

Crack and Powder Cocaine: Exploring Disparities in Cocaine-Related Laws and Their Enforcement

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Received December 31, 2022; Revised July 28, 2023; Accepted, September 11, 2023

Abstract

The widespread use of cocaine in the US in the 1980s and the subsequent War on Drugs brought about many long-lasting effects on racial disparities in the justice system. An uneven sentencing ratio between the two forms of a widely used drug, crack and powder cocaine, was set by politicians to prevent further usage, but it appears that for decades Black users were put at an unfair disadvantage in the legal and law enforcement systems. While this extreme ratio has been brought down in recent years, the law still holds that users who possess crack cocaine are punished more severely. This paper draws on Donald Black's theory of law to try to offer an explanation of this disparity. The paper argues that Black's theory provides a useful framework for highlighting how social inequalities shape the legal and law enforcement systems and are then also reflected in the ongoing bias which affects the levels of punishment of different social groups. Specifically, the paper argues that a combination of factors related to inequalities of not just race but also socio-economic status needs to be considered in explaining, and trying to find solutions, to the persistent disparities in how the use of crack and powder cocaine is coded in law and how the law is enforced.

Keywords: Racial disparities, Crack cocaine, Powder cocaine, Donald Black's theory of law, Social inequalities

1. Introduction

1.1 Background

Cocaine originates in South America and was initially used by native Americans for medical purposes. The leaves of the coca plant were used to create powder, which was injected or inhaled. If injected cocaine gives the user a quicker and more intense high than when it is inhaled. Crack cocaine is based on powder cocaine, which is mixed with baking soda and water, creating a hard rock-like substance. Crack cocaine comes in small, easy to distribute doses (Coca, n.d.), it is typically smoked and, similar to injecting powder cocaine, gives the user an intense high that lasts for only a couple of minutes (Crack vs. Cocaine, 2022). Though produced and used differently, crack and powder cocaine are chemically the same drug, and the short-term effects (e.g. nausea, elevated body temperature, heightened blood pressure) and long-term effects (e.g. adverse impact on the liver, kidneys, the neurological and cardiovascular systems) are almost the same (Lisw, 2023). Despite the lack of meaningful differences between crack and powder cocaine there are enduring disparities in how their use is treated in law and in law enforcement. The dominant framing of this problem in academic debates and in the media tends to be around race and institutional racism. The paper reviews existing evidence and hypotheses that other factors, such as socio-economic status are at least as important.

1.2 Legal disparities and the changing meanings of using powder and crack cocaine

Powder cocaine became popular in Europe as an anesthetic for eye surgeries during the 19th century but later began to make its mark on North America in the late 20th century after it expanded its use from a painkiller to a recreational drug (Hutchinson, 2022). Cocaine was being significantly exploited without addressing the addictiveness of the drug and the mental and physical consequences of using it. The use of cocaine was primarily attributed to Blacks, and was associated with rumors about cocaine users being violent and having greater resistance to bullet wounds than other people (Hart, 2014).

In the 1980s it was the use of crack cocaine, not cocaine as such, that came to be associated with Blacks (Beckett et al. 2005). This might in part be due to the easy distribution, smaller packaging, and lower price of crack cocaine (Hutchinson, 2022) and because a larger percentage of the Black population lives in poor areas or in poverty. For example, between 1980 to 1986, Blacks constituted 12.2% of the population and 59% lived in poverty (O'Hare, 1987), which for white Americans was 80% (Frey, 2020) and 10.2%, respectively (Census Bureau Reports 1980 Poverty Statistics, 1982). The rapid growth of the use of crack cocaine became a social and political concern in the mid-1980s (Crack Cocaine Sentencing Policy, 1997). The Anti-Drug Abuse Act of 1986 was aimed at addressing these concerns. The Act focused on creating a higher sentence for the possession and distribution of crack cocaine compared to that of powder cocaine. Specifically, possession of every 5 grams of crack cocaine would carry the same sentence as possession of 500 grams of powder cocaine, 1:100 ratio. There was no clear rationale supporting this decision as crack and powder cocaine are chemically the same drug. Before being passed into law, “[C]ongress simply considered various arbitrary ratios (including [1-to-20]) and settled on the [1-to-100] ratio, with no evidence to support that figure” (England, 2013). This law was widely discussed as leading to high arrest and conviction rates of Blacks as compared to whites. Substantial evidence has been developed since the period, which explores the impact of the passing and application of the 1986 Act. Before the 1986 Act was passed, Blacks had an 11% higher drug sentencing rate than whites, and after four years, the rate rose by 49% (Vagins & McCurdy, 2006). Figure 1 displays a line graph showing the difference in these rates of Black and white drug arrests, with Black arrests surpassing that of white arrests throughout all three decades. The greatest difference in arrests was recorded in 1987, where 1,346 (per 100,000) Blacks were arrested compared to 299 (per 100,000) whites for drug-related crimes (Human Rights Watch, 2009).

Almost two decades after the Act was passed, 66% of crack users were either white or Hispanic (Vagins & McCurdy, 2006), which may indicate that the prevalence of crack cocaine use in this period was similar among different groups in the US. However, another 2006 sentencing report released in Massachusetts found that 80% of defendants who received mandatory sentences were Black or of another race, while of those arrested for state-level drug offenses, 45% were white (Greene et al., 2006). Another statement from 2006 highlights these issues with an ex-federal prosecutor of Massachusetts claiming that between drug users, Black defendants were more often charged with “a drug-free zone offense and face[d] the two-year mandatory prison sentence than whites” (Greene et al., 2006). The Act has also been seen as ineffective in targeting major drug felonies, which was one of its stated aims, while appearing to reinforce other evidence about the underlying racial disparities it created and reinforced. For example, it is estimated that around 13% of Black adult men may be disenfranchised due to being given felony convictions (Vagins & McCurdy, 2006).

Partly as a recognition of the lack of evidence about different impacts of powder and crack cocaine, and partly due to pressure related to the racial aspect of the disparity in sentencing, the Fair Sentencing Act of 2010 was passed during Obama’s presidency. The Fair Sentencing Act aimed to address the racial bias in the system by reducing the sentencing for the use of powder and crack cocaine from 1:100 ratio to a 1:18 ratio (Carle, 2010). While it is still not a completely equal sentencing ratio, reports over the years have shown that this has led to a gradual decrease in the number of Blacks sentenced for the use of cocaine. However, a 2020 report found that the crack offenders arrested by police were still predominantly Blacks, 77.1% of all arrests, compared to 6.3% for whites and 15.9% for other ethnicities, respectively (Crack Cocaine Offenses, 2018).

There are two related questions that can still be asked. These are first, why has the 1:18 ratio not been made a 1:1 given the overwhelming evidence of the absence of any substantive differences between powder and crack cocaine? And second, why are Blacks disproportionately affected in terms of arrests and convictions? The former, relating to how the use of cocaine is coded in law, can be explained through reference to deterrence theory and cost-benefit analysis. One of the explanations that can account for the latter question is around racial bias on the level of individuals and institutional racism, especially in relation to police discretion in enforcing the law.

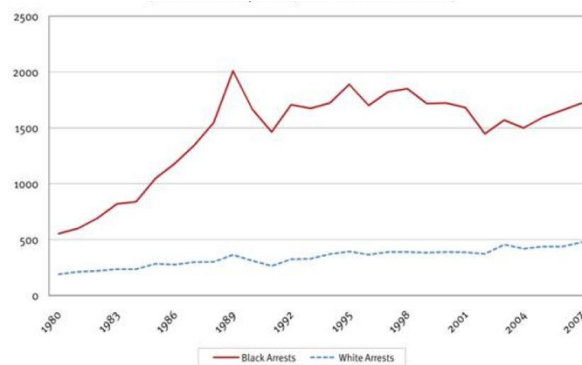


Figure 1. Comparing the Rates of Black and White Drug Arrests Between the Years 1980 and 2007 (Human Rights Watch, 2009).

2. Deterrence theory: justifying disparity in the legal framing of the use of crack and powder cocaine

The basis for many acts passed on criminal legislation can be attributed to, and justified through a reference to, deterrence theory, which states that “human behavior is driven by cost-benefit ratios” (Walker & Mezuk, 2018) and originates from philosopher Jeremy Bentham and Cesare Beccaria’s utilitarian perspective on human behavior (Tomlinson, 2016). Drawing on deterrence theory, it may be argued that crack cocaine was inexpensive and therefore more attainable than powder cocaine. The Anti-Drug Abuse Act of 1986 created an arrest ratio for which the cheaper alternative of the cocaine drug received greater punishment, meaning that citizens were more likely to be deterred from its usage.

A similar logic is consistent with the 2010 Fair Sentencing Act. Today, on average, crack cocaine on the street sells at roughly \$60 (per gram), while powder cocaine can range from \$93 to \$163 (per gram) (Addiction Resource Editorial Team, 2021). The current ratio in cost between the two types of cocaine could be seen, from the perspective of deterrence theory, as encouraging avoidance of punishment and violation of the law. This commonly used rationale for crime reduction could provide further reasoning for the remaining disparity in sentencing ratios and drug arrests. However, there is evidence that such rationale is not applied consistently. White collar crimes, for instance, are typically given lighter sentences and therefore, recidivism rates are higher (Fredericks et al., 2016). Such crimes are more likely to be committed by people who are white and of higher socio-economic status, which may indicate an underlying race and class bias (Sohoni and Rorie, 2021).

3. Police discretion and racial bias in enforcing the law

Discretion, or self-judgment, is valued by police officers as they associate it with having a positive professional self-identification, higher financial rewards, and an expression of their achievement and the value of their contribution to society (Grawitch et al., 2009). There are several aspects of police work which require a degree of discretion. These can include prioritizing certain areas to focus on patrolling, the ways in which an agency operates, and the extent to which strict regulation is exerted over officers.

Police discretion is often put to the test where the officers more freely patrol and need to make decisions based on their assessment of the surrounding context and the situation. This prompts the question of how each officer carries their work with reasonable discernment, and how decisions may be shaped by pre-existing bias, individual and shared experiences from the past, and awareness of trends in data collected from varied arrests.

On the organizational level, higher levels of police discretion appear to be associated with, what is seen as, a high level of complexity of each agency and the context in which it operates. Organizational content (the environment of the agency, e.g. crime rates, social status and racial composition in the surrounding area) and an agency’s control (how the varied police departments officers work to administer and formalize the organization through written policies and regulations) are some of the criteria according to which police agencies are regulated (Nowacki & Spencer, 2019). Results from a recent study on how police organization influences arrests found that “police officers in more structurally complex agencies tend to have more discretion. This is because as organizations grow more complex, direct supervision becomes less feasible” (Nowacki & Spencer, 2019).

Police discretion is also justified through defining some areas as ‘hot spots’ and ‘broken windows’ areas. These are small geographic, usually urban, areas where crime levels are high and as a result, policing tends to occur (Hot Spots Policing, n.d.). These areas also make police more likely to engage in police-citizen interactions and perform drug-related arrests while patrolling (Wheeler, 2019). Although adopting such methods could reduce crime rates, many of these police stops can lead to a racial disparity in arrests, i.e. high number of arrests for minor offenses compared to small number of arrests for people committing felonies. As Blacks are more likely to live in areas defined as ‘hot spots’, ‘broken windows’, and ‘complex to police’ they are more likely to be associated with higher levels of police discretion, and thus also of inherent police bias and institutional racism (Winship, 2021). This may help explain the policing applied to cocaine-related drug arrests as well. However, as Blacks represent 13.2% of the United States’ total population but 23.8% of the population living in poverty (Creamer, 2020), it may be worth considering whether police discretion may also be related to bias against people living in deprived areas or are disadvantaged in other ways. A study on police demands and stress in smaller suburban areas found that officers working in lower socio-economic status communities were more likely to view these areas as high-crime areas (Grawitch et al., 2009). Furthermore, in an additional study on police discretion, it was found that when controlling for socioeconomic status, there was no difference in the rate of arrests between Blacks and whites (Campbell et al., 2021).

Racial bias and institutional racism understood through the prism of police discretion, and deterrence theory may be insufficient to fully address the two questions asked in the beginning of the paper. This is because there is evidence that there may be other processes shaping the legal framing of drug offenses and the application of law in practice.

Specifically, the above findings indicate that while racism and discrimination within the legal and enforcement systems hold influence on arrests and convictions, socio-economic disadvantages through poverty and social standing should also be considered as important contributing factors. Donald Black’s Theory of Law (1976) may be a useful framework to help account for the disparity in the arrests and conviction rates related to the use of crack and powder cocaine.

4. Donald Black’s Theory of Law

Donald Black uses a social-structural framework to define law as “the number and scope of prohibitions, obligations, and other standards to which people are subject” (Black, 1976). Using the factors of stratification, morphology, culture, organization, and social control, Donald Black argues that the quantity of law could vary in situations involving certain obligations, and prohibitions can have differing effects on each individual (Gottfredson and Hindelang, 1979). Donald Black argues that social stratification can be measured on a vertical scale- the way an individual is positioned into society, and wealth, education, and race can have a large impact on how a crime is weighed in the criminal justice system (Campbell et al., 2021). Morphology, the way an individual is integrated in society, which can be measured on a horizontal scale, refers to the “aspect of social life, the distribution of people in relation to one another, including their division of labor, networks of interaction... whether societies, communities, neighborhoods, or organizations” (Gottfredson and Hindelang, 1979). For example, Black argued that education and culture, described as the aspect of social life, were directly related to changes in law (Kuo et al., 2011). In relation to drug offenses, what Black calls the social stratification, and the morphology and culture of society can offer a way of understanding how such offenses are defined in law and how the law is enforced.

This may suggest that crimes that are more often committed by individuals who are less well positioned in a society (lower in social stratification and morphology) are likely to be defined as more serious crimes within the legal system. Donald Black would refer to this as a deviance in law. It may also be more likely that the law is more strictly enforced for people in such a position. Additionally, those who are socioeconomically advantaged may be more likely to use their greater connections to “economic, social, political, and legal resources” with police to “ensure they work in their favor” (Hernández & Heimark, 2021).

5. Applying Black’s theory: Understanding the disparity in the context of inequalities of socio-economic power and social status

In a recent study on the behavior of police and whether race plays a factor in their arrests, the results showed that “arrestee race did not independently influence type of police discretion” and “that arrestee race played a role when interacting with neighborhood concentrated disadvantage” (Campbell et al., 2021). The existing evidence indicates that Black users of cocaine who are arrested for cocaine offenses are typically of lower socioeconomic status (Hernández & Heimark, 2021), and wider data on arrests continue to question methods of law enforcement as policymakers realize how “crime control strategies... intensified law enforcement in low-income communities of color” (Hinton & Henderson, 2018). Figure 2 indicates that people who were arrested and booked multiple times in 2017 were more likely to be poor (e.g. have an annual income below \$10,000), be unemployed, and have less than a high school education (Jones & Sawyer, 2019).

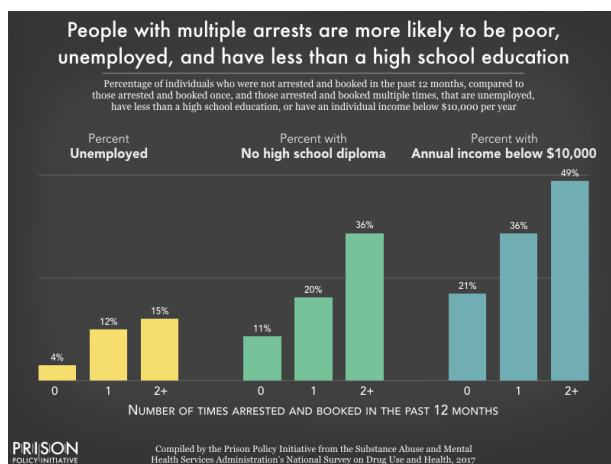


Figure 2. Number of Times Arrested and Booked in the Past 12 Months (Jones & Sawyer, 2019).

These findings are consistent with Black’s framework and indicate that race on its own cannot sufficiently explain disparities in cocaine related arrests as well as the current 1:18 sentencing ratio. Race must instead be paired with other factors, such as

those on the vertical and horizontal domains in Black’s theory, in order to better understand police discretion and the decisions officers make in police-citizen interactions. If Black’s theory is correct, we may expect that white people living on low incomes and in poorer neighborhoods, and who are also not well integrated into professional, local, and cultural networks, may experience high levels of arrests if using crack cocaine. Because poverty is associated with

race (Parolin & Lee, 2022), the experience of the disparities in law and its application are more likely to be observable in the treatment of Blacks. However, while Blacks, compared to poor whites, are likely to experience additional disadvantages related to institutional racism, it should be noted that key factors driving unequal treatment of powder and crack cocaine appear to be related to differences in income, wealth and education. As for the sentencing ratio, Black's theory may also explain why the punishment for cocaine has greater leniency towards powder cocaine users. These are likely of higher social standing and able to afford the more expensive version of the drug; this may be compared to the easily accessible and more appealing option for groups with lower incomes and thus stricter tendencies for punishment directed at them. Developing a complementary focus on the role of socio-economic status and social integration in shaping the law and how it is enforced helps us in avoiding explanations and solutions that are focused on a single factor (e.g. race and racism), as well as in identifying other groups that are likely to also be affected by these disparities (e.g. people living in poverty).

6. Conclusion

This paper aimed to answer two questions: why the 1:18 crack to powder cocaine ratio has not been lowered to 1:1, and which factors may contribute to the disproportionate arrests of Black users. The existing evidence indicates that deterrence and police discretion theories only offer a partial explanation of the legal framing of cocaine offenses and the enforcement of the law.

Donald Black's theory offers a way of looking at drug related arrests and sentencing ratio for crack and powder cocaine in relation to a wider set of factors (summarized in vertical and horizontal domains) that include, but are not reducible to, institutional racism and disadvantage related to race. Existing evidence, consistent with Black's theory, indicates that socio-economic disadvantage, for example, is also an important predictor of disparities in powder and crack cocaine arrests. Black's theory may suggest that addressing the disparity in crack and powder cocaine arrests may require developing a better understanding as to how the legal and police systems are prejudiced against Blacks, but also against people of lower socio-economic status, people living in poor neighborhoods, as well as people who are less socially integrated into professional, local, and cultural networks. Focusing on socio-economic disparities and how these relate to other structural conditions in shaping drug laws, arrests, and imprisonment among different users offers a more realistic picture (compared to single factor explanations) of the underlying causes of the enduring disparities in how powder and crack cocaine use are framed. This research paper helps identify groups affected by these disparities that may be less visible and improves understanding of the experiences of cocaine users who are Black.

Identifying and lessening the disparities within the legal and law enforcement systems (such as in the treatment of powder and crack cocaine offenses) may require addressing problems of the enduring and wide-ranging impact of poverty and inequalities in income, wealth, and opportunities, in addition to problems of social exclusion, and everyday institutional racism. Black's theory offers a useful framework through which to explore such questions.

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