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## Well-Intentioned Federal Drug Policies May Leave Minorities Behind

William Ryan

Throughout the second half of the 20th Century and the first decade and a half of the 21st Century, the United States has fought a prolonged War on Drugs.<sup>1</sup> The effects of the War on Drugs on African Americans are well-known, most notably in increased incarceration rates.<sup>2</sup> In 1989, Congress mandated a five-year minimum sentence for any person in possession of at least five grams of crack cocaine, making crack the only drug where possession meant automatic imprisonment.<sup>3</sup> Congress directed courts to give harsher sentences for those who possessed greater quantities of crack or those who had the intent to distribute.<sup>4</sup> In the years that followed, African Americans became increasingly overrepresented in federal prisons.<sup>5</sup> To receive a five year sentence for possession of powdered cocaine, a drug that is more traditionally associated with Caucasian individuals, the defendant must have been carrying at least 500 grams.<sup>6</sup> Even though Congress reduced the severity of punishment for crack-related crimes in 2010 when it passed the Fair Sentencing Act, disparities still exist.<sup>7</sup> Scott VanDerKarr is a retired Franklin County, Ohio Municipal Court Judge, where he founded Franklin County's Mental Health Court, Drug Court, and eventually, a Heroin Court.<sup>8</sup> Franklin County is comprised of the city of Columbus and some of its inner suburbs.<sup>9</sup> He said that "[the judicial system and law enforcement] did not handle addiction well in the past. We did not see it as a disease."<sup>10</sup>

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<sup>1</sup> Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 CT. REV. 40, 40 (2011) (recapping the effects of the War on Drugs on minorities).

<sup>2</sup> *Id.*

<sup>3</sup> Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANNU. REV. L. SOC. SCI. 41, 46 (2011) (discussing sentencing in the War on Drugs).

<sup>4</sup> *Id.* at 45.

<sup>5</sup> *Id.* at 46.

<sup>6</sup> Provine, *supra* note 3 at 46.

<sup>7</sup> *Id.*

<sup>8</sup> Interview with Scott VanDerKarr, Retired Judge and Founder of Franklin County, Ohio Heroin Court, Mental Health Court, and Drug Court, Columbus, Ohio (October 13, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

States are continuing to establish drug courts as a way to fight addiction, as there are now over 3,000 across the country.<sup>11</sup> Usually, those sentenced to drug court attend treatment, attend meetings with judges, and undergo drug testing.<sup>12</sup> Drug courts are increasingly popular because they reduce recidivism and drug use, and are generally seen as a wiser investment of tax dollars than incarceration.<sup>13</sup> The National Institute of Justice found that by sentencing defendants to treatment rather than prison, money was saved overall because these individuals were much less likely to commit crimes in the future.<sup>14</sup> Though drug courts are operated primarily at the local level, the federal government provides numerous grants to increase drug court participation.<sup>15</sup>

### DRUG COURT DEMOGRAPHICS

A 2008 study found that 62% of drug court participants were white, 21% were African American, and 10% were Hispanic or Latino.<sup>16</sup> However, African Americans made up 28% of the individuals arrested that year for drug crimes.<sup>17</sup> Additionally, African Americans have been found to be less likely to graduate from drug court than Caucasians, though this phenomenon is not linked strictly to race.<sup>18</sup> The federal government is helping to fund local drug courts where racial disparities exist nationwide, as federal aid to drug courts has increased under both President George W. Bush and President Obama.<sup>19</sup> Some of the federal funding allocated for drug courts should be used to give minorities vocational counseling and training as part of the drug court program.<sup>20</sup> Moreover, the federal government should support cocaine-specific treatment in drug courts, as that is often the drug of choice in African American communities.<sup>21</sup>

In Dane County, Wisconsin, which includes the city of Madison, two judges were troubled by the racial disparities they saw in Dane County Drug

<sup>11</sup> U.S. DEP'T OF JUSTICE, DRUG COURTS (2016).

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Maia Szalavitz, *How America Overdosed on Drug Courts*, PACIFIC STANDARD (May 18, 2015, 12:00 AM), <https://psmag.com/how-america-overdosed-on-drug-courts-a813ff745a6e#.b2h64bjc>.

<sup>17</sup> Marlowe, *supra* note 1 at 42.

<sup>18</sup> Marlowe, *supra* note 1 at 42.

<sup>19</sup> Szalavitz, *supra* note 16.

<sup>20</sup> Marlowe, *supra* note 1 at 47.

<sup>21</sup> *Id.*

Court.<sup>22</sup> In 2014, 84% of Dane County's drug court participants were white, and only 14% were black.<sup>23</sup> This may not be due to explicit racism on the part of prosecutors, who traditionally are the individuals who choose which defendants go to drug court.<sup>24</sup> In Milwaukee County, Wisconsin, Circuit Court Judge Ellen Brostrom oversaw its drug court.<sup>25</sup> When she examined the drug court participant demographics, she found from 2009 to 2014 that "the proportion of African-Americans has gone down as the proportion of heroin addicts has gone up."<sup>26</sup>

Dane County's drug court judges recognized this problem and decided to act.<sup>27</sup> First, they expanded the pool of potential defendants to include those with more prior criminal convictions.<sup>28</sup> Second, prosecutors no longer play as large of a role in determining drug court eligibility, as they were often hesitant to allow those who had previously committed crimes, including violent crimes, into drug court.<sup>29</sup> Additionally, Dane County now offers some specific treatment for offenders considered to be high risk.<sup>30</sup> These new steps were likely to increase African American participation.<sup>31</sup> Today, heroin is prevalent in communities across the country.<sup>32</sup> Over 10,000 Americans died from heroin overdoses and over 6,000 from cocaine (including crack) in 2014.<sup>33</sup> The following year, in Ohio alone, 1,424 people died of heroin overdoses.<sup>34</sup> However, politicians are striking a much more understanding tone when discussing today's

<sup>22</sup> Taylor Chase, *Wisconsin Drug Courts Grow, but Racial Disparities Persist*, WIS. WATCH (Aug. 17, 2014, 12:00 AM), <http://wisconsinwatch.org/2014/08/wisconsin-drug-courts-grow-but-racial-disparities-persist/>.

<sup>23</sup> *Id.*

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

<sup>25</sup> Taylor Chase, *Experts: Drug Choice, not Race, Fuels Disparities in Wisconsin Drug Courts*, WIS. WATCH (Aug. 17, 2014, 12:00 AM), <http://wisconsinwatch.org/2014/08/drug-choice-not-race-fuels-disparities-experts-say/>.

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

<sup>27</sup> Chase, *supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Kevin Johnson, *Exclusive: Obama Administration to Launch New Effort on Heroin Crisis*, USA TODAY (Sep. 16, 2016), <http://www.usatoday.com/story/news/politics/2016/09/16/heroin-justice-department-lynch-obama-administration/90421316/>.

<sup>33</sup> NAT'L INSTITUTE ON DRUG ABUSE, OVERDOSE DEATH RATES (2015).

<sup>34</sup> Kimball Perry, *Heroin Epidemic Forces First Responders to Revise Tactics*, COLUMBUS DISPATCH (Sep. 21, 2016), <http://www.dispatch.com/content/stories/public/2016/heroin/1-0921-law-enforcement-revise-tactics-in-face-of-heroin-epidemic.html>.

heroin addicts than they did for addicts in the past.<sup>35</sup> Yet, Judge VanDerKarr disputed that increased attention is solely driven by race, noting that across the country, some areas have seen a 500% increase in overdoses.<sup>36</sup> A study conducted by Washington University in St. Louis found that about 90% of heroin users are white.<sup>37</sup> “In Columbus, we just have not had African Americans or Latinos arrested with heroin as much,” said Judge VanDerKarr.<sup>38</sup> However, he added that the federal government should establish a federal drug court task force.<sup>39</sup> He believes that the federal task force should support local drug courts to help them tailor their efforts so that they may meet the needs of their communities, including increasing minority drug court participation.<sup>40</sup>

### NEW ANTI-DRUG EFFORTS

In July 2016, President Obama signed the Comprehensive Addiction Recovery Act (“CARA”) into law.<sup>41</sup> Assuming Congress appropriates funds for the law, CARA will expand the availability of naloxone (a drug that reverses the effects of opioids), increase prevention and educational outreach, and further efforts by states to track prescription drug diversion programs.<sup>42</sup> Senator Rob Portman, a Republican from Ohio and the sponsor of CARA, stated that for the first time, the government has “treated addiction like the disease that it is, which will help put an end to the stigma that has surrounded addiction for too long.”<sup>43</sup> In addition to CARA, President Obama, working with the Justice Department, has recently committed more effort to combatting opioids.<sup>44</sup> President Obama expressed his desire to disperse over \$1.1 billion in grants to fight heroin this year.<sup>45</sup>

<sup>35</sup> Emmarie Huettman, *Senate Approves Bill to Combat Opioid Addiction Crisis*, N.Y. TIMES (Jul. 13, 2016), [http://www.nytimes.com/2016/07/14/us/politics/senate-opioid-addiction-bill.html?\\_r=0](http://www.nytimes.com/2016/07/14/us/politics/senate-opioid-addiction-bill.html?_r=0).

<sup>36</sup> Interview with Scott VanDerKarr, *supra* note 8.

<sup>37</sup> Chase, *supra* note 25.

<sup>38</sup> Interview with Scott VanDerKarr, *supra* note 8.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> CJ Arlotta, *Obama Signs Opioid Legislation, Despite Funding Concerns*, FORBES (Jul. 23, 2016), <http://www.forbes.com/sites/cjarlotta/2016/07/23/obama-signs-opioid-legislation-despite-funding-concerns/#4a1dba3c34e6>.

<sup>42</sup> *Id.*

<sup>43</sup> Huettman, *supra* note 35.

<sup>44</sup> Johnson, *supra* note 32.

<sup>45</sup> *Id.*

The political focus is now on heroin and other opioids rather than crack and powder cocaine.<sup>46</sup> “We’re seeing a lot more in the media about heroin versus cocaine,” said Dr. Randall Brown, Director of the Center for Addictive Disorders at the University of Wisconsin.<sup>47</sup> Many in the media have described the United States’ heroin problem as an epidemic.<sup>48</sup> Dr. Brown speculated that there is added pressure on politicians as drug addiction is spreading out of inner cities to rural areas and more white people are dying as a result of overdoses.<sup>49</sup>

While the federal government is not proactively fighting crack like it is heroin, President Obama has commuted the sentences of hundreds of non-violent drug offenders.<sup>50</sup> The president, along with the Justice Department, has encouraged prosecutors to no longer seek mandatory minimum sentences for low level drug offenders.<sup>51</sup> Since before his time as Attorney General, Eric Holder has called for eliminating the sentencing disparity between crack and powder cocaine.<sup>52</sup>

However, these efforts have solely related to reducing sentences rather than expanding treatment and access to drug court for African Americans. The federal government needs to employ the same tactics it is using to curb the heroin crisis on crack. Furthermore, more African Americans need to be admitted into drug courts. To facilitate this change, the federal government should mandate that any drug court or local government applying for federal grants to fight drug addiction must increase minority outreach to be eligible. Additionally, Congress must treat those who struggle with crack with the same compassion and understanding as those who are fighting heroin addiction.

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<sup>46</sup> Chase, *supra* note 25.

<sup>47</sup> *Id.*

<sup>48</sup> Chase, *supra* note 22.

<sup>49</sup> Chase, *supra* note 25.

<sup>50</sup> Sari Horwitz and Wesley Lowery, *Obama’s Legacy: The First Black President*, WASH. POST (Apr. 22, 2016), [https://www.washingtonpost.com/graphics/national/obama-legacy/racial-pro-filing-criminal-justice-reform.html?tid=a\\_inl](https://www.washingtonpost.com/graphics/national/obama-legacy/racial-pro-filing-criminal-justice-reform.html?tid=a_inl).

<sup>51</sup> *Id.*

<sup>52</sup> Eric H. Holder Jr., *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html>.