

# CRACK COCAINE AND THE FAIR SENTENCING ACT

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Crack cocaine, formally known as cocaine base, is an alternative form of powder cocaine produced by heating a mixture of powder cocaine, sodium bicarbonate (baking soda), and water. The chemical reaction creates “small, irregularly shaped chunks (or ‘rocks’).” Unlike powder cocaine, crack vaporizes when it is heated and thus can be smoked. Smoking crack results in the substance reaching the brain very quickly and produces a more intense high in comparison to snorting powder cocaine. In addition to crack offering users a quicker and more intense high, it is also significantly cheaper than powder cocaine. An individual can purchase a small vial of crack for \$5-\$20, while a gram of powder cocaine can range from \$50-\$100.

Crack’s euphoric effects and low-cost led to a rise of the substance’s popularity in the early 1980s, and by 1986, crack was widely available in most large U.S. cities. As crack’s popularity rose, misinformation about the drug led many Americans to become fearful of the drug, believing that crack was instantaneously addictive, that crack use led to violence, and that crack-exposed infants, or “crack babies,” would grow up with severe mental or physical deficiencies. These fears combined with the emphasis placed on the “war on drugs” and the high-profile fatal overdose of professional basketball player, Len Bias (who was presumed to have overdosed on crack but was later proven to have overdosed on powder cocaine), led Congress to determine that the existing sentences for drug violations were inadequate to deal with the dangers of crack. In response, Congress passed the Anti-drug Abuse Act of 1986 (1986 Act), which President Ronald Reagan signed into law on October 27, 1986.<sup>1</sup>

The 1986 Act established mandatory minimum sentences for federal drug trafficking crimes and established much harsher sentences for crack offenses than for powder cocaine offenses, which resulted in a 100:1 sentencing disparity between crack and powder cocaine. Prior to 1986, federal sentencing law did not distinguish between crack and powder cocaine. The 1986 Act provided that individuals convicted of crimes involving 500 grams of powder cocaine or five grams of crack were sentenced to at least five years of imprisonment, without regard to any mitigating factors. The 1986 Act also provided that those individuals convicted of crimes involving 5,000 grams of powder cocaine or 50 grams of crack be sentenced to 10 years of imprisonment. Congress designed the 100:1 drug quantity ratio to account for the harmful conduct it believed to be associated to a greater degree with crack than with powder cocaine. However, how Congress settled on the 100:1 ratio and the reasoning behind the number is unclear due to a lack of legislative history surrounding the Act. It is known that the House of Representatives initially established the ratio as 50:1, but as the 1986 Act advanced through Congress, the Senate, citing the harmfulness of crack, increased the penalty. The legislative history of the 1986 Act shows that different ratios were considered, but it does not offer a clear explanation as to why Congress decided on any one ratio in particular. It is clear, however, that the fear and concerns over crack were enough to convince Congress that greater punishment for crack offenses was necessary, because the 1986 bill passed the House by a 392-16 vote and the Senate by a 97-2 vote.<sup>2</sup>

Two years after the passage of the 1986 Act, drug-related crimes continued to rise, and Congress responded by passing the Omnibus Anti-drug Abuse Act of 1988 (1988 Act).<sup>3</sup> The 1988 Act created a five-year mandatory minimum and a 20-year maximum sentence for simple possession of five grams or more of crack cocaine. In comparison, the maximum penalty for simple possession of any other drug, including powder cocaine, remained at

<sup>1</sup> Anti-drug Abuse Act of 1986, Pub. L. No. 99-570 (1986).

<sup>2</sup> Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 733, 778 (2011). <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1520&context=facpubs>.

<sup>3</sup> Omnibus Anti-drug Abuse Act of 1988, Pub. L. No. 100-690 (1988).

no more than one year in prison. This made crack the only drug subject to a mandatory minimum prison sentence for a first offense.

## RACIALLY DISPARATE IMPACT OF FEDERAL CRACK LAWS

In August 1991, the U.S. Sentencing Commission completed a study on the effects of mandatory minimums and concluded that non-white individuals were much more likely to receive mandatory minimum sentences and that they were being applied in a discriminatory manner.<sup>4</sup> The racial disparities in the application of mandatory minimum sentences could be easily seen in the application of mandatory minimum sentences for crack. Despite the 1986 and 1988 Acts being racially neutral on their faces, the policies, in practice, had a racially disparate impact. Black individuals have comprised the vast majority of those convicted of crack offenses despite white individuals using crack the most. In 1986, the average federal drug sentence for Black individuals was 11 percent higher than for white individuals, but just four years later, the average federal drug sentence for Black defendants was 49 percent higher than for white individuals.<sup>5</sup> The crack disparity has resulted in longer prison sentences for Black Americans, which in turn has led to the devastation of Black communities and families.

In addition to sentencing data indicating that the federal crack laws had a racially disparate impact, scientific studies started to disprove many of the beliefs surrounding crack and its use. Scientific and medical experts determined that in terms of its pharmacological effect, crack is not more harmful or potent than powder cocaine. However, crack can become more harmful and potent depending on the way that a user ingests it. Smoking crack produces a quicker, more intense high than snorting powder cocaine, but injecting powder cocaine produces a fast, intense high similar to crack. Additionally, comprehensive studies have found that the effects of prenatal crack exposure are identical to the effects of prenatal powder cocaine exposure and that gestational exposure to either form of cocaine is unlikely to cause developmental deficiencies any more severe than other risk factors, including poverty. The pharmacological findings regarding crack combined with the racial disparities produced by the federal crack laws caused many in government to question the rationale and fairness of the 100:1 sentencing disparity between crack and powder cocaine.

In 1997, 27 federal judges sent a letter to the United States Senate and House Judiciary Committees stating that “[i]t is our strongly held view that the current disparity between powder cocaine and crack cocaine, in both mandatory minimum statutes and the [U.S. sentencing] guidelines, cannot be justified and results in sentences that are unjust and do not serve society’s interest.”<sup>6</sup> In its 1995, 1997, and 2002 reports, the U.S. Sentencing Commission recommended that the crack quantity thresholds should be revised.<sup>7</sup> Additionally, bills that would have reduced the crack to powder ratio were introduced in Congress multiple times between 1993 and 2009, but were never enacted into law.<sup>8</sup> In May 2007, the U.S. Sentencing Commission amended the drug quantity table within the U.S.

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<sup>4</sup> U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991\\_Mand\\_Min\\_Report.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf).

<sup>5</sup> “The EQUAL Act: Why Congress Must #EndTheDisparity Between Federal Crack and Powder Cocaine Sentences.” Families Against Mandatory Minimums. Accessed November 2, 2023. <https://famm.org/wp-content/uploads/Crack-Disparity-One-Pager.pdf>.

<sup>6</sup> Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), in 10 FED. SENT’G RPTR. 195 (No. 4, Jan./Feb. 1998). <https://online.ucpress.edu/fsr/article-abstract/10/4/194/42402/1997-Statement-on-Powder-and-Crack-Cocaine-to-the?redirectedFrom=fulltext>.

<sup>7</sup> U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY (1995). [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf); U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY (1997). [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/19970429_RtC_Cocaine_Sentencing_Policy.pdf); U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY (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](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).

<sup>8</sup> Graham, *supra* note 2, at 767.

Sentencing Guidelines to lower the sentencing range for trafficking five grams of crack from 63-78 months of imprisonment to a range of 51-63 months and lowered sentences related to 50 grams of crack from 121-158 months to a range of 97-121 months.<sup>9</sup> However, it was not until 2010 that Congress acted to address the disparity between crack and powder cocaine.

## THE FAIR SENTENCING ACT

On August 3, 2010, President Barack Obama signed the Fair Sentencing Act of 2010 (FSA) into law.<sup>10</sup> As originally introduced, the FSA would have eliminated the crack sentencing disparity, but in order for the bill to gain bipartisan support, the drafters amended the bill to reduce the disparity as opposed to eliminating it. Some members of Congress were uncomfortable with completely eliminating the disparity due to their continued belief that crack was more addictive and more closely tied to violent crime than powder cocaine. After negotiations, Congress agreed to reduce the 100:1 disparity to 18:1. The new 18:1 ratio garnered bipartisan support and passed via a voice vote in both chambers. With this new legislation, the threshold quantity of crack necessary to trigger the five-year mandatory minimum would be 28 grams of crack. For the 10-year mandatory minimum, Congress raised the threshold quantity of crack to 280 grams. The threshold quantities for powder cocaine remained unchanged. In addition to reducing the crack disparity, the FSA also eliminated the five-year mandatory minimum sentence for simple possession of five grams of crack. Furthermore, the FSA increased the financial penalties and raised the sentencing guidelines for major drug traffickers and for drug cases that involved violence or other aggregating factors.

A limitation to the FSA was that it only applied to future crack offenses. This meant that individuals convicted prior the FSA were still subject to the rules established by the 1986 and 1988 Acts. It was not until President Donald Trump signed the First Step Act of 2018 into law on December 21, 2018 that the FSA became retroactive.<sup>11</sup> Section 404 of the First Step Act allowed individuals incarcerated for crack offenses to apply for resentencing under the updated sentencing criteria. A May 2021 report from the U.S. Sentencing Commission stated that 3,705 individuals had been granted a sentence modification under Section 404 of the First Step Act.<sup>12</sup> Additionally, the average sentence for a crack offense fell from 274 months to 202 months as a result of the resentencing provisions of the First Step Act.<sup>13</sup>

While the FSA and the First Step Act provided much needed changes to federal crack laws, many civil rights and criminal justice experts believe that the changes did not go far enough. In 2009, one year before the passage of the FSA, Black individuals made up 79 percent of the crack defendants despite white individuals making up the majority (71.8 percent) of crack users.<sup>14</sup> In 2020, years after the changes implemented by the FSA went into effect, Black individuals still made up the majority of crack defendants (76.8 percent) despite white individuals continuing to be the primary users of crack (69.6 percent).<sup>15</sup> Many civil rights and criminal justice experts assert that in order to reduce the racial disparity caused by federal crack laws, the disparity between crack and powder cocaine must be eliminated.

<sup>9</sup> USSC App. C, Amendment 706 (effective November 1, 2007). <https://www.ussc.gov/guidelines/amendment/706>.

<sup>10</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010).

<sup>11</sup> First Step Act of 2018, Pub. L. NO. 115-391 (2018).

<sup>12</sup> U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT (2021).

<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf>

<sup>13</sup> *Id.*

<sup>14</sup> Jason Pye, "Ending the Crack Cocaine Sentencing Disparity," Due Process Institute, last modified January 26, 2022.

<https://idueprocess.org/blog/f/ending-the-crack-cocaine-sentencing-disparity>

<sup>15</sup> "2020 National Survey of Drug Use and Health, Table 1.32A," Substance Abuse and Mental Health Services Administration, October 25, 2021,

<https://www.samhsa.gov/data/sites/default/files/reports/rpt35323/NSDUHDetailedTabs2020v25/NSDUHDetailedTabs2020v25/NSDUHDetTabsSectIpe2020.htm#tab1-32a>.

## THE EQUAL ACT

The Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act, first introduced in 2021, seeks to eliminate the federal sentencing disparity between crack and powder cocaine offenses by repealing the weight thresholds for crack.<sup>16</sup> The EQUAL Act would apply these statutory changes to pending cases, regardless of when the offense was committed and would allow for retroactive application to past offenses. An impact statement from the U.S. Sentencing Commission estimates that retroactive application of the EQUAL Act would provide 7,644 individuals with a reduced prison sentence, with the average sentence estimated to fall from 173 months to 100 months.<sup>17</sup> Proponents note that these sentence reductions would allow families to be reunited quickly and reduce costs associated with incarceration. The EQUAL Act is supported by groups across the political spectrum who believe that the sentencing variation between crack and powder cocaine creates harmful racial disparities. A bipartisan letter signed by 28 organizations in April 2021 urged Congress to pass the EQUAL Act, stating that “[t]his critical bicameral bill corrects misguided policymaking from 35 years ago and would continue the important bipartisan progress Congress is making on creating more effective, more efficient, and more fair federal sentencing laws.”<sup>18</sup>

While the EQUAL Act has attracted bipartisan support, there are some members of Congress who have concerns about completely eliminating the disparity between crack and powder cocaine. The hesitancy stems from beliefs that crack is more dangerous and readily available than powder cocaine and that crack offenses are often committed by individuals with violent criminal histories. However, drug policy and criminal justice experts assert that these concerns are not evidence-based and do not justify the need for a sentencing disparity between crack and powder cocaine. First, while it is true that fatal cocaine overdoses have increased since 2014, data from the Centers for Disease Control and Prevention show that the increase in fatal cocaine overdoses are being driven by synthetic opioids combined with cocaine.<sup>19</sup> In comparison, cocaine overdose deaths involving cocaine not adulterated with synthetic opioids have remained relatively stable over the past several years.<sup>20</sup> Second, the conversion of powder cocaine to crack produces a negative yield, with one gram of pure powder cocaine converting under ideal conditions into approximately 0.89 grams of crack.<sup>21</sup> Additionally, one gram of powder cocaine generally generates more doses than one gram of crack.<sup>22</sup> Third, when it comes to violence, the U.S. Sentencing Commission has noted that “[a]lmost all crack cocaine related violence is of the ‘systemic’ type, that is, violence that occurs within the drug distribution process.”<sup>23</sup> Thus, crack cocaine offenses are not inherently more violent than other drug offenses. Moreover, sentencing enhancements, such as 18 U.S.C. § 924(c) (possession of a firearm) and 18 U.S.C. § 924(e) (prior violent felony convictions), already exist to address acts of violence or gun possession that occur in connection with drug offenses. It is also important to note that the retroactive provisions of the EQUAL Act would require a judge to consider a variety of factors before lowering a person's sentence, “including the nature and circumstances of the original offense, the history and characteristics of the defendant, the seriousness of the offense, deterrence of criminal conduct, and what is necessary to protect the public.”<sup>24</sup>

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<sup>16</sup> Eliminating a Quantifiably Unjust Application of the Law Act, H.R. 1693, 117<sup>th</sup> Cong. (2021); S. 79, 117<sup>th</sup> Cong. (2021).

<sup>17</sup> U.S. SENTENCING COMM’N, ESTIMATE OF THE IMPACT OF H.R. 1693, THE EQUAL ACT OF 2021, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January\\_2022\\_Impact\\_Analysis\\_for\\_CBO.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2022_Impact_Analysis_for_CBO.pdf).

<sup>18</sup> Letter from ALEC Action, et al., to Senator Dick Durbin, Chair of the Senate Judiciary Committee, et al. (Apr. 12, 2021), <https://img1.wsimg.com/blobby/go/e92afdcc-9a38-4bb1-a4e7-44c54975c6b9/downloads/Coalition%20Letter%20EQUAL%20Act.pdf?ver=1618421771772&niReferrerLink=federal-bills-6937998823457030146>

<sup>19</sup> “Drug Overdose Death Rates- Figure 7” National Institute on Drug Abuse, last modified June 30, 2023. <https://nida.nih.gov/drug-topics/trends-statistics/overdose-death-rates>.

<sup>20</sup> *Id.*

<sup>21</sup> U.S. Sentencing Comm’n, Cocaine and Federal Sentencing Policy (2007) pg. 63.

[https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> Pye, *supra* note 13.

<sup>24</sup> *Id.*

On June 22, 2021, Regina LaBelle, the Acting Director of the Office of National Drug Control Policy, testified before the Senate Judiciary Committee to voice support for the EQUAL Act on behalf of the Biden-Harris Administration and advocated for its swift passage.<sup>25</sup> During her testimony, Acting Director LaBelle stated that “[t]he current disparity [between crack and powder cocaine] is not based on evidence yet has caused significant harm for decades, particularly to individuals, families, and communities of color. The continuation of this sentencing disparity is a significant injustice in our legal system, and it is past time for it to end.”<sup>26</sup> On September 28, 2021, the U.S. House of Representatives voted 361-66 to pass the EQUAL Act. The Senate, however, did not vote on the bill. The EQUAL Act has been reintroduced in both chambers with bipartisan support during the 118<sup>th</sup> Congress but has yet to be voted on as of this writing.<sup>27</sup>

## CONCLUSION

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The racial disparities and stigma surrounding crack cocaine established in the late 1980s continue to this day. While the FSA has helped to lessen the sentencing disparity between crack and powder cocaine, a disparity nevertheless remains. Passage of the EQUAL Act would eliminate the sentencing disparity and likely the racial disparity in cocaine sentencing.

## RESOURCES

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<sup>25</sup> “Acting Director Regina LaBelle Voices Support for Bill to End Federal Sentencing Disparity Between Crack and Powder Cocaine on Behalf of the Biden-Harris Administration,” White House, June 22, 2021. <https://www.whitehouse.gov/ondcp/briefing-room/2021/06/22/acting-director-regina-labelle-voices-support-for-bill-to-end-federal-sentencing-disparity-between-crack-and-powder-cocaine-on-behalf-of-the-biden-harris-administration/>

<sup>26</sup> *Id.*

<sup>27</sup> Eliminating a Quantifiably Unjust Application of the Law Act, H.R. 1062, 118th Cong. (2023); S. 79, 118th Cong. (2023).

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