

RECENT LEGISLATION

WELFARE REFORM — PUNISHMENT OF DRUG OFFENDERS — CONGRESS DENIES CASH ASSISTANCE AND FOOD STAMPS TO DRUG FELONS. — Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115, 110 Stat. 2105 (to be codified at 42 U.S.C. § 862a).

Illegal drug use among Americans has, on average, fallen off considerably since 1979.¹ Yet among the nation's urban poor, the rate of drug use — of heroin and cocaine in particular — continues to escalate.² Across the country, legislators have responded to this problem by imposing increasingly harsh punishments on drug offenders.³ The growing concentration of drugs in poor urban areas, however, is both a testament to the limitations of this sort of punitive response and an indication that policymakers serious about reversing this trend should consider carefully whether initiatives to expand penalties for drug offenses will reduce the demand for drugs in these communities.

No deliberation of this kind accompanied the attachment of the Gramm Amendment to the sweeping welfare reform legislation signed into law by President Clinton in August 1996. This amendment, proposed by Senator Phil Gramm of Texas and passed through the Senate to the Conference Committee with bipartisan support,⁴ permanently denies cash assistance and food stamps to anyone convicted under state or federal law of a felony offense that "has as an element the possession, use, or distribution of a controlled substance."⁵ Because of

¹ See ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 21-22 (1993); SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., PRELIMINARY ESTIMATES FROM THE 1995 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 11 (1996) (reporting that the number of illicit drug users in 1995 was less than half of that reported in 1979).

² See CURRIE, *supra* note 1, at 3; WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 59 (1996); see also SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., *supra* note 1, at 15, 18 (reporting that rates of illicit drug use are disproportionately high among the unemployed and underemployed).

³ Recent legislative initiatives include an Alabama bill prescribing the death penalty "for a second conviction of engaging in a criminal enterprise for the purpose of trafficking in illegal drugs," S.B. 291, Reg. Sess. (Ala. 1996); a Mississippi bill making trafficking in cocaine that leads "to a natural, though not inevitable, lethal result" a capital offense, H.B. 1013, Reg. Sess. (Miss. 1996); and a New Jersey bill sending those guilty of "a first offense of murder or manslaughter, of being a drug kingpin, or of manufacturing or dispensing a controlled dangerous substance" to a "People's Prison" that emphasizes "punishment rather than rehabilitation," A.B. 451, 207th Leg., 1st Annual Sess. (N.J. 1996) (citations omitted). For further description of politicians' proposed punishments for drug offenders, including flogging and "cutting off a finger for each drug conviction," see DOUGLAS N. HUSAK, DRUGS AND RIGHTS 13 (1992).

⁴ See 142 CONG. REC. S8499 (daily ed. July 23, 1996).

⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 115(a), 110 Stat. 2105 (to be codified at 42 U.S.C. § 862a). The statute exempts some federal benefits, including emergency medical services, "[s]hort-term, noncash, in-kind emergency dis-

this provision's seeming harmony with the overall spirit of the welfare reform package, legislators failed to assess the measure on its own terms: as an augmentation of the statutory punishment inflicted on drug offenders. As a consequence, Congress unwisely approved a measure that serves no legitimate punitive purpose and that may well increase the incidence of drug use and dealing among the very group most vulnerable to the lure of drugs: the urban poor.

Forty years of research have demonstrated that people living with a "surplus of vulnerability"⁶ — in lives of poverty, unemployment or underemployment, limited education, bleak prospects, and little sense of identity or purpose⁷ — are most susceptible to the temptation of drugs.⁸ For some residents of "unstable, disorganized, and deprived communities," drugs "become a way of getting away from daily problems, medicating emotional anguish, relieving stress, escaping pain — a strategy of 'palliative coping.'"⁹ For others — women in particular¹⁰ — selling drugs is a way to make ends meet at times when the cost of housing, clothing, and feeding dependents is overwhelming.¹¹

aster relief," prenatal care, job training, and drug treatment programs, *id.* § 115(f), and does not apply to "convictions occurring on or before [the law's] enactment," *id.* § 115(d)(2). It also contains a state opt-out clause, *see id.* § 115(d)(1)(A), although, given the strong stigmatization of drug felons, no state is likely to choose this option.

⁶ ISIDOR CHEIN, DONALD L. GERARD, ROBERT S. LEE & EVA ROSENFELD, *THE ROAD TO H: NARCOTICS, DELINQUENCY, AND SOCIAL POLICY* 73 (1964).

⁷ *See* CURRIE, *supra* note 1, at 67.

⁸ *See id.* at 75–77 ("The link between drug abuse and deprivation is one of the strongest in forty years of careful research.").

⁹ *Id.* at 113 (quoting Norweeta Milburn & Ann D'Ercole, *Homeless Women: Moving Toward a Comprehensive Model*, 46 AM. PSYCHOLOGIST 1161, 1167 (1991)).

¹⁰ The relationship between economic status and crime is starkly evident in the lives of women. Women and their children constitute a disproportionate number of those living below the poverty line. *See* MARK ROBERT RANK, *LIVING ON THE EDGE: THE REALITIES OF WELFARE IN AMERICA* 41–43 (1994) (discussing the feminization of poverty). In 1990, 75% of women in prison were mothers, and "[m]ost had never earned more than \$6.50 an hour." *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 150 (Steven R. Donziger ed., 1996) [hereinafter *THE REAL WAR ON CRIME*]. Thus, it is perhaps not surprising that well over half of the women in state prisons in the United States are serving time for property crimes, including the distribution of narcotics. *See* OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, *STATE COURT SENTENCING OF CONVICTED FELONS*, 1992, at 16 (1996).

¹¹ *See, e.g.,* WILSON, *supra* note 2, at 58 ("Me myself I have sold marijuana, I'm not a drug pusher, but I'm just tryin' to make ends — I'm tryin' to keep bread on the table — I have two babies." (quoting a 28-year-old welfare mother living in a large Chicago public housing project)). Defenders of the Gramm Amendment will no doubt respond that, because it denies benefits only to the offender herself and not to her children, no parent will be forced to deal drugs in order to put food on the table. Yet although the families of drug offenders will continue to receive assistance, the statute directs that the amount of this assistance "shall be reduced by the amount which would have otherwise been made available to the individual under such part." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 115(b)(1). In other words, assuming that, for example, federal assistance provided equal entitlement for adults and children, the lifetime ban created by the Gramm Amendment would require a mother of three to make do with 75% of the benefits that an unaffected four-member family would receive. This provision is no less than collective punishment, for this arrangement does not mean that the drug offender will get no government support, but that every member of her family will make do with less.

Not every user or dealer turns to drugs out of desperation or despair — but many do. And many people with a history of involvement with drugs have already demonstrated that they lack meaningful alternatives. Depriving prior offenders of access to welfare at moments when they most need outside help will actively undermine any efforts on the part of such individuals to avoid a return to drugs.¹²

Denying welfare benefits to drug offenders will also take a disproportionate toll on African-Americans and Hispanics. Not only are members of these groups already overrepresented among the ranks of the poor,¹³ but the government officials responsible for enforcing drug laws focus disproportionate attention on African-American and Hispanic communities. Although African-Americans make up only 12% of the U.S. population,¹⁴ they constituted 55% of the 280,000 people convicted of felony drug crimes in state court in 1992.¹⁵ Today, almost 90% of those individuals sentenced to state prison for drug possession are African-American or Hispanic.¹⁶ The combination of racial bias in law enforcement and poverty virtually guarantees that the weight of the Gramm Amendment will fall most heavily on African-Americans and Hispanics. This effect is certain to reinforce the sense of disaffection and abandonment that many members of these groups already feel,¹⁷ and thus to aggravate the problem of drug use in poor minority communities.

Defenders of the Gramm Amendment may argue that, as with the welfare reform package as a whole, this provision will actually encourage drug offenders to take "responsibility" for their own situa-

¹² There are patterns of drug use even in deprived areas that at first do not seem likely to be aggravated by the Amendment. People who use or sell drugs to gain status in communities where legitimate avenues for earning social approbation are effectively closed, *see* CURRIE, *supra* note 1, at 107, do not seem likely to seek public support as an alternative to involvement with drugs. The same may be said of people who use or deal because they need "structure and purpose" in their lives, *id.* at 116, or because, in neighborhoods "saturated" with drugs, using or dealing is the most obvious and natural thing to do, *see id.* at 119–21, or because it is the easiest way to make a buck, whatever the consequences to others.

Elliott Currie cautions, however, that individual motivations for drug use may not always be so easily cabined: an impoverished teen, for example, may become involved with drugs for some combination of these reasons. *See id.* at 121. Moreover, as conditions change, so do motives. Today's show-off or profit-seeking pusher may be tomorrow's unemployed father of four, in need of a way to keep his kids from starving.

¹³ *See* BARBARA EHRENREICH, *THE SNARLING CITIZEN* 180 (1995) ("African Americans are three times as likely as whites to fall below the poverty level . . ."); *THE REAL WAR ON CRIME*, *supra* note 10, at 105 ("In 1992, for example, 46 percent of African American children and 39 percent of Hispanic children were born into poverty, compared to only 16 percent of white children." (footnote omitted)).

¹⁴ *See* *THE REAL WAR ON CRIME*, *supra* note 10, at 115.

¹⁵ *See* OFFICE OF JUSTICE PROGRAMS, *supra* note 10, at 3, 15.

¹⁶ *See* Pam Widener, *Eddie Ellis at Large*, *PRISON LIFE*, Oct. 1996, at 46, 47.

¹⁷ *See* David Remnick, *Dr. Wilson's Neighborhood*, *NEW YORKER*, Apr. 29 & May 6, 1996, at 96, 98–99.

tions.¹⁸ The very name of the package — the Personal Responsibility and Work Opportunity Reconciliation Act¹⁹ — attests to the strength of this belief. However, the conception of responsibility used to justify the general elimination of guaranteed federal assistance is significantly different from that demanded of drug offenders by the Gramm Amendment.²⁰ The former conception is an exhortation to future praiseworthy conduct. It assumes both that individuals are equipped to create their own life circumstances and that to be the causal agent of one's own circumstances is a good to be encouraged. In contrast, the latter conception — the same deployed to attach guilt or blame to criminals and other wrongdoers — is backward looking, an insistence on moral accountability for one's own past actions.²¹ It is this conception that drives the Gramm Amendment, which requires proof of only one past criminal conviction to exact a price that looks very much like an additional punishment for past wrongdoing.

Constrained only by the Eighth Amendment ban on cruel and unusual punishment,²² Congress is entitled to legislate any punishment it sees fit for the violation of a federal crime. This power extends even to the passage of cumulative statutory penalties, so that a single criminal conviction may carry multiple punishments.²³ Yet responsible legislators ought still to consider whether adding to the punishment for any given offense is good criminal justice policy. In the case of drug

¹⁸ This theme of responsibility echoed throughout politicians' descriptions and explanations of welfare reform. Republican presidential nominee Bob Dole called for welfare reform "that strengthens families and requires personal responsibility." *Dole's Statement on Measure*, N.Y. TIMES, Aug. 1, 1996, at A24. References to responsibility also frequently punctuated President Clinton's remarks at the news conference held to announce his decision to sign the welfare reform bill. See *Text of President Clinton's Announcement on Welfare Legislation*, N.Y. TIMES, Aug. 1, 1996, at A24.

¹⁹ Pub. L. No. 104-193, 110 Stat. 2105 (1996) (to be codified at 42 U.S.C. § 862a).

²⁰ The following discussion draws on the distinction between causation and blameworthiness suggested by Marion Smiley. See MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* 74-75 (1992).

²¹ One could argue, given the tone and effect of the 1996 welfare package as a whole, that a punitive impulse against the poor in general did not distinguish the Gramm Amendment, but actually colored the drafting and passage of the entire bill. There is, however, no constitutional right to welfare. See *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970). Thus, although the provisions of the Act are certainly ungenerous and embody a strong element of moral censure, the Act does not deprive recipients of anything to which they would necessarily have been otherwise entitled. It is therefore not, strictly speaking, punitive. The Gramm Amendment, in contrast, does deny to a particular group — drug offenders — something to which they would otherwise have been statutorily entitled — welfare payments.

²² U.S. CONST. amend. VIII. With regard to penalties for drug offenders, this constraint has proven extremely weak. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 961, 994 (1991) (holding that a life sentence without parole for an offender charged with possession of 672 grams of cocaine did not violate the Eighth Amendment); *Hutto v. Davis*, 454 U.S. 370, 372 (1982) (per curiam) (rejecting an Eighth Amendment challenge brought by a defendant who was caught with only nine ounces of marijuana and was sentenced to 40 years in prison).

²³ As long as the finding of guilt is established within a single proceeding, the imposition of multiple punishments does not implicate the Double Jeopardy Clause. See *United States v. Halper*, 490 U.S. 435, 450 (1989); *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

policy, this inquiry should involve two prongs: whether the policy will effectively reduce the incidence of drug crimes, and whether it will further any legitimate goal of punishment. The denial of welfare benefits to drug offenders fails on both counts.

First, this policy will not reduce the incidence of drug crimes. Although providing welfare for people in high-risk communities will not solve the nation's drug problem, denying public assistance to all drug felons seems certain to trap those most at risk in a downward spiral of repeat offending. Of course, this argument presumes that one's material circumstances significantly influence one's choices, a view inconsistent with the radically individualist moral theory informing the Gramm Amendment.²⁴ On this theory, character and strength of will fully account for one's circumstances and social context is irrelevant.²⁵ From this perspective, the Gramm Amendment does not punish people whose social context makes them more susceptible to the appeal of illegal substances, but rather establishes the appropriate incentive structure to help the morally weak avoid further transgressions.

Yet, popular though this view may be, an individualist moral ideal does not in itself constitute a sufficient basis for policy, particularly if its invocation will disserve important governmental interests. Although one might argue that disproportionate drug use among the urban poor attests to the moral weakness of members of this group, this pattern also supports the contrary conclusion — borne out by extensive research into the causes of drug use²⁶ — that social context plays a much greater role in moral choices than radical individualists acknowledge.²⁷ The well-documented relationship between poverty and crime in general²⁸ further reinforces the intuition that poor people, regardless of their moral character, are more likely to turn to crime or drugs for survival or escape.

If the rate of felony drug convictions and the level of recidivism remain as high as they were in the late eighties and early nineties, the Gramm Amendment will permanently deny welfare eligibility to as many as 200,000 people per year.²⁹ This denial will serve no legiti-

²⁴ In this respect, the Amendment is in harmony with the welfare reform package in general.

²⁵ In philosophical terms, this position can be characterized as supporting the idea of free will against arguments for determinism. See Peter Van Inwagen, *The Incompatibility of Responsibility and Determinism*, in *MORAL RESPONSIBILITY* 241, 241-42 (John Martin Fischer ed., 1986).

²⁶ See CURRIE, *supra* note 1, at 75-76.

²⁷ See ELLIOTT CURRIE, *CONFRONTING CRIME* 144-46 (1985); *THE REAL WAR ON CRIME*, *supra* note 10, at 27-30, 105.

²⁸ See CURRIE, *supra* note 27, at 144-45.

²⁹ The most recent statistics from the Department of Justice reveal that over 300,000 people per year are convicted of felony drug offenses. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *FEDERAL CRIMINAL CASE PROCESSING*, 1982-93, at 9 (1996) (stating that the number of drug convictions per year in federal courts for the years 1989 to 1994 ranged from 15,799 to 20,458); OFFICE OF JUSTICE PROGRAMS, *supra* note 10, at 3 (documenting 280,232 felony convictions for drug offenses in state courts in 1992). The most recent available recidivism data — from

mate punitive purpose³⁰ — and thus will fail the second prong of the inquiry. Given the extremely harsh sentences that drug offenders already face, the Amendment cannot sincerely be viewed as a deterrent; if the threat of life in prison without parole will not deter, the threat of loss of access to public assistance is unlikely to do so. Likewise, the measure will have little rehabilitative effect, given that denial of assistance to drug felons makes it more likely, not less, that those affected will return to selling or using drugs. Although the motivation behind the measure certainly suggests a desire for vengeance,³¹ the Amendment cannot adequately be described as retribution for the drug crime itself, as only those drug offenders who are economically marginal enough to be otherwise eligible for federal assistance will ever feel its “unpleasant”³² effects.³³ Finally, given the zeal with which drug laws are currently enforced, it is an open question whether the provision will be a money-saving device, as any savings that the government will realize by denying welfare benefits to drug offenders will in all probability be more than offset by the increased costs to the criminal justice system likely to result from increased drug use among the urban poor.

In the past decade, legislators caught up in the militaristic spirit of the “war on drugs”³⁴ have found virtually no punitive response to drug offenders too draconian to merit political support. Despite — or perhaps because of — this display of machismo, the drug trade has flourished in the nation’s poorest communities. If Congress lacks the courage to reorient drug strategy away from its excessive focus on the identification, arrest, and punishment of drug offenders, it should at least refrain from passing laws that serve no legitimate punitive purpose and that are likely to exacerbate the very conditions that drive people to use drugs in the first place.

the mid-1980s — reports reconviction rates for drug felonies to be as high as 35.3% for offenders who served prison time, *see* OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 5 (1989), and rearrest rates to be as low as 26.7% for offenders who received probation, *see* OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF FELONS ON PROBATION, 1986–89, at 6 (1992). The estimate that the Gramm Amendment will affect 200,000 people per year is therefore somewhat conservative.

³⁰ *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 187–210 (4th ed. 1983) (discussing retribution, deterrence, and reform as the three central justifications for punishment).

³¹ Consider Senator Gramm’s comments: “I don’t believe that people who are using drugs and who are selling drugs should be getting welfare It is a tough provision but it’s time to get tough.” *Convicts Could Lose Public Aid*, DES MOINES REG., July 25, 1996, at 3A.

³² *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968) (defining punishments in part as “involv[ing] pain or other consequences normally considered unpleasant”).

³³ One could argue that the provision’s underinclusiveness does not in itself negate any retributive effects. However, that this provision extends in practice only to poor offenders suggests that the real motivation behind it is not the desire to punish drug offenders per se, but rather to punish those poor people who through “moral weakness” succumb to the temptation of drugs.

³⁴ DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE at xi (1996).