The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance

I. Introduction

No other feature of the Federal Sentencing Guidelines has been viewed more critically than the 100:1 crack-powder cocaine disparity built into the guidelines because of the requirement in the Federal Anti-Drug Abuse Act of 1986. The disparity is particularly distressing because crack defendants are primarily black and powder defendants are primarily white and Hispanic, so the differential treatment can too easily be seen as a manifestation of racial discrimination. Thus, there have been efforts in many quarters to call attention to this concern and to drastically diminish or eliminate this disparity.

It is important to understand the context of the drug market situation during 1986 when the Act was passed. It was a time of considerable expansion in the marketing of a technological innovation—crack, that made the “pleasures” of cocaine available at a much lower price per hit than previous products. That led to a major growth in demand and activity in inner-city street markets. Competition among sellers in these markets was marked by violent turf battles rather than advertising campaigns. At the same time, there was major effort directed at incarcerating the sellers, which encouraged the resilient markets to recruit replacements. Often, these replacements were juveniles, and since sellers in street markets had to carry handguns to protect themselves against robbers, handgun violence among juveniles increased sharply. This raised widespread concern in the political arena to “do something” about the problem of increasing seriousness. Understandably, the Congress did what it knows best how to do—raise the sanction level when it doesn’t have any other demonstrably effective approach. That didn’t necessarily solve the problem, but it did alleviate the pressure to “do something.”

In 2003, seventeen years after passage of the Act, the situation of crack and crack markets has changed considerably. The demand for crack by new users has declined appreciably, the activity in street markets has correspondingly declined since the older, addicted users can be served privately, and the level of violence associated with crack has diminished. Also, some of the preconceptions about the pharmacological effects of crack on its users and especially on “crack babies” born to crack-using mothers have been shown to be misconceived and not markedly different from powder cocaine, and appreciably less serious to the fetus than alcohol.

Thus, when the situation that gave rise to the initial disparity has changed, that warrants reconsideration of the disparity. In this paper, I would like to examine some of the situations that prevailed in the mid-1980s and examine how they have changed in 2003, and perhaps that re-examination will lead to a willingness to reconsider the disparity. An important part of that re-examination involves consideration of the empirical facts regarding the growth of incarceration, especially for drug crimes; the changes in the rates of violence from the time when the legislation was originally passed, the peak in 1993, and today; and especially the degree to which the growth of violence was an unintended consequence of the growth in incarceration for drug crimes. One cannot intelligently address these issues without examining the data that bear on them.

II. Some Background Data on Violence and Drug Markets

In the mid-1980s, prisons were filling up with drug offenders. Figure 1 provides a clear indication of this growth, with the incarceration rate for drug offenses increasing by a factor of 10 from 1980 to 1996. In my Presidential Address to the American Society of Criminology in 1992, I argued that that growth was not likely to have much effect on drug markets because the resilient drug markets were quite able to recruit new sellers to replace those sent to prison and even those deterred from drug selling because of the draconian sentences being imposed. As a result, drug transactions would continue to respond to the articulated demand, and so the number of transactions averted through incarceration would be negligibly small as long as the demand persists.

It was only subsequently that I came to appreciate that the massive incarceration was not only ineffective, but was seriously counter-productive. The young people recruited as replacements in the crack markets were primarily African-American youth drawn from inner-city areas who had little opportunity in the legitimate...
economy at the time. This recruitment is indicated in Figure 2, which displays the ratio of drug arrests of non-whites compared to those of whites; here, we see that the ratio for adults began to climb in the early 1980s, whereas that for juveniles didn’t begin to climb until 1985 (as the prisons were filling with the older sellers) and reached a peak of four times that of whites from 1989 until 1992, and then began a sharp decline as the demand for crack by new users dried up in the mid-1990s.6 Since the youths were recruited primarily for street markets, they had to carry handguns to protect themselves against street robbers. One characteristic of these young folks was that they were far more volatile in their use of guns than the older people they replaced. Not only were these replacements a violence problem, but because of the tight networking among young people (remember the sneakers epidemics of the 1970s), their carrying guns gave rise to a major diffusion of handguns from these drug-market recruits to their friends, and out into the larger community.7 The data bearing on that diffusion process was documented by Daniel Cork, who showed that a sharp rise in arrests of juveniles for drug offenses was followed by a sharp rise in arrests of juveniles for homicide, but with a one- to three-year lag. That diffusion of handguns was the major factor contributing to the rise of violence that began in about 1985, reached a peak in 1993, and has been declining since.

One of the important features of the rise in homicide from 1985 to 1993 was the narrow population group that contributed to it. For young people, that rise was considerable. This shift is reflected in the data presented in Figure 3, the classic age-crime curve. The figure depicts the age-specific arrest rate (arrests at each age divided by the population of that age) for homicide. The lower curve depicts the pattern for 1985, which was typical of the previous fifteen years, and the upper curve shows how much that had changed by 1993, when homicide rates reached their peak.8 Comparison of the two curves clearly shows that the entire growth was attributable to young people under 25. Indeed, the 1993 curve is seen to be below the 1985 curve for all the ages above 30. Thus, over this period, when the national homicide rate increased by about 25 percent, the increase among the young people was sufficiently great that it overcame the decrease among the older people.

Another important feature of the young people’s increase was the form of weaponry involved. The data in Figure 4 were drawn from homicide-incident reports compiled in the FBI’s Supplementary Homicide Reports (SHR). The figure indicates the dramatic growth in the use of handguns by juveniles in homi-
The figure presents the index, with the use of handguns in 1985 set at 100, so all other values on the chart are relative to that index. This shows that juveniles used handguns in almost four times as many homicides in 1993 as they did in 1985. Over that time, there was a decrease in homicides with means other than guns and somewhat of an increase in homicides with long guns, but those changes were much smaller than the dramatic changes in handgun homicides.

The current situation is very close to a complete restoration of the situation that prevailed in 1985. The data presented in Figure 5 depict the ratio of the age-specific homicide arrest rates compared to 1985. The upper curve is based on rates in 1993 (the peak year) compared to the rates in 1985. This graph is the ratio of the two age-crime curves presented in Figure 3. These data highlight the fact that homicide arrests for 15-year-olds tripled between 1985 and 1993, and that the rate more than doubled for all ages of 20 and under. We also note here that the ratio for all ages over 30 is about 0.8, so that the arrest rate for those ages has dropped about 20 percent below the rates that prevailed in 1985, an observation consistent with the observation noted in the age-crime curve.

The lower curve of Figure 5 presents the ratio of the homicide arrest rate by age in 2000 compared to 1985. The striking observation here is that the major rise of young people’s rates that happened by 1993 was largely undone by 2000, and that the rates of homicide by these young people are now back to or below the rates that prevailed in 1985 for all ages. The reasons for the recovery by 2000 involve a mixture of factors: the reduction in demand for crack by new users, thereby diminishing the role and need for street markets, the diminished need for young people in the market, the availability of a robust economy that could absorb those who might otherwise be in the market, aggressive policing targeted at young people’s guns, and the deterrent effect on gun-carrying of that aggressiveness. All of these factors led to a de-escalation of carrying after 1993 that mirrored the escalation that began in about 1985. That de-escalation is reflected in the steady decline of the number of juvenile handgun homicides in Figure 4 after the 1993 peak.

III. The Crack-Powder Disparity

This background of a dramatically changing violence environment, especially involving young people, associated with the rapid growth of crack markets in the 1980s provides some indication of the level of public anxiety—and hence the political panic in which the crack-powder distinction was enacted in the Federal Anti-Drug Abuse Act of 1986. That act introduced the 100:1 disparity between the 5 grams of crack and the 500 grams of powder requiring a 5-year mandatory-minimum sentence. The feature that makes this distinction particularly troublesome is the fact that crack is dealt primarily by blacks (85% of federal crack offenders are black), whereas powder cocaine is dealt primarily by whites (18%) and Hispanics (5%).

The 100:1 disparity is widely seen as a blatant demonstration of racial discrimination by the criminal justice system. Similar concerns surround racial profiling in police stops and racial disproportionality in prison, but in neither of these kinds of situations is the disparity so explicitly built into the law. Also, the racial difference in the outcomes could have legitimate explanations for the disproportionate consequences they produce: disparate police stops could possibly be explained by racial differences in the involvement in the offenses being checked for. The vigorous challenges against racial profiling have been widely responded to in most quarters. The racial disproportionality in prison could be associated with differential involvement in the
crimes leading to prison. Thus, the crack-powder disparity contributes in an especially powerful way to a serious challenge to the legitimacy of that system.

This disparity is crying for careful reconsideration, at a minimum because of the powerful symbolic import of the difference. That reconsideration should focus on issues of culpability of people arrested for drug offenses, their role in the distribution hierarchy (particularly the degree to which they are the “king-pins” against whom the rhetoric surrounding severe sentences is almost always focused), and especially the societal harm associated with their involvement. The disparity would be seen as far more legitimate if these were the considerations involved rather than minor chemical differences in the substances involved.

A. Societal Harm and Violence

The first and probably most important basis for reconsideration relates to the issue of societal harm, specifically the violence associated with the marketing of crack, especially at the time the Congress introduced the original 100:1 disparity. But, as with all illegal drugs, that difference in violence is far less associated with the pharmacological nature of crack and its behavioral effects than with the nature of its markets. We have to understand that market, both in its initial years and how it has changed in recent years.

Crack came on the scene in the early 1980s as an important technological innovation that made cocaine pharmacologically available to a stratum of society that could afford a hit-at-a-time purchase of crack but did not have the capital to buy powder in its minimum available quantities. That innovation started initially in the coasts, particularly New York City and Los Angeles, and worked its way into the center of the country. As with any innovation that significantly expands the size of the market, there was vigorous competition for a share of that growing market. However, as with all illegal markets that are denied access to civil dispute-resolution mechanisms, that competition often shows itself in the use of violence against competitors.

Also, the means and locus of distribution contributed to the growth of violence. First, the aggressive marketing of crack, particularly to the new customers, typically took place in street markets, most often located in the poorest neighborhoods of the city. Neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.

Finally, the dynamics of the market’s response to the massive incarceration of drug violators became a major factor in the late 1980s and early 1990s: recruitment of young people as replacements for the crack dealers sent to prison, arming of these volatile individuals, and diffusion of guns to their friends, and resort to the traditional mode of teen-age dispute resolution—fighting—but with much more lethal consequences because of the nature of the weapons that had suddenly appeared.

Thus, for all these reasons, we saw considerably more violence associated with crack during its early years, and that difference may well have provided the rationale behind the disparity in the mandatory minimums. But that situation has changed considerably. The nation’s violence rates are now well down, lower than they have been for over 35 years. As shown in Figure 5, the rates of violence by young people are down to or below the level they started at in 1985. The crack markets have matured with the decline in the number of new users, and so there is no longer a need for the young participants (see the rapid decline in drug arrests of non-white juveniles after 1993 in Figure 2). It is much easier to sell to established customers, sellers’ market shares have largely stabilized, and police have been effective in getting the guns out of the hands of the kids.

In particular, the US Sentencing Commission’s report demonstrates the low level of violence currently associated with the marketing of either drug, and shows the negligible difference between them. No weapons were involved in 82 percent of the powder cases and in 75 percent of the crack cases, and there was no bodily injury in 91 percent of the powder cases and in 88 percent of the crack cases. Death occurred at the same level (3.4 percent) in both sets of cases. Thus, these data show that the crack cases do have somewhat more involvement of weapons and more bodily injury, but these differences are very small, and certainly less than enough to warrant major discrepancy in treatment based on the drug involved.

While there may still be slightly more violence associated with crack markets, it seems to make little sense to associate the penalty with the chemical composition of the drug. It seems so much more appropriate to associate the penalty with the violent behavior itself. Thus, the Commission’s proposal to provide sentencing enhancements for gun carrying—and especially for gun use—seems to carry out that concern with a principle that is so much more appropriate than associating it with the drug involved.

B. Role of Offenders in the Distribution Network

The principle of culpability should apply much more strongly to those high in the distribution hierarchy and whose distribution scope is national as opposed to local. In this context, there are important differences in the roles in the drug markets that are played by Federal
crack defendants. The US Sentencing Commission reports that 67 percent of the crack cases in 2000 involved street-level dealers, but only 29 percent of the powder dealers. On the other hand, 31 percent of the powder cases involved mules, but only 2 percent of the crack cases. Thus, 69 percent of the crack cases were clearly low-level defendants, whereas 59 percent of the powder cases were low level. For these two low-level functions, however, crack defendants’ sentences were twice as long as the powder defendants’.

The geographic scope of activities by the crack dealers reflects their predominant low-level function: 75 percent of the Federal crack cases involved sales in a neighborhood or city, whereas only 37 percent of the powder cases were that confined. In contrast, the powder cases covered larger units, and 33 percent involved international transactions. Thus, based on these role considerations alone, the sanction for powder should be appreciably higher than for crack. But, as with violence, any such distinctions should be based on the role and behavior of the individual offender through sentencing enhancements rather than through the chemistry of the drug.

III. Mandatory-Minimum Sentencing Laws

The mandatory-minimum sentencing laws being considered here were representative of the widespread practice of legislatures during the late 1970s and 1980s to demonstrate their toughness on issues that concerned the public. In many cases, these political acts were taken with little regard to the benefits that might be derived, and with even less regard to the unintended consequences that might result. Indeed, one of the motivations underlying the creation of sentencing commissions was to provide an institutional arrangement that would give careful deliberation to the level of sentence that is most appropriate for a particular class of offense and offender broadly defined, to provide a coherent structure that reflects the seriousness of the offense and the offender, and that would provide enough flexibility for the individual judge dealing with a particular case to address those relevant factors not incorporated in the guidelines. Indeed, a number of the state legislatures created their sentencing commissions in the 1980s as a blocking action against the then faddish mandatory minimums. In their calmer moments, they realized the inappropriateness of the political passions that so often drive sentencing decisions by a legislative body. This can happen after a particularly heinous crime has captured the headlines. It can also happen when the public becomes sufficiently concerned about some crime problem that it demands some action by the political system; if there is nothing obvious to do, then the legislature can always resort to passing a mandatory-minimum sentencing law.

Regardless of whether it does any good in addressing the crime problem, it has indeed seemed to work in at least temporarily satiating the public’s demands. This has certainly been the case with the drug mandates. When the early two-year mandates didn’t work, then they were cranked up to five years, and then to ten years, never with any clear or careful assessment of what good—or harm in terms of the replacements recruited—they did.

It does appear that the political passions that fueled the passage of many mandates—especially in the drug area—have cooled considerably. This is reflected in the passage in California of Proposition 36 calling for community treatment in preference to incarceration for drug offenders. Similar moves are under way in a number of other states. The pressure to make such changes results from a combination of fiscal problems faced by the states and a growing recognition of the ineffectiveness—often pure futility—of the often-draconian mandatory-minimum sentencing laws. I have for a long time advocated sunsetting mandatory-minimum sentencing laws because I have been skeptical that legislatures would be willing to risk being labeled “soft on crime” by repealing them. At least, with sunsetting, the law would have to be reconsidered after some period of time, and the ineffective ones left to disappear quietly in the absence of a strong reason to extend them. It is encouraging to note that Michigan has repealed its mandatory-minimum laws, and that a number of states are similarly considering a move to a more rational and coherent approach to sentencing policy.

IV. Summary

I have tried here to highlight the concern about the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs in 1986 at the time of original passage of the Act, it is important that the advocates of retaining the disparity recognize that those differences occurred as a result of the nature of the markets at the time much more than as a result of any pharmacological differences between the drugs. Data from the late 1980s and early 1990s clearly showed the growth of violence, but data after the 1991 peak show that the recent evolution of the crack markets has significantly lowered the level of violence that characterized their early years. The data clearly show that there is currently very little difference between the violence associated with crack and that associated with powder. Also, it seems much more rational to use sentencing enhancements to punish those who use violence regardless of the drug they are dealing than to base the sentencing difference on the chemical itself. Similarly, enhancements should account for an offender’s role in the distribution hierarchy. If that were done, it becomes apparent that federal powder cocaine offenders should
fare even worse than crack offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder.

The United States Sentencing Commission has proposed raising the crack level from 5 grams to “at least” 25 grams, thus reducing the disparity from 100:1 down to 20:1.12 Thus, while it is clearly a move in the right direction, this shift is less than a major concession to reasonableness. Perhaps the sanctions for crack and powder might be equalized at some future time, using enhancements for whatever operational differences might remain. That would be an important step in diminishing the widespread concern of racial discrimination in the criminal justice system.

I would also hope that the Congress would capitalize on the growing national enlightenment on drug policy to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to widespread appreciation by all those concerned with developing more rational sentencing policy.

Notes


6 The data for the age-crime curve are drawn from arrest data in the FBI’s Uniform Crime Reports (for the numerator) and age-specific population from Census data (for the denominator).

7 These issues are developed in Blumstein and Wallman, op cit., See especially Chapter 2, “Disaggregating the Violence Trends”

8 The rates for the ages over 30 have continued to decline, and are now about half what they were in 1985.

9 These issues are discussed in detail in Blumstein and Wallman, supra note 3, and summarized in Chapter 1 of the book.

Data from United States Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy May 2002, at 63, Table 3.

10 It is important to recognize that the 100:1 disparity is not necessarily reflected in empirical reality of sentences imposed. The US Sentencing Commission report (supra, note 10 at 35, Figure 3) shows that Federal crack offenders have recently been getting sentences that are about 50% higher than cocaine offenders. But those sentences are complex aggregates of cases that differ in many ways, and it is difficult to discern how the sentences of comparable offenders would compare. Indeed, there are certainly indications that crack offenders tend to have much lower roles in the market—predominantly street dealers.


13 See Cork, supra note 5.


15 Id. at 39, Figure 6

16 Id. at 41–43, Figures 7 and 8.

17 I personally know that an important motivation in introducing the legislation creating Pennsylvania’s sentencing commission (the second commission created, following Minnesota’s) was an attempt to pre-empt a variety of mandatory-minimum bills that were then pending.


20 That ratio is consistent with a proposal made earlier by Senators Hatch and Sessions. Unlike the Commission proposal, the Hatch and Sessions approach would include a decrease in the amount of powder cocaine needed to trigger the mandatory penalty and a smaller increase in the amount of crack needed to trigger the mandatory.