

DRUG ENFORCEMENT AND POLICY CENTER

ISSUE 1: EXPERT COMMENTARIES

Issue 1: What It Tells us About the Purposes of Punishment for Drug Possession

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What is most exciting to me about Ohio Issue 1 is that, if it passes, it would tell us clearly that voters believe rehabilitation should be the purpose of drug possession sentencing. Rehabilitation is a theory of punishment that focuses on using punishment in order to transform the offender into a healthier, law abiding person. One might think that rehabilitation is always the purpose of punishment, but that is not the case. Most criminal codes recognize other purposes of punishment: deterrence (punishing the offender in order to stop that offender or other offenders from committing the same offense), incapacitation (punishing the dangerous offender in order to keep him and his dangerous ways out of society, and retribution (punishing the offender based on the level of their moral blameworthiness). Until October 29, 2018, the Ohio Revised Code recognizes two purposes of punishment as the overriding purposes in felony cases: incapacitation and retribution.

ORC 2929.11(A) reads: A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. *The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender* using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

In guiding the court on how to achieve the overriding purposes, the Code incorporates deterrence and rehabilitation. However, effective October 29, 2018, the Code will read rehabilitation explicitly into the primary purposes of sentencing.

The new ORC 292.11(A) will read as follows: A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. *The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, **and to promote the effective rehabilitation** of the offender* using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both. *(Emphasis added.)*

However, despite this legislative move toward embracing rehabilitation in drug sentencing, the momentum behind Issue 1 tells us that identifying rehabilitation as one purpose among many may not be what voters want. The type of rehabilitative punishment called for by Issue 1 is focused and substantive. By focused, I mean that it applies to specific categories of offenses: low-level, nonviolent drug possession and non-criminal probation violations. It clearly exempts offenders serving sentences of death or life imprisonment for murder, rape, or child molestation. Issue 1 is substantive in that it spells out just how rehabilitative punishment is supposed to be carried out. If this initiative were to pass in November, sentencing credits would be given to offenders who satisfy rehabilitation programs, making the punishment length directly related to how much “better” the offender is becoming. Remember, when it comes to rehabilitation, the punishment itself is supposed to change the offender

for the better. So, Issue 1 is creating an incentive for the offender to use the punishment experience in that manner. Perhaps, most importantly, the proposed amendment is substantive in the sense that it provides guidance for how the rehabilitation programs should be funded. This is an important detail that is missing in statutes that simply direct sentencing courts to think about rehabilitation in fashioning an appropriate sentence. Though Issue 1 identifies rehabilitation as the purpose of drug sentencing, the initiative also implies a few notable messages about the other purposes of punishment. By providing that drug possession offenses shall be classified no higher than a misdemeanor, the proposed constitutional amendment is making a statement about retribution. While retribution punishes someone for being morally blameworthy, it punishes them *only to the extent of their blameworthiness*. In other words, proportionality is essential to the theory of retribution. If Issue 1 were to pass, it would be clear that the Ohio voters believe that felony punishment and resulting felony lengths of incarceration are disproportionate to the harm caused by the crime of drug possession. The drug possessor is not blameworthy enough to require incarceration. Likewise, the simple drug possessor is not dangerous enough to require lengthy incarceration, and thus an incapacitation theory is satisfied by misdemeanor level punishment alone. Further, Issue 1 prohibits imprisoning a person on probation for non-criminal probation violations. This could be understood to represent a belief that incarceration does not deter these sorts of violations for drug possessors.

With all of this in mind, if Issue 1 were to pass, not only will focused, substantive rehabilitation take center stage in drug possession punishment in Ohio, but outcome accountability will have a prominent place as well. The proposed amendment calls for biennial evaluations of the effectiveness of substance abuse programs funded under the amendment. This sort of evaluation and accountability – actually testing whether punishment is fulfilling the identified purposes – have been largely missing in any meaningful way throughout sentencing systems in this country. But, as voters continue to speak out about what they hope to accomplish through punishment, methods of focused evaluation will be essential to indicating whether reform measures have been successful in accomplishing those goals. Of course, despite these laudable aspects of Issue 1, the fact that it would amend the state constitution will bother some people, even those who are committed to progressive sentencing reform. Many prefer to see such changes take place through legislative channels. And, that's understandable. However, for me, the potential gains of Issue 1 outweigh the discomfort with it being pursued through a seemingly abnormal avenue. Whether or not Issue 1 passes in November, the identification of drug punishment purpose and the call for accountability in meeting those purposes are key components of sentencing reform that I hope do eventually become the norm.

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