¹⁷

¹⁰ USSC, Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002),

https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.

¹¹ Average yearly drug violation arrests from 2001-2004 numbered 18,610.5, compared to 17,947.25 from 2005-2008. Connecticut Department of Public Safety, Uniform Crime Reports, <https://www.dpsdata.ct.gov/dps/ucr/>.

¹² To a total of 8981 drug violation arrests in 2015. Connecticut Department of Emergency Services and Public Protection Crimes Analysis Unit, Crime in Connecticut 2017, <https://www.dpsdata.ct.gov/dps/ucr/data/2017/Crime%20in%20Connecticut%202017.pdf>.

¹³ Alan Wedd, Ohio Office of Criminal Justice Services, Drug Crimes Reported to the Ohio Incident-Based Reporting System 2004-2014, https://www.ocjs.ohio.gov/links/ocjs_DrugCrimesReportedOIBRS2016.pdf.

¹⁴ South Carolina Law Enforcement Division and South Carolina Department of Public Safety, Crime in South Carolina 2019, <https://www.sled.sc.gov/forms/statistics/2019%20Crime%20in%20South%20Carolina.pdf>.

¹⁵ Rob Bonta, California Department of Justice, Crime in California 2020, <https://data-openjustice.doj.ca.gov/sites/default/files/2021-06/Crime%20In%20CA%202020.pdf>.

¹⁶ Average rate of felony arrests from 2009-2013 was 1494.6 per 100,000 compared to 977.23 per 100,000 from 2015-2020. Id.

¹⁷ When comparing average arrests from 2012-2015 (5,951.5 and 10,157.5, respectively) to 2016-2019 (3,906.75 and 7,048.75). Maryland Central Records Division, Uniform Crime Reporting Program, Crime in Maryland: 2016 Uniform Crime Report, <https://mdsp.maryland.gov/Document%20Downloads/Crime%20in%20Maryland%202016%20Uniform%20Crime%20Report.pdf>; Maryland Central Records Division, Uniform Crime Reporting Program, Crime in Maryland: 2019 Uniform Crime Report

- Oklahoma is the most recent state to eliminate its crack/powder sentencing disparity, a change the state made in 2018. Drug-related arrests in the state have decreased from pre-elimination numbers – in 2019, drug arrests were 21.2% lower than 2017, the last full year with a sentencing disparity.¹⁸

Is there a difference in dosage between crack and powder cocaine that would justify a sentencing disparity?

No. If anything, the current sentencing disparity is unjustifiable if Congress intends to focus mandatory minimum sentences on high-level and large-quantity traffickers. The Drug Enforcement Administration has concluded that dosage for crack and powder cocaine is similar, stating that it is “reasonable” to assume 100 mg as the common dosage for both.¹⁹ One gram of powder cocaine yields approximately 0.89 grams of crack cocaine.²⁰ This means that individuals trigger a mandatory 5-year sentence with 280 doses of crack cocaine. Powder cocaine requires 5,000 doses (or 4,450 doses if the powder would ultimately become crack cocaine) to trigger the same mandatory sentence.

,<https://mdsp.maryland.gov/Document%20Downloads/Crime%20In%20Maryland%202019%20Uniform%20Crime%20Report.pdf>;

¹⁸ Oklahoma eliminated its disparity for most cocaine-related drug crimes, but preserved it for aggravated manufacturing. Oklahoma State Bureau of Investigation, Crime Statistics, <https://osbi.ok.gov/publications/crime-statistics>.

¹⁹ U.S. Department of Justice, Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties, https://www.justice.gov/archive/olp/pdf/crack_powder2002.pdf.

²⁰ Id.