



RESEARCH AND ADVOCACY FOR REFORM



## **Cracked Justice**

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In August 2010 President Barack Obama signed the Fair Sentencing Act (FSA), historic legislation that reduced the quantity-based sentencing differential between federal crack and powder cocaine convictions that resulted in significant racial disparities and excessive penalties. The bipartisan measure addressed the 100-to-1 disparity that punished defendants with five grams of crack cocaine (also known as cocaine base) with the same five-year mandatory minimum penalty imposed on powder cocaine defendants with 100 times that amount. Lawmakers rushed to establish the disparity and stiff sentences for crack cocaine in 1986 when the growing hysteria around the drug's emergence in urban communities climaxed because of the death of a college basketball star whose overdose, officials believed, was caused by crack cocaine.

The policy advances at the federal level, which reduced the disparity to 18-to-1, provide an opening for reevaluating similar state policies enacted during the height of the crack cocaine “epidemic,” and followed the lead of Congress. While each state maintains its own laws governing offenses involving crack cocaine, and none maintain the extreme 100-to-1 differential between crack and powder cocaine, the harsh penalties for low-level crack cocaine offenses are considerable and produce significant consequences. Today 13 states maintain sentencing disparities between crack and powder cocaine offenses. These include:

- In Missouri, where a defendant convicted of selling six grams of crack cocaine faces the same prison term –a ten-year mandatory minimum – as someone who sells 450 grams of powder cocaine, or 75 times that amount..
- In Oklahoma, which maintains a 6-to-1 quantity-based sentencing disparity, a ten-year mandatory minimum sentence is triggered for five grams of crack cocaine and 28 grams of powder cocaine.
- In Arizona, which has a 9-to-1 disparity, nine grams of powder cocaine or less than a gram of crack cocaine trigger five-year prison terms for trafficking offenses.

Harsh drug penalties like these are a contributing factor to the exceptionally high rates of incarceration and overcrowding in state prison facilities. During the 1980s, policy responses to drug abuse deprioritized treatment in favor of enforcement and sentencing enhancements. A quadrupling of investments in drug enforcement ramped up drug arrests.<sup>1</sup> Moreover, since the early days of the war on drugs, the number of Americans incarcerated for drug offenses in state prisons has increased from 19,000 in 1980 to 265,000 by 2008.

Fiscal pressure to tighten state corrections budgets, along with mounting evidence documenting the unfair and unwarranted structure of these sentencing laws, suggests that lawmakers should reexamine the sentencing differential between crack and powder cocaine. According to the National Governors Association, 46 states expect budget deficits this year. High rates of incarceration are expensive to maintain and sentencing changes that limit terms for low-level drug offenses, including crack cocaine, can effectively conserve resources without adverse effects on public safety. States like Kansas, Michigan, New York, and New Jersey have enacted policy changes in recent years that significantly reduced prison populations, while maintaining public safety and curbing the cost of incarceration.

### State Crack-Powder Ratio

State	Disparity Adopted	Ratio	Penalty
Alabama	1990	10-to-1	Alabama uses a 10-to-1 drug quantity ratio for determining eligibility for its drug abuse diversion program. For powder cocaine the quantity cannot exceed five grams; for crack cocaine the quantity cannot exceed one-half gram.
Arizona	1993	12-to-1	Nine grams of powder cocaine or 750 milligrams of cocaine base trigger five-year prison terms for trafficking offenses.
Iowa	1989	10-to-1	Trafficking more than 500 grams of powder cocaine or more than 50 grams of cocaine base triggers a maximum penalty of 50 years in prison. Iowa requires a cocaine offender to serve a minimum period of confinement of one-third the maximum sentence prescribed by law.
California	1986	2:1 or 4:1	Possession or sale of a mixture containing 14.25 grams or more of cocaine base or 57 grams or more of a substance containing at least five grams of cocaine are subject to a term of three to five years in prison. Defendants convicted of possessing for sale 28.5 grams or more of powder cocaine or 57 grams or more of a substance containing five grams of cocaine base are subject to a prison sentence ranging from three to five years depending on aggravating or mitigating circumstances. Whereas, a person convicted of possessing 28.5 grams or more of powder cocaine is subject to a sentence range of two to four years pending the circumstances.
Maine	1987	3.5-to-1	Aggravated trafficking offenses involving 112 grams or more of powder or 32 grams or more of cocaine base subject defendants to a four-year mandatory minimum term.
Maryland	1990	9-to-1	Mandatory minimum penalty of five years for persons convicted of trafficking 448 grams or more of powder cocaine or 50 grams or more of crack cocaine.
Missouri	1989	75-to-1	Trafficking more than 150 grams but less than 450 grams of powder cocaine or two grams but less than six grams of cocaine base is a Class A felony and are subject to a mandatory minimum of ten years.
New Hampshire	1994	28-to-1	Trafficking 142.5 grams of powder cocaine or five grams of crack cocaine provides a maximum penalty of 30 years in prison.
North Dakota	1990	10-to-1	First time defendants can receive a sentencing enhancement of life imprisonment with or without parole for trafficking 50 grams or more of powder cocaine or five grams or more of crack cocaine. Mandatory minimums apply if a defendant has prior offenses; a defendant convicted of a subsequent offense is subject to a mandatory minimum of five-years imprisonment while a person convicted of a third offense is subject to a mandatory minimum sentence of 20 years.
Ohio	1995	10-to-1 and 2-to-1	Felony categories range in degree from first to fourth and sentencing disparities vary across felony categories based on quantity amounts. The state uses a 10-to-1 ratio of 1,000 grams of powder cocaine an 100 grams of cocaine base for major drug offenses and imposes a ten-year mandatory minimum.
Oklahoma	1990	6-to-1	Possessing five grams or more of cocaine base or 28 grams or more of powder cocaine triggers a ten-year mandatory minimum prison sentence. A 20-year mandatory minimum sentence is triggered for possession or trafficking 50 grams or more of crack cocaine or 300 grams of powder.
Vermont	1989	2.5-to-1	Trafficking 150 grams or more of powder cocaine or 60 grams or more of cocaine base subject defendants to a 30-year maximum sentence.
Virginia	1987	2-to-1	Trafficking 5 kilograms or more of powder cocaine or 2.5 kilograms or more of cocaine base triggers a 20-year mandatory minimum sentence.

Source: United States Sentencing Commission<sup>2</sup> and The Sentencing Project.

## **THE CASE FOR CRACK COCAINE SENTENCING REFORM**

A range of research from scientists and criminal justice experts now supports crack cocaine sentencing reform. 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 in the form of crack or powder.<sup>3</sup> In addition, the United States Sentencing Commission (USSC) has published four reports since 1995 that detail the policy implications of crack and powder cocaine sentencing disparities, and its work helped build consensus to reform the sentencing disparities at the federal level. The Commission found that the violence associated with crack cocaine is primarily related to the drug trade and not to the effects of the drug itself, and that both powder and crack cocaine cause distribution-related violence, as do all illicit drug markets.

The USSC has also addressed the significant racial disparity associated with those sentenced for crack cocaine offenses. According to the Commission in 2004, “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”

The debate and research about crack cocaine addiction and use has motivated some states to reform their sentencing law even before federal reform took place. Since 2003 Connecticut, Iowa and South Carolina have adopted reforms to address their sentencing disparities:

- Connecticut equalized penalties for crack and powder in 2005. Prior to reform the state distinguished between crack and powder at a ratio of 56.7-to-1.
- Iowa modified the state sentencing disparity in 2003 from 100-to-1 to 10-to-1.

- South Carolina equalized penalties for cocaine offenses in two stages, in 2005 and 2010. Prior to reform the state maintained a complex disparity scheme between the two drugs.

State lawmakers should build upon the momentum resulting from passage of the FSA to advance policy changes that address the unfairness of treating two similar drugs differently, as well as limiting overly harsh sentences for low-level drug offenses. Advancing these reforms will help curb high rates of incarceration which are costly and produce few public safety benefits, and restore community trust in the criminal justice system.

## **ORIGINS OF STATE-BASED CRACK-POWDER SENTENCING DISPARITIES**

Sensationalized news coverage about drug use during the 1980s coupled with the federal government's punitive response to drug offenses, even for small quantities, influenced state lawmakers during the 1980s and early 1990s. Following the adoption of the federal Anti-Drug Abuse Act of 1986, fourteen states implemented sentencing disparities between crack and powder cocaine in their criminal codes. Although each state crafted its laws differently, the national war on drugs impacted state policies, resulting in harsh penalties for crack cocaine.

### **Alabama**

In Alabama, the state differentiates between powder and cocaine base for eligibility determinations for drug abuse programs. Defendants charged with a drug offense may submit a request to the district attorney to enroll in a substance abuse treatment program as an alternative to prosecution. Eligibility for this diversion program depends on different quantity levels for powder and crack cocaine. To be eligible, defendants cannot possess more than five grams of powder cocaine or 500 milligrams (one-half gram) of cocaine base.<sup>4</sup> Alabama code does not distinguish between crack and powder for non-diversionary penalties.

### **Arizona**

Arizona lawmakers established a zero tolerance approach towards drugs which prioritized drug enforcement and contributed to prison population growth. Legislators adopted a crack-powder sentencing disparity of 12-to-1 in 1993. The tough on drugs approach was popularized with commercials showing graphic images of prison life.<sup>5</sup>

### **California**

In California the crack-powder disparity varies. Defendants convicted of possession with intent to sell 57 grams of powder cocaine are subject to sentences of three to five years in prison depending on aggravating or mitigating circumstances, whereas crack cocaine offenders face the same penalties for only 14.25 grams of the drug. Policymakers in the 1980s sought to control drug use by adopting sentencing



enhancements and a tough on crime approach. While several bills introduced in the California Assembly would have provided assistance to counties to operate drug treatment facilities, the prevailing sentiment among elected officials was that drug users needed to be punished rather than helped.<sup>6</sup>

*“The number of people who have requested services has skyrocketed on us,” said William Edelman, deputy assistant director of the Orange County Health Care Agency. “At the same time, for whatever reasons, we have been unsuccessful in convincing people that there is a need for treatment services.”<sup>7</sup>*

Moreover, state policymakers focused on drug quantity as the primary factor in determining drug penalties, often excluding factors such as a defendant’s role in the offense, age or mental condition. The California state legislature approved the “penalty-by-the-pound law” in the mid-1980s, which sought to focus law enforcement priorities on major dealers of cocaine and other drugs.<sup>8</sup> However, lawmakers also focused sentencing policies on lengthening sentences for low-level drug offenses.

California lawmakers have attempted reform in recent years. During 2008, lawmakers considered a measure that would eliminate distinctions for crack and powder cocaine from the criminal code resulting in the equalization of penalties as a strategy to make sentences fairer. The bill was voted out of the Public Safety Committee on a 5-2 vote and the Appropriations Committee on a 9-6 vote, but failed to be scheduled for a vote on the Assembly floor.

### **Maryland**

Maryland lawmakers established a 9-to-1 crack-powder sentencing disparity in 1990 during a period when it was popular to adopt mandatory minimum penalties for drug crimes. At the time, Governor William Donald Schaefer spearheaded efforts to enhance penalties for drug dealers, broaden authority to seize property bought with illegal drug profits and impose mandatory minimum sentences for dealers caught within 1,000 feet of schools.<sup>9</sup> Strong public support and the Governor’s aggressive

approach to strengthening criminal penalties encouraged the Maryland General Assembly to enact strict anti-drug measures that lawmakers had previously denounced as draconian and unconstitutional.<sup>10</sup> Shifting law enforcement priorities that focused on increased drug arrests resulted in a growth in the prison population. As a result, the Maryland legislature convened special sessions in 1989 at the governor's request to build more prison beds to meet the demand for increased capacity.<sup>11</sup>

### **Missouri**

Missouri adopted the crack-powder sentencing disparity in 1989 amid reports that cocaine-related deaths had increased significantly in recent years.<sup>12</sup> In addition to enhancing penalties, lawmakers adopted legislation to allow police to wiretap telephones of suspected drug dealers, established harsher penalties for selling drugs to minors near schools, and heightened penalties for drug-related murders.<sup>13</sup> During that same legislative session, lawmakers considered measures that marginalized drug offenders, including a no bail policy for persons accused of selling drugs, suspending drivers' licenses for anyone convicted of drug possession, and revoking licenses and certificates of doctors, attorneys and other professionals regulated by the state board who were convicted of a drug offense.<sup>14</sup>

### **Ohio**

Ohio lawmakers adopted penalties for crack cocaine in the mid-1990s and established a ratio that fluctuates between 10-to-1 and 2-to-1 for low-level crack and powder offenses. Prior to adopting the disparity, Representative Otto Beatty, an African American attorney said that both the Ohio House and the Senate had competed with each other by passing draconian drug legislation. Legislative approaches focused on attacking drug sales and abuse as criminal justice problems by toughening sentencing mechanisms and strengthening law enforcement capacity.<sup>15</sup> According to Representative Beatty, the concern around controlling drug use was so strong that state legislators in Ohio were prepared to go to increasing lengths to stop it, including weakening basic constitutional liberties by permitting no-knock searches on people's homes and imposing life sentences for selling small amounts of narcotics.<sup>16</sup>

Ohio lawmakers have explored equalizing crack-powder cocaine sentencing disparities by lowering the quantity amounts of powder cocaine to trigger felony sentences in line with crack cocaine. According to reports, attempts to reduce penalties for crack failed because lawmakers did not want to be perceived as being soft on crime.<sup>17</sup> During the 2007 legislative session, state lawmakers considered a policy proposal that would have equalized crack and powder sentences by enhancing penalties for powder cocaine through lowering the quantity amounts that triggered criminal penalties. That bill also received bipartisan support and passed out of the state senate unanimously. According to a legislative analysis, projected costs for additional incarceration numbered \$25 million more per year for harsher powder penalties.<sup>18</sup> The measure did not make it out of committee in the state house.

In 2010, Ohio policymakers attempted to reform the state criminal justice system through a comprehensive package of reforms that included eliminating the sentencing disparity between powder and crack cocaine. The package included measures to remove any definitions that distinguished crack cocaine from powder cocaine in the criminal code.<sup>19</sup> While the measure garnered bipartisan support it did not pass. Today, lawmakers and community advocates continue to work towards reform.

## RACIAL DISPARITY IN THE WAR ON DRUGS HEIGHTENED AMONG CRACK COCAINE CASES

While blacks and whites use drugs at similar rates, more than one-third of all drug arrests are of African Americans and they are serving state prison sentences on drug charges at a rate ten times higher than whites.<sup>20</sup> Although drug war penalties never explicitly referred to race, the “tough on crime” rhetoric in response to the crack epidemic demonized crack as a “black” drug and thereby shaped the drug problem among political leaders and law enforcement. Statistics from the Substance Abuse and Mental Health Services Administration (SAMHSA) indicate that whites constitute 50% of crack users, blacks 37%, and Latinos 13%.<sup>21</sup> Despite this, African Americans constitute about 80% of persons incarcerated in federal prisons for crack offenses.

Data on the racial composition of crack offenders at the state level is difficult to obtain, but in two of the states that maintain a sentencing disparity, Iowa and Ohio, we can observe these effects. As the table below illustrates, blacks are considerably more likely than whites to be admitted to prison for a crack offense. Specifically, blacks account for 81% of crack admissions in Iowa, and 75% in Ohio.

**Percentage of Crack and Powder Cocaine Admissions to Prison by Race, 2008**

	Iowa <sup>22</sup>			Ohio <sup>23</sup>		
	Blacks	Whites	Hispanic	Blacks	Whites	Hispanic
Powder Cocaine	42	35	22	57	43	0
Crack Cocaine	81	14	5	75	25	1

## **STATES HAVE ENACTED REFORM**

In recent years, three states moved to reform sentencing disparities between crack and powder cocaine. Lawmakers in Iowa worked to reduce the ratio that triggered criminal penalties for the two forms of cocaine, while South Carolina and Connecticut equalized the ratio between crack and powder.

### **Connecticut**

Connecticut equalized penalties for crack and powder in 2005. Prior to reform the state had penalized crack and powder offenses in 1987 using a ratio of 56.7-to-1; a penalty of five years to life imprisonment had been triggered by trafficking either in one ounce (28.5 grams) of powder cocaine or .5 grams of crack cocaine. In 2005, a coordinated grassroots campaign encouraged lawmakers to reform criminal penalties for crack and powder cocaine. Initially, policymakers proposed equalizing crack and powder offenses by increasing the quantity amount that triggered a five-year mandatory minimum sentence from a half gram to one ounce (28.5 grams), the quantity amount that triggered the same sentence for powder cocaine. While the bill garnered bipartisan support in the Connecticut legislature the reform measure was vetoed by the governor.

As a result, lawmakers and state advocates worked to develop a compromise that would reform state law. The General Assembly eliminated the sentencing disparity between crack cocaine and powder cocaine by increasing the trigger quantity for crack cocaine to one-half ounce (approximately 14.25 grams) and lowering the quantity amount for powder cocaine to the same level.

### **Iowa**

During 2003, the Iowa legislature lowered its sentencing disparity from 100-to-1 to 10-to-1. The lower ratio impacts the quantity amounts that determine the maximum statutory penalty. For example, 500 grams of powder cocaine or 50 grams of cocaine base trigger a maximum penalty of 50 years imprisonment. Iowa also requires a defendant who commits one of these offenses to serve a minimum period of confinement of one-third the maximum sentence before being eligible for parole.

### **South Carolina**

The South Carolina legislature worked to equalize sentences between crack and powder cocaine offenses in 2005 and advanced that reform in 2010 by incorporating equalization as a policy throughout the criminal code. In 2005, the legislature reduced penalties for a first-time possession offense of cocaine and made the offense a misdemeanor.

That reform attempted to remove the distinction between crack and powder cocaine from state law and bring the penalties for crack offenses in line with other drugs. Previously, persons convicted of first offense crack possession faced up to five years in prison, while those convicted of first offense powder cocaine possession faced a maximum two-year sentence. The 2005 legislative reform established three-year maximum sentences for first time crack and powder offenses. While crack offenders experienced a reduction in possible sentences, powder offenders were subjected to more serious penalties than prior to the reform.<sup>24</sup>

The 2005 revision did not equalize all penalties for crack and powder offenses in the state code. As a result, the legislature worked to complete the work in 2010. It passed an omnibus sentencing reform measure that eliminated mandatory minimums for first-time drug possession offenses and established probation or parole as a sentencing option for second- and third-time drug possession offenses. The measure also moved to restructure drug penalties throughout the state criminal code, resulting in equal penalties for crack and powder cocaine.<sup>25</sup>

## CONCLUSION AND RECOMMENDATIONS

In the post-Fair Sentencing Act environment, there is an opportunity to continue to build upon reforms to make the criminal justice system more effective and fairer at the state level. Recommendations to address state crack and powder sentencing disparities include:

- **Eliminating crack and powder cocaine sentencing disparities.** Decades of research has determined that crack cocaine and powder cocaine are both harmful drugs, but have similar effects on the body and brain. Distinguishing between the two drugs for sentencing purposes contributes to racial disparity in prisons and sends a message of disparate treatment within communities of color.
- **Increasing trigger quantities for nonviolent drug offenses.** Low quantity triggers that result in long prison sentences result in excessive incarceration of low-level drug offenders.
- **Ending mandatory minimum sentences for low-level drug offenses.** Mandatory minimums do not reduce drug use but result in lengthy prison terms that contribute to overcrowding. Repealing mandatory minimum provisions and allowing for judicial discretion for low-level drug offenses will restore fairness to state criminal justice systems.

As policymakers enter new legislative sessions, they face difficult budget decisions that require balancing funding for prisons with education, health care and other vital services. Exploring opportunities for modifying sentencing policies will result in cost savings that can be reallocated to community programs and substance abuse treatment programs at a local level. This investment offers a better approach to reducing crime and substance abuse than continued high levels of incarceration.

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