

# Themis: Research Journal of Justice Studies and Forensic Science

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Volume 2 *Themis: Research Journal of Justice Studies and Forensic Science, Spring 2014*

Article 10

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5-2014

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### Recommended Citation

Zimmerman, Kristin (2014) "The Unfair Sentencing Act: Racial Disparities and Fiscal Consequences of America's Drug Laws," *Themis: Research Journal of Justice Studies and Forensic Science*: Vol. 2 , Article 10.

<https://doi.org/10.31979/THEMIS.2014.0210> <https://scholarworks.sjsu.edu/themis/vol2/iss1/10>

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## The Unfair Sentencing Act: Racial Disparities and Fiscal Consequences of America's Drug Laws

### Abstract

In 1986, the United States government attempted to combat the perceived war on drugs by enacting mandatory drug laws, with a primary focus on incarcerating crack offenders. The result of this was a mass influx of African Americans to US penitentiaries and minimal to zero reduction of crack convictions. Because the Anti-Drug Abuse Act of 1986 recognized 100 grams of cocaine as equivalent to one gram of crack, it has been perceived not as a war on drugs, but as a war on a war on minorities. The mass incarceration of drug offenders also led to severely damaging fiscal consequences that were forced onto the nation's taxpayers. In November 2010, President Obama signed the Fair Sentencing Act, which decreased the imbalanced ratio of 100:1 to 18:1. The Fair Sentencing Act, named by the United States government, is still unfair. Until Congress and the Sentencing Commission agree that one gram of cocaine is equivalent to one gram of crack, justice has not been served.

### Keywords

Fair Sentencing Act, drug war, racial disparity

The Unfair Sentencing Act: Racial Disparities and  
Fiscal Consequences of America's Drug Laws

*Kristin Zimmerman*

**Abstract**

In 1986, the United States government attempted to combat the perceived war on drugs by enacting mandatory drug laws, with a primary focus on incarcerating crack offenders. The result of this was a mass influx of African Americans to US penitentiaries and minimal to zero reduction of crack convictions. Because the Anti-Drug Abuse Act of 1986 recognized 100 grams of cocaine as equivalent to one gram of crack, it has been perceived not as a war on drugs, but as a war on a war on minorities. The mass incarceration of drug offenders also led to severely damaging fiscal consequences that were forced onto the nation's taxpayers. In November 2010, President Obama signed the Fair Sentencing Act, which decreased the imbalanced ratio of 100:1 to 18:1. The Fair Sentencing Act, named by the United States government, is still unfair. Until Congress and the Sentencing Commission agree that one gram of cocaine is equivalent to one gram of crack, justice has not been served.

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### **Introduction**

Prior to August 3, 2010, federal law recognized 100 grams of powder cocaine and one gram of crack as equivalents. Minimum sentencing for offenders in possession of five or less grams of crack received a five-year mandatory minimum prison sentence, while those in possession 500 grams or less of cocaine received the same sentence. This federal law disproportionately affected young, low-income, African American males who represented the majority of those prosecuted for crack possession, in comparison to cocaine offenders who were predominantly Caucasian and Latino (Graham, 2011).

Prior to 1986, crack and cocaine were not distinguished as different substances by the federal government. However, the Anti-Drug Abuse Act of 1986 clearly differentiated crack from cocaine, and labeled crack as the greater of the two evils, which led to significantly harsher sentencing for crack (Graham, 2011). Conflict theory puts an emphasis on the role of power in the production of social order (Cherry, 2013). Those with the most political, economic, and social power dominate those with fewer resources or of lower socioeconomic class. Though the intentions behind the formation of the 2010 Fair Sentencing Act were to reduce the gap between crack and cocaine convictions, the implications of the policy are far from fair. Through analyzing the problems that arise in the Fair Sentencing Act, this paper will review the key elements at issue and provide recommendations for new policies that eliminate the imbalance between crack cocaine and powder cocaine punishments, reduce racial disparities, reduce recidivism, and counter the financial crisis America is facing.

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**Crack Cocaine vs. Powder Cocaine**

Cocaine use is documented as far back as the sixth century, but most likely started much earlier. South American natives chewed coca leaves for their altering effects and ability to increase endurance, particularly at the high altitudes in which many of these people resided. Addiction to cocaine is unknown to South American cultures where the drug has been used for centuries to increase stamina and the ability to work. The method in which the natives ingest the drug—by chewing on the coca leaves—provides a mild stimulant effect, therefore there is no rush, and the drug is relatively safe. The modern day formulations of crack and cocaine are far more addictive than those used by South American natives.

Today, the two most common forms of cocaine are: white powder, which is either snorted or dissolved for injection; and crack, a solid chunk of cocaine prepared with sodium bicarbonate and heated directly in a pipe to form a vapor that is then inhaled into the lungs. Oftentimes, powdered cocaine is diluted with other white powders such as cornstarch, lactose, local anesthetics, caffeine, or amphetamine. The purpose behind the dilution is purely economic. Powder cocaine is an expensive drug. By diluting it with cheaper substances that provide some semblance of the sensations associated with cocaine, a higher profit can be obtained by producing more product. According to 2004 DEA statistics, the purity of powdered cocaine is rather high, between 70 and 80 percent. The methods in which these stimulants are ingested vary from user to user, as does the rate at which the drug moves through the body. Snorting, which is one of the most common ways of using cocaine, is a relatively slow way to deliver cocaine into the bloodstream. In contrast, crack cocaine is normally smoked, which moves the drug as quickly

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through the body as intravenous injection. Stimulants, like powder cocaine and crack cocaine, increase energy, alertness, and movement. Stimulant users and abusers are constantly in motion, whether it be talking, moving, or general fidgeting (Kuhn, Swartzwelder & Wilson, 2008).

### **The Unfair Sentencing Act**

In the midst of the crack epidemic of 1986, Congress held hearings regarding the perceived crisis. At the hearings, they asserted that crack was more addictive than powder cocaine, producing different and more dangerous physiological effects than those caused by powder cocaine. Crack attracted users who could not afford powder cocaine, and it led to a higher rate of crime than powder cocaine. Before the Anti-Drug Abuse Act of 1986 (ADAA), powder cocaine and crack were indistinguishable. The ADAA made a clear distinction between the two highly addictive substances and deemed crack as the more dangerous drug—the greater of the two evils. While considering the appropriate ratio between the quantity thresholds applicable to the crack and cocaine disparity in the ADAA, most of the members of Congress felt crack was more dangerous than cocaine, and that crimes involving crack should be punished accordingly. There was no consideration of what sentences would be imposed on those found to be involved with amounts less than what was necessary to trigger the mandatory minimum sentence. Additionally, members of Congress were responding to the perceived crack epidemic, and did not vigorously investigate the facts about the drugs themselves (Block & Rhodes, 1989; Graham, 2011).

Over two decades after the ADAA was enacted, with millions of people placed behind bars for unjustifiable amounts

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of time, President Obama signed the Fair Sentencing Act of 2010 (FSA). Though the weight ratio of crack to cocaine went from the immensely disproportionate ratio of 100:1 to 18:1 in favor of cocaine possession, as well as decreased the enormous gap between punishments, it remains unequal. The newly enacted FSA is a major step toward equality for crack and cocaine offenders. However, it remains disproportionate due to the outdated and discredited assumptions regarding the two strikingly similar substances (American Civil Liberties Union, n.d.). Defendants convicted of possessing as little as five grams of crack will no longer receive a mandatory five-year prison sentence (Mauer, 2010). Additionally, the FSA increased the gram amount of crack that will send someone to prison for a five to ten year mandatory minimum sentence. The FSA was intended to reduce the racial disparity impact of the nation's drug laws, which have disproportionately affected African Americans, reduce the powder-crack disparity, as opposed to eliminating the gap altogether, decrease the incarceration rates of the past two decades, and most importantly, to attack the disturbing difference between crack and cocaine convictions.

In recent years, crack use has been declining, with methamphetamine being deemed as the drug at the heart of the nation's "drug problem." Additionally, African Americans still represent the majority of the defendants prosecuted for crimes involving crack, while Caucasians and Latinos represent the majority of those prosecuted for crimes involving powder cocaine (Graham, 2011). Specifically, 80 to 90 percent of defendants convicted of crack-related offenses are African American, while approximately 70 percent of those convicted of powder cocaine offenses are Caucasian or Latino (Diamond & Milhiser, 2011). One of the goals of enacting the Fair Sentencing

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Act was to reduce the racial disparities by creating a fair ratio of crack and cocaine, which turned out to be 18:1 (possession of 18 grams of cocaine was punished the same as one gram of crack). This ratio is an improvement from the previous 100:1 ratio resulting from the Anti-Drug Discrimination Act of 1986, but it is still far from fair and substantially distant from eliminating the gap between African Americans, Caucasians, and Latinos incarcerated for crack- or powder cocaine-related criminal offenses.

Though this may be good news for people who have been convicted of crack offenses after August 2010, what does it mean for those convicted prior to that date? The Sentencing Commission voted in June 2011 for the retroactive application of the reduced penalties for crack offenses. Because of this vote, many prisoners became eligible to seek sentencing reductions in court on November 1, 2011. However, not all of those who are incarcerated will benefit from this vote, particularly those who were sentenced under the mandatory minimum sentencing laws (Diamond & Millhiser, 2011). Though the FSA was signed in August 2010, African Americans continue to be the majority of those imprisoned in the United States.

### **Racial Disparities**

The crack and cocaine federal sentencing laws disproportionately affect African Americans. By 2008, one out of every nine black men under 35 years old was behind bars. However, the sole cause of incarceration is not crack addiction, abuse, or sales, but it does account for a significant number of those incarcerated. The War on Drugs has made an enemy out of the poor, and therefore, targets minority populations (Mauer, 2010). According to Census Bureau figures, racial

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categorizations, racial disparities, and biases in the criminal justice system have been most felt by African Americans (Brown, 2012). According to Bourgois (2003), crack, as a preferred drug of abuse, is only appealing to the desperate population subgroups who are victims of structural violence. There is a disproportionate concentration on the blocks surrounding public housing, where prostitutes roam, and vacant lots. Because of the crack epidemic, many of the younger generations of African Americans learned to shun crack after they witnessed firsthand the effect on their family members, friends, and neighbors (Blumstein, 2006). This can be explained through social learning theory, which has three core concepts: the ideas that people can learn by observing; internal mental states are essential to the learning process; and that just because something is learned does not mean one's behavior will change (Cherry, 2013). Those who became hooked on crack during the crack epidemic of the mid-1980s never experienced the devastation of addiction until they lived it.

On the contrary, the majority of those convicted of crimes involving cocaine were Caucasian or Latino, which then raised suspicion that the basis of the ADAA was discriminatory and merited revision (Graham, 2011). On average, African Americans serving time for crack-related offenses at the 100:1 crack-to-cocaine ratio were serving virtually the same amount of time in prison for nonviolent offenses as Caucasians were serving for violent offenses.

In 2010, President Barack Obama signed the FSA. However, as previously stated, a disparity in punishment remains, and the newly determined ratio of 18:1 is not equal. A disproportionate number of African Americans remain incarcerated for non-violent drug crimes, and law enforcement

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officials continue to fight the War on Drugs. In 2011, one year after the FSA was signed, more than 80 percent of the 30,000 inmates incarcerated in federal prisons for crack-related charges were African American (Garcia, 2013). In 2011, the United States Sentencing Commission voted to retroactively apply the newly enacted FSA sentencing guidelines to those sentenced prior to the signing of the law. If all goes as planned, the retroactive application will help ensure that over 12,000 prisoners, a striking 85 percent of whom are African American, will be granted the overdue opportunity for their sentences to be re-examined by a federal judge (Block & Rhodes, 1989).

### **Conflict Theory**

According to Karl Marx, there are two major social groups: the ruling class and the subject class. The ruling class oppresses and controls the subject class in an effort to further serve its interest, which leads to conflicts between the two groups (Sociology Guide, 2013). In an effort to incapacitate drug offenders, and to deter individuals from committing similar drug crimes, the federal government established mandatory sentencing laws to dominate and control the lower class crack offenders. This oppression primarily affects African Americans, as demonstrated by the racially imbalanced prison population. There are limited chemical differences between crack and cocaine, but there are differences between those who generally use the substances. As previously mentioned, crack usage is associated with African Americans, while cocaine usage is associated with upper-middle class Caucasians. Those with political and economic power are primarily Caucasian, while those without power generally are not.

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### **Fiscal Consequences of the War on Drugs**

Fiscal consequences of the War on Drugs have been substantial, especially for taxpayers. Between 1975 and 2000, the United States has experienced nearly a four-fold rise in its prison population. From 1980 to 1997, there was a twelve-fold increase in prisoners who were incarcerated for drug-related offenses (Bourgois, 2003). In 2009, states spent upwards of \$52 billion on corrections. The approximate cost of incarceration per inmate is \$29,000, compared to probation or parole, which costs a mere \$2,900 per person annually (Brown, 2012). Not only does this create a major financial issue, it does not address recidivism. In recent years, the cost of substance abuse and the incarceration of users have reached disproportionate levels across the nation. The federal budget allows for \$15.5 billion to be allotted annually for the fight against substance use and abuse. Comparatively, \$1.7 billion is set aside for prevention programs, and \$3.9 billion for treatment services (Anglin, Nosyk, Jaffe, Urada & Evans, 2013). There is a correlation between crime rates and drug use, but incarceration is not the only solution for the matter.

The ADAA was quickly passed through the legislature and enacted, but failed to provide a distinct definition of cocaine. The ADAA did, however, provide a clear distinction between crack and cocaine in general, and placed the two substances on completely different levels even though they shared a plethora of similarities. Additionally, Congress did not incorporate the traditional legislative process of using subcommittees and conferences between the chambers that would have produced discussions and reports about the meaning of the potential statute. Instead, the ADAA was enacted quickly in order to respond to a perceived drug crisis. The cryptic wording of the

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ADAA has created much contention surrounding the definition of “cocaine base.” There is no definition of “cocaine” or “cocaine base” in the statute (Mac Nally, 2007). In other words, there is varied understanding of the differences between these substances, and a lack of similarity between the interpretations of the definitions that do exist. This particular act dramatically affected the prison population, which then affected taxpayers.

### **Policy Implications**

In an effort to live up to the United States Constitution, and create a country of equal rights and justice for all, the Fair Sentencing Act should be reconstructed to create identical sentencing for crack and cocaine. The perceived difference between crack and cocaine is based on an assumption that crack causes users and dealers to be more violent, and participate in more criminal behavior than cocaine. Additionally, there is a significant racial divide between convictions for crack addicts and dealers, and cocaine addicts and dealers. Crack has been portrayed as a significantly more delinquent drug than cocaine, though the two are both highly addictive substances and share many of the same characteristics. The main difference between the two illegal drugs is that crack users are primarily low-income African Americans, while cocaine users are generally affluent, middle and upper class Caucasians and Latinos (Graham, 2011). In order to destroy the enormous divide between those imprisoned for crack-related offenses versus cocaine-related offenses, the current 18:1 ratio must be reduced to 1:1.

Imprisonment perceptively consolidates the issue of the drug infestation, but does not address the underlying dilemma. From 1980 to 2000, the rate of incarceration for drug-related offenses grew at an astounding rate. In recent years, over 20

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percent of state prisoners, and over 50 percent of federal prisoners, are held because of drug-related convictions (Blumstein, 2006). The unfortunate circumstance that the United States has put itself in because of its policymakers' decisions has had an extremely negative effect on society, the economy, and imprisoned individuals.

Rehabilitation programs not only address the disease of addiction at its root, but also reduce the financial implications on taxpayers. The solution to America's drug problem is not to lock addicts in a cell and throw away the key, while providing no services to help with the underlying causes of addiction. It is to offer an alternative route of service to addicts. How will rehabilitation help society and reduce recidivism rates? Who will pay for these services? These are viable questions that deserve extensive research and must be answered in detail in order to convince officials that this recommendation is going to be a success if attempted. Placing nonviolent drug offenders in prisons with gang members, murderers, sex offenders, and other violent offenders does nothing to help them recover from their addiction, nor does it give them any hope for a better life. Offering these men and women an alternative to prison will help reintegrate them into society when the time comes, and will help them stay out of the life of violence that prison often promotes. This can be achieved through sober living environments, halfway houses, or rehabilitation units within the prison walls. By addressing the issue of addiction and housing drug offenders in alternative units or facilities, rates of recidivism decline. The cost of recidivism and incarceration is extremely high and will be offset by the reduced substance dependence, which will reduce incarceration and crime (Bahr, Masters, & Taylor, 2012). The Center for Substance Abuse Treatment (CSAT) published a

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study in 1997, which evaluated the economic and societal effectiveness of drug treatment verses imprisonment. Studies showed that treatment costs range from \$1,800 to \$6,800 per client, in comparison to \$64,338 if the individual was to be incarcerated for 25 months (McVay, Schiraldi & Ziedenberg, 2004). Additionally, it was found that those individuals who had completed their treatment programs had substantially lower arrest rates following their program graduations. Along with reduction in drug dependency and recidivism rates, many treatment programs help prepare individuals for the reintegration process (McVay et al., 2004). In order to cease drug-related recidivism rates, it is important that treatment programs be implemented and offered in lieu of, or in addition to, imprisonment.

Unfortunately, however, many of those with substance abuse issues have not necessarily been incarcerated solely for their drug use or any offense related to crack or cocaine. Many offenders committed acts that are more violent, or crimes directly detrimental to society while they were high on crack, cocaine, or another mind-altering substance. Should these individuals receive the same rehabilitation as those who were specifically charged with drug offenses?

Though addiction may have been a significant factor in their decisions to break laws, it does not count as a “get out of jail free card.” Those who are convicted of crimes while under the influence or in possession of drugs, such as violent offenses, property offenses, organized crime, or hate crimes, must be held accountable for their actions. Drugs should not be an excuse for a lesser sentence for other crimes. However, if the only crime that one is convicted of has a direct correlation with drugs, rehabilitation should be made an alternative to the offender. For

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those who have committed and been convicted of other types of criminal activities while high on an illegal substance, or in possession of an illegal, mind-altering substance, rehabilitation should be a larger part of their sentences. Non-profit groups, such as Alcoholics Anonymous and Narcotics Anonymous, go into institutions and offer their time, free of charge and commitment. Though these programs are critical for people to maintain their sobriety, it is simply not enough for those who are incarcerated. There is a large expense account dedicated to penitentiaries. The division of these finances should be rearranged. Instead of purchasing more weapons, police cruisers, and building more prison facilities, money should be utilized in a more productive manner, offering these individuals more programs that will help them reestablish their positions in society and divert them away from criminal activity. Without direction, convicts are lost. By providing services to help point them on a positive path, both society and the criminally convicted will benefit.

### **Conclusion**

The primary issue is that the Fair Sentencing Act of 2010 did not settle the discrepancy between offenders with crack cocaine charges and offenders with powder cocaine charges. Though it did reduce the unfair divide between the two substances, it has failed to create identical sentences for the strikingly similar drugs. Furthermore, minorities are incarcerated for crack at an alarming rate, while cocaine users and dealers seem to suffer minimal punishment for similar actions. In an effort to accurately educate society about the policies adopted by the federal government, more research is needed in deciphering one drug from another. The public needs to be made aware of the

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similarities between the two substances and be notified that they were provided with falsehoods back in 1986 when the Anti-Drug Abuse Act was passed. The road to equality and justice for those convicted of crimes involving crack cocaine and powder cocaine is long and arduous. It will take years for legislation to right the wrongs of the past, but that is no reason for policy makers to delay any further. The time to act is now.

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