

It's Time for the U.S. to Decriminalize Drug Use and Possession

**A Drug
Policy
Alliance
release.**

**We are the Drug Policy Alliance
and we envision new drug policies
grounded in science, compassion,
health and human rights.**

Please join us.

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Executive Summary

By any measure and every metric, the U.S. war on drugs – a constellation of laws and policies that seeks to prevent and control the use and sale of drugs primarily through punishment and coercion – has been a colossal failure with tragic results. Indeed, federal and state policies that are designed to be “tough” on people who use and sell drugs have helped over-fill our jails and prisons, permanently branded millions of people as “criminals”, and exacerbated drug-related death, disease and suffering – all while failing at their stated goal of reducing problematic drug use.

This report offers a roadmap for how to begin to unwind our failed drug war. It focuses on one practical step that can and should be taken to avoid many of the harms that flow from punitive prohibitionist drug laws and to promote proven, effective health-based interventions.

Drug decriminalization is a critical next step toward achieving a rational drug policy that puts science and public health before punishment and incarceration. Decades of evidence has clearly demonstrated that decriminalization is a sensible path forward that would reap vast human and fiscal benefits, while protecting families and communities.

Drug decriminalization is defined here as the elimination of criminal penalties for drug use and possession, as well as the elimination of criminal penalties for the possession of equipment used for the purpose of introducing drugs into the human body, such as syringes. Throughout this report, we will use the phrase “drug possession” to include drug possession, drug use, and possession of paraphernalia used for the purpose of introducing drugs into the human body.

Ideally, drug decriminalization entails the elimination of all punitive, abstinence-based, coercive approaches to drug use; however, for purposes of this report, the term encompasses a spectrum of efforts to eliminate criminal penalties, even if such efforts do not eliminate all forms of coercion entirely. Drug decriminalization also ideally entails the removal of criminal penalties for low-level sales, given that the line between seller and user is often blurred (this subject and the broader issue of people who sell drugs will be addressed in a subsequent DPA report).

This report is the product of a comprehensive review of the public health and criminology literature, an analysis of drug policies in the U.S. and abroad, and input from experts in the fields of drug policy and criminal justice. By highlighting the benefits of eliminating criminal penalties for drug use and possession, we seek to provide policymakers, community leaders and advocates with evidence-based options for a new approach.

Most countries’ drug laws exist on a spectrum between criminalization and decriminalization. Some have eliminated penalties for possession of all drugs, while some countries (and U.S. states) have eliminated penalties only for marijuana possession. Still other countries and states have taken steps in the right direction by reducing criminal penalties, without eliminating them entirely.

The problems that result from the criminalization of small amounts of drugs are detailed in the body of this report but can be summarized as follows:

- The criminalization of drug possession is a major driver of arrests and pretrial detention in the United States. Each year, U.S. law enforcement makes nearly 1.5 million drug arrests – more arrests than for all violent crimes combined. The overwhelming majority – more than 80 percent – are for possession only and involve no violent offense. Each year hundreds of thousands of people are held in jail for drug possession, most of them pretrial.
- Hundreds of thousands of people remain under some form of correctional supervision (probation, parole, or other post-prison supervision) for drug possession offenses.
- Discriminatory enforcement of drug possession laws has produced profound racial and ethnic disparities at all levels of the criminal justice system.
- For noncitizens, including legal permanent residents (many of whom have been in the U.S. for decades and have jobs and families) possession of any amount of any drug (except first-time possession of less than 30 grams of marijuana) can trigger automatic detention and deportation – often without the possibility of return.
- People convicted of drug law violations face a host of additional consequences, including the loss of federal financial aid, eviction from public housing, disqualification from a wide range of occupational licenses, loss of the right to vote, and denial of public assistance.

By contrast, a policy of drug decriminalization:

- Reduces the number of people arrested, incarcerated, or otherwise swept into the justice system, thereby allowing people, their families and communities to avoid the many harms that flow from drug arrests, incarceration, and the lifelong burden of a criminal record;
- Alleviates racial, ethnic and income-based disparities in the criminal justice system;
- Improves the cost-effectiveness of limited public health resources;
- Revises the current law enforcement incentive structure and redirects resources to prevent serious and violent crime;
- Creates a climate in which people who are using drugs problematically have an incentive to seek treatment;
- Improves treatment outcomes (when treatment is called for);
- Removes barriers to the implementation of evidence-based practices to reduce the potential harms of drug use, such as drug checking (to test for adulterants in illicit substances); and
- Improves relationships between law enforcement agencies and the communities they have sworn to protect and serve.

Many of the concerns often raised in opposition to drug decriminalization are not supported by evidence. Available empirical evidence from the U.S. and around the world strongly suggests that eliminating criminal penalties for possession of some or all drugs would not significantly increase rates of drug use. As with drug use rates, crime rates do not appear to correlate to the severity of criminal penalties. Use of the criminal justice system to get people into treatment is not necessary for the majority of people who use drugs problematically. And though many people believe that so-called “hard drugs” like cocaine, heroin, and methamphetamine are more addictive than other substances, the data suggests that most people who use these drugs never become addicted. But for those who do, community-based treatment outside of the criminal justice system is the most effective way to keep them safe.

There have been many steps toward decriminalization that have reduced drug penalties in the U.S., and most of them have been successful at reducing rates of addiction without increasing crime. Some of these efforts include “defelonizing” drug possession by reducing it to a misdemeanor, decriminalizing or legalizing marijuana possession, establishing pre-arrest diversion programs such as Law Enforcement Assisted Diversion (LEAD), and

enacting 911 Good Samaritan laws, which allow for limited decriminalization of drug use and possession at the scene of an overdose for those who are witnesses and call for emergency medical assistance. But more ambitious efforts are needed in the U.S.

Several other countries have experience with decriminalization, most notably Portugal. The Portuguese policy emerged in reaction to an escalation of problematic drug use – in particular unsafe injection drug use and its impact on public safety and health. While overall prevalence rates of drug use and drug-related illness in Portugal have always been on the lower end of the European average, in 1999 Portugal had the highest rate of drug-related AIDS in the European Union and the second highest prevalence of HIV among people who inject drugs, and drug-related deaths were increasing dramatically.

In 2001, Portuguese legislators enacted a comprehensive form of decriminalization – eliminating criminal penalties for low-level possession and consumption of all drugs and reclassifying these activities as administrative violations. Today in Portugal, no one is arrested or incarcerated for drug possession, many more people are receiving treatment, and there is a reduced incidence of HIV/AIDS and drug overdose – all without any significant increases in rates of crime or drug use.

This report makes the following recommendations for local, state and federal policymakers in the U.S.:

- Congress and U.S. states should eliminate federal and state criminal penalties and collateral sanctions for drug use, drug possession for personal use, and possession of paraphernalia intended for consuming drugs.
- Congress should amend federal law to de-schedule marijuana and remove it from the federal Controlled Substances Act.
- Administrative penalties – such as civil asset forfeiture, administrative detention, driver’s license suspension (absent impairment), excessive fines, and parental termination or child welfare interventions (absent harm to children) – run counter to the intent of a decriminalization policy and should not be imposed.
- Decriminalization policies – like other drug policies – generally function far more effectively when accompanied by robust and diverse harm reduction and treatment-on-demand programs, including medication-assisted treatment.
- Local and state governments should adopt pre-booking diversion and 911 Good Samaritan policies to prioritize public health over punishment and incarceration.

What is Decriminalization?

Definition

This report defines drug decriminalization as the elimination of criminal penalties for drug use and possession, as well as criminal penalties for the possession of equipment used for the purpose of introducing drugs into the human body. Ideally, drug decriminalization entails the elimination of all punitive, abstinence-based, coercive approaches to drug use; however, for the purposes of this report, the term encompasses a spectrum of efforts to eliminate criminal penalties, even if such efforts do not eliminate all forms of coercion entirely. Throughout this report, we will use the phrase “drug possession” to include drug possession, drug use, and possession of equipment used for the purpose of introducing drugs into the human body.

Under such a legal and policy regime, drug possession is not a criminal offense, while drug production, trafficking, and distribution, driving under the influence, or other conduct that goes beyond simple possession or use – particularly conduct that harms or poses an unreasonable threat of harm to others – remain criminal offenses.¹ Drug decriminalization does not affect existing criminal laws other than those specifically addressing use and possession.

Decriminalization not only means eliminating traditional criminal penalties for drug possession, but also moving beyond court, prosecutor or police-centered responses to problematic drug use, such as court-ordered and probation-supervised treatment.

As we demonstrate throughout this report, decriminalization is a sound, effective solution to some of the myriad fiscal, public health, social, and public safety issues caused by the criminalization of drug possession.

Decriminalization means that people are no longer arrested or incarcerated merely for possessing or using a drug.

Legalization refers not only to the elimination of criminal penalties for possession but also to the regulation and control of legal production and sales to adults without a prescription – including limits on use and sales, licensing requirements, quality controls, consumer protections, taxation and/or advertising restrictions. Legalization today typically refers to the approaches society tends to take with regard to alcohol, tobacco, and, increasingly, marijuana. This report addresses – and endorses – a policy of drug decriminalization; it does not examine or discuss the legalization of drugs.

What Does Decriminalization Look Like in Practice?

Most countries’ drug laws exist on a spectrum between criminalization and decriminalization. Some have eliminated penalties for possession of all drugs, while some countries (and U.S. states) have eliminated penalties only for marijuana possession. Still other countries and states have taken steps in the right direction by reducing criminal penalties without eliminating them entirely.

Decriminalization models differ widely in terms of:

- the threshold drug quantities chosen to distinguish between personal use and sales or trafficking offenses;
- the institutions or actors (health professionals, judges, prosecutors, police, etc.) that decide what separates mere possession from sales or trafficking, if no formal threshold limits are established;
- the type and severity of administrative sanctions that can be imposed;
- the role of the health system;
- the extent to which decriminalization is accompanied by an expansion of treatment, harm reduction, health and social support services; and
- the degree to which the decriminalization law is faithfully implemented.

Some countries have decriminalized by enacting legislation; in others, courts have decriminalized drug possession by issuing a judicial decision. Other countries, like the Netherlands, have effectively decriminalized in practice without formally changing their drug laws – sometimes called *de facto* (as opposed to *de jure*) decriminalization. The Netherlands model relies on changes in administrative or law enforcement practices that are not formally codified.



The decriminalization of drug use needs to be considered as a core element in any public health strategy.

- Organization of American States, 2013



The question of whether to establish drug quantity cut-off points (“thresholds”) to distinguish between personal drug possession and drug distribution or intent to distribute is pivotal to the form a decriminalization regime will take.² Jurisdictions often set thresholds unrealistically low, which can result in large numbers of people who possess drugs for their own use being wrongly arrested and prosecuted for drug trafficking and facing lengthy prison sentences. To avoid this pitfall, it is critical to understand how and in what quantities each type of drug typically is made available for purchase on the illicit market, and set thresholds with a wide enough margin to ensure that all people with no intent to sell drugs are protected from arrest and prosecution.

While clearly defined threshold limits are the norm among countries with decriminalization laws on their books, other, potentially more efficacious options exist. Many European countries have experimented with threshold amounts, and some impose no legal threshold, instead allowing judges to make determinations about whether someone may have been trafficking on a case-by-case basis.³ The bottom line is that thresholds may be appropriate if they are set at high enough levels; as usual, the devil is in the details.

Because laws punishing the use or possession of drugs in “public view” are subject to discretionary abuses by law enforcement, the best decriminalization policies eliminate criminal penalties for possession in public as well as in private (even if they retain some penalties for use in public, as is commonly the case with alcohol). New York State’s experience with decriminalizing marijuana provides a cautionary tale regarding public view and drug enforcement practices. In 1977, New York State decriminalized possession of less than one ounce of marijuana in *private*, while possession in *public* view remains a criminal offense. Because of the widespread use of “stop and frisk” police tactics in New York City, many people, the overwhelming

majority of them Black or Latino, are stopped by the police without suspicion and forced to reveal the contents of their pockets or bags in public. If they are carrying marijuana, they are then arrested for having less than an ounce of marijuana in public view. Under stop and frisk, marijuana arrests skyrocketed (between 2002 and 2013, stops and interrogations increased 448 percent).⁴ The New York example is demonstrative of two equally important points: (1) legislatures seeking to decriminalize need to decriminalize *both* private possession and public possession; and (2) *de jure* decriminalization is often not enough – changes in law enforcement *practices* are needed as well.

When putting decriminalization policies into place that do not go as far as full decriminalization, it is important that any punishment that remains in place not be worsened. For example, it would be inappropriate to *decrease* a crime from a felony to a misdemeanor while simultaneously *increasing* the punishment that may be imposed. It would also be inappropriate to decrease a crime from a misdemeanor to an infraction while simultaneously *increasing* the administrative penalties that may be imposed.

In summary, for decriminalization policies to be effective, jurisdictions should:

- Carefully calibrate drug quantity thresholds to ensure that people who merely possess drugs for personal use are not ensnared;
- Eliminate criminal penalties for possession in public as well as in private;
- Consider forms of *de facto* decriminalization by changing administrative and law enforcement practices (for example, the Law Enforcement Assisted Diversion (LEAD) program, discussed later).

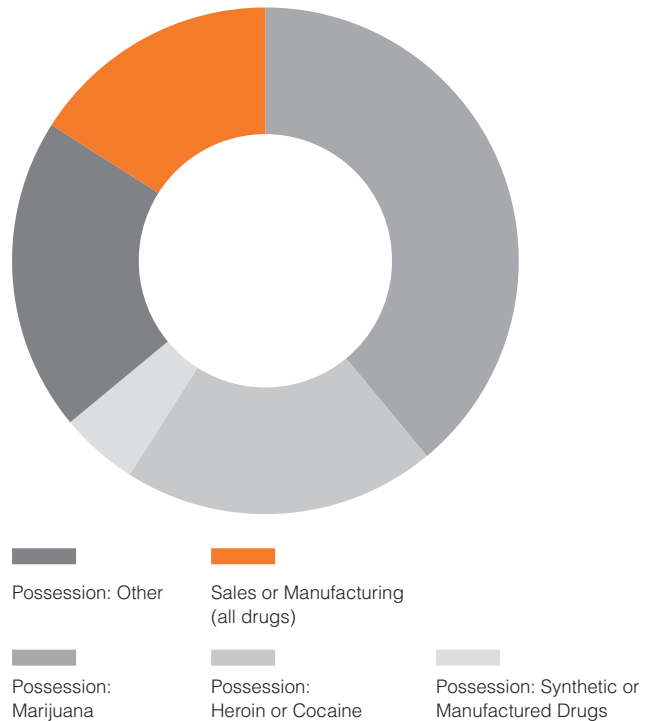
Why is Criminalization a Problem?

Mass Criminalization

The criminalization of drug possession is a major driver of arrests in the United States. Each year, U.S. law enforcement makes nearly 1.5 million drug arrests – more arrests than for all violent crimes combined. The overwhelming majority – more than 80 percent – are for possession *only* and involve no violent offense.⁵ In 2015, nearly 40 percent of drug arrests (more than 570,000 people) were for marijuana possession, and 45 percent (over 674,000 people) were for possession of drugs other than marijuana.⁶ Just 16 percent of all drug arrests were for sale or manufacture of any drug.⁷ When people are arrested for possession of small amounts of drugs, they are sucked into the quicksand of the criminal justice system, whether or not a prosecution is pursued, a conviction is obtained, or jail time is served.

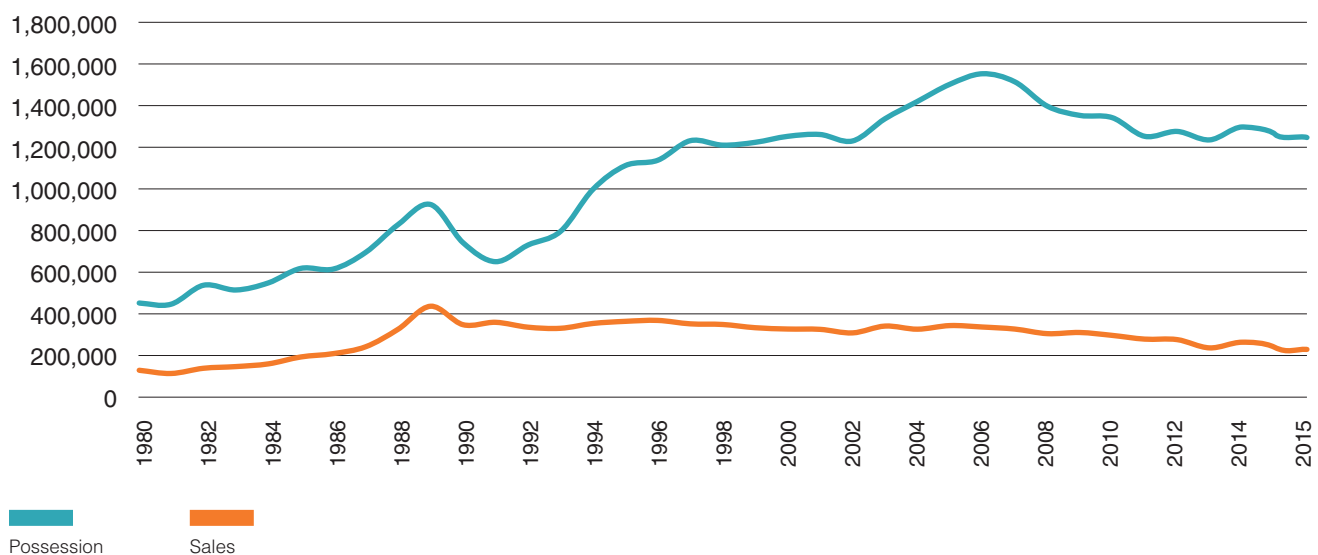
It is worth noting that the brunt of this is borne disproportionately by poor people. Wealthy people typically have the resources to address problematic drug use voluntarily and privately; it is primarily poor people whose problematic drug use ensnares them in the criminal justice system.

U.S. Drug Arrests, 2015



Source: Federal Bureau of Investigation, 2015.⁸

U.S. Drug Arrests, 1980-2015



Source: Federal Bureau of Investigation, Uniform Crime Reports.⁹

Mass Incarceration

As of 2015, approximately 87,000 people were held in jail for drug possession on any given day, and most of them (63,000) were held *pretrial*.¹⁰ People incarcerated on a pretrial basis have not been convicted of any crime, meaning they are legally innocent. Incarcerating a legally innocent person for drug use or possession is unfair,¹¹ unnecessary,¹² and expensive.¹³

A person *convicted* of drug use or possession may also be incarcerated in state prison or local jails. Or they may be required or encouraged to enter a court-supervised program that relies on coerced treatment or places them under correctional or judicial supervision for several months or years. Although most people who are arrested for drug possession do not end up in prison, a disturbing number of people do.

Approximately 46,000 people were locked up in a state prison for drug possession on any given day, as of 2015.¹⁴ In addition, in criminal cases that do not involve drug possession, *prior* drug possession convictions are often used to enhance jail and prison sentences.

Although most people who are arrested for drug possession do not end up in prison, a disturbing number of people do.

Mass Supervision and Surveillance

In 2015, there were approximately 3.8 million people on probation and 870,000 on parole in the U.S., and approximately one in 53 Americans was under some form of correctional supervision (probation, parole, or other post-prison supervision).¹⁵ Available data do not specify how many people are under supervision for drug possession (as opposed to other drug offenses), yet evidence suggests that possession offenses comprise a substantial portion numbering in the hundreds of thousands.¹⁶ In 2015, one quarter of all people on probation in the U.S. – or nearly one million (947,450) – and almost one-third of those on parole (269,855 people) had a drug law violation as their most serious offense.¹⁷

Probation and parole revocations are key drivers of mass criminalization and incarceration.¹⁸ There are unknown thousands of people who are on probation and parole for drug and non-drug offenses but who are re-incarcerated for a minor drug possession offense or for failing a court-mandated drug test. Precise data do not exist, but the few studies that have been conducted on this population reveal that minor drug use or possession is a primary reason that people on probation or parole are incarcerated or re-incarcerated.¹⁹ To get a sense of the potential scope of this problem, consider that 29.1 percent of those on probation (1,283,000 people) and 23 percent of people on parole (334,000 people) reported using an illicit drug in the past month, mostly marijuana.²⁰ Depending on their state, most of these people could, at any time, be drug tested, produce a positive test result and face additional penalties, including a new prison or jail sentence or increased term of supervision.

Probation terms can be lengthy – it is not unheard of for people to be on probation for up to twenty-five years.²¹ And while serving time under supervision is better than being behind bars, supervision can involve onerous conditions, including GPS monitoring, which amounts to placing people under constant surveillance.²² The onerousness of these conditions should not be underestimated. People under supervision are subjected to almost constant surveillance and, especially given recent advances in technology, are under nearly constant oversight by criminal justice officials.

Costs

The total costs of criminalizing drug possession are difficult to calculate, but we know that they are exorbitant. Criminalizing drug possession and placing people in prison, jail or on probation or parole is an enormous waste of criminal justice resources that comes with a staggering price tag for U.S. taxpayers. In a 2010 report published by the Cato Institute, Harvard economist Jeffrey Miron estimated that the cost of policing low-level drug possession offenses exceeds \$4.28 billion annually – and this does not include the massive additional costs of incarceration, supervision and court processing.²³ Miron also provides a state-by-state breakdown of drug-related taxpayer expenditures – California spends over a billion dollars; Florida and Georgia each spend hundreds of millions.

Why is Criminalization a Problem?

continued

At an average annual cost of approximately \$31,000 per person, the price tag for incarcerating people in state prisons for possession is likely well over \$1 billion,²⁴ with even larger sums spent at the local level.²⁵ In contrast, the average cost to obtain a GED is \$120.²⁶

The criminalization of drug possession is a costly affair, and decriminalization would likely save U.S. taxpayers billions of dollars.

Unjust Racial and Ethnic Discrimination and Disparities

Although rates of reported drug use do not differ substantially among people of different races and ethnicities, Black people are far more likely to be criminalized for drug possession and use than white people.²⁷ African Americans experience discrimination at every stage of the criminal justice system and are more likely to be stopped, searched, arrested, convicted, harshly sentenced and saddled with a criminal record for mere possession. These dynamics have clear outcomes. Black people comprise 13 percent of the U.S. population.²⁸ But Black people comprise 29 percent of those arrested for drug law violations,²⁹ nearly 35 percent of those incarcerated in state or federal prison for any drug law violations,³⁰ and roughly 35 percent of those incarcerated in state prison for possession only.³¹

Discriminatory enforcement of drug possession laws has produced profound racial and ethnic disparities at all levels of the criminal justice system.

National-level data on arrests of Latinos are incomplete (what data are available are often inaccurate, because Latinos are routinely undercounted in national criminal justice statistics, or are categorized as white).³² Yet among drug arrest incidents in 2015 for which ethnicity was reported, more than 20 percent of those arrested were Latino.³³ Where available, state and local level data also show that Latinos are disproportionately arrested and incarcerated for drug possession violations.³⁴ Disparities are less stark for Latinos than for Black people, but they clearly exist. And it has been demonstrated that likelihood of arrest is associated with skin tone.^{35,36}

The Impact of Criminalization on Individual and Public Health

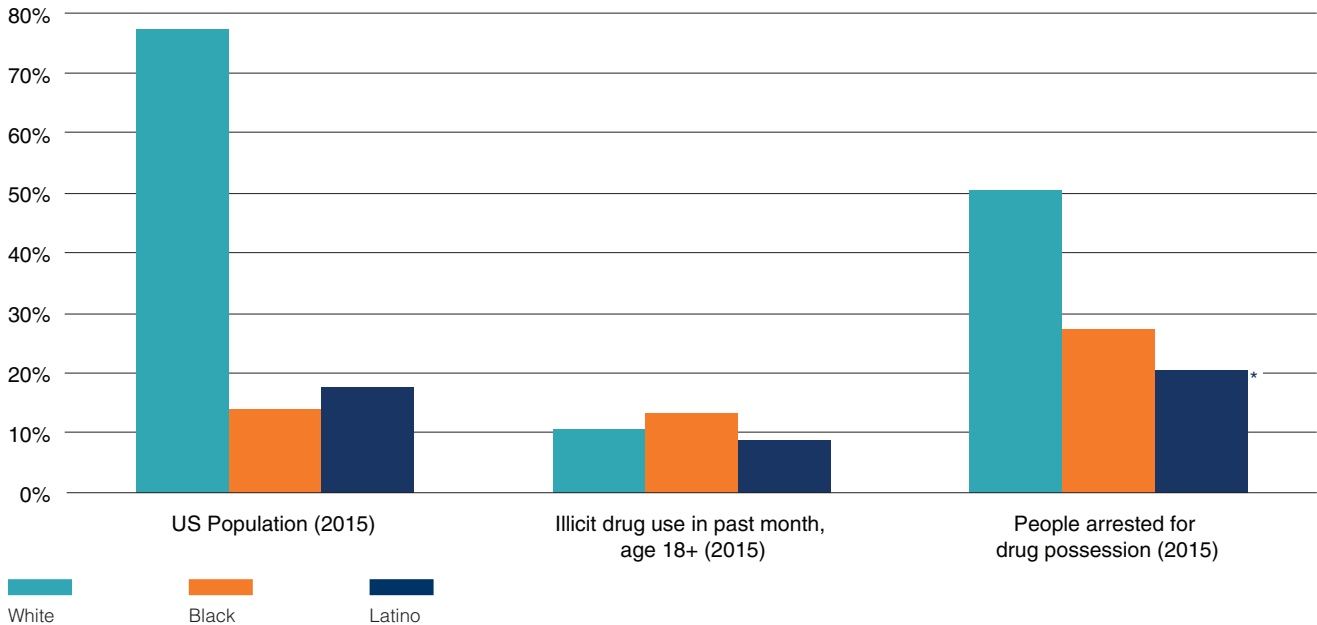
Though some individuals may access helpful services or treatment through the criminal justice system, available evidence suggests that using the criminal justice agencies to address problematic drug use overall causes more harm than good, and positive health outcomes do not usually result from criminal justice involvement.

The criminalization of people who use drugs dramatically heightens risks to individual and public health. Criminalization contributes to the marginalization of people who use drugs, making it more difficult to engage them in treatment, health care and other vital services that are proven to transform and save lives.³⁷ Aggressive law enforcement practices and harsh criminal penalties for drug possession drive many people into environments where risks of contracting or transmitting HIV and hepatitis C are greatly elevated, and away from testing, prevention, treatment and other effective public health services.³⁸

Of course, the most appropriate and effective way for people to access services and treatment related to drug use is through the healthcare system. To truly address problematic drug use efficiently and effectively, health services – including substance abuse and mental health services – must be accessible.

Fear of arrest is also the most common reason that witnesses do not immediately call 911 in the event of an overdose.³⁹ Overdose has now surpassed motor vehicle accidents as the leading cause of injury-related death in the U.S.

Racial and Ethnic Disparities in Drug Possession Enforcement



Sources: United States Census Bureau, Substance Abuse and Mental Health Services Administration, Results from the 2015 National Survey on Drug Use and Health, Federal Bureau of Investigation, 2015 Crime in the United States.
* Exact numbers are difficult to report as Latinos are routinely undercounted in criminal justice statistics or are categorized as white.

According to the Centers for Disease Control and Prevention, 52,404 people – an average of 143 people a day – died from a drug overdose in 2015.⁴⁰ Overdose risk is significantly greater following an extended period of abstinence or reduced use – such as after spending time in a rehabilitation facility or behind bars.⁴¹

Criminal penalties for drug use and possession have increased the dangers that problematic drug use can pose to individuals and communities.

Criminalization promotes and reinforces stigma against people who use drugs and who struggle with drug misuse.⁴² In turn, stigma makes it easier for government officials to further criminalize people who use drugs.⁴³ It is often argued that stigma for drug users is good thing, either because drug use is inherently immoral or because stigma provides an incentive to avoid drug use. But in fact, stigma can be a formidable barrier to a wide range of opportunities and rights with often devastating consequences.

People who are stigmatized for their drug involvement can endure social rejection, labeling, stereotyping and discrimination, including denial of employment, housing or treatment⁴⁴ – even in the absence of any concrete negative consequences associated with their drug use. Stigma is a major factor preventing individuals from seeking and completing drug treatment⁴⁵ and from utilizing harm reduction services such as syringe access programs⁴⁶ – although the social exclusion created by stigma often increases the need for such

Why is Criminalization a Problem?

continued

services.⁴⁷ In addition, social isolation can itself be a driver of problematic drug use, so further isolating problematic drug users is counter-productive. In short, people who use drugs, even non-problematically, already suffer from stigma in ways that have material consequences; criminalization of drugs merely exacerbates that problem.

Immigration Consequences

For noncitizens, including legal permanent residents (many of whom have been in the United States for decades and have jobs and families), possession of any amount of any drug (except first-time possession of less than 30 grams of marijuana) can trigger automatic detention and deportation – often without the possibility of return.⁴⁸ Nearly 20,000 people were deported in 2013 for simple drug possession.⁴⁹

A 2015 report by Human Rights Watch found that deportations for drug possession offenses increased significantly in recent years: from 2007 to 2012, deportations for possession offenses jumped by 43 percent. During this period, 266,000 people were deported for any drug offense, of whom 38 percent – over 100,000 people – were deported for a possession offense.⁵⁰

Minor drug possession charges can also lead to inadmissibility from entering the U.S. for noncitizen residents – meaning that, even if a minor offense does not lead to incarceration or deportation, it can prevent a legal permanent resident from ever returning to the U.S. if they leave the country for any reason.⁵¹

What is more, the simple admission of past drug *use* – absent arrest or conviction for any drug-related crime – has been cited by U.S. consular officials as grounds for denying visas to would-be visitors to the United States.

Diversion programs like drug courts that require people to plead guilty as a condition of participation only exacerbate this problem. Any noncitizen (including a legal permanent resident) who pleads guilty to a drug law violation (except for first-time possession of less than 30 grams of marijuana) is at risk of being permanently deported.⁵² Moreover, it is not clear that this risk is assuaged if and when the guilty plea or conviction is sealed or expunged, because federal law enforcement authorities may be able to access and act upon “sealed” or even “expunged” state records.

Additional Consequences

In addition to all of the above, a drug possession conviction can also result in many additional consequences, including, but not limited to:

- Loss of federal financial aid, for one year, two years or indefinitely, based on whether it is a first, second or third offense;
- Eviction from public housing for those convicted *and* other members of the household, even if they had no prior knowledge of the activity;
- Disqualification from a wide range of occupational licenses, government grants, professional certifications and other opportunities;
- Denial of public assistance like TANF and SNAP.⁵³

The brunt of all of this falls disproportionately on poor people and people of color.⁵⁴

Drug Courts Are Not The Answer

Drug courts were created by well-intentioned judges frustrated at having few alternatives to lengthy terms of incarceration when people came before them charged with simple drug offenses. Drug courts have since spread across the country: as of 2016, there were more than 3,000 such courts operating in the 50 states and U.S. Territories.⁵⁵ Half of all U.S. counties have at least one operating drug court.

Today, many critics of decriminalization base their position on the existence of drug courts.⁵⁶ They argue that because drug courts can divert and treat people arrested and charged with drug offenses there is no need for systematic legal or policy change.

However, as an increasing body of research shows, drug courts actually perpetuate many of the harms associated with criminalization. As discussed below and elsewhere,⁵⁷ evidence in favor of drug courts is decidedly lacking. Where there is data, it shows that most drug courts fail to offer real treatment to people in actual need of it, and they often inflict more (not less) punishment on people suffering drug problems than traditional criminal courts. Though there may be some anecdotal evidence that drug courts can help in individual cases, that is not a convincing rationale for expanding drug courts systemically.

Unconvincing Evidence for Drug Courts

The data collected on drug courts is quite limited and plagued by methodological problems, and the studies published on drug courts show inconclusive or mixed results, at best. And because every drug court is unique (there are no nation-wide mandatory standards) it is impossible to claim that the successes of any single drug court translate to other drug courts, even those in the same or neighboring jurisdictions.⁵⁸

On balance, drug courts (like other forms of coerced treatment) appear to be no more effective than voluntary treatment in terms of treatment engagement, retention, completion and reductions in drug use. However, they are typically far more expensive and coercive than voluntary treatment.⁵⁹

Many Drug Courts Are Abstinence-Only and Increase Criminal Justice Involvement

In spite of their proliferation, drug courts have not reduced rates of incarceration or criminal justice involvement in the U.S.⁶⁰ Drug court judges routinely end treatment and incarcerate drug-dependent people who suffer relapse.⁶¹ Yet relapse is central to the medical definition of drug addiction: a chronic, relapsing disorder. Drug courts' systematic reliance on jail sanctions as a response to drug use relapse contravenes fundamental principles of medicine and public health. In addition, drug courts frequently jail people who violate technical program rules like attendance at Narcotics Anonymous meetings. One result of drug courts' heavy reliance on incarceration is that drug court participants often end up serving more time behind bars than those whose cases are handled by conventional criminal courts.⁶²

As a result of their punitive practices, drug courts leave many participants worse off for trying.

Drug courts contribute to other problems in the criminal justice systems as well. One is that most drug courts require participants to plead guilty as a condition of program participation, which means that even people who are factually innocent of any drug law violation might end up behind bars, and suffer the collateral consequences of a criminal conviction, if they do not complete the program.⁶³ Another is that drug courts appear to manifest the same racial disparities that exist within other parts of the criminal justice system – drug courts generally do a poor job of collecting and reporting relevant data, but what limited numbers are available indicate that people of color are less likely to be admitted to drug court, less likely to successfully graduate from drug court, and more likely to receive a punitive sanction for failing drug court.⁶⁴

Drug Courts – An Example of Coercive Treatment

continued



Drug Courts Provide Inadequate Treatment and Often Deny Proven Treatment Modalities

Most drug courts fall woefully short of providing appropriate, quality treatment services to the people most in need in a manner that effectively promotes public safety and health.

For example, opioid substitution treatments such as methadone and buprenorphine have been long recognized by leading U.S. and international health agencies to be the most – and in several circumstances, the only – effective medical intervention for reducing problematic opioid drug use, the spread of HIV/AIDS, overdose deaths and crime.⁶⁵

Yet the vast majority of drug courts prevent opioid-dependent people from receiving opioid substitution treatment,⁶⁶ despite the fact that the National Association of Drug Court Professionals has called for the use of opioid substitution treatments in appropriate circumstances.⁶⁷ Opposition to the use of such treatment by drug courts is so widespread that in February 2015 the Office of National Drug Control Policy (ONDCP) announced that it would refuse funding to drug court programs that fail

to provide it. Nevertheless, court, probation, and treatment staff routinely and inappropriately deny medication assisted treatment to deserving drug court clients for non-medical reasons.⁶⁸

Moving Beyond Drug Courts: Ending Mass Criminalization

In short, drug courts are more expensive, less effective, and unnecessarily punitive compared to less coercive, health-based approaches to dealing with drug use and addiction.

People who are found in possession of a drug should never be arrested or sent to a criminal court – including a drug court.⁶⁹ The Multi-Site Drug Court Evaluation recommended that drug courts should de-prioritize simple possession offenses – which are prevalent in most drug courts today.⁷⁰

Rather than relying primarily or exclusively on drug courts, states seeking to implement more efficient and fiscally responsible drug policies should consider removing drug possession from the criminal justice system entirely.

Why is Decriminalization the Solution?

Decriminalization mitigates or eliminates each of the above-noted problems associated with criminalization. Specifically, decriminalization:

- Reduces the number of people arrested, incarcerated, or otherwise swept into the justice system, thereby allowing persons, their families and communities to avoid the many harms that flow from drug arrests, incarceration, and the lifelong burden of having a criminal record;
- Alleviates income-based disparities in the criminal justice system;
- Improves the cost-effectiveness of limited public health resources;
- Revises the current law enforcement incentive structure and redirects resources to prevent serious and violent crime;
- Reduces racial discrimination and disparities in drug law enforcement;
- Creates a climate in which people who are using drugs problematically have an incentive to seek treatment;
- Improves treatment outcomes where treatment is called for;
- Removes barriers to the implementation of evidence-based practices to reduce the potential harms of drug use, such as drug checking;
- Improves relationships between law enforcement agencies and the communities they have sworn to protect and serve; and
- Makes communities safer by reducing prohibition-related violence.

Removing criminal penalties for drug use and possession will save billions of dollars a year that can be used to provide effective health interventions for those who need them, while focusing criminal justice resources on serious public safety problems.

Despite its many critical benefits, decriminalization does not undo all of the inherent harms of drug prohibition. Decriminalization does not completely eliminate illegal and unregulated markets, racial discrimination and disparities in enforcement, or the problem of “net-widening” (getting people caught up in the criminal justice system through the use of ineffective or inefficient diversion programs). Nevertheless, decriminalization would be a major step forward, saving lives, reducing harm to communities and improving public safety.

Addressing Four Important Questions About Decriminalization

In this section, we address some of the most common concerns about decriminalization and assess those objections against the best available evidence.



Decriminalization of recreational use of marijuana by adults has not led to an increase in youth rates of recreational marijuana. Thus, decriminalizing simple possession of marijuana for both minors and young adults may be a reasonable alternative to outright criminal prosecution, as long as it is coupled with drug education and treatment programs.

- American Academy of Pediatrics, Technical Report: The Impact of Marijuana Policies on Youth: Clinical, Research, and Legal Update, 2015.



Won't decriminalization increase drug use?

The most common fear about decriminalization is that it might cause drug use to increase. This fear is understandable, and it is difficult to predict with precision what impact such a policy change would have in practice. Yet available empirical evidence from the U.S. and around the world strongly suggests that eliminating criminal penalties for possession of some or all drugs would not significantly increase rates of drug use.⁷¹

The example of marijuana provides some insight into this question: there is no correlation between decriminalization of marijuana and rate of marijuana or other drug use. In the 1970s, several U.S. states either reduced or eliminated criminal penalties for personal possession of marijuana. Evidence from these states found no significant increase in marijuana or other drug use.⁷² The Institute of Medicine has also concluded that “there is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use.”⁷³ Similarly, in the 1980s and 1990s several jurisdictions in Australia decriminalized possession of marijuana for personal use; surveys showed no increases in use of marijuana attributable to the law change.⁷⁴

This appears to be the case for other drugs as well. The National Research Council determined in 2001, and reaffirmed in 2015, that “existing research seems to indicate that there is little apparent relationship between severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use.”⁷⁵

Similarly, a 2013 study of European Union member-states showed that countries with less punitive policies (including different forms of decriminalization) did not have higher rates of drug use – and in fact tend to have lower rates – than countries with more punitive policies.⁷⁶

The Organization of American States conducted a review of drug policies in the Americas in 2013 and concluded, “The available evidence suggests that reducing penalties for possession of small quantities has little effect on the number of users but retains the benefit of reducing judicial caseloads and incarceration rates.”⁷⁷

Won't Decriminalization Increase Crime Rates?

Crime rates are influenced by a wide range of factors, and any association between a particular policy intervention and crime rates is likely to be complex. The theoretical and

empirical literature around such topics – well beyond the scope of this report – is decidedly mixed about the potential deterrent effect of different criminal justice policies.⁷⁸

But, as with drug use rates, crime rates do not appear to correlate to the severity of criminal penalties. Countries that have decriminalized some or all drugs have not experienced significant increases in non-drug crimes, and some have even seen reductions in theft and other offenses. These benefits may derive from the significant police and court resources freed up by decriminalization and redeployed.⁷⁹ Conversely, a substantial amount of evidence points to the high opportunity cost of aggressively policing possession offenses, suggesting that aggressive policing practices may lead to more crime, not less, because they divert scarce law enforcement resources away from combatting more serious crimes,⁸⁰ and because aggressive policing of drug possession harms police-community relations.

Ceasing to criminalize drug possession improves community-police relations, and increases levels of trust in law enforcement.⁸¹

It can also improve the justice system by streamlining processes and reducing administrative burdens for police, prosecutors and courts, which translates into more resources for the investigation, prevention and prosecution of more serious crime.⁸²

Law enforcement agencies in countries that have decriminalized drug possession have reportedly not been hampered in their investigations of large drug trafficking operations,⁸³ and decriminalization does not seem to have impacted drug markets, drug seizures or crimes related to drug trafficking.⁸⁴

Despite their initial opposition or concerns, members of law enforcement in these countries have expressed high levels of satisfaction with their drug policy reforms, and many believe decriminalization has had a positive impact on public safety and health.⁸⁵

Isn't the Criminal Justice System Effective at Getting People Into Treatment?

Many lawmakers and criminal justice actors understandably, but falsely, believe that the coercive power of the criminal justice system is necessary to get people into treatment, and that punishing people who return to drug use after treatment helps people stop using drugs. Yet only one-third of people admitted to substance abuse treatment nationwide between 2002 and 2012 – 600,000 people – did so on a coerced basis; the remainder entered voluntarily.⁸⁶ It is certainly true that treatment is better than incarceration for some people who are addicted to drugs. But there are several reasons to believe that coercion is not helpful, and may actually be counter-productive.

First, arguments in favor of coerced treatment ignore the serious harms that are inflicted by any involvement with the criminal justice system, including: the trauma of arrest and potential incarceration, potential job loss and strain on family relations, the stigma of having a criminal record, and the myriad collateral consequences of having a criminal record (including, in some jurisdictions, deprivation of the right to vote).⁸⁷

Second, although some individuals may be more likely to enter treatment if they are forced to, there is no statistical, system-wide evidence that those who are coerced to enter treatment fare any better than those who access treatment voluntarily. Treatment completion and retention rates are scarcely different.⁸⁸

Third, only a minority of people who use a drug – any drug – will actually go on to become dependent or develop a problem.⁸⁹ Indeed, the majority of people who use illicit drugs do not need drug treatment, according to federal government surveys.⁹⁰ But coerced treatment programs do not distinguish between drug use and dependence or addiction: many people who possess, but are not drug-dependent, get placed into coercive treatment programs. Placing people who occasionally use drugs non-problematically into unnecessary treatment deprives people suffering from serious drug dependence of access to the limited treatment opportunities that do exist. Treatment is inappropriate for people who do not need it, and those who seek to access it voluntarily should have the ability to do so.

Why is Decriminalization the Solution?

continued

Fourth, and related to the third point above, treatment is often unnecessary. Most people recover from drug dependence without treatment. Often called “natural” recovery, this process involves changes in substance use without the aid of formal interventions.⁹¹ Researchers who have examined “natural recovery” have demonstrated that it is the *common* course of *most* cases of substance dependence.⁹² The majority of people who use or become dependent on substances naturally reduce their use as they age, and ultimately most cease their use entirely.⁹³

Fifth, many health professionals consider any form of coerced treatment to be medically unethical. The American Public Health Association, for example, branded coerced drug treatment “ethically unjustifiable.”⁹⁴

In sum, the argument that the criminal justice system is necessary to get people into treatment is not supported by the evidence and ignores some serious problems associated with coerced treatment:

- the argument ignores many of the harms that coerced treatment causes;
- there is no evidence that people who are coerced into treatment have more successful outcomes than people who enter voluntarily;

- treatment is often unnecessary for people to stop using drugs problematically;
- only a minority of people who use drugs will go on to become addicted; and
- it is unethical to coerce health care treatment using threats of criminal punishments.

Doing away with coercive treatment doesn’t mean doing away with constructive tools to encourage those who use drugs problematically to address their drug use. Family, doctors, employers, co-workers and community can all be engaged to convince people engaged in problematic drug use to seek and receive treatment. This kind of non-criminal justice pressure to enter treatment is already the norm for many wealthier people who are unlikely to end up in the criminal justice system for drug-related reasons and can afford to access private treatment.⁹⁵

In addition, coerced treatment programs tend to apply a cookie-cutter approach to treatment requirements: total abstinence is frequently required and relapse is treated punitively. This approach is not supported by research, from a health standpoint. Some people can recover by taking small steps (such as reducing or moderating use); for others, total abstinence is appropriate. And for many, occasional relapse is a predictable and frequent aspect of recovery.⁹⁶



Coerced treatment is ethically unjustifiable, especially when voluntary treatment can yield equal or more positive outcomes.

- American Public Health Association, 2013

The criminal justice system is binary – someone caught up in it is either compliant with the rules or not, and failure to comply with the rules results in harsh (and expensive) punishment. From a health perspective, whether a person is totally abstinent from alcohol, marijuana or other drugs matters far less than whether the problems associated with their drug misuse are getting better or not. Metrics like health, employment, housing and family situation are more important than the outcome of a drug test. But when drug possession is criminalized, reduction of drug use and reduction of drug-related harms become irrelevant, because *by law* anything short of abstinence is a crime. Under decriminalization, alternative, tested and productive ways for discussing and addressing problematic drug use and dependence become possible.

Finally, coercive criminal justice-based treatment programs absorb scarce resources from the public health systems, and for many low-income people, the criminal justice system may currently be the only means of accessing some form of treatment. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), “About two thirds (67.5 percent) of admissions aged 26 or older that were referred to substance abuse treatment by the criminal justice system had no health insurance, which substantially exceeded the percentages for most other referral sources.”⁹⁷ Inability to pay for treatment is a leading reason millions of people who need treatment do not access it.⁹⁸ It simply does not make sense to punish drug-dependent people when we could be helping them instead.

The failed drug war has prioritized funding for criminalization – to the detriment of effective prevention, treatment and harm reduction services.

How Hard Are So Called Hard Drugs?

It is often assumed that drugs like cocaine, heroin, and methamphetamine are automatically addictive or addictive beyond rates seen with alcohol and tobacco. The common belief is that most people who use these drugs will become dependent the very first or second time they use these substances. This is problematic because it tends to drive the assumption that possession of any amount of these drugs should be criminalized and that punishment is the only approach. The data tells a different story. The reality is, most people who use these drugs do so recreationally and never become dependent.

According to the 2015 National Survey on Drug Use and Health, only 0.8 percent of the nearly 16 million people aged 18 or older who reported using cocaine in their lifetime had used cocaine in the past month. Rates were even lower for heroin and methamphetamine. Only 0.4 percent of the 14.4 million people who reported having used methamphetamine in their lifetime reported past month use. And just 0.1 percent of the nearly 4.7 million people who reported having used heroin in their lifetime reported past month use.⁹⁹

Stepping Stones to Decriminalization: Efforts to Reduce Drug Penalties in the U.S.

U.S. attitudes and policy on decriminalization has evolved dramatically over the last few decades. Support for the proposition that marijuana should be made legal grew from just 15 percent in 1970 to 60 percent in 2016.¹⁰⁰ A majority of the U.S. public supports not only decriminalizing but also legalizing and regulating marijuana for adult recreational use,¹⁰¹ as a number of U.S. states are now doing.

Some U.S. jurisdictions have been experimenting with different approaches to decriminalization. As stated above, an ideal decriminalization model would be the elimination of all sanctions for drug possession, but there are some incremental approaches that are helpful as well. Several are explored below.

“Defelonizing” Drug Possession

Despite significant progress in the case of marijuana, 32 states still consider simple possession of small amounts of drugs like cocaine or heroin a felony, while 18 states, as well as Washington, DC and the federal government, treat possession as a misdemeanor.¹⁰²

California “defelonized” drug possession in 2014 by passing Proposition 47, “The Safe Neighborhoods and Schools Act,” an overwhelmingly popular voter initiative. The new law changed six low-level crimes, including drug possession, from felonies (or “wobblers” – crimes that can be charged as either felonies or misdemeanors) to misdemeanors, retroactively and prospectively. Since its passage, more than 13,000 people have been released and resentenced – saving the state an estimate \$156 million in incarceration costs. This money is being reinvested in drug treatment and mental health services, programs for at-risk students in K-12 schools, and victim services.¹⁰³ The law is significantly easing notorious (and unconstitutional) jail overcrowding in California counties.¹⁰⁴ There is some evidence that crime has increased since the passage of Prop 47, but no evidence that the law enactment is to blame.¹⁰⁵

Public sentiment in favor of reducing criminal penalties for drug possession is growing in other parts of the country too. A 2014 national Pew poll found that roughly two-thirds of respondents across the country believe that people should

no longer be prosecuted for possession of cocaine or heroin.¹⁰⁶ In the nation’s capital, a 2013 poll found that more than half (54 percent) of respondents supported decriminalizing possession of small amounts of drugs other than marijuana.¹⁰⁷

A 2016 poll of presidential primary voters in New Hampshire found that a substantial majority (66 percent) support decriminalizing drug possession outright.¹⁰⁸ A 2016 poll of voters in Maine found that 63 percent “think we should treat drug use as a public health issue and stop arresting and locking up people for possession of a small amount of any drug for personal use.”¹⁰⁹ Similarly, a 2016 poll found that 59 percent of South Carolina primary voters support decriminalizing drug possession, asserting that someone caught with a small amount of any illegal drug for personal use should be offered treatment but not be arrested, let alone face jail time.¹¹⁰ Finally, legislation was introduced in Maryland in 2016 and again in 2017 to decriminalize low-level drug possession, part of a groundbreaking package of health-centered responses to drug use.

Many U.S. jurisdictions have started to move in the direction of decriminalization.

Decriminalizing Marijuana Possession

Twenty-one states and Washington D.C. have either replaced criminal sanctions with the imposition of civil, fine-only penalties or reduced marijuana possession from a felony to a fine-only misdemeanor.¹¹¹ Eight of these states have taken the additional step of legally regulating the production, distribution and sale of marijuana.

Where implemented effectively, arrests have declined substantially, especially among youth.¹¹² Nevertheless, marijuana arrests still continue at alarming rates nationally, though they have slightly declined in recent years. More than 485,000 people were arrested for marijuana possession in 2015.¹¹³ This demonstrates that state-by-state decriminalization of marijuana is not enough.



Unlike drug court, LEAD does not require the presence of judges, court staff, prosecutors, or public defenders. The resources saved from keeping participants out of the criminal justice system are directed towards those individuals.

- Lisa Daugaard, Defender Association, Seattle.



Decriminalization schemes differ vastly in the protections they offer against arrest, prosecution and incarceration. Some states have set the threshold for simple marijuana possession quite low (in relation to local marijuana consumption patterns); possession of more than these amounts may still trigger harsh criminal penalties. Other states have only decriminalized a first offense, while subsequent offenses are punished severely.¹¹⁴ Many people residing in these states perceive no difference in their risk of arrest compared to prior to the implementation of these inadequate decriminalization schemes.¹¹⁵

Law Enforcement Assisted Diversion (LEAD)

Absent robust reform at the state or federal level, cities are increasingly exercising leadership and moving to reduce the role of criminalization in drug policy with very promising results. Seattle, Washington, has been at the forefront of such efforts, developing and implementing a program in 2011 known as “Law Enforcement Assisted Diversion,” or LEAD, that aims to bypass the criminal justice system at the earliest possible moment – before arrest – without any changes to state or federal law.

LEAD is an example of *de facto* decriminalization – rather than amending drug possession laws, local jurisdictions are changing their *practices*. Instead of arresting and booking people for certain drug law violations, including drug possession and low-level sales, police in select Seattle neighborhoods immediately direct them to drug treatment or other supportive services.¹¹⁶

LEAD is based on a commitment to “a harm reduction framework for all service provision.”¹¹⁷ The program does not require abstinence, and clients cannot be sanctioned for drug use or relapse.¹¹⁸ LEAD emphasizes “individual and community wellness, rather than an exclusive focus on sobriety.”¹¹⁹ Former acting Seattle Police Chief James Pugel explains that LEAD’s “overall philosophy is harm reduction...we know there may be relapse and falls.”¹²⁰

LEAD incorporates measures like health, employment, social relationships and overall well-being – instead of abstinence – into the program’s goals and evaluation, so that participants are never punished for failing a drug test.¹²¹

Responses to LEAD have been favorable, and initial indications are quite promising. A multi-year evaluation by the University of Washington suggests that LEAD is reducing the number of people arrested, prosecuted, incarcerated and otherwise caught up in the criminal justice system. It is also achieving significant reductions in recidivism. The evaluation team found that LEAD participants were nearly 60 percent less likely to reoffend than a control group of non-LEAD participants.¹²² This result is particularly encouraging in light of the high re-arrest rate for this population under the traditional criminal justice model.

Stepping Stones to Decriminalization: Efforts to Reduce Drug Penalties in the U.S.

continued

The evaluation team also conducted an analysis of LEAD's effect on criminal justice costs, concluding that “[a]cross nearly all outcomes, we observed statistically significant reductions for the LEAD group compared to the control group on average yearly criminal justice and legal system utilization and associated costs.”¹²³ LEAD participants showed cost reductions, while non-LEAD controls showed cost increases. These significant cost decreases result from significant reductions in time spent in jail, jail bookings per year, and probability of incarceration or felony charges among LEAD participants compared to “system-as-usual” controls.¹²⁴

LEAD has helped improve community-police relations¹²⁵ and precipitated a fundamental policy reorientation in Seattle-King County: from an “enforcement-first” approach to a health-centered model, reinforced by specialized harm reduction training required of every police officer.¹²⁶ LEAD appears to be changing law enforcement's mindset about how to promote public safety.¹²⁷

In 2014, Santa Fe, New Mexico, became the second city in the U.S. to implement a LEAD program. Its experience shows how different communities can adapt the LEAD model to their particular local contexts. Santa Fe's LEAD was developed after nine months of study and community engagement and is tailored to the community's needs: unlike Seattle, Santa Fe's main concerns were not drug markets, but rather opioid misuse, dependence and overdose. Eligibility for Santa Fe LEAD is limited to those caught possessing or selling three grams or less of opioids. A cost-benefit analysis estimates that New Mexico spends \$1.5 million per year to criminalize people in the city of Santa Fe for these offenses; LEAD could cut those costs in half.¹²⁸

Portland, OR, Baltimore, MD, Albany, NY, Fayetteville, NC, and Huntington, WV, now also have LEAD programs operating, and dozens more cities are in the process of developing and launching LEAD. And in July 2015, in a remarkable indication of both the growing interest in LEAD as well as the evolution of the Office of National Drug Control Policy (ONDCP), the White House held a national convening to discuss and promote LEAD, with the participation of representatives from over 30 cities, counties and states.¹²⁹

LEAD is a working example of how cities can craft policies that avoid or minimize the use of criminal penalties – and do so in a manner that benefits public safety and health.

911 Good Samaritan Laws

Drug overdose is now the leading cause of injury-related death in the U.S.¹³⁰ Drug criminalization has not just failed to reduce problematic drug use, but has exacerbated it.

Tragically, more people are dying from drug overdose with each passing year. In an effort to save lives, 40 states and the District of Columbia have passed “911 Good Samaritan” laws, which allow for limited decriminalization of drug use and possession at the scene of an overdose for those who are witnesses and call for emergency medical assistance.¹³¹ Good Samaritan laws provide a valuable example of the risks of drug possession remaining a criminal offense, and the positive impact that decriminalization can have on public health and safety.

Not all overdoses result in death, and Good Samaritan laws do not prevent overdose, but they can prevent overdose-related deaths. Most overdose fatalities occur one to three hours after the victim has ingested or injected drugs.¹³² The chance of surviving an overdose, like that of surviving a heart attack, depends greatly on how fast one receives medical assistance. Witnesses to heart attacks rarely think twice about calling 911, but witnesses to an overdose often hesitate to call for help. The most common reason people cite for not calling 911 is fear: fear that the police will respond along with medical personnel and that the caller and/or others will be arrested and prosecuted if the police see drugs at the scene or suspect that drugs were involved in the incident.¹³³



Good Samaritan immunity laws provide protection from arrest and prosecution for overdose witnesses who call 911. Exempting overdose witnesses from criminal prosecution encourages people to seek medical help right away in the event of an overdose. Such laws may also be accompanied by training for law enforcement, EMS and other emergency and public safety personnel.

Risk of criminal prosecution or civil litigation can deter medical professionals, people who use drugs, and bystanders from aiding overdose victims. Well-crafted legislation can provide simple protections to alleviate these fears, improve emergency overdose responses, and save lives.

These policies only protect the caller and victim from arrest and prosecution for simple drug possession, possession of equipment used to ingest or inject drugs, and/or being under the influence. They do not protect people from arrest for drug sales or other offenses. 911 Good Samaritan policies prioritize saving lives over arrests for possession.

Initial results from an evaluation of Washington State's Good Samaritan law, adopted in 2010, found that 88 percent of people who use opioids said they would be more likely, and less afraid, to call 911 in the event of a future overdose after learning about the law.¹³⁵ Good Samaritan laws are not only good policy; they also help illuminate the merits of drug decriminalization more generally.

There is a growing consensus that treating drug use as a health issue is the right approach. Taking drug use out of the criminal sphere will improve the health and safety of our communities.

Other Countries' Experiences with Decriminalization

Portugal

Portugal provides the best and most well-documented example of decriminalization in practice. The Portuguese approach has proven successful in reducing drug-related harms as well as minimizing the number of people arrested or incarcerated for drug law violations.

The Portuguese policy emerged in reaction to an escalation of problematic drug use – in particular unsafe injection drug use and its impact on public safety and health. While overall prevalence rates of drug use and drug-related illness in Portugal have always been on the lower end of the European average, in 1999 Portugal had the highest rate of drug-related AIDS in the European Union and the second highest prevalence of HIV among people who inject drugs,¹³⁶ and drug-related deaths were increasing dramatically.¹³⁷

In 2001, Portuguese legislators enacted a comprehensive form of decriminalization – eliminating criminal penalties for low-level possession and consumption of *all drugs* and reclassifying these activities as administrative violations.

Portugal's decriminalization was one aspect of a much larger drug policy shift – a deliberate decision to address low-level drug possession through their public health system instead of their criminal justice system. The policy was part of a comprehensive health-oriented approach to addressing problematic drug use, especially unsafe injecting, that also included a major expansion of treatment and harm reduction services, including access to sterile syringes, methadone maintenance and other health interventions, and the elimination of most barriers to such vital services.¹³⁸

After an extensive consultation with experts and stakeholders, Portuguese policymakers created the infrastructure and made the necessary financial investment to put the policy into practice.¹³⁹ The key rationales for the reform were to deploy the resource savings from the criminal justice system for more in-depth health-oriented approaches, to allow law enforcement to focus on more serious and violent crime, as well as to dissuade drug use and to encourage those dependent on drugs to enter treatment voluntarily.¹⁴⁰

A person found in possession of small amounts of any drug in Portugal is no longer arrested. Rather, the person is summoned to appear before a local “dissuasion commission”, comprised of one official from the legal arena and two from the health or social service arenas, who determine whether and to what extent the person is addicted to drugs. The commissions – which operate independently from the criminal justice system – can refer that person to a voluntary treatment program or impose a fine or other administrative sanctions. The Portuguese made a commitment to not incarcerate someone for failing to enter treatment, failing a drug test or continuing to use drugs. The majority of people who appear before the commissions are deemed non-problematic users and receive no sanction or intervention, but rather a provisional suspension of the proceedings; if they are not found in possession again within six months, the matter is completely dropped. Drug trafficking and non-drug offenses, however, remain illegal and are still processed through the criminal justice system.¹⁴¹

Portugal decriminalized *all* drugs in 2001. More than a decade later, drug use has remained about the same – but arrests, incarceration, disease, overdose and other harms are all down.

Independent research of the Portuguese policy has shown promising outcomes.¹⁴²

No major increases in drug use

Rates of illicit drug use have mostly remained flat.¹⁴³ In some cases, past month drug use has actually decreased since decriminalization. Overall, Portugal’s drug use rates remain below the European average¹⁴⁴ – and far lower than rates of drug use in the United States.¹⁴⁵

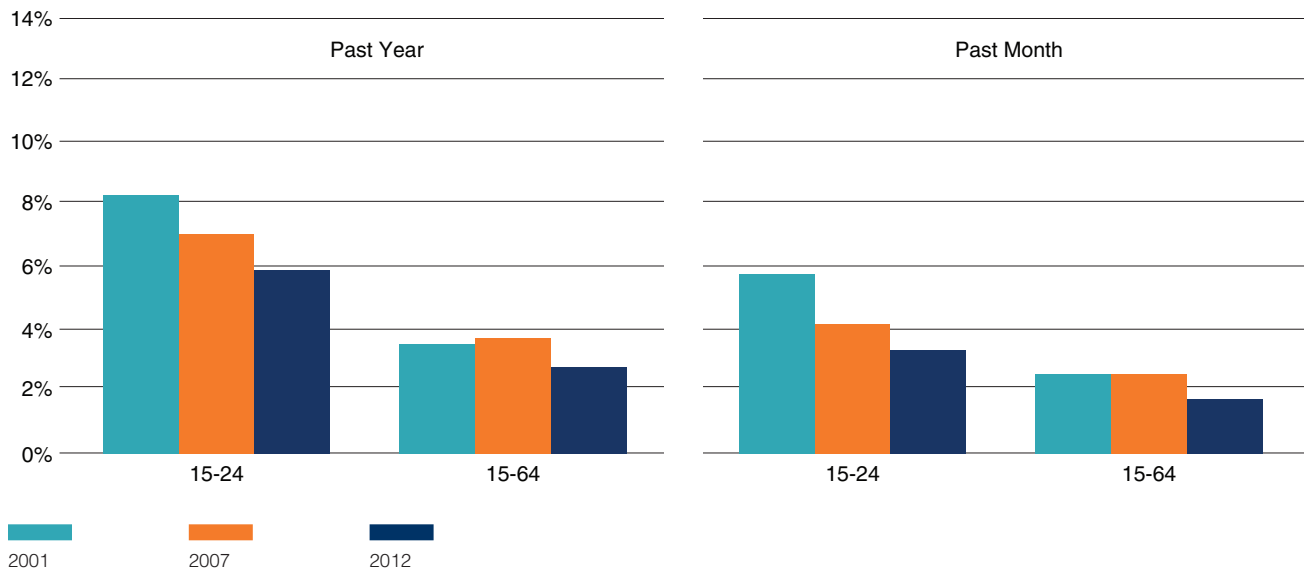
In fact, adolescent drug use, as well as problematic drug use – or use by people deemed to be dependent or who inject – has decreased since 2003.¹⁴⁶

In addition, a 2015 analysis found that drug prices have not decreased in Portugal following decriminalization, a result that “contrasts with the argument that softer

drug law enforcement necessarily leads to lower prices and, consequently, to higher drug usage rates and dependence.”¹⁴⁷

Adolescent drug use as well as problematic drug use has decreased in Portugal in the years after removing criminal penalties for personal use and possession.

Illegal Drug Use in Portugal, Before and After Decriminalization



Any Illegal Drug Use in Portugal in Past Year and Past Month Among Youth (ages 15-24) and General Population (ages 15-64)

Source: Balsa et al., IDP, 2013.¹⁴⁸

Fewer people arrested and incarcerated for drugs

The number of people arrested and sent to criminal courts for drug offenses annually declined by more than 60 percent following decriminalization.¹⁴⁹ The number of people referred for administrative offenses under the new law has remained constant (between 6,000 and 8,000 per year) for most of the period since decriminalization, “indicating no overall increase in the amount of formal contact that drug offenders are having with Portuguese police.”¹⁵⁰ The vast majority – more than 80 percent – of dissuasion commission cases are deemed non-problematic and dismissed without sanction.¹⁵¹ Given the fact that the majority of drug users in the U.S. are not using drugs problematically, it is likely that we would see a similar outcome here if drug use and possession were decriminalized.

The percentage of people behind bars in Portugal for drug law violations also decreased dramatically, from 44 percent in 1999 to 24 percent in 2013.¹⁵² This decrease reflected a significant drop in people incarcerated for all drug offenses, not just possession.¹⁵³

More people receiving drug treatment

Between 1998 and 2011, the number of people in drug treatment increased by more than 60 percent (from approximately 23,600 to roughly 38,000).¹⁵⁴ Treatment is voluntary – making Portugal’s high rates of uptake even more noteworthy. Over 70 percent of those who seek treatment receive opioid-substitution therapy, the most effective treatment for opioid dependence.¹⁵⁵

By removing the threat of criminal penalties, Portugal also took away the fear and stigma associated with seeking treatment. Now those who need treatment come to it voluntarily – and are more likely to succeed as a result.

Reduced incidence of HIV/AIDS and drug overdose

The number of new HIV diagnoses dropped dramatically – from 1,575 cases in 2000 to 78 cases in 2013 – and the number of new AIDS cases decreased from 626 in 2000 to 74 cases in 2013 (in a country of just over 10 million people).¹⁵⁶ Drug overdose fatalities also dropped from about 80 in 2001 to just 16 in 2012.¹⁵⁷

The World Health Organization found that in Portugal, “Since decriminalization, rates of drug-related morbidity and mortality and of injecting have decreased dramatically. Though injecting drug use (IDU) was an important driver of the HIV epidemic in Portugal, cases associated with IDU have declined dramatically over the past decade.”¹⁵⁸

Reduced social costs of problematic drug use

A 2015 study found that the per capita social cost of drug misuse in Portugal decreased by an average of 18 percent over the period 2000-2010.¹⁵⁹ The study notes that though “the reduction of legal system costs (possibly associated with the decriminalization of drug consumption) is clearly one of the main explanatory factors, it is not the only one . . . the rather significant reduction of health-related costs has also played an important role.”¹⁶⁰

“ Contrary to predictions, the Portuguese decriminalization did not lead to major increases in drug use. Indeed, evidence indicates reductions in problematic use, drug-related harms and criminal justice overcrowding.”¹⁶¹

- Professors Caitlin Hughes and Alex Stevens, *British Journal of Criminology*, 2010.

“ The biggest effect [of decriminalization] has been to allow the stigma of drug addiction to fall, to let people speak clearly and to pursue professional help without fear.”

- Dr. João Goulão, Portugal's Drug Czar, 2011.¹⁶²

Independent experts validate Portugal's approach

Nearly a decade and a half later, none of the fears that initial critics expressed have come to pass in Portugal. Instead, law enforcement and the criminal justice system function more efficiently, and the health and wellbeing of people who use drugs has significantly improved. Community relations with the police have also improved.¹⁶³

The United Nations Office on Drugs and Crime (UNODC), the international body charged with enforcing the global drug control regime, initially warned Portugal against decriminalizing. But in 2009 it agreed in its annual World Drug Report that “Portugal’s policy has reportedly not led to an increase in drug tourism. It also appears that a number of drug-related problems have decreased.”¹⁶⁴

Nuno Capaz, one of three public officials charged with evaluating people who are ordered to appear before the Lisbon Dissuasion Commission in Portugal, stated:

“We came to the conclusion that the criminal system was not best suited to deal with this situation... The best option should be referring them to treatment... We do not force or coerce anyone. If they are willing to go by themselves, it's because they actually want to, so the success rate is really high... We can surely say that decriminalization does not increase drug usage, and that decriminalization does not mean legalizing... It's possible to deal with drug users outside the criminal system.”¹⁶⁵

A Snapshot of Other Experiences with Drug Decriminalization

In addition to Portugal, a number of countries around the world have decriminalized possession of all drugs. Their experiences are diverse and reflect a number of important considerations as states and countries pursue decriminalization policies.

Czech Republic

The Czech Republic has long integrated many elements of harm reduction and treatment into its drug policies, including low-threshold opioid substitution treatment and syringe access programs that are some of the most expansive in Europe. After its post-Soviet transition, personal drug possession was not criminalized, but in the late 1990s, the government imposed criminal penalties on personal possession of a “quantity greater than small” (though this quantity was never defined). The Czech government subsequently conducted an in-depth evaluation of this policy change, determined that criminal penalties had no effect on use or drug-related harm, and concluded that such penalties were costly and unjustifiable.¹⁶⁶

Based on this finding, in 2010 the country enacted a law decriminalizing personal possession of drugs and defining personal use amounts pragmatically: those found in possession of certain quantities of illicit drugs – up to 15 grams of marijuana, one gram of cocaine, 1.5 grams of heroin, four ecstasy pills, or 40 pieces of psilocybin mushrooms – face administrative sanctions, which may include a fine. According to available data, the new Czech model appears to result in net societal benefits,¹⁶⁷ without increasing rates of drug use.¹⁶⁸ In fact, drug use among Czech youth and young adults has decreased following decriminalization.¹⁶⁹

Netherlands

The Netherlands has a long-standing *de facto* decriminalization policy, in which government officials have instructed prosecutors not to prosecute possession of roughly a single dose of any drug for personal use. Neither civil nor criminal penalties apply to possession of amounts equal to or lesser than this threshold. Dutch drug policy has been widely studied, and the outcomes are not in question: the Netherlands has lower rates of addiction and problematic drug use than most of Western Europe and the U.S. Moreover, the Dutch also have much lower heroin overdose rates and prevalence of injection drug use compared to the U.S.¹⁷⁰

Mexico

Mexico's limited decriminalization policy – adopted in 2009 and known as the *narcomenudeo* (“small-trafficking”) law – does not appear to have had much of an impact, owing in part to problems with the legal framework. In particular, the threshold limits distinguishing between personal “possession” versus “trafficking” were set very low, and penalties for “trafficking” were increased. Consequently, Mexico's law may have resulted in an increased number of people arrested and sanctioned for drug law violations, according to data.¹⁷¹ In addition, and unlike Portugal and other European countries, Mexico has not invested in treatment and harm reduction interventions, and lacks a sufficient treatment infrastructure for its citizens.¹⁷² As a result, Mexico's decriminalization has largely been in name only. Several studies have shown that people who use drugs – especially poor youth – continue to be detained, arrested and prosecuted for drug possession and consumption, even though these activities have been nominally decriminalized.¹⁷³ Mexico's experience with decriminalization should be viewed as a cautionary tale – when U.S. jurisdictions engage in efforts to decriminalize drug possession, they can look to Mexico's experience as an example of what pitfalls to avoid.

Appendix I: Growing National and International Support for Decriminalizing Drug Use and Possession

In recent years, debate and political will for ending the criminalization of drug possession has gained unprecedented global momentum. A wide array of national and international organizations have joined the call for alternatives to criminalization:

The Johns Hopkins-Lancet Commission on Drug Policy and Health (2016)

The Johns Hopkins–Lancet Commission, co-chaired by Professor Adeeba Kamarulzaman of the University of Malaya and Professor Michel Kazatchkine, the UN Special Envoy for HIV/AIDS in Eastern Europe and Central Asia, is composed of 22 experts from a wide range of disciplines and professions in low-income, middle-income, and high-income countries. It reviewed the global evidence base on the impacts of drug policy on health outcomes and conducted novel analyses, including mathematical modelling, to further enhance understanding of the complex and manifold interactions of drug policy with health, human rights, and wellbeing. “To move towards the balanced policy that UN member states have called for, we offer the following recommendations: Decriminalise minor, non-violent drug offences—use, possession, and petty sale—and strengthen health and social-sector alternatives to criminal sanctions.”¹⁷⁴

World Health Organization (2014)

The World Health Organization (WHO) is the international authority charged with directing and coordinating health within the United Nations system. It plays a leadership role in global health issues, including evidence-based public health policies, and routinely provides guidelines and technical support to countries around the world on health matters.

In recent guidelines issued in 2014, WHO urged:

*“Countries should work toward developing policies and laws that decriminalize injection and other use of drugs and, thereby, reduce incarceration. Countries should work toward developing policies and laws that decriminalize the use of clean needles and syringes.... Countries should ban compulsory treatment for people who use and/or inject drugs.”*¹⁷⁵

American Public Health Association (2013)

Established in 1872, American Public Health Association (APHA) is the world’s oldest and most diverse public health association – and the foremost body of public health professionals in the U.S. In a 2013 policy statement, APHA endorsed the elimination of criminal penalties on use and possession as a key element in a truly public health approach to drugs, stating:

*“APHA believes that national and state governments and health agencies must reorient drug policies to embrace health-centered, evidence-based approaches ... Therefore, APHA... [u]rges Congress and state governments to eliminate federal and state criminal penalties and collateral sanctions for personal drug use and possession offenses and to avoid unduly harsh administrative penalties, such as civil asset forfeiture, ... such penalties should not be imposed solely for personal drug possession and use.”*¹⁷⁶

Organization of American States (2013)

The Organization of American States (OAS) is the world’s oldest regional organization. Today it is the most important, multilateral body in the hemisphere, composed of 35 independent member-states of the Americas. In May of 2013, the OAS produced a far-reaching report, commissioned by heads of state of the region, which stated:

*“The decriminalization of drug use needs to be considered as a core element in any public health strategy.”*¹⁷⁷

Human Rights Watch (2013)

Human Rights Watch is an international nonprofit, nongovernmental human rights organization with a staff of 400 human rights professionals working in some 90 countries around the world. Founded in 1978, Human Rights Watch works with local human rights defenders to press governments, as well as regional and international bodies, for changes in policy and practice that promote human rights and justice around the world.

Appendix I: Growing National and International Support for Decriminalizing Drug Use and Possession

continued

In spring 2013, Human Rights Watch issued a policy statement, in which it condemned criminalization policies for violating human rights and urged governments to decriminalize possession of all drugs, writing:

“National drug control policies that impose criminal penalties for personal drug use undermine basic human rights... Subjecting people to criminal sanctions for the personal use of drugs, or for possession of drugs for personal use, infringes on their autonomy and right to privacy... The criminalization of drug use has undermined the right to health. Fear of criminal penalties deters people who use drugs from using health services and treatment, and increases their risk of violence, discrimination, and serious illness. Criminal prohibitions have also impeded the use of drugs for legitimate medical research, and have prevented patients from accessing drugs for palliative care and pain treatment... [G]overnments should rely instead on non-penal regulatory and public health policies.”¹⁷⁸

Global Commission on Drug Policy (2011)

In 2011, Kofi Annan, Richard Branson, George Shultz and Paul Volcker joined former presidents Fernando Henrique Cardoso (Brazil), César Gaviria (Colombia) and Ernesto Zedillo (Mexico) and other distinguished international leaders and experts formed the Global Commission on Drug Policy. The Commission released a report saying the time had come to “break the taboo” on exploring alternatives to the failed war on drugs – including the decriminalization of possession of all drugs. The Commission called on national governments to:

“End the criminalization, marginalization and stigmatization of people who use drugs but who do no harm to others... and replace the criminalization and punishment of people who use drugs with the offer of health and treatment services to those who need them.”¹⁷⁹

In 2014, the Commission reiterated its call for governments to:

“Stop criminalizing people for drug use and possession – and stop imposing “compulsory treatment” on people whose only offense is drug use or possession.”¹⁸⁰

International Federation of Red Cross and Red Crescent Societies (2012)

The International Federation of Red Cross and Red Crescent Societies (IFRC) is the largest humanitarian network in the world, with 13 million volunteers assisting 150 million people across the globe before, during and after disasters and health emergencies to meet the needs and improve the lives of vulnerable people. In a 2012 statement before the United Nations Commission on Narcotics Drugs, IFRC stated:

“Treating drug addicts as criminals, is destined to fuel the rise of HIV and other infections not only among those unfortunate enough to have a serious drug addiction, but also for children born into addicted families and ordinary members of the public who are not normally exposed to HIV risks. Injecting drug use is a health issue. It is an issue of human rights. It cannot be condoned, but neither should it be criminalized... Criminalization, discrimination and stigmatization are not [appropriate] responses. Laws and prosecutions do not stop people from taking drugs. Neither does the cold turkey methods of detoxification that can be potentially life-threatening. On the contrary, governments should recognize once and for all that a humanitarian drug policy works!”¹⁸¹

NAACP (2012)

The NAACP is the oldest and largest civil rights organization in the United States. Established in 1909, its mission is to ensure the political, educational, social, and economic equality of rights of all people and to eliminate race-based discrimination. The NAACP advocates for smarter, evidence-based criminal justice policies to keep our communities safe, including treatment for addiction and mental health problems, judicial discretion in sentencing, and an end to racial disparities at all levels of the system.¹⁸²

The NAACP Board of Directors adopted a resolution in 2012 calling for the establishment of a Portuguese-style decriminalization policy, at least as a pilot program and later (if results are favorable) to be scaled up across the country. Its resolution stated:

“The United States government [should] pilot the Portugal Decriminalization program in three U.S. cities and apply the lessons learned... throughout the United States.”¹⁸³

National Latino Congreso (2010)

The National Latino Congreso is an annual meeting of more than one-hundred Latino advocacy and community-based organizations, whose purpose is to create an open and inclusive space to explore the policy and political agenda of Latino communities in the USA, including the international/Latin American perspective. In 2010 the National Latino Congreso was convened by Hispanic Federation, League of United Latin American Citizens, Mexican American Legal Defense and Educational Fund, Mexican American Political Association, National Alliance of Latin American and Caribbean Communities, National Day Laborer Organizing Network, National Hispanic Environmental Council, Southwest Voter Registration Education Project and the William C. Velasquez Institute. It adopted a resolution that urged sweeping drug policy reforms, including the decriminalization of all drugs along the Portugal model. The resolution reads:

“[T]he delegates of the 2010 National Latino Congreso... urge state and federal governments to follow the successful example of countries like Portugal that have decriminalized personal adult possession and use of all drugs, which has improved the health of drug users, reduced incarceration and death, and saved taxpayer money with no negative consequences to society.”¹⁸⁴

LatinoJustice PRLDEF (2017)

LatinoJustice PRLDEF champions an equitable society. Using the power of the law together with advocacy and education, LatinoJustice PRLDEF protects opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities.

“The criminalization of drug use expands mass criminalization, with devastating effects on people of color, citizens, returning citizens, and noncitizens alike. It is time we stop using law enforcement as society’s primary response to drug use. It is time to do things differently.”

United Nations Office on Drugs and Crime (UNODC), Scientific Consultation Working Group on Drug Policy, Health and Human Rights (2014)

In 2014, a key working group of the United Nations Office on Drugs and Crime (UNODC) announced the release of groundbreaking recommendations discouraging criminal sanctions for drug use. The Scientific Consultation Working Group on Drug Policy, Health and Human Rights

of the UNODC – which includes Nora Volkow, head of the U.S. National Institute on Drug Abuse (NIDA) – released recommendations at the High-Level Segment of the 57th UN Commission on Narcotic Drugs. One of its recommendations was that:

“Criminal sanctions are not beneficial in addressing substance use disorders, and [we] discourage their use.”¹⁸⁵

United Nations Development Programme’s Global Commission on HIV and the Law (2012)

The Global Commission on HIV and the Law is an independent entity convened by the United Nations Development Programme and the Joint United Nations Programme on HIV/AIDS (UNAIDS). After a comprehensive, two-year process of research and analysis investigating the relationship between HIV response and national legal context the Commission released a report of its findings, in which it stated:

“Countries must reform their approach towards drug use. Rather than punishing people who use drugs who do no harm to others, they must offer them access to effective HIV and health services, including harm reduction and voluntary, evidence-based treatment for drug dependence. Countries must... [d]ecriminalize the possession of drugs for personal use, in recognition that the net impact of such sanctions is often harmful to society.”¹⁸⁶

International Federation of Catholic Universities (2013)

The International Federation of Catholic Universities is a network of more than 219 Catholic universities and higher education institutions around the world, working to coordinate Catholic higher education issued and practices, with a focus towards education for humane action. In 2013 it issued a report, which stated:

“As a minimum, the decriminalization of the use and possession for personal consumption of some substances that are currently controlled should be considered.”¹⁸⁷

Appendix I: Growing National and International Support for Decriminalizing Drug Use and Possession

continued

National Association of Criminal Defense Lawyers (2000)

The National Association of Criminal Defense Lawyers (NACDL) is the leading organization representing criminal defense lawyers and their mission to ensure due process and justice for people accused of crimes or misconduct. NACDL was established in 1958, and has roughly 10,000 members in 28 countries. It was an early endorser of decriminalization, adopting a resolution in 2000 stating:

“[T]he National Association of Criminal Defense Lawyers, the pre-eminent organization of criminal defense lawyers whose membership numbers more than 10,000, calls upon federal and state governments to end the War on Drugs by declaring all drug use to be a health rather than a criminal problem and immediately repeal all laws criminalizing the possession, use and delivery of controlled substances.”¹⁸⁸

“Offenses that do not involve a significant risk to public safety should be decriminalized.”¹⁸⁹

American Civil Liberties Union (2014)

The American Civil Liberties Union (ACLU) is the largest organization in the United States working in courts, legislatures and communities to protect individual rights and liberties. In 2014, it signed a public letter, along with more than 50 human rights and drug policy organizations throughout the hemisphere, which read:

“The undersigned organizations urge the... [d]ecriminalization of consumption, drug possession and cultivation for personal use. Criminalization of drug users intensifies their exclusion and stigmatization. Minority groups and impoverished people are especially affected by this, since they are usually the main target of law enforcement interventions. Governments should consider the possibility of adopting decriminalization as an alternative response to criminalization of drug users, by offering health policies for problematic consumers within the framework of the public health system, so that they are not stigmatized.... Prison overcrowding is one of the main causes of human rights violations in the region, strongly impacting the families of detainees and their living conditions.”¹⁹⁰

West African Commission on Drugs (2014)

Initiated by former United Nations Secretary General Kofi Annan, the West African Commission on Drugs is chaired by former Nigerian President Olusegun Obasango and includes other former heads of state as well as a distinguished group of West Africans from the worlds of politics, civil society, health, security and the judiciary. In a 2014 report, the Commission writes:

“We believe that the consumption and possession for personal use of drugs should not be criminalized. Experience shows that criminalization of drug use worsens health and social problems, puts huge pressures on the criminal justice system and incites corruption. Decriminalizing drug use is one of the most effective ways to reduce problematic drug use as it is likely to facilitate access to treatment for those who need it. It can also help free up resources for law enforcement to focus on more selective deterrence and targeting of high-value traffickers, especially those whose behavior is more damaging to society in the long run.”¹⁹¹

Vienna Declaration (2010)

The Vienna Declaration is a statement prepared by leading international public health experts and organizations, including the International AIDS Society, International Centre for Science in Drug Policy and the BC Centre for Excellence in HIV/AIDS – and endorsed by more than 20,000 organizations, academics and concerned individuals – which calls for solid scientific evidence to be incorporated into drug policies. It reads:

“The criminalization of illicit drug users is fueling the HIV epidemic and has resulted in overwhelmingly negative health and social consequences. A full policy reorientation is needed...[countries must] decriminalize drug users, scale up evidence-based drug dependence treatment options and abolish ineffective compulsory drug treatment centers that violate the Universal Declaration of Human Rights.”¹⁹²

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