

Testimony to the US Sentencing Commission on the disparity between crack and powder cocaine sentences

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Summary

The social consequences associated with a drug are determined in part by the characteristics of the user population. If crack cocaine appeals to a population that has lower self-control and more capacity for violence as compared to the population that uses cocaine powder, then any inherent differences in harms between the two forms of the drug will be exacerbated. Should sentencing decisions “control” for user characteristics or should they reflect simply the harm that is caused, without such controls? I believe that given changes over time in who uses a drug, there is a strong argument for controlling for user differences in deciding on sentencing levels.

Testimony

We have been asked to address the question of the appropriate statutory penalties for powder cocaine and crack. Given the limited time available, we will consider just one aspect, namely whether those differences in social damage that are the consequence of differences in who uses the drug should be controlled for in making this decision. That is should the focus be on what might be regarded as the inherent properties of the drug or the contingent differences (i.e. those associated with its actual use) in the harms associated with each drug? We believe that the inherent properties should guide sentencing decisions.

The basic motivation for the federal sentencing disparity between powder cocaine and crack cocaine is that crack cocaine is perceived to be much more dangerous. In assessing the meaningfulness in making this distinction legally between the two forms of cocaine it is useful to consider the same issues for other substances.

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Alcohol provides a useful parallel. Younger males consume much more of their alcohol in the form of beer than do older females; the latter are more likely to consume wine or spirits. For young males, alcohol generates a great deal of violent crime; for older females alcohol leads to adverse health and family consequences but not much violence against weaker victims. Analysis might show that on average beer produces more violent crime per litre of ethanol but one would hardly claim that beer was itself more criminogenic. That association with crime is simply a consequence of preferences among groups that differ in their propensity for certain kinds of acts. If young males preferred fortified wines, then fortified wines would appear to be more criminogenic.

Consider trying to apply the same logic of differentiation by form to other illegal drugs. Injected heroin is more harmful for users and society than is smoked or snorted heroin, because it carries a greater risk of overdose and because it promotes transmission of blood-borne diseases. Should we have legislation enforcing substantially different penalties on injected as opposed to smoked or snorted heroin? It seems almost silly to even ask the question because heroin is heroin and the relatively “safe” heroin a user is about to snort can very easily be converted into “more dangerous” injectable heroin just by dissolving it in water.

However, the same can be said of the two forms of cocaine. Relatively safe powder cocaine can very easily be converted into “more dangerous” crack cocaine just by dissolving it along with baking soda and boiling. Indeed, that is where all crack in America comes from. It is converted from powder cocaine primarily at lower market levels and at a cost that is trivially compared to the value of the cocaine itself. There is no such thing as crack cultivation by South America or Colombian crack cartels. So the same atoms that merit only a modest sentence when part of a wholesale dealer’s one pound bag of powder cocaine can elicit a 5-year mandatory minimum sentence several layers further *down* the distribution chain when they are part of a low-level seller’s 5 gram stash of crack.

There are two reasons we impose different sentences for powder cocaine and crack cocaine even though we do not do so for injectable heroin vs. snortable heroin. One is an accident of chemistry; the other is the misattribution of causality to an observed correlation.

The accident of chemistry is that dissolving and heating induces a minor chemical change, not just a phase change as in the heroin example. That chemical change is minor, not affecting at all the part of the molecule that is pharmacologically active, but it matters because “powder cocaine” (more accurately cocaine alkaloid) vaporizes at a relatively high temperature, so most of it decomposes when heated. In contrast, the base form can more readily be vaporized and hence “smoked”, which facilitates taking the drug via a route of administration that has a faster and more intense time profile of absorption and delivery to the brain.

Route of administration matters to the user, and one generally expects faster and shorter acting routes of administration to be more reinforcing, in psychologists’ sense of the term. However, the rapid course of action is not primarily what motivates a desire for differential sentencing. Smoking nicotine and injecting powder (alkaloid) cocaine are also very fast acting.

Rather, it is more crack’s *association* with violence and birth of drug-addicted infants that drove fear of crack and the resulting differences in sentence severity between powder cocaine and crack cocaine. I use the term “association” intentionally because it is just that. There is nothing intrinsic about crack cocaine being the base not the alkaloid form of the molecule that made its retail markets so violent in the 1980s or that made it any more harmful in utero.

As compared to powder cocaine, crack is much more heavily used by poor, African-American males than by other groups. That demography is not reflected in the National Survey on Drug Use and Health or in Monitoring the Future; neither of these surveys describes the population of heavy users who account for the bulk of quantity consumed

and the resulting harms. It is instead a reasonable summary of what is known from studies of Emergency Department and Medical Examiner admissions¹ the population in treatment² and urinalysis and interviews of arrestees (ADAM)³. All of these data are vulnerable to bias. For example, it is open use of drugs in poor neighborhood that is most likely to lead to arrest; thus ADAM is not a random sample of drug users but describes drug use among the arrested population. The treatment system includes many who enter as a consequence of criminal justice referral, so it suffers from the same bias. Low income users are more likely than others to go to an Emergency Department as the result of unexpected consequences of drug use; they are more likely also to die as a result of adverse effects because they are in poorer health. Nonetheless there is a great deal of consistency in these indicators and there is little evidence of substantial white or Asian middle-class crack dependence or abuse.

The violence associated with crack has declined over time. In the mid-1980s crack was used primarily by the young. Now, because rates of initiation/escalation into frequent use have been lower for a long time, the population of users has aged. For example in 2004 among treatment admissions for which smoked cocaine is the primary drug of abuse, two thirds of admissions were age 35 or older, a much higher figure than for powder cocaine. Violence, even among crack users, is likely to be a young man's game. Studies of crack in 2005 will surely find much less violence associated with the drug than did the studies of 1985. Relationships between any specific drug and behaviors such as crime and violence are subject to change over the course of a drug epidemic.

Implications for Sentencing

Assuming that this analysis is correct, what are its consequences for sentencing policy, specifically for the appropriate relationship between penalties for comparable quantities of crack cocaine and powder cocaine? On the one hand, the reality is that crack cocaine

¹ These data are gathered in the Drug Abuse Warning Network (DAWN) system

² Treatment data are gathered in the Treatment Episode Data System (TEDS)

³ The Arrestee Drug Abuse Monitoring system, which operated in various forms from 1989 to 2004, when it was terminated for budgetary reasons.

has historically been associated with high levels of violence, regardless of whether that is primarily the drug itself or the interaction between the drug and the population. Some might argue that crack is more dangerous precisely because it is attractive to those for whom stimulants engender particularly harmful behavior, young poorly educated males in high crime neighborhoods. Perhaps in a classless society, crack would not have much worse consequences than powder cocaine, but we do not live in such a society and do not anticipate doing so in the foreseeable future. If the goal of sentencing is part retributive, then it can be argued that selling crack cocaine has resulted in greater harm to society than selling cocaine powder and thus longer sentences are appropriate.

The arguments also have to weigh the instrumental value of long sentences. Illegality certainly raises prices and reduces use. However, there is in general depressingly little evidence that increasing sentence lengths reduces drug use either by raising prices or reducing availability. Others will address these issues in detail but I want to note briefly that the one published paper on the effects of increased incarceration for cocaine offenses⁴ found that the tripling of incarceration between 1986 and 1997 only raised price by between 5% and 15%, a modest accomplishment given the financial and human costs associated with that incarceration.

On the other hand there are social and racial consequences of ignoring this interaction. To do so results in heavier sentences for drugs that are used by populations that are disproportionately young, low income, minority males. As this Commission well knows, the result of the disparity in the sentences for the two forms of cocaine is to produce a tragic disproportion in the share of crack prison time served by African-Americans; the disproportion is high even when compared to that for prison sentences generally. There are many sources of injustice for African-Americans in contemporary society which are difficult to deal with. This is one that can be ameliorated by policy. If the crack-powder disparity is reduced from 100 to 10, the sense of injustice will be ameliorated while still recognizing that crack is a more dangerous drug.

⁴ Kuziemko, I. and S. Levitt (2004) "An Empirical Analysis of Imprisoning Drug Offenders" *J. Public Economics* **9-10** pp.2043-2066

For us the decisive factor is that the contingent relationship changes over time. Use of very dangerous drugs in this country have shown epidemic patterns. The drug is popular in the early phase when its positive effects are conspicuous and the adverse effects are still not well understood. As the dangers of a drug become more prominent there can be a sharp fall in initiation rates. That has been the pattern in the U.S. for cocaine, crack and heroin. Each drug has been associated with an aging cohort of users. That reduces the level of violence associated with the drug over time. A sentencing structure that ignores this fact and is based solely on the damage inflicted during the early stages will become increasingly arbitrary.

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