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COMMENT

EVERY HIGH HAS A LOW: A PRAGMATIC APPROACH TO THE WAR ON DRUGS

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One of the lasting vestiges of Richard Nixon's presidency is the infamous "War on Drugs," a forty-year-old effort aimed at curtailing "illicit drug consumption and transactions in America."¹ Although the goal behind the policy—a reduction in the rate of substance abuse—may be altruistic, the War on Drugs has dismally failed to achieve its goals and has exacerbated existing problems.² Specifically, laws dealing with crack cocaine result in a "heavily disproportionate impact on black defendants;"³ in 2008 "blacks comprised 79.8 percent of those convicted for crack cocaine-related offenses," whereas "whites comprised only 10.4 percent."⁴ More generally, these laws illustrate a fundamental misconception of the chief cause of drug abuse and the necessary remedial measures.⁵ The best solution to achieve the goals of the United States' War on Drugs is to mimic Portugal's and Sweden's

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1. Matthew P. Fitzsimmons, *Primary, Significant, or Merely More than Incidental: What Level of Intent Does the Federal Drug-Involved Premises Statute Really Require?*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 186 (2009).

2. See, e.g., Martha Mendoza, *US War on Drugs Has Met None of its Goals: AP Impact*, THE HUFFINGTON POST (May 13, 2010, 6:24 PM), http://www.huffingtonpost.com/2010/05/13/us-war-on-drugs-has-met-n_n_575351.html (explaining that drug use is still rampant and drug-related violence is more brutal and widespread).

3. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995).

4. *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the S. Subcomm. on Crime and Drugs*, 111th Cong. (2009) (testimony of Wade Henderson, President & CEO, Leadership Conference on Civil Rights), available at <http://www.civilrights.org/advocacy/testimony/henderson-crack.html>

5. See *2012 National Drug Control Strategy*, THE WHITE HOUSE, <http://www.whitehouse.gov/ondcp/2012-national-drug-control-strategy> (last visited Sept. 2, 2012) ("Science has shown that drug addiction is not a moral failing but rather a disease of the brain that can be prevented and treated.").

approach to combating drug abuse.⁶

This Comment will first track the history of Congress's treatment of crack cocaine to highlight the United States's broadly misguided drug control policies. It will then discuss Portugal and Sweden's well-crafted strategies for regulating illegal drugs and suggest how to integrate these strategies into the current United States legal infrastructure.

To counteract the fact that crack cocaine is cheaper, more addictive, and more dangerous than powder cocaine,⁷ Congress passed significantly tougher laws in the 1980s for the possession and sale of crack cocaine.⁸ Indeed, federal law "previously treated one hundred grams of powder cocaine as the equivalent of one gram of crack for sentencing purposes."⁹ Possessing 5000 grams of powder cocaine triggered the same ten-year mandatory minimum as possessing 50 grams of crack cocaine.¹⁰ Given that the latter tends to be found in inner city neighborhoods because of its low cost of production, the effects of these disparate sentencing guidelines tend to fall disproportionately on racial minorities, particularly African-Americans.¹¹

Hence, these sentencing guidelines result in a lopsided number of incarcerated African-Americans,¹² because powder cocaine is more commonly used by whites.¹³ This reality further strained racial tensions. In the late 1980s, "whites strongly

6. Countries like Portugal and Sweden have replaced prison terms in favor of mandatory drug treatment programs, and their policy reforms have achieved a substantial decrease in the rate of substance abuse. See *Country Overview: Sweden*, EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, <http://www.emcdda.europa.eu/publications/country-overviews/se> (last visited Aug. 11, 2012); Erik Kain, *Ten Years After Decriminalization*, FORBES (July 5, 2011, 3:09 PM), <http://www.forbes.com/sites/erikkain/2011/07/05/ten-years-after-decriminalization-drug-abuse-down-by-half-in-portugal/>.

7. Todd Wilk Estroff, *Routes of Abuse and Specific Drugs*, in *MANUAL OF ADOLESCENT SUBSTANCE ABUSE TREATMENT* 45 (Todd Wilk Estroff ed., 2001).

8. David H. Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1212 (1997).

9. Kyle Graham, Essay, *Sorry Seems to Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 766 (2011) (emphasis added).

10. Sklansky, *supra* note 3, at 1287.

11. *Id.* at 1289.

12. Angeli, *supra* note 8 ("For drug offenses, the African American proportion of arrests increased from 24% in 1980 to 39% in 1993, even though African Americans comprise only 13% of monthly drug users.")

13. *Id.* at 1213.

associated crack with the same minority group they linked with heroin—inner city blacks—and there was widespread fear that use of the drug was expanding beyond the ghetto into suburbia.”¹⁴ The mandatory minimum sentences also carry with them another human impact, since defendants who fit the statutory definition of the crime are punished equally severely, irrespective of idiosyncratic factors.¹⁵ The lack of judicial discretion has led one judge to lament, “[t]his is one of those situations where I’d like to see a Congressman sitting before me.”¹⁶

President Barack Obama, realizing the implications of the disparate sentencing guidelines, signed into law an act that reduced the “statutory ratio” between federal treatment of crack and powder cocaine from 100:1 to 18:1.¹⁷ It is a noteworthy effort, but an insufficient one. First, the penalty for crack cocaine is still disproportionately high. Some claim that the disparity between crack and powder cocaine sentencing is warranted due to the former’s availability and addictive properties,¹⁸ implying that the sentencing guidelines for these two substances are appropriately proportional. Nevertheless, the discrepancy still falls excessively on minorities, and the aforementioned incarceration inequality and associated stigma are not adequately addressed. Second, the penalties still fail to achieve the objectives of the War on Drugs: the reduction in the rate of substance abuse.

The original architects of the War on Drugs believed that the manufacture and distribution of drugs were the principal culprits in substance abuse.¹⁹ They reasoned that without supply and suppliers, there would not be a substance abuse problem. Hence,

14. Sklansky, *supra* note 3, at 1293.

15. *What Are Mandatory Minimums?*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://www.famm.org/aboutsentencing/WhatAreMandatoryMinimums.aspx> (last visited Oct. 8, 2012).

16. DeJarion Echols, FAMILIES AGAINST MANDATORY MINIMUMS, <http://www.famm.org/FacesofFAMM/FederalProfiles/DeJarionEchols.aspx> (last visited Oct. 8, 2012).

17. Graham, *supra* note 9, at 756–66.

18. *E.g.*, *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994) (“Congress had a valid reason for mandating harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack.”).

19. Jimmy Franco, Sr., *Narcolandia: The Failed War on Drugs*, LATINO POINT OF VIEW.COM (June 12, 2011), <http://www.latinopov.com/blog/?p=1872> (“The initial thinking and rationale for the war on drugs that was proposed by Nixon . . . was the naïve belief that if the supply of drugs was destroyed or at least drastically reduced, then the demand by the public would automatically decrease and the drug problem would go away.”).

prohibition appeared to be the natural solution.²⁰ But prohibition “is a textbook example of a policy with negative unintended consequences.”²¹ Because “people don’t change their drug consumption very much in response to changes in prices ... vigorous enforcement means higher prices and higher revenues for drug dealers.”²² Instead of reducing the supply of illicit substances, prohibition, by raising the price of drugs, makes drug trafficking more lucrative.²³ The proliferation of drugs is thus merely a symptom of the real cause of substance abuse: addiction.²⁴ Interestingly, when the Nixon administration declared the War on Drugs, the majority of funding—for “the only time in the history of the war on drugs”—went towards treatment.²⁵ This might suggest that, at its outset, the War on Drugs was actually focused on treatment over law enforcement. Currently, however, our legal system is largely inadequate at dealing with addiction issues, as its paramount effect is to incarcerate, not to rehabilitate.²⁶ Recognizing this, President Obama vowed in May 2010 to shift the focus of the War on Drugs towards a national policy that treats “drug use more as a public health issue” meriting “prevention and treatment.”²⁷

The United States should follow the example of countries like Sweden and Portugal that, through decriminalization, have replaced prison sentences for drug possession with rehabilitation and therapy by social workers and psychotherapists.²⁸ Now, drug

20. *Id.*

21. Art Carden, *Let’s Be Blunt: It’s Time to End the Drug War*, FORBES (Apr. 19, 2012, 9:39 PM), <http://www.forbes.com/sites/artcarden/2012/04/19/lets-be-blunt-its-time-to-end-the-drug-war/>.

22. *Id.*

23. *Id.*

24. *2012 National Drug Control Strategy*, *supra* note 5 (explaining that “illicit drug use and its consequences” are a result of “drug addiction”).

25. *Thirty Years of America’s Drug War*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Oct. 8, 2012).

26. *The War on Addiction*, THE DAILY BEAST (Feb. 11, 2001, 7:00 PM), <http://www.thedailybeast.com/newsweek/2001/02/11/the-war-on-addiction.html> (“Washington still directs two thirds of the federal drug budget ... to law enforcement, while state legislatures—leery of seeming to coddle criminals—lag behind public opinion on funding treatment.”).

27. Mendoza, *supra* note 2.

28. See *Country Overview: Sweden*, EUR. MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, <http://www.emcdda.europa.eu/publications/country-overviews/se> (last visited Aug. 11, 2012); Erik Kain, *Ten Years After Decriminalization*, FORBES (July 5, 2011, 3:09 PM), <http://www.forbes.com/sites/erikkain/2011/07/05/ten-years-after-decriminalization-drug-abuse-down-by-half-in-portugal/>.

users, instead of being sent to prison and later released back into the streets still addicted, are being treated for their illness and consequently rehabilitated as contributing members of society.²⁹ In Portugal, for example, drug possession and use are “deemed to be exclusively administrative violations and are removed completely from the criminal realm,”³⁰ and penalties range from a fine to mandatory treatment.³¹ Europe’s policy reforms are achieving the primary goal of our own War on Drugs, as they are leading to a decreased rate of drug use.³²

Within our own borders, Congress ought to adopt the drug treatment tenets of the Obama Administration’s 2012 National Drug Control Strategy³³ in a new federal act that will replace the current mandatory prison terms. The act should include compulsory treatment programs for drug possessors based on the history of the possessors’ use and their addiction levels. The amount with which a user is caught may be indicative of intent to distribute, and prison penalties for drug traffickers ought to remain constant.³⁴ The dichotomy between users and traffickers can continue to be ascertained through the current mechanisms of law enforcement. However, for dealers, the disparate sentences for powder and crack cocaine ought to be abolished as well. This dynamic scheme for dealing with supply and demand will help reduce the rate of use and recidivism among users, and at the same time help stomp out the enablers.³⁵

Encouragingly, the United States already has an infrastructure in place to deal with drug users: over one thousand specialized drug courts that use “mental health, social services, and treatment communities” to place offenders in “long-term treatment

29. “Many of these innovative treatment procedures would not have emerged if addicts had continued to be arrested and locked up rather than treated by medical experts and psychologists.” Kain, *supra* note 28.

30. GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 1 (2009) *available at* http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf.

31. *Id.* at 3.

32. *Id.* (one decade after Portugal’s “unprecedented experiment, drug abuse is down by half.”).

33. See OFFICE OF NAT’L DRUG CONTROL POLICY, 2012 NATIONAL DRUG CONTROL STRATEGY, *available at* http://www.whitehouse.gov/sites/default/files/ondcp/2012_ndcs.pdf.

34. GREENWALD, *supra* note 30, at 1 (explaining that, in Portugal, “[d]rug trafficking continues to be prosecuted as a criminal offense”).

35. *Id.* at 11 (“[U]sage has declined in many key categories and drug-related social ills have been far more contained in a decriminalized regime.”).

services.”³⁶ The recidivism rate for abusers who appear before drug courts is much lower than that of those who undergo the traditional, incarceration-focused system.³⁷ Congress’s reform ought to funnel users into the drug courts—a move that will free up the overburdened dockets of other courts—but maintain dealers and violent drug offenders in the criminal courts.

Obstacles, such as intransigent Republicans, timid Democrats, and a four-decade-old tradition of aggressive criminalization of drug-related conduct will undoubtedly stand in the way of this proposed reform. The calls for change, however, have only gotten louder over the years, and Congressional representatives from both parties have taken notice.³⁸ A plethora of data indicates that the current drug policies are failing to achieve their stated goals.³⁹ Additionally, the experiences of Portugal and Sweden ought to dispel many of the trepidations associated with this proposed reform.⁴⁰

Although Portugal has decriminalized all personal drug use, our own reform should be more gradual.⁴¹

The impact of the sentencing disparities between crack and powder cocaine make these particular drugs worth addressing first. Such a reform will not only provide insight into the efficacy of a rehabilitation-over-incarceration approach, but will also

36. C. WEST HUDDLESTON, III, KAREN FREEMAN-WILSON & DONNA L. BOONE, NAT’L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 1* (2004), available at http://fourthjudicialcourt.idaho.gov/pdf/report_on_effectiveness_of_drug_courts.pdf.

37. *Id.*

38. Of the twenty-three cosponsors of the Fair Sentencing Act of 2010, six were Republicans, fifteen were Democrats, and one was an independent. *Fair Sentencing Act of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/s1789> (last visited Oct. 8, 2012)

39. See, e.g., *supra* text accompanying notes 19–27.

40. “Because more than seven years have now elapsed since enactment of Portugal’s decriminalization system, there are ample data enabling its effects to be assessed... More significantly, none of the nightmare scenarios touted by preenactment decriminalization opponents—from rampant increases in drug usage among the young to the transformation of Lisbon into a haven for ‘drug tourists’—has occurred.” GREENWALD, *supra* note 30, at 1.

41. Michael Specter, *Getting a Fix*, THE NEW YORKER, (Oct. 17, 2011), http://www.newyorker.com/reporting/2011/10/17/111017fa_fact_specter (“Unfortunately, nothing about substance abuse is simple [A]lthough many people maintain that addiction would decline if drugs were legal ... the misuse of legally sold prescription medications has become a bigger health problem than the sale of narcotics or cocaine.”).

mitigate the aforementioned implications for racial minorities. As such, the current sentencing guidelines for other drugs, such as methamphetamine, heroin, and various psychedelics, ought to remain the same for now. The initial reform, if successful, will pave the way for similar measures in other fronts of the War on Drugs. Overall, the reform ultimately suggests channeling resources in a manner more conducive to addressing the true causes of substance abuse, as opposed to simply mitigating its symptoms.