



Summer 2017

## Beyond the War: The Evolving Nature of the U.S. Approach to Drugs

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### Recommended Citation

Stemen, Don. Beyond the War: The Evolving Nature of the U.S. Approach to Drugs. *Harvard Law and Policy Review*, 11, 2: 375-418, 2017. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works,

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# Beyond the War: The Evolving Nature of the U.S. Approach to Drugs

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*Don Stemen\**

## INTRODUCTION

Over the last forty years, perhaps no issue has affected the United States's criminal justice system as profoundly as has drug policy. Since President Nixon declared drug abuse "America's public enemy number one,"<sup>1</sup> concerns about the manufacture, distribution, and possession of drugs have remained at the fore of criminal justice policy discussions.<sup>2</sup> President Reagan's subsequent pronouncement of drugs as "an especially vicious virus of crime" set a course for national drug policy that emphasized enforcement and punishment over treatment to "win the war on drugs."<sup>3</sup> Throughout the 1980s, increasing public concern about the effects of drug abuse<sup>4</sup> further pressured policymakers at the state and federal levels to adopt new mandatory sentences and sentence enhancements that increased the probability and length of prison sentences.<sup>5</sup>

By the mid-1990s, perceptions of drugs in the United States began to shift. Policymakers and the public struggled with the continued emphasis on enforcement and punishment as a response to drugs and began to look to-

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<sup>1</sup> Richard Nixon, President of the United States, Remarks About an Intensified Program for Drug Abuse Prevention and Control, White House Briefing Room (June 17, 1971), in AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=3047> [<https://perma.cc/B8DB-9TYU>].

<sup>2</sup> See MARC MAUER & RYAN KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 7–12 (2007).

<sup>3</sup> Ronald Reagan, President of the United States, Radio Address to the Nation on Federal Drug Policy, Camp David (Oct. 2, 1982), in AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=43085> [<https://perma.cc/F4KT-29PU>]. In the same address, President Reagan renewed the war on drugs metaphor, declaring that the United States was going to take "down the surrender flag and run up the battle flag . . . [a]nd . . . win the war on drugs." *Id.*

<sup>4</sup> See PEW RES. CTR. FOR THE PEOPLE AND THE PRESS, PEW CHARITABLE, 74% SAY DRUG WAR BEING LOST: INTERDICTION AND INCARCERATION STILL TOP REMEDIES 1 (2001), <http://www.people-press.org/files/legacy-pdf/16.pdf> [<https://perma.cc/H82F-FVG9>]. In the 1990 Pew Research opinion poll, more than thirty percent of U.S. citizens cited drug abuse as the most important problem facing the nation. *Id.*

<sup>5</sup> See generally DON STEMEN ET AL., VERA INST. OF JUSTICE, OF FRAGMENTATION AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975–2002 (2005) (discussing the emergence of structured sentencing, determinate sentencing, and mandatory sentencing laws across the United States and their effects on state incarceration rates).

ward rehabilitation and treatment as alternative approaches.<sup>6</sup> Drug courts, residential substance abuse treatment programs, and alternative sentencing policies for drug possession expanded across the United States as jurisdictions sought ways to divert drug offenders from prison and to develop community- and prison-based treatment programs for drug users.<sup>7</sup> Yet, policymakers also expanded the war on drugs in new ways, passing federal legislation denying financial aid,<sup>8</sup> restricting access to public housing,<sup>9</sup> and blocking food stamps<sup>10</sup> for people convicted of drug felonies. In the end, most of the aggressive law enforcement and punitive sentencing policies of the 1980s remained, continuing to drive drug arrests, convictions, and prison sentences through the 1990s.<sup>11</sup>

The twenty-first century has ushered in a marked change in the U.S. approach to drugs. Policymakers and the public have increasingly recognized that criminal justice responses to the manufacture, distribution, and possession of drugs have consumed billions of taxpayer dollars,<sup>12</sup> resulted in the incarceration of millions of individuals,<sup>13</sup> led to the marginalization of poor minority communities,<sup>14</sup> and done little to decrease the use of drugs.<sup>15</sup> Since 2000, states have begun to dismantle much of the apparatus of the war

<sup>6</sup> See generally MAUER & KING, *supra* note 2, at 1 (arguing that support for the tough on crime strategy of addressing drugs declined and support for a treatment approach increased in the 1990s, resulting in the expansion of drug courts and other diversion strategies).

<sup>7</sup> See generally BUREAU OF JUSTICE ASSISTANCE, LOOKING AT A DECADE OF DRUG COURTS (1998) (arguing that, in the 1990s, state and local jurisdictions increasingly found incarceration did not reduce drug use and crime and that these jurisdictions looked for ways to divert people from prison and to provide drug abuse treatment to reduce both drug addiction and drug-related crime).

<sup>8</sup> Higher Education Amendments of 1998, 20 U.S.C. § 1091(r) (2012) (stating that a conviction of any offense under any federal or state law involving the possession or sale of a controlled substance makes an individual ineligible for any federal grant, loan, or work assistance).

<sup>9</sup> The Quality Housing and Work Responsibility Act of 1998, 42 U.S.C. § 13662 (2012) (supporting a public housing authority's right to exclude applicants with a history of controlled substance use and to exercise their discretion to determine which applicants were possible risks to the safety of the community); Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, § 501, 104 Stat. 4079 (imposing a mandatory three-year ban on the readmission of tenants evicted for drug-related criminal activity); Housing Opportunity Program Extension Act of 1996, 42 U.S.C. § 1437d(1), (q) (2012 & Supp. I 2013) (strengthening eviction rules and allowing housing authorities access to housing applicants' criminal records).

<sup>10</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 814(3), 110 Stat. 2105, 2313-14 (since repealed) (establishing that a state or federal felony drug conviction makes an individual ineligible for federal welfare benefits).

<sup>11</sup> See generally MAUER & KING, *supra* note 2, at 3-4, 7 (showing that arrests for drug offenses increased and that the length of prison sentences for drug offenses increased through the 1990s).

<sup>12</sup> The Drug Policy Alliance estimates the United States spends over fifty-one billion dollars annually on the war on drugs. *Drug War Statistics*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/drug-war-statistics> [<https://perma.cc/PK6N-QJCR>].

<sup>13</sup> MAUER & KING, *supra* note 2.

<sup>14</sup> See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that mass incarceration and the war on drugs targeted poor, young, black men and that this had led to the legal marginalization of this population).

<sup>15</sup> ROBERT J. MACCOUN, DRUG WAR HERESIES 15-16 (2001).

on drugs—reclassifying and reducing sentences for drug offenses, repealing mandatory sentencing policies, creating mandatory probation programs, increasing eligibility and opportunities for drug courts and deferred prosecution programs, and legalizing medical and recreational use of marijuana.<sup>16</sup>

The federal response under Presidents Bush and Obama has been more incremental, but still significant. Despite linking drug use to aiding the financing of terrorism in 2001,<sup>17</sup> President Bush pushed for increased funding for substance abuse treatment<sup>18</sup> and advocated passage of the Second Chance Act, which assists people returning from prison.<sup>19</sup> President Obama declared the war on drugs an “utter failure”<sup>20</sup> before taking office and, once in office, ushered in several notable changes in federal approaches to drugs. These included a push to end the crack cocaine/powder cocaine sentence disparity,<sup>21</sup> the reduction of sentences for all drug offenses under the federal sentencing guidelines,<sup>22</sup> and the commutation of sentences for more than one thousand drug offenders in federal prison.<sup>23</sup> Although some argue that President Obama did too little during much of his administration to undo federal

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<sup>16</sup> RAM SUBRAMANIAN & REBECCA MORENO, *VERA INST. OF JUSTICE, A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009–2013* 5 (2014); RAM SUBRAMANIAN & RUTH DELANEY, *VERA INST. OF JUSTICE, PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES* 5, 12 (2014).

<sup>17</sup> *Bush: War on Drugs Aids War on Terror*, CBS NEWS (Dec. 14, 2001, 2:47 PM), <http://www.cbsnews.com/news/bush-war-on-drugs-aids-war-on-terror/> [<https://perma.cc/WWS3-HUSK>] (reporting that President Bush stated, “If you quit drugs, you join the fight against terrorism . . .” and “Drug abuse threatens everything, everything that is best about our country. It breaks the bond between parent and child. It turns productive citizens into addicts. It transforms schools into places of violence and chaos. It makes playgrounds into crime scenes. It supports gangs at home. And abroad, it’s important for Americans to know that trafficking of drugs finances the world of terror, sustaining terrorists.”).

<sup>18</sup> U.S. OFFICE OF NAT’L DRUG CONTROL POLICY, *NATIONAL DRUG CONTROL STRATEGY*, 2004 6 (2004).

<sup>19</sup> Second Chance Act of 2007: Community Safety Through Recidivism Prevention, 42 U.S.C. § 17501 (2012) (supporting state, local, and tribal governments and nonprofit organizations to develop and implement programs to reduce recidivism and improve outcomes for people returning from state and federal prisons, local jails, and juvenile facilities).

<sup>20</sup> Bernd Debusmann, *Obama and the Failed War on Drugs*, REUTERS (Apr. 16, 2012, 1:54PM), <http://www.reuters.com/article/us-column-debusmann-drugs-idUSBRE83F0ZR20120416> [<https://perma.cc/VM7H-PEL8>].

<sup>21</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. § 841 (2012)).

<sup>22</sup> U.S. SENTENCING COMM’N, *THE 2014 REDUCTION OF DRUG SENTENCES* (2015).

<sup>23</sup> Sarah Smith, *Obama Picks Up the Pace on Commutations, But Pardon Changes Still in Limbo*, PROPUBLICA (Jan. 5, 2017, 11:54AM), <https://www.propublica.org/article/obama-picks-up-the-pace-on-commutations-but-pardon-changes-still-in-limbo> [<https://perma.cc/9CVR-GXRP>] (noting that President Obama had granted clemency to 1,176 individuals). The Justice Department also adopted prosecution policies declining in most cases to use federal law to prosecute state-licensed growers and retailers of marijuana, see Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’ys (Aug. 29, 2013) [hereinafter Cole Memorandum], and declining to charge low-level, non-violent drug offenders with offenses carrying mandatory minimum sentences, see Memorandum from Att’y Gen. Eric Holder to all U.S. Att’ys and Assistant Att’y Gen. for the Crim. Div., (Aug. 12, 2013) [hereinafter Holder Memorandum].

drug control policies,<sup>24</sup> he significantly changed the rhetoric surrounding drugs (and crime generally) from a criminal justice perspective to a treatment perspective.<sup>25</sup> President Obama also drew attention to the disproportionate impact of the war on drugs on African American communities.<sup>26</sup> Although African Americans account for just thirteen percent of the U.S. population<sup>27</sup> and just fifteen percent of drug users,<sup>28</sup> they account for twenty-seven percent of individuals arrested for a drug offense<sup>29</sup> and roughly thirty-five percent of state and federal inmates incarcerated for a drug offense.<sup>30</sup>

<sup>24</sup> See, e.g., *A Brief History of the Drug War*, DRUG POLICY ALLIANCE (Feb. 23, 2017, 7:46 PM), <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0>, [https://perma.cc/E3RZ-V7UC] (arguing that President Obama moved drug reform slowly towards sensible policies); Tim Dickinson, *Why America Can't Quit the Drug War*, ROLLING STONE (Feb. 18, 2017, 1:23 PM), <http://www.rollingstone.com/politics/news/why-america-cant-quit-the-drug-war-20160505> [https://perma.cc/8N4V-6WWV] (claiming that the fundamental architecture of the war on drugs remained more-or-less unchanged under President Obama).

<sup>25</sup> Barack Obama, President of the United States, Remarks During a Panel Discussion at the National Prescription Drug Abuse and Heroin Summit in Atlanta, Georgia (Mar. 29, 2016), in AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=115136> [https://perma.cc/XZ9W-63JE] (President Obama noted that “[W]e have viewed the problem of drug abuse generally in our society through the lens of the criminal justice system. . . . [T]he only way that we reduce demand is if we’re providing treatment and thinking about this as a public health problem, and not just a criminal problem.”).

<sup>26</sup> *Id.* (President Obama noted, “Part of what has made it previously difficult to emphasize treatment over the criminal justice system has to do with the fact that the populations affected in the past were viewed as, or stereotypically identified as poor, minority, and as a consequence, the thinking was it is often a character flaw in those individuals who live in those communities, and it’s not our problem they’re just being locked up.”).

<sup>27</sup> U.S. Census Bureau, *Quick Facts*, CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/00> [https://perma.cc/6C9H-GGLX] (showing the Black or African American population at 13.3% of the U.S. population as of 2015).

<sup>28</sup> CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES (2014) [hereinafter NATIONAL SURVEY FINDINGS: 2014, TABLES], Table 1-19b, <https://www.samhsa.gov/data/sites/default/files/NSDUH-DefTabs2014/NSDUH-DefTabs2014.htm#tab1-19b> [https://perma.cc/2TRE-YXYS]. The figures used in the Samhsa Table 1-19b were combined with the population estimates from the Census Bureau to calculate the total number of new drug users in 2014 and the total number of Black or African American drug users in 2014. Based on Census Bureau estimates, the 2015 U.S. population is estimated at 321,418,820 individuals and 13.3% of the population, or 42,748,703 individuals, is Black or African American. According to Samhsa, 16.7% of the U.S. population, or 53,676,942 individuals, used illicit drugs in 2014 and 19.5% of Black or African American individuals, or 8,335,997 individuals, used illicit drugs in 2014. Thus, Black or African American individuals represent roughly 15% of U.S. drug users in 2014 (8,335,997/53,676,942).

<sup>29</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2015, Table 43A <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43> [https://perma.cc/GZ5C-44QE] (noting twenty-seven percent of those arrested for “Drug Abuse Violations” in 2015 were Black or African American).

<sup>30</sup> E. ANN CARSON & ELIZABETH ANDERSON, PRISONERS IN 2015, BUREAU OF JUSTICE STATISTICS 30–31 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [https://perma.cc/GHR2-AFMK]. The total numbers of individuals incarcerated in state prisons for a drug offense and the total number of Black individuals incarcerated in state prisons for a drug offense were taken from Appendix Table 5. The total numbers of individuals incarcerated in federal prisons for a drug offense and the total number of Black individuals incarcerated in federal prisons for a drug offense were taken from Appendix Table 6. These were combined to deter-

On the cusp of the third decade of the twenty-first century, the United States is poised to significantly change its approach to drug offenses at both the state and federal levels. Some argue that there is an opportunity to adopt a medical approach to substance abuse and leave behind the criminalization approach that dominated U.S. policy through the latter half of the twentieth century.<sup>31</sup> The recent shifts in both policy and public perception around drugs also coincide with a new public health problem. Over thirty-three thousand opioid-related fatal overdoses occurred in the United States in 2015,<sup>32</sup> and opioid addiction has ushered in new concerns about drug abuse and state and federal approaches to drug addiction.<sup>33</sup> While this new wave of drug abuse and interdiction has changed both the perception of the typical drug offender and concerns about drugs, it remains unclear how this will affect the long-term approach to drugs in the United States. A look at the recent past indicates that the escalation of the war on drugs happened quickly; whether moving beyond the war on drugs can occur as rapidly remains an unanswered question.

This article examines recent changes to state and federal drug sentencing laws. Part I discusses the context of the war on drugs, considering substance use patterns and sentencing policies in the 1970s that set the stage for the more punitive approaches to drug offenses in the 1980s and 1990s. Part II then analyzes the primary sentencing policies enacted as part of the war on drugs. Although it is often impossible to tie a specific policy directly to an increase or decrease in arrests or prison populations, documenting the content, scope, and volume of sentencing laws provides a context for understanding the extent to which these policies were designed to increase the use of prison. Part III outlines recent changes to state and federal sentencing laws that seek to dismantle the apparatus of the war on drugs. This part details changes to sentencing laws enacted since the 2000s, focusing specifically on alternatives to traditional prosecution and incarceration.

Part IV then considers the short and potential long-term impact of these recent changes, particularly given the state-level movement of marijuana legalization and the rise in opioid abuse. At the state level, these trends are likely to continue to drive changes in drug laws, as the public and policy-makers either see drug use as acceptable (in the case of marijuana or other low-level drugs) or see drug abuse as a problem in need of treatment rather than criminalization; changes in state-level drug laws also will likely continue as states increasingly target changes to low-level drug offenses as non-

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mine the percentage of all individuals incarcerated for a drug offense in the United States who are Black.

<sup>31</sup> Arthur J. Lurigio et al., *A Century of Losing Battles: The Costly and Ill-Advised War on Drugs in the United States*, 6(2) JUST. SYS. J. 1, at 5 (2009).

<sup>32</sup> Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445 (2016), <https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051e1.pdf> [<https://perma.cc/EC5P-NY88>].

<sup>33</sup> Tamara M. Haegerich et al., *What We Know, and Don't Know, About the Impact of State Policy and Systems-Level Interventions on Prescription Drug Overdose*, 145 DRUG & ALCOHOL DEPENDENCE 34 (2014).

controversial means of achieving long-term reductions in prison populations and corrections expenditures.<sup>34</sup> At the federal level, long-term impacts are less clear. Although the Obama administration oversaw several changes to federal drug laws, the majority of federal mandatory sentences remain largely intact. Moreover, many reforms initiated under President Obama—increased federal spending on drug treatment rather than enforcement,<sup>35</sup> the Justice Department’s charging policies regarding marijuana offenses and low-level drug offenses,<sup>36</sup> the commutation of drug sentences—were discretionary policies of the administration and not changes in law. As such, a new administration with a renewed law and order focus and a perception of inner-city neighborhoods as plagued by drugs and violence can easily adopt new policies that either continue or intensify the war on drugs.<sup>37</sup>

## I. BEFORE THE WAR: SETTING THE STAGE FOR THE WAR ON DRUGS

Government efforts to regulate the manufacture, distribution, and possession of drugs are not a new phenomenon in the United States.<sup>38</sup> In the early twentieth century, the federal government began regulating drug production and distribution through the Food and Drug Act of 1906<sup>39</sup> and attaching criminal penalties to the unauthorized production and distribution of narcotics through the Harrison Narcotics Tax Act of 1914.<sup>40</sup> The Narcotic

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<sup>34</sup> See e.g., ILL. STATE COMM’N ON CRIMINAL JUSTICE & SENTENCING REFORM, FINAL REPORT, PARTS I AND II 9 (2016) (noting that low-level offenders often have high levels of recidivism).

<sup>35</sup> Sophie Novak & Patrick Reis, *Here’s How Obama Plans to Spend \$25 Billion on the War on Drugs*, ATLANTIC (Mar. 24, 2014), <https://www.theatlantic.com/politics/archive/2014/03/heres-how-obama-plans-to-spend-25-billion-on-the-war-on-drugs/453108/>, [https://perma.cc/2CCZ-M299].

<sup>36</sup> See Cole Memorandum, *supra* note 23 (announcing policy of declining in most cases to use federal law to prosecute state-licensed growers and retailers of marijuana); Holder Memorandum, *supra* note 23 (announcing policy of declining to charge low-level, non-violent drug offenders with offenses carrying mandatory minimum sentences).

<sup>37</sup> See, e.g., Timothy Williams & Richard A. Oppel, *Police Chiefs Say Trump’s Law Enforcement Priorities Are Out of Step*, N.Y. TIMES (Feb. 12, 2017), <https://www.nytimes.com/2017/02/12/us/police-chiefs-trump-law-enforcement-priorities.html> [https://nyti.ms/2kAKYA3] (noting that police chiefs and prosecutors see the new administration as “out of step with evidence that public safety depends on building trust, increasing mental health and drug addiction treatment, and using alternatives to prosecution and incarceration”).

<sup>38</sup> For historical accounts of federal and state policies regulating controlled substances, see, e.g., LISA N. SACCO, CONG. RESEARCH SERV., DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS (2014); *The 1906 Food and Drugs Act and Its Enforcement*, FDA.GOV (June 18, 2009), <https://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054819.htm> [https://perma.cc/4GL8-TMHV]; Lurigio et al., *supra* note 31. See generally JOHN C. MCWILLIAMS, THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS, 1930–1962, (1990) (describing the initial creation of federal drug policy and the Bureau of Narcotics); DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1999) (describing the political and economic factors underlying initial prohibitions against narcotics).

<sup>39</sup> Food and Drug Acts (Pure Food and Drugs Act) of 1906, Pub. L. No. 59-384, 34 Stat. 768 (codified as amended in scattered sections of 21 U.S.C.).

<sup>40</sup> Harrison Narcotics Tax Act of 1914, Pub. L. No. 63-223, 38 Stat 785.

Drug Import and Export Act of 1922 criminalized the possession of illegally obtained narcotics,<sup>41</sup> the Marijuana Tax Act of 1937 sought to extend narcotics prohibitions to the distribution and possession of marijuana,<sup>42</sup> and the creation of the Federal Bureau of Narcotics in 1930 increased the federal presence in controlling the manufacture and distribution of drugs.<sup>43</sup> The passage of the Boggs Act in 1951<sup>44</sup> and the Narcotics Control Act in 1956<sup>45</sup> increased the penalties for drug offenses creating mandatory sentences for some offenses and making sale of heroin to minors a capital offense.<sup>46</sup> State-level efforts at drug control during this time changed in similar ways, with states seeking increased enforcement, control, and punishment of drug-related activity through the 1960s.<sup>47</sup>

Despite the scope and nature of these approaches, scholars have not generally believed that drug policies through the late 1960s ushered in the “war on drugs.” Rather, rising rates of drug use and crime, increasing politicization of crime, decreasing confidence in rehabilitation, and calls to limit judicial and parole board discretion during the late-1970s and 1980s put drugs in a new context of crime control and shifted criminal justice responses to all drug and non-drug crimes. These factors set the stage for the adoption of more aggressive federal and state approaches to drug control and the unprecedented growth in arrests and prison sentences for drug offense in the 1980s and 1990s.

### A. *Patterns of Drug Use and Crime*

The war on drugs occurred in the context of rising drug use and rising crime rates. During the early-1970s, first-time marijuana use was at historic levels in the United States, with roughly 3.5 million individuals reporting first-time marijuana use annually between 1973 and 1975 (Figure 1).<sup>48</sup> While first-time marijuana use declined through the remainder of the 1970s, the

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<sup>41</sup> Narcotic Drug Import and Export Act, Pub. L. No. 67-227, 42 Stat. 596 (codified as amended in scattered sections of 21 U.S.C.).

<sup>42</sup> Marijuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (codified as amended in scattered sections of 21 U.S.C.).

<sup>43</sup> McWILLIAMS, *supra* note 38, at 46.

<sup>44</sup> The Boggs Act of 1952, Pub. L. No. 82-255, 65 Stat. 767.

<sup>45</sup> The Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 570.

<sup>46</sup> MUSTO, *supra* note 38, at 231, 242. The Drug Abuse Control Act of 1965 also created new requirements for prescription and counterfeit drugs and President Johnson in 1968 consolidated the investigation and enforcement of all federal drug offenses within the Department of Justice, Bureau of Narcotics and Dangerous Drugs. *See* Lurigio et al., *supra* note 31, at 9.

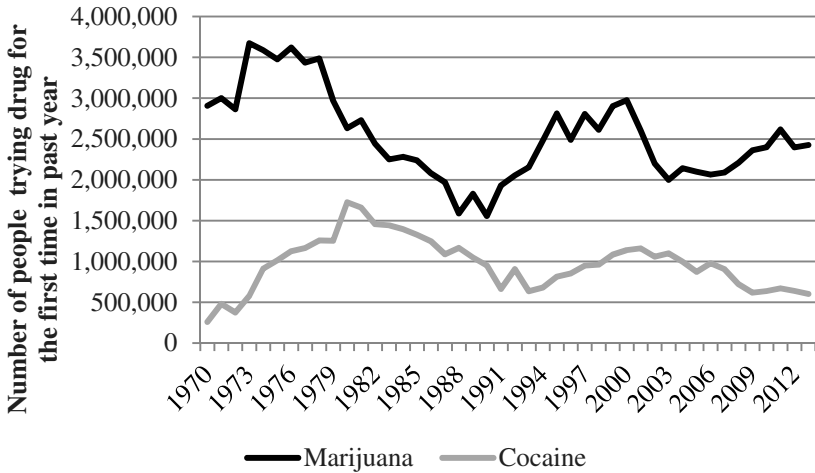
<sup>47</sup> *See* Lurigio et al., *supra* note 31.

<sup>48</sup> CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, RESULTS FROM THE 2002 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS (2002) [hereinafter NATIONAL SURVEY FINDINGS: 2002], at 233–34 (Tables H.35 and H.36 present the number of people who first used marijuana or cocaine between 1965 and 2001); number of new users for 2002 through 2013 are taken from annual reports detailing each subsequent National Survey on Drug Use and Health. *See, e.g.*, CTR. FOR BEHAVIORAL HEALTH STATISTICS & QUALITY, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH (2014) [hereinafter NATIONAL SURVEY FINDINGS: 2014], at 61–62.



number of people reporting first-time cocaine use continued to rise, peaking at over 1.1 million individuals in 1980, up from just 258,000 individuals in 1970.<sup>49</sup> First-time use of marijuana and cocaine continued to decline through the late 1980s, before rising again the 1990s.<sup>50</sup>

FIGURE 1. NUMBER OF PEOPLE INITIATING DRUG USE FOR FIRST TIME IN PREVIOUS 12 MONTHS, BY DRUG TYPE, 1970–2013



During the early 1970s, crime rates in the United States were also in the second decade of a several decades-long upward trend (Figure 2).<sup>51</sup> Between 1960 and 1970, the property crime rate increased 110%, and the violent crime rate increased 125%; between 1970 and 1980, these rates increased an additional 48% and 64%, respectively.<sup>52</sup> Violent crime rates continued to rise through the 1980s, finally peaking in 1991 and resulting in a total increase of 370% between 1960 and 1991.<sup>53</sup>

<sup>49</sup> NATIONAL SURVEY FINDINGS: 2002, *supra* note 48.

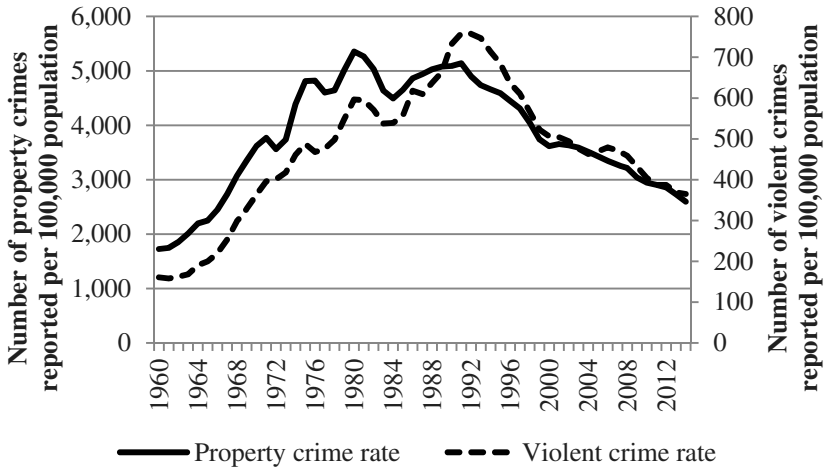
<sup>50</sup> *Id.*

<sup>51</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, MULTIPLE YEARS, <http://www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeStatebyState.cfm> [<https://perma.cc/2DF5-UXJF>].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

FIGURE 2. U.S. VIOLENT CRIME RATE AND PROPERTY CRIME RATE, 1960–2014



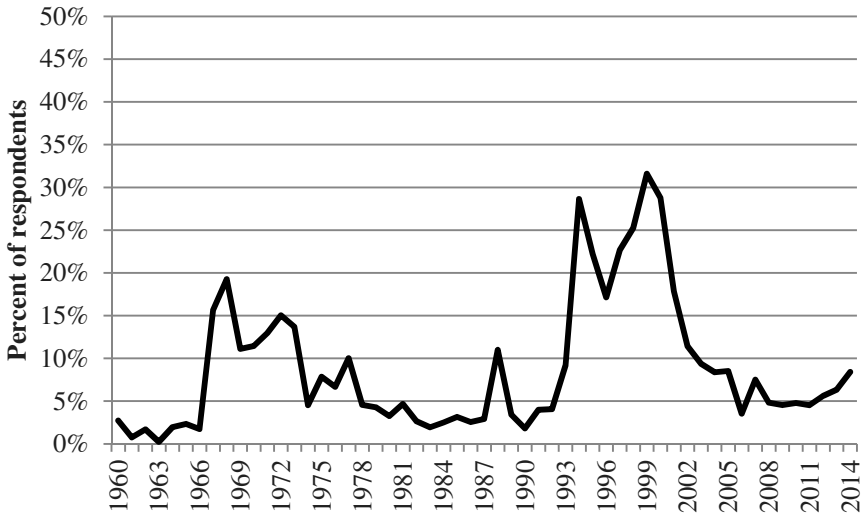
During this same period, public concerns about crime were changing. Throughout most of the 1960s, crime and violence were not important issues for citizens; between 1960 and 1966, an average of 1.6% of Americans responding to the Gallup MIP poll identified crime/violence as the most important issue facing the country (Figure 3).<sup>54</sup> Between 1967 and 1973, however, an average of over fourteen percent of Americans viewed crime/violence as the most important issue facing the country.<sup>55</sup> The number of Americans holding this view declined through the 1980s—hovering around an average of five percent—before rising dramatically in the 1990s; between 1994 and 2000, an average of over twenty-five percent of Americans viewed crime/violence as the most important issue facing the country.<sup>56</sup>

<sup>54</sup> COMPARATIVE AGENDAS PROJECT, <http://www.comparativeagendas.net/tool> [<https://perma.cc/EDU4-GGY9>].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

FIGURE 3. PERCENT OF RESPONDENTS STATING CRIME/VIOLENCE IS THE “MOST IMPORTANT PROBLEM” FACING THE COUNTRY, 1970-2014



Thus, the war on drugs was initiated at a time when the level of drug use was relatively high, crime was rising dramatically, and the public (at times) was very concerned about crime. At the same time, researchers were documenting the nexus between drugs and crime, attributing much of the rise in violent crime to drug use.<sup>57</sup> But rising crime and drug use rates and increasing public concern about crime did not alone change policy responses to drugs; rather, these changes coincided with the increasing politicization of crime.<sup>58</sup>

### B. *The Politicization of Crime*

As crime rates increased, crime and crime control became an integral part of American politics.<sup>59</sup> Since the late 1960s, crime control has routinely been the subject of political debate and a central campaign issue, often used strategically by both liberal and conservative politicians to gain wider elec-

<sup>57</sup> See, e.g., Paul J. Goldstein, *The Drug/Violence Nexus: A Tripartite Conceptual Framework*, 39 J. DRUG ISSUES 493, 493 (1985) (focusing on the connection between violent crime and drug use in the 1980s by documenting that approximately thirty-one percent of homicides committed by individuals under age thirty in Philadelphia were attributed to illicit drug use); Paul J. Goldstein et al., *Drug-Related Homicide in New York: 1984 and 1988*, 38 CRIME & DELINQ. 459, 460 (1992).

<sup>58</sup> See generally KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997).

<sup>59</sup> See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 91–94 (2009).

toral support.<sup>60</sup> This politicization of crime has led politicians to campaign on “law and order” platforms and to adopt policies directed at increased law enforcement and punitive sentencing.<sup>61</sup>

The war on drugs began at a time when politicians realized the political power of crime control platforms and policies, and it continued as that political tool gained in power.<sup>62</sup> Some argue that by the end of the twentieth century, crime and crime control were central to the exercise of authority in the United States at all levels of government<sup>63</sup> and that the control of drugs was central to that authority.<sup>64</sup> Although drug use could have been framed in terms of a medical issue or treatment issue rather than a crime issue, the power of crime as a political and governing tool in the late twentieth century functioned to frame it simply as a crime issue.<sup>65</sup> During this time, the criminal justice system also shifted its focus to view punishment, deterrence, and incapacitation, rather than rehabilitation, as the dominant goal of sentencing and corrections.<sup>66</sup>

### C. *The Decline of the Rehabilitative Ideal*

Throughout much of the twentieth century, sentencing and corrections in the United States maintained a philosophical goal of rehabilitation.<sup>67</sup> Policymakers understood the goal of sentencing and corrections as helping offenders address the underlying causes of their criminal behavior and to change that behavior through drug treatment, counseling, or skills development.<sup>68</sup> However, during the early 1970s, a review of research on the effectiveness of correctional treatment programs questioned the effectiveness of this rehabilitative approach.<sup>69</sup> Robert Martinson’s 1974 article, “What Works,” contended that rehabilitation and treatment, the justifications under-

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<sup>60</sup> See, e.g., *id.*; BECKETT, *supra* note 58, at 23–25. See generally KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2004) (tracing the rise of the “tough on crime” movement from Republican’s political strategy of making crime a national issue in the early 1970s to the Democrat’s use of such approaches in the 1990s to win national elections).

<sup>61</sup> *See id.*

<sup>62</sup> See BECKETT, *supra* note 58, at 55–61.

<sup>63</sup> See SIMON, *supra* note 59, at 71–72 (arguing that politicians use crime not only to gain political power, but to promote government policies and legitimize government action).

<sup>64</sup> *See id.* at 262–63.

<sup>65</sup> *See id.* at 240–44.

<sup>66</sup> Rosalind K. Kelley, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759, 765 (1989).

<sup>67</sup> See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) (arguing that through much of the twentieth century penal policy was focused on the philosophical goal of rehabilitation; however, in the latter part of the twentieth century penal policy became increasingly focused on control through incapacitation and deterrence).

<sup>68</sup> *Id.*

<sup>69</sup> See Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. REFORM 22 (1974).

lying sentencing and corrections policies up to that point in the twentieth century, had failed to produce any desirable changes in individuals.<sup>70</sup>

After Martinson's publication, many policymakers concluded that "nothing works" in rehabilitation.<sup>71</sup> Although Martinson revised his conclusions somewhat,<sup>72</sup> the narrative that treatment was ineffective as a crime control mechanism took hold and policymakers called for a system that shifted away from treatment and rehabilitation and toward one that emphasized personal responsibility as well as punishment, deterrence, and incapacitation as correctional goals.<sup>73</sup> With this shift came an increase in sentence lengths, reaffirmation of the death penalty, an expansion of criminal offenses, and a change in the stated purposes of corrections.<sup>74</sup> The decline in rehabilitation as a goal led to changes in sentencing policies as well, shifting focus from individualized sentences to certainty and uniformity of punishment through mandatory minimums.<sup>75</sup>

#### D. *The Shift to Structure and Determinacy in Sentencing*

Through the mid-1970s, sentencing and corrections policy in all fifty states and the federal government consisted of an unstructured, indeterminate sentencing model. Judges exercised broad discretion over the disposition and duration of imposed sentences, and parole boards maintained equally broad authority over the duration of sentences served through discretionary parole release.<sup>76</sup> The discretionary characteristic of the unstructured, indeterminate model was based on the idea that individualization should be the goal of sanctioning and could be achieved by tailoring both the sentence imposed and the time served in prison to the unique characteristics of the offender.<sup>77</sup>

The unstructured, indeterminate system and its focus on individualization, however, were attacked in the mid-1970s. Liberal reformers argued that the potential for class and racial discrimination existed in the broad discre-

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<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 1, 323–30 (2013).

<sup>72</sup> See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Prison Reform*, 7 HOFSTRA L. REV. 243, 252 (1979).

<sup>73</sup> See GARLAND, *supra* note 67, at 64.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Don Stemen & Andres Rengifo, *Charting the Evolution of Structure and Determinacy in State Sentencing and Corrections Policies, 1970–2010*, 14 JUS. RES. & POL'Y 1, 6 (2012) (noting that legislation generally set wide statutory sentence ranges for offenses, permitting judges equally wide latitude to impose a sentence length anywhere within that range, based on their evaluation of the offense and the offender; also noting that legislation provided few criteria on which parole boards were to base release decisions and, in turn, parole boards had wide discretion to release offenders at any time between some minimal time served requirement and the statutory maximum sentence for the offense); see also KEVIN REITZ, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING IN THE WESTERN WORLD 226–27 (Richard Frase & Michael Tony eds., 2001).

<sup>77</sup> See GARLAND, *supra* note 67.

tion available to judges and parole boards.<sup>78</sup> Conservative reformers argued that such discretion led to lenient sentences from judges and undue early release by parole boards.<sup>79</sup> Both liberal and conservative reformers supported systems that limited or removed the discretion of judges and parole boards to ensure consistency in punishment.<sup>80</sup> The result was the adoption by several states and the federal government of “structured sentencing” through the creation of presumptive sentences or sentencing guidelines that constricted sentence dispositions and lengths available to judges.<sup>81</sup> Several states and the federal government also adopted “determinate sentencing,” in which discretionary release by a parole board was abolished.<sup>82</sup> The objective was to control decision-making at sentencing or at release from prison or both, with the goal of fitting punishments to crimes and abolishing the variability of sentencing and release decisions.<sup>83</sup>

California was the first state to adopt presumptive sentences in 1977, and Minnesota was the first state to adopt sentencing guidelines in 1980.<sup>84</sup> Between 1977 and 2000, twenty-eight states and the federal government enacted some form of structured sentencing.<sup>85</sup> Maine was the first state to abolish discretionary parole release in 1976, and between 1976 and 2000 a total of nineteen states and the federal government abolished discretionary parole release.<sup>86</sup>

The decline of rehabilitation as a goal coincided with a change in sentencing philosophy—a move away from individualized sentencing toward a sentencing scheme based on aggregate sentencing.<sup>87</sup> Political conservatives, however, also realized the creation of new mandatory sentencing laws could

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<sup>78</sup> See, e.g., AM. FRIENDS SERV. COMM. WORKING PARTY, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 124–25; 143–44 (1976); MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 69–102 (1972); MICHAEL TONRY, SENTENCING MATTERS 54–58 (1996) (documenting the existence of unwarranted racial and gender disparities in sentences and time served under the unstructured/indeterminate system); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT 98–102 (1976).

<sup>79</sup> See, e.g., PAMELA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 48–50 (1991); JAMES Q. WILSON, THINKING ABOUT CRIME 189–94 (1975).

<sup>80</sup> See GRISET, *supra* note 79, at 31–32.

<sup>81</sup> Stemen & Rengifo, *supra* note 76, at 6–12 (noting that structured sentencing seeks to narrow or guide judicial discretion in determining the length of an imposed prison term by identifying the “typical” case and providing a recommended sentence or prison term for such a typical case within the wider statutory sentence range).

<sup>82</sup> *Id.* at 12–15 (noting that determinate sentencing is about controlling release decisions and the length of time served, primarily through the abolition of discretionary parole release as a mechanism for releasing offenders from prison).

<sup>83</sup> See, e.g., SANDRA SHANE-DUBOW ET AL., U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, SENTENCING REFORM IN THE UNITED STATES 8–9 (1985); REITZ, *supra* note 76, at 223–24.

<sup>84</sup> Stemen & Rengifo, *supra* note 76, at 8–10.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 13.

<sup>87</sup> See GARLAND, *supra* note 67, at 102–03.

achieve these goals while also increasing the use of incarceration, sentence severity, and offender accountability.<sup>88</sup>

### E. *The Re-emergence of Mandatory Sentencing Laws*

While the adoption of structured and determinate sentencing changed sentencing practices in several states and the federal government, an increase in the adoption and use of mandatory sentencing laws and sentence enhancement laws affected all states and the federal government.<sup>89</sup> Neither policy is new to state and federal sentencing and corrections systems.<sup>90</sup> What is new, however, is the resurgence and prevalence of such laws since the 1970s.<sup>91</sup>

During the early twentieth century, many states and the federal government adopted mandatory sentencing and sentence enhancement laws, directed at specific offenses (e.g., murder and rape) or specific offenders (e.g., repeat offenders), with the goals of deterring and incapacitating offenders.<sup>92</sup> Through the 1950s and 1960s, states and the federal government repealed most mandatory sentencing policies, driven primarily by evidence that mandatory sentencing laws either did not work to reduce crime or were actively circumvented by practitioners.<sup>93</sup> By 1970, the federal government had repealed nearly all mandatory sentencing laws for drug offenses.<sup>94</sup>

Although it conflicted with nearly fifty years of research and experience on the effectiveness of mandatory sentencing laws, beginning in the mid-1970s, every state began adopting mandatory sentencing laws and sentence enhancement laws.<sup>95</sup> The common goals underlying the adoption of structured and determinate sentencing—the desires to fit punishments to crimes and to abolish the variability of sentencing and release decisions—were combined with the goal of increasing the use of incarceration.<sup>96</sup> Conservative critics contended that mandatory sentences were necessary to ensure the imposition of harsher penalties for particular offenses that posed

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<sup>88</sup> See TONRY, *supra* note 78, at 134–35.

<sup>89</sup> See, e.g., STEMEN ET AL., *supra* note 5, at 26; TONRY, *supra* note 78, at 146 (stating that “[d]espite earlier generations’ understanding of why mandatory penalties are unsound policy, mandatory sentencing laws since 1975 have been America’s most popular sentencing innovation.” Mandatory sentencing laws require judges to impose an incarcerative sentence for a particular offense; sentence enhancement laws increase the statutory sentence range available for a particular offense when certain “triggering” factors are present.).

<sup>90</sup> See generally TONRY, *supra* note 78, at 134–64.

<sup>91</sup> *Id.*

<sup>92</sup> See Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 75 (2009) [hereinafter *Mandatory Penalties*].

<sup>93</sup> *Id.* at 65–66, 74.

<sup>94</sup> *Id.* at 74.

<sup>95</sup> *Id.* at 75 (“Between 1975 and 1996, mandatory minimums were America’s most frequently enacted sentencing law changes. By 1983, 49 of the 50 states (Wisconsin was the holdout) had adopted mandatory sentencing laws for offenses other than murder or drunk driving.”).

<sup>96</sup> *Id.* at 101–03 (discussing legislative goal of “getting tough” on crime and increasing incarceration rates).

extreme threats to public safety.<sup>97</sup> Given rising crime rates and the increased recognition of the drugs/crime nexus during this period, drug offenses and specific triggering events surrounding drug offenses (e.g., proximity to a school, offenses involving a minor, offenses involving gang activity) were singled out for increasingly harsh mandatory sentences.<sup>98</sup>

### F. Conclusion

Overall, rising drug use and crime rates, the politicization of crime, the decline of rehabilitation, the shift to structured and determinate sentencing, and the re-embrace of mandatory sentencing set the stage for a new phase in the war on drugs. From the 1970s through the 1990s, states and the federal government adopted sentencing and corrections policies that were increasingly harsh for drug offenses, often limiting or eliminating the sentencing discretion of judges and the release discretion of parole boards. In turn, jurisdictions increased enforcement of drug laws and expanded aggressive law enforcement activities, often with the financial support and direction of the federal government. The following part details some of the policies adopted during the heart of the war on drugs and the effects of those policies on arrests and prison sentences in the United States.

## II. STAGING THE WAR: SENTENCING POLICIES AND THE WAR ON DRUGS

Although the declaration of the war on drugs was initially made at the federal level, that war has been fought primarily at the state level. In 2014, for example, the U.S. Drug Enforcement Administration (DEA) arrested 30,035 individuals for federal drug offenses<sup>99</sup> while state and local law enforcement arrested 1,561,231 individuals for drug offenses.<sup>100</sup> Although the federal Controlled Substances Act (CSA)<sup>101</sup> places drug control under federal jurisdiction, all states have separate statutory frameworks under which they individually enforce state drug laws. As detailed below, both the federal government and the individual states fundamentally changed their approaches to drug offenses under the war on drugs.

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<sup>97</sup> *Id.* at 69; see also JAMES Q. WILSON, THINKING ABOUT CRIME 201–04 (1975).

<sup>98</sup> See *Mandatory Penalties*, *supra* note 92, at 77.

<sup>99</sup> U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., DEA DOMESTIC ARRESTS (<https://www.dea.gov/resource-center/statistics.shtml#arrests>) [<https://perma.cc/MT2N-BGMH>].

<sup>100</sup> U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2014 (<https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main>) [<https://perma.cc/UB4M-9MGQ>].

<sup>101</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).



*A. Federal Responses to the War on Drugs*

In the 1970s, federal efforts in the war on drugs focused primarily on consolidating federal drug policies and improving enforcement of existing laws. Passed in 1970, the CSA placed the control of certain drugs under federal jurisdiction and established the statutory framework for the federal regulation of the production, distribution, and possession of controlled substances, including the classification of drugs into five schedules of controlled substances.<sup>102</sup> In 1973, the DEA was created within the Department of Justice to coordinate federal efforts at enforcing the CSA and federal drug laws.<sup>103</sup> These efforts focused primarily on increasing federal interdiction efforts, as evidenced by the expansion of the size and power of the DEA; indeed, in 1973, the DEA began with 1,470 agents and an annual budget of \$74.9 million; by 1980, these numbers grew to 1,941 agents and an annual budget of \$206.6 million.<sup>104</sup>

It was not until the 1980s and 1990s that the federal government significantly changed the sentencing framework for drug offenses. Through the Comprehensive Crime Control Act of 1984,<sup>105</sup> the Anti-Drug Abuse Acts of 1986<sup>106</sup> and 1988,<sup>107</sup> and the Comprehensive Methamphetamine Control Act of 1996,<sup>108</sup> the federal government increased penalties and limited judicial discretion in setting sentences for drug offenses. The cumulative effect of these laws marked an increase in the overall severity of sentences and an increase in the prevalence of mandatory sentences for drug offenses at the federal level.

The sentencing provisions of the Comprehensive Crime Control Act of 1984 profoundly altered federal sentencing practices and procedures for all federal crimes. The most notable sentencing reforms enacted by the Act included writing into law new goals of federal criminal sentencing, establishing the U.S. Sentencing Commission with the authority to set mandatory sentencing guidelines for all federal offenses, and abolishing discretionary release from prison.<sup>109</sup> The Act increased maximum sentences available for offenses involving Schedule I and II controlled substances and doubled the

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<sup>102</sup> *Id.*

<sup>103</sup> Exec. Order No. 11727, 3 C.F.R. 785 (1971-1975); SEN. COMM. ON GOV'T OPERATIONS, REORGANIZATION PLAN NO. 2 OF 1973, ESTABLISHING A DRUG ENFORCEMENT ADMINISTRATION IN THE DEPARTMENT OF JUSTICE, S. DOC. NO. 93-469, at 5-6 (1973).

<sup>104</sup> U.S. DRUG ENFORCEMENT ADMIN., DRUG ENFORCEMENT ADMINISTRATION: 1970-1975, <http://www.justice.gov/dea/about/history/1970-1975.pdf> [<https://perma.cc/ST36-G4XD>]; U.S. DRUG ENFORCEMENT ADMIN., DRUG ENFORCEMENT ADMINISTRATION: 1975-1980, <http://www.justice.gov/dea/about/history/1970-1975.pdf>. [<https://perma.cc/9S3X-XG8J>].

<sup>105</sup> Pub. L. No. 98-473, 98 Stat. 1976 (Title V of the Controlled Substances Penalties Amendments Act of 1984 altered penalties for drug offenses).

<sup>106</sup> Pub. L. No. 99-570, 100 Stat. 3207.

<sup>107</sup> Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 42 U.S.C.).

<sup>108</sup> Pub. L. No. 104-237, 110 Stat. 3099 (codified as amended in scattered sections of 21 U.S.C.).

<sup>109</sup> See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C.).

sentences available for repeat drug offenses.<sup>110</sup> The act also created two new offenses: cultivating controlled substances on federal land, which included a mandatory fine of five hundred thousand dollars, and distributing a controlled substance within one thousand feet of an elementary or secondary school, which doubled penalties for the underlying offense.<sup>111</sup>

Once the sentencing guidelines created under the Comprehensive Crime Control Act took effect, the mandatory sentences created under the 1986 Anti-Drug Abuse Act were incorporated into the guideline recommendations.<sup>112</sup> The Anti-Drug Abuse Act of 1986 created a series of mandatory sentences for drug offenses,<sup>113</sup> ranging from distribution of controlled substance to a person under twenty-one years of age or near a school (mandatory minimum of one year)<sup>114</sup> to acting as the “kingpin” of a continuing criminal enterprise (mandatory life imprisonment).<sup>115</sup> The Act also created two tiers of mandatory sentences for drug trafficking offenses<sup>116</sup> based on the quantity and type of drug involved.<sup>117</sup> For the largest quantities of drugs (e.g., one kilogram heroin), these sentences included a ten-year mandatory minimum for a first offense and a twenty-year mandatory minimum for a second offense.<sup>118</sup> For trafficking offenses involving smaller quantities of drugs (e.g., one-hundred grams heroin), these included a five-year mandatory minimum for a first offense and a ten-year mandatory minimum for second and subsequent offenses.<sup>119</sup> The 1986 Act also differentiated “cocaine base” (crack) from powder cocaine and created the 100:1 disparity in sentencing for crack and powder cocaine.<sup>120</sup> Under the Act, a person convicted of trafficking just five grams of crack cocaine received the same five-year mandatory sentence as a person convicted of trafficking five hundred grams of powder cocaine; similarly, a person convicted of trafficking just fifty grams of crack cocaine received the same ten-year mandatory sentence as a person convicted of trafficking five thousand grams of powder cocaine.<sup>121</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Pub. L. No. 99-570, 100 Stat. 3207.

<sup>113</sup> For a comprehensive list of federal mandatory minimum sentences and the timing of their enactment dates, see FAMILIES AGAINST MANDATORY MINIMUMS, FEDERAL MANDATORY MINIMUMS, <http://fammm.org/wp-content/uploads/2015/11/Chart-All-Fed-MMs-11.10.15-NW.pdf> [https://perma.cc/9MFA-D5QP].

<sup>114</sup> 21 U.S.C. § 859 (2012) (imposing penalties for sales to persons under twenty-one years of age); 21 U.S.C. § 860 (2012) (imposing penalties for distribution in proximity to schools); *see also* U.S. Sentencing Guidelines Manual § 2D1.2 (2016).

<sup>115</sup> 21 U.S.C. § 848(b) (2012); U.S. Sentencing Guidelines Manual § 2D1.5 (2016).

<sup>116</sup> Drug trafficking offenses include the manufacture, distribution, or possession with intent to distribute controlled substances. 21 U.S.C. § 844 (2012).

<sup>117</sup> Pub. L. No. 99-570, §1002, 100 Stat. 3207 (amending 21 U.S.C. § 841).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* Congress later reduced the cocaine disparity from 100:1 to 18:1 through the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat 2372.

The Anti-Drug Abuse Act sought to coordinate federal agencies' efforts to reduce drug supply and demand by establishing the Office of National Drug Control Policy (ONDCP) and the Director of National Drug Control Policy (commonly referred to as the "drug czar").<sup>122</sup> The Act also created new mandatory minimums for attempts or conspiracies to commit drug offenses, a mandatory life sentence for trafficking the largest quantities of drugs (e.g., one kilogram heroin), and a mandatory ten-year sentence for engaging in a continuing criminal enterprise.<sup>123</sup> The Act also created a five-year mandatory minimum for first-time simple possession of five grams of crack cocaine, the only first-time simple possession drug offense requiring a mandatory prison sentence.<sup>124</sup>

Through the 1990s, federal drug legislation focused primarily on synthetic drugs.<sup>125</sup> Although methamphetamine was included as a Schedule II drug under the Controlled Substance Act of 1970, methamphetamine abuse did not arise until the late-1980s and early-1990s as the popularity of cocaine decreased.<sup>126</sup> Federal efforts were directed largely at reducing the manufacture of methamphetamine, since it could be produced in labs in homes with legally purchased items including pseudoephedrine.<sup>127</sup> These included the creation of enhanced penalties for manufacturing and trafficking methamphetamine under the Comprehensive Methamphetamine Control Act of 1996.<sup>128</sup> Similar changes were made following the re-emergence of MDMA (3,4-methylenedioxy-methamphetamine or ecstasy) in the late 1990s at raves and house parties, increasing penalties for individuals who maintain drug-involved premises.<sup>129</sup> The result was a series of new twenty-year mandatory sentence for trafficking flunitrazepam, GHB, or other synthetic drugs that result in serious bodily injury.<sup>130</sup>

Federal sentencing provisions for drug offenses remained largely the same through the 2000s. The result has been a federal sentencing scheme consisting of draconian drug sentences disproportionate to the underlying offenses and that severely limits judges' ability to deviate from the sentencing guidelines and mandatory sentences required under the law. Despite several changes to federal law and policy described below, this structure remains largely intact today, limiting reformers' ability to make significant changes without large-scale dismantling of mandatory sentencing laws.

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<sup>122</sup> Pub. L. No. 100-690, 102 Stat. 4181.

<sup>123</sup> *Id.*

<sup>124</sup> 21 U.S.C. § 841(a) (2012).

<sup>125</sup> SACCO, *supra* note 38, at 11.

<sup>126</sup> CHARLES F. LEVINTHAL, DRUGS, SOCIETY AND CRIMINAL JUSTICE, 3RD ED. 182 (2012).

<sup>127</sup> SACCO, *supra* note 38, at 11.

<sup>128</sup> Pub. L. No. 104-237, 110 Stat. 3099 (codified as amended in scattered sections of 21 U.S.C.).

<sup>129</sup> Illicit Drug Anti-Proliferation Act of 2003, 21 U.S.C. § 856 (2012).

<sup>130</sup> 21 U.S.C. § 841(a) (2012); 21 U.S.C. § 841(b)(1)(C); U.S. Sentencing Guidelines Manual § 2D1.1 (2016).

*B. State Responses to the War on Drugs*

While tracking the federal approach to the war on drugs is fairly simple, tracking all of the varied state-level policies is more difficult. However, some general patterns are discernible. Between 1970 and 2000, most states introduced greater complexity into drug laws by grading drug offenses by the type and quantity of drug involved.<sup>131</sup> They also increased penalties for drug offenses by increasing statutory sentence ranges, creating sentence enhancements, and enacting mandatory sentences.<sup>132</sup>

Since the 1970s, state approaches to setting penalties for drug law violations became increasingly complex. In 1975, most states had broadly written criminal statutes for drug manufacture, sale, and possession offenses that did not differentiate between offenses based on quantity.<sup>133</sup> For example, in 1975, forty-five states provided only one sentence range for sale of any quantity of cocaine, with only five states increasing penalties for the sale of larger quantities.<sup>134</sup> In the 1980s, an increasing number of states began creating hierarchical schemes for sanctioning drug offenses based on the quantity of drug involved, with longer sentence ranges for both large and small quantities of drugs.<sup>135</sup> By 2000, a total of thirty-eight states had created such quantity thresholds.<sup>136</sup> In addition, states initially created these multiple quantity thresholds for only a limited number of substances—generally, just heroin, cocaine, and marijuana.<sup>137</sup> However, beginning in the late-1980s, two additional substances were increasingly differentiated by quantity—crack cocaine and methamphetamine.<sup>138</sup> One consequence of this was the creation of the same crack/powder cocaine sentence disparity existing in the federal system; by 2000, ten states had created quantity thresholds for the sale of crack cocaine that differed from those for powder cocaine.<sup>139</sup>

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<sup>131</sup> See generally STEMEN ET AL., *supra* note 5, at 22–24 (describing changes in quantity thresholds).

<sup>132</sup> *Id.* at 95–100 (describing the types and number of sentencing enhancements across the states).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 22. For example, New York set three different statutory sentence ranges for sale of the following quantities of cocaine: 0 to 1/8 ounce, 1/8 ounce to 1 ounce, and more than 1 ounce. Generally, increased quantity thresholds were created only for sale and manufacturing offenses and were directed primarily at cocaine, heroin, and marijuana, substances that represented the most used and trafficked drugs at the time. Analysis conducted by author using data collected as part of the National Institute of Justice project, Of Fragmentation and Ferment (project #2002-IJ-CX-0027). Data available at the National Archive of Criminal Justice Data (ICPSR 4456) at <https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/4456> [<https://perma.cc/YZ8X-LH2K>].

<sup>135</sup> STEMEN ET AL., *supra* note 5, at 96–98 (describing general changes in quantity thresholds).

<sup>136</sup> The number of quantity thresholds varied widely across states and over time. In 1975, the largest number of quantity thresholds was found in New York (3); by 2000, eight states had five or more such thresholds.

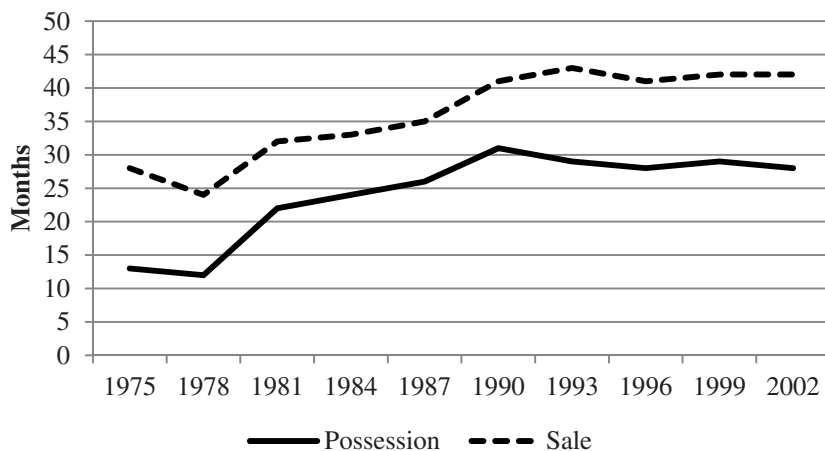
<sup>137</sup> Several states also created quantity thresholds for LSD and PCP, however, not at the same rate as the other substances listed. Nat'l Inst. of Justice, *supra* note 134.

<sup>138</sup> STEMEN ET AL., *supra* note 5, at 99.

<sup>139</sup> Nat'l Inst. of Justice, *supra* note 134.

As penalty schemes became more complex, statutory minimum and maximum sentences for offenses became much longer. Figure 4 shows the evolution of the average statutory minimum sentences for first-offense possession and sale of twenty-eight grams (approximately one ounce) of cocaine across states.<sup>140</sup> For both offense types, average statutory minimum sentences increased steadily between 1975 and 2000, although they plateaued in the early 1990s.<sup>141</sup> Statutory minimum sentences for possession moved from an average of thirteen months in 1975 to twenty-eight months in 2000 (a 115% increase), while minimum sentences for sale moved from an average of twenty-eight months to forty-one months (a 64% increase).<sup>142</sup> Analyses of statutory minimum sentences for the possession and sale of marijuana and heroin follow similar patterns.<sup>143</sup>

FIGURE 4. AVERAGE STATUTORY MINIMUM SENTENCES FOR POSSESSION AND SALE OF TWENTY-EIGHT GRAMS OF COCAINE, 1975–2002



<sup>140</sup> STEMEN ET AL., *supra* note 5, at 22–24. It is important to note that the sentences described here do not necessarily reflect the actual sentences imposed by judges or the actual time served in these states; nor do these sentences represent mandatory minimum sentences for the offense. Rather, this approach simply provides a comparison of the overall drug sentencing structure and statutory minimum sentences available across states.

<sup>141</sup> *Id.* The majority of states did not have statutory minimum sentences until the mid-1980s (i.e., many states had statutory sentences ranges in the form of, for example, zero to ten years).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 96. For example, statutory minimum sentences for possession of 28 grams of heroin increased from 13 months in 1975 to 45 months in 2000 and minimum sentences for sale increased from 33 months to 60 months during the same period. While statutory minimum sentences are higher for heroin than cocaine, trends are very similar: the greatest increase in minimum sentences occurred for both drugs between 1978 and 1981. After this period, the upward movement is still observable but less pronounced.

In addition to increasing the complexity of and lengthening minimum sentences for drug offenses, states also increased the number and types of sentencing enhancements for drug offenses. Laws that enhance penalties in drug-free school zones are illustrative.<sup>144</sup> In 1987, New Jersey became the first state to adopt such a law, requiring judges to impose a sentence of at least three years in prison for individuals convicted of sale or possession with intent to sell drugs within one thousand feet of school property.<sup>145</sup> In 1989, Louisiana passed a similar law allowing judges to impose a sentence of up to one and a half times the maximum sentence for the underlying offense for any offense of sale or possession with intent to sell committed within one thousand feet of a school, including universities.<sup>146</sup> Alabama arguably has the most expansive law, imposing an additional five-year mandatory minimum prison sentence for a sale offense committed within three miles of a school (including colleges) or public housing project.<sup>147</sup>

States created similar sentence enhancements based on location of the offense (e.g., near a park or housing complex), excessive quantities of drugs involved, weapons used, or involvement of minors.<sup>148</sup> Figure 5 displays the average number of such enhancements across the states for sale- or possession-related offenses. In 1975, states had an average of just three such enhancements for drug offenses involving sale or possession of cocaine, heroin, or marijuana; by 2000, states had an average of just fewer than eight enhancements for each substance.<sup>149</sup>

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<sup>144</sup> See generally Tracey A. Bateman, Annotation, *Validity, Construction, and Application of State Statutes Prohibiting Sale or Possession of Controlled Substances Within Specified Distance of Schools*, 27 A.L.R. 5TH 593 (1995) (noting that by 2005, thirty-five states had enacted drug free school zone laws). For a review of drug-free school zone policies across the states, see, e.g., NICOLE D. PORTER, THE SENTENCING PROJECT, DRUG-FREE ZONE LAWS: AN OVERVIEW OF STATE POLICIES (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Drug-Free-Zone-Laws.pdf> [<https://perma.cc/J5P9-7LHJ>].

<sup>145</sup> N.J. Stat. Ann. § 2C:35-7 (West 2010). The law was later amended to include public parks. New Jersey provides no limitations under the law, with criminal liability based exclusively on the location of the offense; knowledge or awareness of one's presence in a school zone, presence of juveniles at the school, or intention to corrupt juveniles are not necessary elements of the offense. See generally THE N.J. COMM'N TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY'S DRUG FREE SCHOOL ZONE CRIMES AND PROPOSAL FOR REFORM (2005), <http://www.sentencing.nj.gov/downloads/supplemental%20schoolzonereport.pdf> [<https://perma.cc/LSJ3-V7C8>] (describing the content of New Jersey's laws concerning drug free school zones).

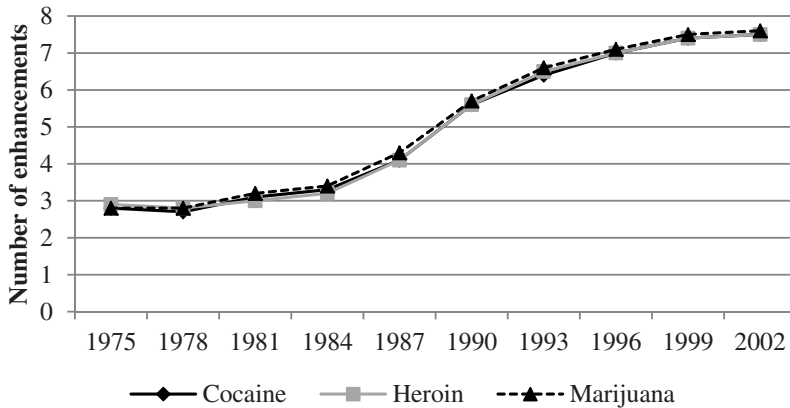
<sup>146</sup> La. Stat. Ann. § 40:981.3 (2014). The law was later amended to include offenses within 2,000 feet of a school, drug treatment facility, religious facility, public housing complex, or day care center; the Louisiana law does not apply to offenses committed within private residences when children are not present.

<sup>147</sup> Ala. Code § 13A-12-250 (2017).

<sup>148</sup> See generally STEMEN ET AL., *supra* note 5, at 22 (examining state statutes that allow for a sentence enhancement for the commission of a drug sale or possession offense when one of the following factors are present: committed near a school, committed near a park, committed near a public housing complex, committed near a church, excessive quantities of drugs involved, offense involves minors, offense involves weapons use, and offense involves gang activity).

<sup>149</sup> *Id.* at 99. Figures 4 and 5 indicate that sentencing laws for drug offenses generally became harsher for all drug types during the 1980s and, while sentence lengths continued to increase, they increased at a slower rate through the 1990s.

FIGURE 5. AVERAGE NUMBER OF SENTENCE ENHANCEMENTS FOR SALE OR POSSESSION OF COCAINE, HEROIN, OR MARIJUANA, 1975–2002<sup>150</sup>



In addition to increasing minimum sentence ranges and creating sentence enhancements for drug offenses, states also passed a variety of mandatory sentencing laws to ensure the imposition of a prison sentence following conviction of a drug law violation. The most famous mandatory sentencing laws may have been New York’s Rockefeller Drug Laws passed in 1973.<sup>151</sup> Under the Rockefeller Drug Laws, any defendant convicted of selling two ounces or possessing four ounces of heroin, morphine, raw or prepared opium, cocaine, or cannabis received a mandatory minimum sentence of fifteen years in prison.<sup>152</sup> While the Rockefeller Drug Laws distinguished New York State as having the toughest drug laws in the United States, other states soon followed. In 1978, for example, Michigan enacted the “650-Lifer Law,” which created a mandatory sentence of life imprisonment without the possibility of parole for the sale, manufacture, or possession of 650 grams or more of a mixture containing a Schedule I or II narcotic or cocaine.<sup>153</sup>

<sup>150</sup> *Id.* at 99.

<sup>151</sup> Act of May 8, 1973, ch. 276 §§ 220.21, 220.43, 1973 N.Y. Laws 371, 380–81 (codified as amended in N.Y. Penal Law) (explaining that criminal possession of two or more ounces of a controlled substance and criminal sale of one or more ounces of a controlled substance are Class A-I felonies). In 1979, the Legislature doubled the weight of the drug required for an A-I felony to two ounces or more for possession and four ounces or more for sale). Spiros A. Tsimbinos, *Is it Time to Change the Rockefeller Drug Laws?*, 13 ST. JOHN’S J. LEGAL COMMENT. 613, 625 (1999).

<sup>152</sup> *Id.* The primary intent of the Rockefeller Drug Laws was to deter drug abuse and drug crimes. See Rockefeller, Governor of New York, Annual Message To the members of the Legislature of the State of New York (Jan. 3, 1973), in *Public Papers of Nelson A. Rockefeller*, at 21–22. However, subsequent evaluations showed that the law had little impact on drug activity or crime. See, e.g., Edward J. Maggio, *New York’s Rockefeller Drug Laws, Then and Now*, 78 N.Y. ST. B. ASS’N J. 30, 31 (2006).

<sup>153</sup> Controlled Substances Act by Public Act 147 of 1978, incorporated into the recodified Public Health Code by Public Act 368 of 1978. Mich. Comp. Laws Ann. § 333.7403(2)(a)(i)

While other states did not enact sentencing policies as harsh as those in New York and Michigan, nearly every state adopted some form of mandatory sentences for drug offenses. For example, in South Dakota, a first offense conviction of manufacture, sale, or possession with intent to sell a narcotic drug carries a mandatory sentence of at least one year in prison; a second or subsequent conviction carries a mandatory sentence of at least ten years in prison.<sup>154</sup> In Georgia, a first offense conviction of possession of a Schedule I drug carries a mandatory sentence of at least two years in prison and a second or subsequent conviction carries a mandatory sense of at least five years in prison.<sup>155</sup>

Like the federal system, during the 1980s and 1990s, states significantly increased sentences for drug offenses and created sentencing schemes that limited judges' ability to deviate from mandatory sentences. These changes laid the legal backbone of the war on drugs and articulated the state and federal governments' goals of sanctioning and the appropriate severity of sanctions for drug offenses. As described above, underlying these changes was a shift toward punishment and incapacitation and away from rehabilitation. The result was the historic increase in the number of individuals arrested and convicted of drug offenses as well as the mass incarceration of drug offenders in the United States.

### C. *The Impact of the War on Drugs on Arrests and Sentences*

As the war on drugs began in earnest in the 1980s, changes in enforcement produced a dramatic change in arrests. The number of people arrested for drug law violations in the United States increased 227% between 1970 and 1989, from 415,000 arrests to 1.3 million arrests (Figure 6).<sup>156</sup> Most of

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(West Supp. 1990–1991) provides a mandatory sentence of life in prison for possession of 650 grams or more of any mixture containing a Schedule 2 controlled substance. The Michigan legislation also required imprisonment for the sale, manufacture, or possession of lesser quantities. For example, Michigan required imprisonment of at least twenty years for offense involving between 225 and 650 grams; either imprisonment for at least ten years or lifetime probation for a violation involving between 50 and 225 grams; imprisonment for up to twenty years for manufacturing, delivering, or possessing with intent to deliver less than 50 grams; and imprisonment for up to four years for possessing less than 50 grams. Probation, parole, and suspension of sentence were prohibited during the period of the minimum sentences. For a description of changes to the law, see PATRICK AFFHOLTER & BETHANY WICKSALL, STATE NOTES TOPICS OF LEGISLATIVE INTEREST, ELIMINATING MICHIGAN'S MANDATORY MINIMUM SENTENCES FOR DRUG OFFENSES, SENATE FISCAL AGENCY (2002) (describing the history and repeal of the 650-Lifer law).

<sup>154</sup> S.D. Codified Laws § 22-42-2 (2017).

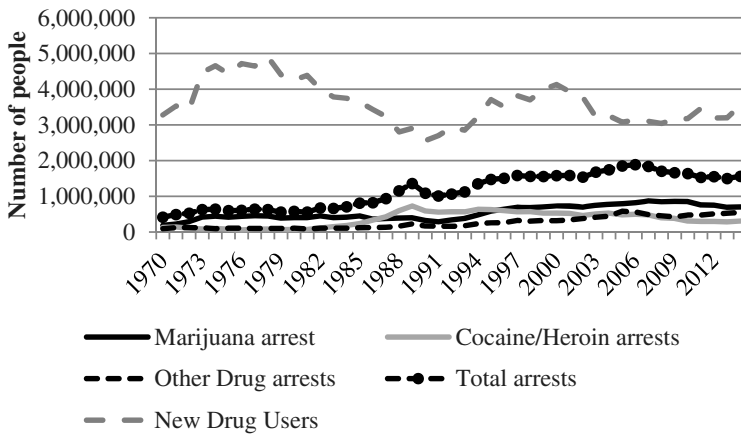
<sup>155</sup> Ga. Code Ann. § 16-13-30(c) (2016). The same statute sets out longer sentences for distribution offenses in Georgia: a first offense conviction of distribution of a Schedule I or Schedule II drug carries a mandatory sentence of at least five years in prison and a second or subsequent conviction carries a mandatory sense of at least ten years in prison. *Id.* § 16-13-30(d).

<sup>156</sup> FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1970–2014 series [hereinafter FBI CRIME REPORTS: 1970–2014], Tables 4.1 and 29 (Table 29 provides the total number of drug law violation arrests; Table 4.1 provides the percent distribution of arrests for each drug type. By combining the total arrests and percent distribution for each year, it is possible to



this increase was due to arrests for cocaine or heroin, which increased 463% during this period, from 130,000 arrests in 1970 to 732,000 arrests in 1989.<sup>157</sup> However, this initial increase in arrests occurred during a period when drug use in the United States was on the decline.<sup>158</sup> For example, between 1978 (peak drug use rate) and 1989 (peak drug arrest rate), overall rates of illicit drug use decreased 41% while drug arrest rates increased 117%.<sup>159</sup> Drug arrests continued to rise to over 1.8 million arrests in 2006.<sup>160</sup> However, unlike the 1980s, arrests in the 1990s mirrored drug use patterns in the general population.<sup>161</sup> After peaking in 2006, drug arrests then declined through 2014 to 1,488,707 arrests—yet, a rate that remains roughly 258% higher than in 1970.<sup>162</sup>

FIGURE 6. NUMBER OF ARRESTS FOR DRUG OFFENSES AND NUMBER OF PEOPLE INITIATING DRUG USE FOR FIRST TIME IN PREVIOUS TWELVE MONTHS, 1970–2014<sup>163</sup>



As a result of this dramatic increase in felony-level drug arrests, the number of felony sentences also increased significantly. In federal court, the

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calculate the total number of drug law violations by drug type for each year). *See, e.g.*, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1995, SECTION IV PERSONS ARRESTED, at 207 (Table 4) and 208 (Table 29), <https://ucr.fbi.gov/crime-in-the-u.s/1995/95sec4.pdf> [<https://perma.cc/Y8UV-5YP7>].

<sup>157</sup> *Id.*

<sup>158</sup> NATIONAL SURVEY FINDINGS: 2002, *supra* note 48 (Tables H.35 and H.36 present the number of people who first used marijuana or cocaine between 1965 and 2001).

<sup>159</sup> *Id.*; FBI CRIME REPORTS: 1970–2014., *supra* note 156. During this period marijuana use decreased 64% and cocaine use decreased 73%. Yet, between 1982 and 1992, overall drug arrests increased 58%, with arrests for cocaine and heroin increasing 280%.

<sup>160</sup> FBI CRIME REPORTS: 1970–2014., *supra* note 156.

<sup>161</sup> Between 1990 and 2000, for example, marijuana use increased 91%, cocaine use increased 8%, and heroin use increased 128%. NATIONAL SURVEY FINDINGS: 2002, *supra* note 48.

<sup>162</sup> FBI CRIME REPORTS: 1970–2014., *supra* note 156.

<sup>163</sup> *Id.*

number of individuals convicted of a drug offense increased from just 4,000 individuals in 1978 to 26,000 individuals in 2010—an increase of over 550%.<sup>164</sup> The number of felony drug sentences in state courts showed similarly large increases. State drug trafficking sentences increased 177% between 1986 and 2006, from roughly 76,000 sentences to over 212,000 sentences.<sup>165</sup> Similarly, between 1990 and 2006, the number of felony drug possession sentences increased 55%, from 106,000 sentences to over 165,000 sentences.<sup>166</sup> What is strikingly different between the federal and state sentencing trends is the percent of convictions resulting in a prison sentence during this period—roughly 90% of federal sentences were to prison compared to roughly 40% of state court sentences. It is also noteworthy that the probability of receiving a prison sentence for those convicted of a drug felony in both federal and state courts did not appear to change dramatically during this period.

Despite the relative stability in the percentage of individuals sentenced to prison in both federal and state courts, the average federal sentence length increased substantially while the average state sentence length declined (Figure 7). Between 1978 and 1992, the average sentence imposed for a federal drug offense increased from just over fifty months to nearly ninety months.<sup>167</sup> Despite decreasing by roughly eleven months through the 1990s, the length of federal drug sentences increased again through the 2000s to eighty-two months.<sup>168</sup> Again, state courts have sentenced drug offenders quite differently. Sentences for felony drug trafficking in state courts showed a general decrease since the 1980s, dropping from forty-two months in 1986 to thirty-eight months by 2006.<sup>169</sup> Sentences for felony drug possession in state courts showed a larger decrease since the 1980s, dropping from just thirty months in 1990 to twenty-three months by 2006.<sup>170</sup>

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<sup>164</sup> Sourcebook of Criminal Justice Statistics Online, Table 5.38.2010 <http://www.albany.edu/sourcebook/pdf/t5382010.pdf> [<https://perma.cc/CTY2-R25D>]; Derived from Admin. Office of the U.S. Courts, Annual Report of the Director (various years).

<sup>165</sup> BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 1986 (1989), at 2 (Table 1); SEAN ROSENMERKEL ET AL., 2006—STATISTICAL TABLES, (2009) at 3 (Table 1.1).

<sup>166</sup> PATRICK A. LANGAN & CRAIG A. PERKINS, FELONY SENTENCES IN STATE COURTS, 1990 (1994), at 2 (Table 1); ROSENMERKEL ET AL., *supra* note 165.

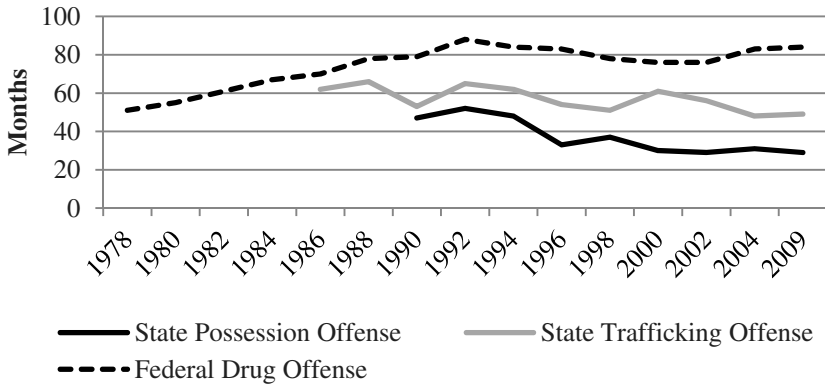
<sup>167</sup> Sourcebook of Criminal Justice Statistics Online, *supra* note 165.

<sup>168</sup> *Id.*

<sup>169</sup> BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 1986 (1989), at 4 (Table 3); ROSENMERKEL ET AL., *supra* note 165, at 6 (Table 1.3).

<sup>170</sup> LANGAN & PERKINS, *supra* note 166, at 7 (Table 10); ROSENMERKEL ET AL., *supra* note 165, at 6 (Table 1.3).

FIGURE 7. AVERAGE PRISON SENTENCE IMPOSED FOR A FELONY DRUG OFFENSE IN FEDERAL AND STATE COURT, 1978–2006<sup>171</sup>



These increases in arrests and prison sentences have fueled a significant increase in the number of drug offenders held in both federal and state prisons. In 1980, federal prisons incarcerated just 4,900 people for drug offenses, representing roughly twenty-five percent of the federal prison population.<sup>172</sup> By 2014, those same prisons held 96,500 people for a drug offense, accounting for 50% of the federal prison population and a 1,869% increase since 1980.<sup>173</sup> Moreover, by 2010, eighty percent of drug offenders in federal prisons had been convicted of an offense carrying a mandatory minimum sentence.<sup>174</sup> The states have seen a similarly dramatic increase in drug offenders in prison. In 1980, state prisons incarcerated roughly 19,000 people for a drug offense, representing 6.5% of states' total prison populations.<sup>175</sup> By 2014, states cumulatively incarcerated roughly 208,000 people for a drug offense—a 995% increase since 1980; drug offenders accounted for 15.3% of states' prison populations in 2014.<sup>176</sup>

#### D. The Racially Disparate Impact of the War on Drugs

The changes in arrests, convictions, and sentences at both the federal and state levels have negatively impacted African American communities

<sup>171</sup> BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATES COURTS, annual series 1986–2009; Sourcebook of Criminal Justice Statistics Online, *supra* note 148.

<sup>172</sup> MAUER & KING, *supra* note 2, at 9

<sup>173</sup> E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, 30 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/TUA9-WVPN>].

<sup>174</sup> U.S. Sentencing Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Oct. 2011), Ch. 8, 165, [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_08.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf) [<https://perma.cc/3LV3-S8ZD>].

<sup>175</sup> MAUER & KING, *supra* note 2, at 9

<sup>176</sup> CARSON, *supra* note 173, at 30.

more than other racial or ethnic groups.<sup>177</sup> Some argue that this is because of “the concentration of drug law enforcement in inner city areas; harsher sentencing policies, particularly for crack cocaine; and, the drug war’s emphasis on law enforcement at the expense of prevention and treatment.”<sup>178</sup> During the mid-1980s, as the use of crack cocaine increased in inner-city neighborhoods, federal and state policymakers publicized the problem and used it to expand law enforcement activities into predominantly African American communities.<sup>179</sup> The more aggressive enforcement resulted in dramatic increases in arrests of African Americans and the mandatory sentencing policies in place meant that a disproportionate number of these individuals were sentenced to prison.

The disparity between drug use rates and arrest rates for African Americans and Whites highlights how dramatic this differential treatment is. African Americans and Caucasian-Americans use drugs at roughly the same rate—19.5% of African Americans report using drugs in the previous year compared to 16.9% of Caucasians.<sup>180</sup> As a percentage of all drug users, African Americans represent roughly 15% of all current drug users.<sup>181</sup> However, arrest rates for the two groups are quite different. While African Americans represent just fifteen percent of all current drug users, they accounted for twenty-nine percent of all drug arrests in 2014.<sup>182</sup> When considering arrest rates, roughly 828 of every 100,000 African Americans were arrested for a drug offense in 2014, compared to just 339 of every 100,000 Whites.<sup>183</sup>

Estimating the number of drug offenders in prison by race is more difficult. However, the Sentencing Project estimated that African Americans ac-

<sup>177</sup> See MAUER & KING, *supra* note 2, at 19–24.

<sup>178</sup> *Id.* at 19.

<sup>179</sup> ALEXANDER, *supra* note 14, at 52–53.

<sup>180</sup> NATIONAL SURVEY FINDINGS: 2014, TABLES, *supra* note 28.

<sup>181</sup> *Id.*; *Quick Facts*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/table/PST045216/00> [<https://perma.cc/TDE6-24BR>]. The figures used in the Samhsa Table 1-19b were combined with the population estimates from the Census Bureau to calculate the total number of new drug users in 2014 and the total number of Black or African American drug users in 2014. Based on Census Bureau estimates, the 2015 U.S. population is estimated at 321,418,820 individuals and 13.3% of the population, or 42,748,703 individuals, is Black or African American. According to Samhsa, 16.7% of the U.S. population, or 53,676,942 individuals, used illicit drugs in 2014 and 19.5% of Black or African American individuals, or 8,335,997 individuals, used illicit drugs in 2014. Thus, Black or African American individuals represent roughly 15% of U.S. drug users in 2014 (8,335,997/53,676,942).

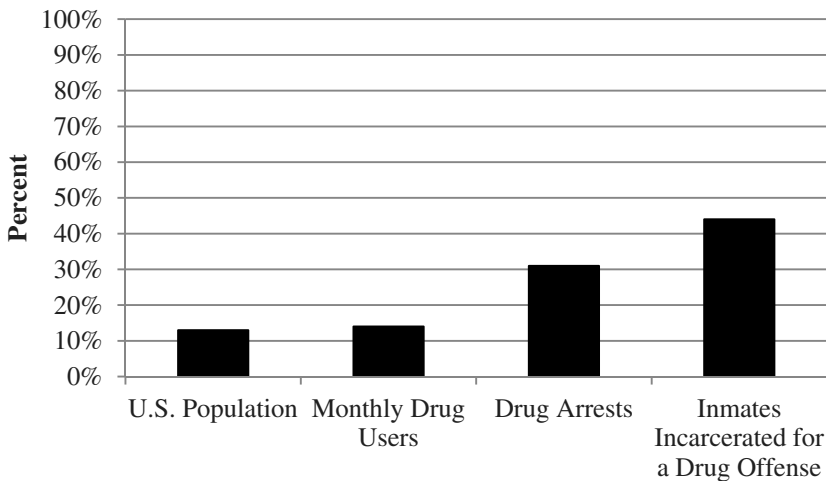
<sup>182</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2014, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-43> [<https://perma.cc/6FHK-9ET2>].

<sup>183</sup> *Id.*; U.S. CENSUS BUREAU, *supra* note 181. The figures used in the FBI Table 43 were combined with the population estimates from the Census Bureau to calculate the arrest rates for 2014. Based on Census Bureau estimates, the 2015 U.S. population is estimated at 321,418,820 individuals; 13.3% of the population, or 42,748,703 individuals, is Black or African American and 77.1% of the population, or 247,492,291 individuals, is White. According to the FBI, 353,862 individuals identified as Black or African American and 837,851 individuals identified as White were arrested for a drug abuse violation in 2014. Thus, the Black or African American drug arrest rate for 2014 was 827.7 arrests per 100,000 Black or African American population (353,862/427,48703) and the White drug arrest rate was 338.5 arrests per 100,000 White population (857,851/2,474,92291).

counted for fifty-seven percent of drug offenders in state prisons and forty-three percent of drug offenders in federal prison in 1999.<sup>184</sup> By 2014, African Americans accounted for a declining, but still disproportionate, percentage of state and federal inmates incarcerated for drug offenses, composing thirty-three percent of inmates in state prisons and thirty-eight percent of inmates in federal prison.<sup>185</sup>

The arrest rates and incarceration rates for African Americans are markedly disproportionate to African American representation in the U.S. population. When viewing the differences between the percentages of the U.S. population, monthly users, drug arrests, and prisoners who are African American, the racial disparity of the war on drugs becomes more apparent (Figure 8).

FIGURE 8. AFRICAN AMERICANS AS A PERCENT OF U.S. POPULATION, DRUG USERS, ARRESTEES, AND INDIVIDUALS INCARCERATED FOR A DRUG OFFENSE, 2014<sup>186</sup>



<sup>184</sup> MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 4, 6 (2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf> [<https://perma.cc/NBY7-TT3Y>].

<sup>185</sup> CARSON & ANDERSON, *supra* note 30, at 30–31. The total numbers of individuals incarcerated in state prisons for a drug offense and the total number of Black individuals incarcerated in state prisons for a drug offense were taken from Appendix Table 5; the total numbers of individuals incarcerated in federal prisons for a drug offense and the total number of Black individuals incarcerated in federal prisons for a drug offense were taken from Appendix Table 6.

<sup>186</sup> U.S. CENSUS BUREAU, *supra* note 181; NATIONAL SURVEY FINDINGS: 2014, TABLES, *supra* note 28; FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2014, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-43> [<https://perma.cc/7TJ7-9S87>]; CARSON & ANDERSON, *supra* note 30, at 30–31.

Since the 1970s, the U.S. prison population has exploded from 200,000 prisoners to more than two million prisoners, with the majority of the increase due to drug convictions.<sup>187</sup> But the impact of the war on drugs has been disproportionately felt by the African American community. While these racially disparate impacts were quickly apparent, it was not until the wider financial and social costs of the war markedly increased in the late 1990s and 2000s that states and the federal government began to reform many of the sentencing policies adopted in the build-up of the war on drugs.

### III. A SHIFT IN THE WAR: POLICY CHANGE SINCE 2000

As state incarceration rates continued to rise through the late 1990s, policymakers and corrections administrators encountered growing fiscal constraints and social scrutiny, which demanded that they evaluate the cost-effectiveness and efficacy of incarceration as a response to drugs.<sup>188</sup> Many states responded by reclassifying drug offenses and revising sentencing ranges, while several states moved to decriminalize or legalize low-level drug possession.<sup>189</sup> Other states responded by repealing mandatory prison sentences for many drug offenses,<sup>190</sup> while some implemented new mandatory probation sentences in lieu of incarceration for individuals convicted of simple drug possession.<sup>191</sup> Many state and local jurisdictions also strengthened existing diversion programs as a way to further redirect drug offenders away from prison.<sup>192</sup> Although not seen as equally consequential by some critics, several notable changes in federal approaches to drug enforcement occurred as well, including a reduction in the crack cocaine/powder cocaine sentence disparity,<sup>193</sup> increased federal spending on drug treatment,<sup>194</sup> reductions in sentences for all drug offenses under the federal

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<sup>187</sup> MARC MAUER, *RACE TO INCARCERATE* 10 (2d ed. 2006).

<sup>188</sup> MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 85–91 (2005).

<sup>189</sup> See generally SUBRAMANIAN & MORENO, *supra* note 16; SUBRAMANIAN & DELANEY, *supra* note 16 (giving an overview of recent changes in state drug statutes).

<sup>190</sup> See generally SUBRAMANIAN & MORENO, *supra* note 16; SUBRAMANIAN & DELANEY, *supra* note 16.

<sup>191</sup> Don Stemen et al., *The Focal Concerns of Sentencing and Mandatory Sentencing Laws: Circumvention in the Context of Mandatory Probation and Treatment*, 38 J. OF CRIME & JUSTICE 2 (2015) (discussing the content of mandatory probation laws in Kansas, California, and Arizona).

<sup>192</sup> See, e.g., CTR. FOR HEALTH & JUSTICE AT TASC, *NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES* 30 (2013) (documenting the many varied diversion programs from pre-arrest diversion to pre-trial diversion programs for drug offenders implemented across the states and noting, “The relatively recent and rapid expansion of intervention approaches such as drug and law enforcement crisis intervention and various problem-solving courts suggests a growing institutional acceptance among policymakers and practitioners that, in certain circumstances, less restrictive justice strategies may offer increased effectiveness in reducing recidivism and addressing substance use disorders and mental illness, as well as greater efficiency in the use of public resources.”).

<sup>193</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

<sup>194</sup> Novak & Reis, *supra* note 35.

sentencing guidelines,<sup>195</sup> and changes in federal prosecution policies for drug offenses.<sup>196</sup> Documenting all such reforms is beyond the scope of this article; rather, this part focuses on a select set of reforms, which illustrate a trend in alternative sentencing policies. For a detailed account of nearly all changes in state-level drug laws enacted between 2009 and 2013, the Vera Institute of Justice's recent report is an excellent resource.<sup>197</sup>

### A. *Reclassifying, Decriminalizing, and Legalizing*

Many states have taken the first step toward undoing the drug sentencing laws enacted during the 1980s and 1990s by reclassifying drug offenses (e.g., by downgrading offenses to lower felony classes or to misdemeanors) and by increasing quantity thresholds necessary before prosecutors consider an offense as a felony. In many instances, these efforts have decriminalized some drug offenses, primarily marijuana offenses.

Colorado illustrates how states, perhaps tentatively, have approached the reclassification of drug offenses. Since 2000, Colorado has revised sentencing provisions related to drug offenses three times.<sup>198</sup> In 2003, the state reclassified possession of less than one gram of Schedule I or II drugs to a Class 6 felony (the lowest level felony class) for first offenders and from a Class 2 to a Class 4 felony for repeat offenders.<sup>199</sup> In 2010, the state again lowered the classification levels for possession of controlled substances, reclassifying all drug use offenses as Class 2 misdemeanors, reclassifying Schedule III, IV, or IV possession offenses as Class 1 misdemeanors, and reclassifying Schedule I or II possession offenses of under four grams as Class 6 felonies (down from a Class 4 felony).<sup>200</sup> In 2013, Colorado reclassified all felony possession offenses as the lowest drug felony level, regardless of weight.<sup>201</sup>

Several states have taken similar steps to reclassify possession offenses as either lower-level felonies or misdemeanors. In 2011, for example, Arkansas reclassified drug offenses and removed legal presumptions that possession of certain quantities constituted possession with intent.<sup>202</sup> In 2011, Delaware revised much of its criminal code, reclassifying some drug offenses previously classified as felonies to misdemeanors.<sup>203</sup> Finally, in 2013, Indiana reclassified possession of marijuana and other low-level drug of-

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<sup>195</sup> U.S. SENTENCING COMM'N, *supra* note 22, at 1–2.

<sup>196</sup> Cole Memorandum, *supra* note 23 (adopting prosecution policies declining in most cases to use federal law to prosecute state-licensed growers and retailers of marijuana); Holder Memorandum, *supra* note 23 (declining to charge low-level, non-violent drug offenders with offenses carrying mandatory minimum sentences); Smith, *supra* note 23 (noting that President Obama had granted clemency to 1,176 individuals).

<sup>197</sup> SUBRAMANIAN & MORENO, *supra* note 16.

<sup>198</sup> *Id.* at 10–11, 14.

<sup>199</sup> S.B. 03-318, 64th Gen. Assemb., 1st Sess. (Colo. 2003).

<sup>200</sup> SUBRAMANIAN & MORENO, *supra* note 16, at 14.

<sup>201</sup> *Id.* at 15.

<sup>202</sup> *Id.* at 14.

<sup>203</sup> *Id.* at 8.

fenses from felonies to misdemeanors and reduced the felony classifications of possession of more serious drugs.<sup>204</sup> The U.S. Sentencing Commission also amended the federal sentencing guidelines in 2014 to reduce most drug trafficking offenses by two offense levels under the guidelines; the Commission also voted to make the amendment retroactive, allowing eligible incarcerated offenders to ask courts to reduce their sentences.<sup>205</sup>

Several states went a step further and decriminalized marijuana possession, making possession a civil infraction rather than a crime.<sup>206</sup> For example, in 2008, Massachusetts reduced possession of one ounce or less of marijuana to a civil infraction carrying a \$100 fine.<sup>207</sup> In 2010, California converted possession of less than 28.5 grams of marijuana from a misdemeanor offense to an infraction, punishable by a \$100 fine.<sup>208</sup> In 2011, Connecticut converted possession of less than half an ounce of marijuana for personal use and many drug paraphernalia offenses to an infraction punishable by a fine.<sup>209</sup> And, in 2013, Vermont converted possession of up to one ounce of marijuana from a misdemeanor to an infraction punishable by a \$200 fine.<sup>210</sup>

Most notably, a number of states have moved to legalize the possession of marijuana for recreational use. In 2012, Colorado and Washington legalized the possession and distribution of up to one ounce of marijuana for personal use.<sup>211</sup> Since 2014, five additional states—California, Maine, Massachusetts, Nevada, and Oregon—as well as the District of Columbia similarly have legalized the distribution and possession of small amounts of

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<sup>204</sup> *Id.* at 15. Although not as dramatic, in 2011, North Dakota downgraded manufacture, delivery, or possession with intent to manufacture or deliver more than one hundred pounds of marijuana from a Class A to a Class B felony. *Id.* at 14. In 2012, Georgia reclassified drug offenses using quantity thresholds; in the past, purchasing or possessing any quantity of drugs carried the same maximum sentence of fifteen years; the fifteen-year maximum now only applies to purchase or possession of four to twenty-eight grams. *Id.* at 14–15.

<sup>205</sup> U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL AMEND. TO THE SENTENCING GUIDELINES (2004).

<sup>206</sup> See generally Walter R. Cuskey et al., *The Effects of Marijuana Decriminalization on Drug Use Patterns: A Literature Review and Research Critique*, 7 CONTEMP. DRUG PROBS. 491 (1978) (discussing the various efforts in the 1970s to decriminalize marijuana). Oregon led the state movement to decriminalize recreational marijuana use in 1973 when it made the possession of small amounts of marijuana a civil offense punishable by a fine rather than a criminal offense punishable by incarceration or supervision; between 1973 and 1978, ten more states similarly decriminalized possession of marijuana: Alaska (1975), Colorado (1975), Ohio (1975), Maine (1976), California (1976), Minnesota (1976), Mississippi (1977), New York (1977), North Carolina (1977), and Nebraska (1978). *Id.*

<sup>207</sup> David Abel, *Voters Approve Marijuana Law Change*, BOSTON GLOBE (Nov. 5, 2008), [http://archive.boston.com/news/local/articles/2008/11/05/voters\\_approve\\_marijuana\\_law\\_change/](http://archive.boston.com/news/local/articles/2008/11/05/voters_approve_marijuana_law_change/) [<https://perma.cc/7AHB-7C89>] (noting that voters approved a ballot initiative making possession of less than one ounce of marijuana punishable by a civil fine of \$100).

<sup>208</sup> S.B. 1449, 2009–10 Leg., Reg. Sess. (Cal. 2010).

<sup>209</sup> S.B. 1014, Public Act No. 11-71 (Conn. 2011).

<sup>210</sup> H. 200, 2013 Gen. Assemb., Reg. Sess. (Vt. 2013).

<sup>211</sup> Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html> [<https://perma.cc/9HF4-XZH6>].



marijuana.<sup>212</sup> The federal response to legalization efforts is less clear. President Obama declared that “it’s important for [legalization of marijuana] to go forward”<sup>213</sup> at the state level; and the Justice Department under President Obama adopted prosecution policies declining in most cases to use federal law to prosecute state-licensed growers and retailers of marijuana,<sup>214</sup> indicating tacit approval of legalization efforts. Recent comments by both Attorney General Jeff Sessions and White House Press Secretary Sean Spicer, however, indicate that the Trump administration is poised to increase enforcement of federal drug laws to address recreational marijuana use, even in those states in which it is legal.<sup>215</sup>

There are strong incentives, however, to continue legalizing, reclassifying, and decriminalizing drug offenses. First, recent polls indicate strong public support for legalization—fifty-nine percent of citizens believe recreational marijuana use should be legal; there is also strong public opposition to the enforcement of federal laws against marijuana in states that have legalized recreation or medical marijuana—seventy-one percent of citizens are against federal enforcement in such instances.<sup>216</sup> Second, in the first year of legalization, Washington generated \$220 million and Colorado generated \$129 million in taxes; and neither state has experienced a notable increase in crime or substance abuse following legalization.<sup>217</sup> Some project that the legal marijuana market will generate \$23 billion in annual revenue by 2020.<sup>218</sup>

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<sup>212</sup> Trevor Hughes, *After Election, Where Could It Be Legal To Smoke Pot?*, USA TODAY (Nov. 8, 2016, 4:10 PM), <http://www.usatoday.com/story/news/politics/elections/2016/2016/11/08/marijuana-legalization-recreational-medical-california-nevada-voters-decide/93483760/> [<https://perma.cc/YHD5-QYM9>].

<sup>213</sup> David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER (Jan. 27, 2014), <http://www.newyorker.com/magazine/2014/01/27/going-the-distance-david-remnick> [<https://perma.cc/37DU-KBD9>].

<sup>214</sup> Cole Memorandum, *supra* note 22.

<sup>215</sup> Tessa Berenson, *Attorney General Jeff Sessions Just Hinted at a Crackdown on Legal Marijuana*, TIME (Feb. 28, 2017), <http://time.com/4685414/jeff-sessions-recreational-marijuana-legal-crackdown/> [<https://perma.cc/L7UY-25DR>] (quoting Attorney General Sessions as saying, “States, they can pass the laws they choose . . . I would just say, it does remain a violation of federal law to distribute marijuana throughout any place in the United States, whether a state legalizes it or not.” Also quoting Sean Spicer as saying, “I do believe you’ll see greater enforcement of [marijuana laws].”).

<sup>216</sup> Quinnipiac University Poll (Feb. 23, 2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2432> [<https://perma.cc/CU65-4SEM>] (finding that fifty-nine percent of respondents supported legalizing marijuana in the United States, ninety-five percent of respondents supported legalized marijuana for medical purposes if prescribed by a doctor, and seventy-two percent did not support the federal government should enforce federal laws against marijuana in states that have legalized medical or recreational marijuana use).

<sup>217</sup> Christopher Ingraham, *Here’s How Legal Pot Changed Colorado and Washington*, WASH. POST (Oct. 13, 2006) [https://www.washingtonpost.com/news/wonk/wp/2016/10/13/heres-how-legal-pot-changed-colorado-and-washington/?utm\\_term=.e053611ba487](https://www.washingtonpost.com/news/wonk/wp/2016/10/13/heres-how-legal-pot-changed-colorado-and-washington/?utm_term=.e053611ba487) [<https://perma.cc/5SDX-HNYG>]. In the other states legalizing marijuana use, the effects of legalization have not yet been felt, primarily because the changes are relatively recent.

<sup>218</sup> Trevor Hughes, *Legal Marijuana Sales Forecast to Hit \$23 Billion in Four Years*, USA TODAY (Mar. 20, 2016, 10:46 AM), <http://www.usatoday.com/story/money/business/2016/03/20/legal-marijuana-sales-forecast-hit-23b-4-years/82046018/> [<https://perma.cc/W34E-RC7S>].

Given the increased revenues generated from such policies and the seeming lack of public safety concerns, the attraction of legalization will likely continue in other states. The movements toward reclassifying and decriminalizing drug use will likely continue as well, as states look for ways to reduce prison populations. States like Illinois<sup>219</sup> and Alaska,<sup>220</sup> whose governor and legislature (respectively) called for a twenty-five percent reduction in state prison populations, are targeting changes to low-level drug offenses as non-controversial means of achieving long-term prison reductions. Thus, as states look for ways to either generate revenue or make more effective use of scarce revenue, these reforms will likely continue to expand.

### B. *Repealing Mandatory Sentencing Laws*

One of the most significant parts of the legislative response to the war on drugs through the 1980s and 1990s was the proliferation of mandatory sentencing laws.<sup>221</sup> In turn, one of the most consequential and symbolic legal changes since 2000 has been the repeal of many mandatory sentencing schemes.

The repeal of New York's Rockefeller Drug Laws in 2009 may be the most well known. As noted above, under the original Rockefeller Drug Laws, in place since the 1970s, any defendant convicted of selling two ounces or possessing four ounces of heroin, morphine, raw or prepared opium, cocaine, or cannabis received a mandatory minimum sentence of fifteen years in prison.<sup>222</sup> The repeal eliminated mandatory sentences and allowed many drug offenders to become eligible for diversion and drug treatment rather than incarceration.<sup>223</sup> Although the repeal of the Rockefeller Drug Laws may be the most well-known repeal effort, New York was certainly not the first state to repeal harsh mandatory sentencing laws for drug offenses. In 2001, Indiana eliminated mandatory minimums for certain non-violent drug offenses and gave judges discretion to sentence offenders to home detention and work release; the law also granted judges discretion to divert from prison drug offenders who sold drugs to support their personal

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<sup>219</sup> ILL. STATE COMM'N ON CRIMINAL JUSTICE AND SENTENCING REFORM, FINAL REPORT 3 (2016), [http://www.icjia.org/cjreform2015/pdf/CJSR\\_Final\\_Report\\_Dec\\_2016.pdf](http://www.icjia.org/cjreform2015/pdf/CJSR_Final_Report_Dec_2016.pdf) [<https://perma.cc/82F5-CSRJ>]. To accomplish that goal, the report recommends a reduction of one felony class for all drug offenses, including reducing the lowest-level felony drug offenses to misdemeanors. *Id.* at 58.

<sup>220</sup> ALA. CRIMINAL JUSTICE COMM'N, JUSTICE REINVESTMENT REPORT 19 (2015), [http://www.ajc.state.ak.us/sites/default/files/imported/acjc/recommendations/ak\\_justice\\_reinvest\\_initiative\\_report\\_to\\_acjc\\_12-9.pdf](http://www.ajc.state.ak.us/sites/default/files/imported/acjc/recommendations/ak_justice_reinvest_initiative_report_to_acjc_12-9.pdf) [<https://perma.cc/HTP4-J74Y>] (recommending reclassifying simple possession of heroin, methamphetamine, and cocaine as a misdemeanor offense, and limiting the maximum penalty for first- and second-time possession offenses to one month and six month suspended sentences, respectively).

<sup>221</sup> See STEMEN ET AL., *supra* note 5, at 118–26.

<sup>222</sup> Rockefeller, *supra* note 152. However, subsequent evaluations showed that the law had little impact on drug activity or crime. See, e.g., MAGGIO, *supra* note 152, at 30–36.

<sup>223</sup> JIM PARSONS ET AL., VERA INST. OF JUSTICE, END OF AN ERA? THE IMPACT OF DRUG LAW REFORM IN NEW YORK CITY 4 (2015).

use.<sup>224</sup> In 2002, Michigan eliminated most mandatory minimum sentences for drug offenses, reduced supervision terms for low-level drug offenses from lifetime supervision to five years probation, and revised drug quantity thresholds;<sup>225</sup> upon passage of the law, roughly 1,200 Michigan prisoners sentenced under the old mandatory minimum sentences became eligible for earlier parole consideration<sup>226</sup> and roughly 7,000 low-level drug offenders became eligible for discharge from life-time probation.<sup>227</sup> In 2003, Delaware decreased mandatory minimum sentences for drug trafficking offenses, doubled quantity thresholds for drug trafficking to ten grams, and eliminated a fifteen-year mandatory minimum prison sentence for a second-offense sale or possession with intent to sell;<sup>228</sup> in 2011, Delaware again revised most of its existing drug code, repealing mandatory sentences for most low-level drug offenses.<sup>229</sup>

The repeal of federal mandatory minimums has been much less dramatic. In 2010, Congress passed the Fair Sentencing Act, which eliminated the mandatory five-year prison sentence for simple possession of crack cocaine.<sup>230</sup> Nonetheless, other mandatory sentences remain. In the 1990s, however, Congress adopted a “safety valve,” allowing judges to avoid the imposition of a mandatory drug sentence if five factors are met: the defendant has a minimal criminal history, the offense did not involve violence or a firearm, the offense did not result in death or serious bodily injury, the defendant was not a leader in the offense, and that the defendant cooperated in providing information to the prosecution.<sup>231</sup> Of the roughly 24,000 federal

<sup>224</sup> H.B. 1892 2001 Reg. Sess., (Ind. 2001); *see also* SUBRAMANIAN & DELANEY, *supra* note 16, at 22.

<sup>225</sup> SUBRAMANIAN & DELANEY, *supra* note 16, at 7, 14.

<sup>226</sup> *Id.* at 14.

<sup>227</sup> *FAMM's Guide to the Michigan Sentencing Reforms*, FAMILIES AGAINST MANDATORY MINIMUMS (2002), <http://famm.org/Repository/Files/Guide%20to%20MI%20reforms.pdf> [<https://perma.cc/6E2U-YMN5>] (noting that at the time of enactment 6,864 people were currently serving lifetime supervision).

<sup>228</sup> H.B. 210 2003 Reg. Sess. (Del. 2003); *see also* SUBRAMANIAN & DELANEY, *supra* note 16, at 22.

<sup>229</sup> SUBRAMANIAN & MORENO, *supra* note 16, at 14. The Vera Institute of Justice report notes a long list of states repealing mandatory sentencing policies: in 2009, New Jersey amended a mandatory sentencing law to allow judges to waive a mandatory three-year sentence and, instead, place an offender on probation following a conviction for distributing, dispensing, or possessing with intent to distribute a controlled dangerous substance within one thousand feet of a school; in 2009, Minnesota removed a mandatory minimum prison sentence for low-level drug offenses, allowing a judge to sentence individuals to probation for a conviction of a fifth-degree controlled substance sale or possession; in 2009, Rhode Island removed a ten-year mandatory sentence for the manufacture, sale, or possession with intent to manufacture or sell less than one kilogram of a Schedule I or II controlled substance and removed a twenty-year mandatory sentence for offenses involving more than one kilogram. In 2010, South Carolina passed a comprehensive reform package that eliminated mandatory minimum sentences for a conviction of simple drug possession, allowed the possibility of probation for certain drug offense convictions, and added a “knowledge element” applicable to school-zone drug offenses (i.e., prosecution must prove beyond a reasonable doubt that defendants knew they were selling controlled substances in a designated school-zone area).

<sup>230</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372 (2010).

<sup>231</sup> *See* 18 U.S.C. § 3553(f) (2012).

drug offenders convicted in 2006, about thirty-seven percent (9,115 individuals) received such a “safety valve” sentence.<sup>232</sup>

Although the federal government has not moved as quickly as the states to repeal mandatory sentences, the trend in both the federal and state systems is clearly toward repeal. The U.S. Sentencing Commission has continually pressed for the repeal of federal mandatory sentencing policies and the reduction of guideline sentences for drug offenses. Moreover, states are repealing mandatory sentencing policies for many types of offenses, not just drug offenses; thus, the trend away from mandatory sentences and toward more discretion in sentencing is likely to continue.

### C. Mandating Probation

Indeed, the movement in some states is toward mandatory probation. While many states repealed mandatory prison sentences over the last fifteen years, several states went one step further, creating mandatory *probation* sentences in lieu of incarceration for some drug offenses. In 1996, Arizona voters created a mandatory probation sentence for low-level drug possession with the passage of Proposition 200.<sup>233</sup> Proposition 200 requires judges to impose a probation sentence for all non-violent offenders convicted of a first or second offense of drug possession. When initially enacted, it also required the state to release *all* non-violent drug offenders currently in prison.<sup>234</sup> According to initial reports, Proposition 200 diverted over 2,600 offenders from prison in the first year and saved Arizona taxpayers \$2.6 million.<sup>235</sup> In 2000, California voters passed Proposition 36, creating a similar mandatory probation sentence for all non-violent offenders convicted of a first or second offense of drug possession.<sup>236</sup> Despite evidence of some circumvention of

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<sup>232</sup> MATTHEW IACONETTI, U.S. SENTENCING COMM’N, IMPACT OF PRIOR MINOR OFFENSES ON ELIGIBILITY FOR SAFETY VALVE 4 (Mar. 2009), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2009/20090316\\_Safety\\_Valve.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2009/20090316_Safety_Valve.pdf) [<https://perma.cc/2BPL-2VSR>].

<sup>233</sup> Drug Medicalization, Prevention and Control Act of 1996, ARIZ. REV. STAT. ANN. § 13-901.01 (2016).

<sup>234</sup> Arizona Secretary of State, 1996 Ballot Propositions, Proposition 200 §§ 8–9, <https://www.azsos.gov/sites/azsos.gov/files/1996-ballot-propositions.pdf> [<https://perma.cc/5PDK-7CQD>] (According to analyses by the Legislative Council, Proposition 200 required “that persons who have been convicted before the proposition passes of the personal possession or use of a controlled substance such as marijuana and who are serving their sentence in prison be released on parole.”).

<sup>235</sup> Hector Tobar, *Drug Diversion Law in Arizona Paying Dividends*, L.A. TIMES (Apr. 21, 1999), <http://articles.latimes.com/1999/apr/21/news/mn-29508> [<https://perma.cc/6PET-2YKT>].

<sup>236</sup> See SCOTT EHLERS & JASON ZIEDENBERG, PROPOSITION 36: FIVE YEARS LATER, JUSTICE POLICY INST. 2 (2006), <http://www.justicepolicy.org/uploads/justicepolicy/documents/prop36.pdf> [<https://perma.cc/QT4-2FRF>]; CAL. PENAL CODE § 1210.1(b)(1) (Westlaw through 2012) (individuals are ineligible for Proposition 36 if they have a prior conviction for a serious or violent felony, or they are convicted in the same proceeding of a misdemeanor or felony offense not related to drug use).

the law,<sup>237</sup> Proposition 36 resulted in a thirty-two percent reduction in admissions to prison for drug possession and a twenty-seven percent reduction in the number of people in California prisons for drug possession during the first four years after implementation.<sup>238</sup> The law, however, had little impact on recidivism rates of program participants.<sup>239</sup> Kansas soon followed suit, creating mandatory probation sentences for some offenders convicted of drug possession.<sup>240</sup> Evaluations of the Kansas mandatory probation law found that it diverted few people from prison<sup>241</sup> and had little impact on recidivism rates;<sup>242</sup> however, researchers did find that the law significantly increased access to treatment in the state.<sup>243</sup>

In recent years, a number of additional states have created presumptive probation sentences for low-level drugs offenses as well. For example, in 2011, Kentucky created presumptive probation sentences for first-time low-level trafficking offenders; first- and second-time possession offenders who do not receive deferred prosecution must also be given presumptive probation sentences.<sup>244</sup> In 2013, Colorado created a presumptive probation sentence for low-level felony drug offenders and South Dakota created a presumptive probation sentence for all Class 5 and Class 6 felonies, which include many drug offenses.<sup>245</sup>

Overall, mandatory and presumptive probation sentences send a clear message that probation should be the default sentence for many low-level drug offenses. In addition to moving toward reclassification and decriminalization of drug offenses, many states are moving toward either community-based sanctions or fines for many types of low-level drug offenses.

<sup>237</sup> See Gregory A. Forest, Comment, *Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters?*, 36 *McGEORGE L. REV.* 627, 639–41 (2005) (finding that prosecutors increased charges, added misdemeanor charges, or filed more serious alternative charges to make some defendants ineligible under the law); Alex Ricciardulli, *Getting to the Roots of Judges' Opposition to Drug Treatment Initiatives*, 25 *WHITTIER L. REV.* 309, 367–96 (2003) (finding that judges found defendants guilty of offenses that made them ineligible for Proposition 36 and ignored disqualifying prior offenses to sentence otherwise ineligible drug possessors to prison).

<sup>238</sup> See Ehlers & Ziedenberg, *supra* note 206, at 4–5.

<sup>239</sup> See DARREN URADA ET AL., *EVALUATION OF PROPOSITION 36: THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000*, 2008 REPORT, 201–09 (2008) (finding little difference in three-year recidivism rates for Proposition 36 participants relative to a comparison group).

<sup>240</sup> Kan. Stat. Ann. § 21-4729 (repealed 2011). Hawaii passed a similar law in 2002, S.B. 1188 21st Leg. (Haw. 2002) (creating mandatory treatment and probation for first-time, nonviolent offenders convicted of drug possession or use. However, similar evaluations of the impact of the law are not available).

<sup>241</sup> Don Stemen & Andres F. Rengifo, *Reconciling the Multiple Objectives of Drug Diversion Programs: Evidence from Kansas' Senate Bill 123*, 35 *EVALUATION REV.* 642, 663–64 (2011).

<sup>242</sup> Andres F. Rengifo & Don Stemen, *The Impact of Drug Treatment on Recidivism: Do Mandatory Programs Make a Difference? Evidence from Kansas' Senate Bill 123*, 59 *CRIME AND DELINQ.* 930, 932 (2013).

<sup>243</sup> Don Stemen & Andres Rengifo, *Mandating Treatment for Drug Possessors: The Impact of Senate Bill 123 on the Criminal Justice System in Kansas*, 37 *J. CRIM. JUST.* 296, 300 (2009).

<sup>244</sup> SUBRAMANIAN & MORENO, *supra* note 16, at 15.

<sup>245</sup> *Id.* at 15–16.

*D. Expanding Deferred Prosecution and Drug Courts*

In recent years, local jurisdictions have sought to expand alternatives to traditional adjudication for drug offenders through deferred prosecution and drug courts. Deferred prosecution programs are a type of diversion program that redirects eligible persons charged with certain offenses from traditional prosecution and court proceedings into a program that monitors participants' progress toward specific goals (e.g., drug treatment or community service). These programs often have the aim of dismissing charges upon successful completion.<sup>246</sup> Although prosecutors have historically had discretion to exercise deferred prosecution,<sup>247</sup> Kentucky in 2011 made deferred prosecution the presumptive outcome for first- and second-time possession offenses.<sup>248</sup> Under the law, a prosecutor may deny a request for deferred prosecution only by providing substantial and compelling reasons.<sup>249</sup> Even then, when the state denies defendants deferred prosecution, it must give them a presumptive probation sentence.<sup>250</sup> In 2011, North Carolina expanded eligibility for deferred prosecution to all first-time felony drug possession defendants and required that all eligible defendants participate in the program.<sup>251</sup> Finally, in 2011, Ohio expanded eligibility for deferred prosecution to offenders whose drug use contributed to the commission of the offense, which extended deferred prosecution beyond those charged with a drug offense.<sup>252</sup>

Since the late 1980s, local jurisdictions have also responded to the dramatic increase in drug offenses by developing specialized drug courts to handle only drug offenses and those with substance abuse problems.<sup>253</sup> These drug treatment courts focus on providing therapeutic services to those identified as substance abusers.<sup>254</sup> Since Miami-Dade County established the first drug court in the United States in 1989, drug courts spread rapidly throughout the country; by 2009, over 1,600 drug courts were operating in the United States.<sup>255</sup> Despite their popularity, not all jurisdictions had the option to create a drug court. In recent years, several state legislatures—Alabama, Indiana, Pennsylvania, and South Dakota—have authorized local jurisdictions to do so.<sup>256</sup> In 2013, West Virginia went beyond simply authorizing

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<sup>246</sup> Matt Senko, *Prosecutorial Overreaching in Deferred Prosecution Agreements*, 19 S. CAL. INTERDISC. L. J. 163, 169 (2009).

<sup>247</sup> *Id.* at 186.

<sup>248</sup> SUBRAMANIAN & MORENO, *supra* note 16, at 18.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> See, e.g., CELINDA FRANCO, CONG. RESEARCH SERV., R41448, DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 1–2 (2010).

<sup>254</sup> See *id.* at 9.

<sup>255</sup> RYAN S. KING & JILL PASUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 1 (2009).

<sup>256</sup> See SUBRAMANIAN & MORENO, *supra* note 16, at 19–21.

localities to create drug courts by requiring every judicial district in the state to establish a drug court by July 1, 2016.<sup>257</sup>

Although drug courts and diversion are not new tools, the recent expansion of these alternatives is an indication that traditional approaches to drug offenses are no longer desired. More importantly, the expansion of eligibility for these programs to individuals who are not charged with a drug offense, but who have a substance abuse problem, is a further indication that policy-makers are beginning to look toward addressing the underlying causes of crime and to move away from simply criminalizing substance abuse.

### E. Conclusion

The recent reforms adopted in the states—decriminalization, legalization, mandatory probation, drug courts, and deferred prosecution—seek to divert individuals from prison and, in some instances, to require individuals to engage in drug treatment. The use of such diversion programs and compulsory drug treatment has long been a key component of U.S. drug policy,<sup>258</sup> and research indicates that such forms of compulsory drug treatment can have a positive impact on a number of key outcomes, including reducing drug use and criminal behavior.<sup>259</sup> The recent expansion of alternatives like drug courts to populations beyond drug offenders is a further indication of a clear movement away from criminalization and toward treatment as a response to drug offenses. Indeed, the last fifteen years has seen a significant shift in the war on drugs, and the increased acceptance of opioid addiction as a medical problem will likely continue this trend.

## IV. AFTER THE WAR: MOVING BEYOND THE WAR ON DRUGS

While some of the recent reforms were initially brought on by fiscal concerns over the rising costs of incarceration associated with drug offenses, additional concerns about the proportionality of drug sentences and the effectiveness of harsh sentencing practices to combat drug use have affected calls for change. Moreover, during these shifts, two phenomena occurred: the rise in the use and abuse of prescription drugs (primarily opioids) and the

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<sup>257</sup> *Id.* at 21.

<sup>258</sup> For reviews of compulsory treatment programs, see M. Douglas Anglin & Yi Hser, *Criminal Justice and the Drug-abusing Offender: Policy Issues of Coerced Treatment*, 9 BEHAV. SCI. & L. 243, 244–48 (1991); James A. Inciardi, *Compulsory Treatment in New York: A brief Narrative History of Misjudgment, Mismanagement, and Misrepresentation*, 18 J. DRUG ISSUES, 547, 549–56 (1988).

<sup>259</sup> See, e.g., Adele Harrell, U.S. Dep't of Justice, *Drug Courts and the Role of Graduated Sanctions* (1998); Denise C. Gottfredson et al., *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL'Y 171, 189–91 (2003); BETH M. HUEBNER & JENNIFER COBBINA, *The Effect of Drug Use, Drug Treatment participation, and Treatment Completion on Probationer Recidivism*, 22 J. DRUG ISSUES 619, 620–22 (2007); Douglas Young et al., *Criminal Recidivism in Three Models of Mandatory Drug Treatment*, 27 J. SUBSTANCE ABUSE TREATMENT 313, 319–22 (2004).

increased acceptance of marijuana use. These phenomena have further shifted both the rhetoric and response to drug use away from strict criminal justice responses to a more medical, treatment-based response to drug use.

### A. *Opioids and Prescription Drug Abuse*

Beginning in the 1980s, pain management advocates began a campaign against undertreated pain.<sup>260</sup> This effort led to a liberalization in the use of narcotics to treat pain, the rise of opiates as one of the most widely prescribed pharmaceuticals in the United States,<sup>261</sup> and, by the 2000s, a new “epidemic”<sup>262</sup> of prescription drug abuse. Indeed, as the prescription of opioids for pain management increased, the ready availability and use of prescription drugs was normalized and the use of prescription drugs for non-medical purposes increased as well.

In recent years, the misuse of prescription drugs has become a growing public health concern. National estimates from the 2014 National Survey on Drug Use and Health (NSDUH) report that nearly 4.3 million Americans had used prescription pain relievers for non-medical purposes.<sup>263</sup> The 2013 Treatment Episodes Data Set (TEDS) reported that the number of individuals admitted to substance abuse treatment facilities due to non-heroin opiate/opioid abuse increased 570% between 1999 and 2013, from 23,000 admissions to more than 154,000.<sup>264</sup> The Centers for Disease Control and Prevention reported that in 2015, over thirty-three thousand opioid-related deaths occurred in the United States, accounting for sixty percent of all drug-related deaths in the United States.<sup>265</sup>

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<sup>260</sup> Thomas Catan & Evan Perez, *A Pain-Drug Champion Has Second Thoughts*, WALL ST. J. (Dec. 17, 2012), <http://online.wsj.com/news/articles/SB1000142412788732447830457817342657044604> [<https://perma.cc/FJ3S-XEAS>].

<sup>261</sup> Matthew Herper, *America’s Most Popular Drugs*, FORBES (May 11, 2010) <https://www.forbes.com/2010/05/11/narcotic-painkiller-vicodin-business-healthcare-popular-drugs.html> [<https://perma.cc/FHV8-FSNL>] (noting that Hydrocodone, a narcotic, was the most prescribed drug in 2010, citing a report from IMS Health, a company that tracks sales).

<sup>262</sup> DEP’T OF HEALTH & HUMAN SERVS., *THE OPIOID EPIDEMIC: BY THE NUMBERS*, (2016) <https://www.hhs.gov/sites/default/files/Factsheet-opioids-061516.pdf> (describing both opioid abuse and opioid-related deaths and “epidemic”).

<sup>263</sup> See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP’T OF HEALTH AND HUMAN SERVS., *BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 7* (2015), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf> [<https://perma.cc/LGG6-9ZTN>].

<sup>264</sup> See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP’T OF HEALTH AND HUMAN SERVS., *TREATMENT EPISODES DATA SET (TEDS) 2003–2013* (2015), at 45, tbl.1.1a (2015), [https://www.samhsa.gov/data/sites/default/files/2003\\_2013\\_TEDS\\_National/2003\\_2013\\_Treatment\\_Episode\\_Data\\_Set\\_National.pdf](https://www.samhsa.gov/data/sites/default/files/2003_2013_TEDS_National/2003_2013_Treatment_Episode_Data_Set_National.pdf) [<https://perma.cc/SA6M-N5PU>]; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP’T OF HEALTH AND HUMAN SERVS., *TREATMENT EPISODES DATA SET (TEDS) HIGHLIGHTS—2002* (2004), at 4, tbl.1a (2004), [https://www.dasis.samhsa.gov/dasis2/teds\\_pubs/2002\\_teds\\_highlights\\_rpt.pdf](https://www.dasis.samhsa.gov/dasis2/teds_pubs/2002_teds_highlights_rpt.pdf) [<https://perma.cc/LK7G-5MK9>].

<sup>265</sup> Rudd et al. *supra* note 32.



In the end, the rise of prescription drug addiction and overdoses in the 2000s led many pain management advocates to admit that the push for the increased availability and use of opiates ignored many of the potential risks of addiction and abuse.<sup>266</sup> As patients continue to seek pain relief, the rise of opioid abuse calls into question medicine's approach to pain management and creates new conflicts in United States approaches to illegal drug use. Indeed, the question of how to address prescription drug misuse falls to both health care professionals and criminal justice system actors and creates conflicts between legitimate approaches for treating pain and the punishment for engaging in the illegal use of drugs. Moreover, because the illegal use of drugs in this context often begins from a legitimate, legal use of such drugs, the response has been more focused on treatment than punishment, marking a significant change in both national rhetoric and practice around drug abuse.<sup>267</sup>

The medical community has begun to address the issue by better policing prescriptions and long-term patient use of such drugs, indicating a movement toward supply reduction by decreasing prescriptions and targeting doctors to change prescription practices. This is markedly different than the supply reduction practices surrounding illicit, non-prescription drugs (i.e., cocaine, heroin, etc.), since the pharmaceutical and medical communities largely can control supply as both the sellers and distributors of these drugs. Given the medical community's recognition that a change in practice must occur, the abuse of prescription opioids may decrease. However, the decrease in the availability of prescription opioids has already led to an increase in heroin use in many parts of the country, as people search for alternatives.<sup>268</sup> Thus, there is likely not a quick end to the opioid epidemic.

Nonetheless, the prevalence of legitimate opioid use and subsequent opioid addiction has also somewhat normalized or humanized drug addiction. In the long term, this can change the national perspective on many drug offenses, particularly possession offenses. Since opioid use is seen as legitimate and opioid addiction may be seen as accidental, this may change how policymakers and the public perceive substance use and abuse. Indeed, opioid addiction is seen as requiring a medical treatment response—the most appropriate response to a medically induced problem. Moreover, the recent rise of heroin use is often discussed as an unfortunate side effect of both opioid addiction and efforts to reduce it. This has the potential to carry over to the abuse of other substances, which may be seen as the result of other underlying circumstances similar to opioid addiction.

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<sup>266</sup> See Catan & Perez, *supra* note 260.

<sup>267</sup> See Tim Dickinson & Ethan Nadelmann, *The Real Drug Czar*, ROLLING STONE (June 6, 2013), <http://www.rollingstone.com/culture/news/ethan-nadelmann-the-real-drug-czar-20130606> [<https://perma.cc/Z7MV-ZHG2?type=image>]; Dickinson, *supra* 24.

<sup>268</sup> Theodore J. Cicero, Matthew S. Ellis, & Hillary S. Surratt, *Effect of Abuse-Deterrent Formulation of OxyContin*, NEW ENG. J. MED., 367:187–89 (2012) (noting that when access to OxyContin decreased, sixty-six percent of patients abusing OxyContin “indicated a switch to another opioid, with ‘heroin’ the most common response”).

Indeed, the discussion of criminal justice responses has sparked a debate about the need to embrace a treatment approach to substance abuse. Speaking at the National Prescription Drug Abuse and Heroin Summit in 2016, President Obama, for example, noted, “[F]or too long, we have viewed the problem of drug abuse generally in our society through the lens of the criminal justice system. . . . [T]he only way that we reduce demand is if we’re . . . thinking about this as a public health problem.”<sup>269</sup> On the same day, the White House released a plan for “\$1.1 billion in new funding to help every American with an opioid use disorder who wants treatment to get the help they need.”<sup>270</sup> There is strong support even among conservative policymakers to provide overdose-reversal drugs to law enforcement officers<sup>271</sup> and to create needle exchange programs.<sup>272</sup>

As some observers note, “The severity of the epidemic has worn down historic Republican resistance to public health driven drug policy.”<sup>273</sup> But this may be due to the demographics of prescription drug users—opioid abuse and overdose deaths affect a wider cross-section of Americans. While African Americans remain over-represented among those arrested and incarcerated for a drug offense, Whites account for a large percent of drug overdose deaths. In 2014, Whites accounted for eighty-three percent of all drug overdose deaths in the United States and eighty-five percent of all opioid-related overdose deaths.<sup>274</sup> As President Obama noted in his announcement shifting the U.S. approach to opioids:

Part of what has made it previously difficult to emphasize treatment over the criminal justice system has to do with the fact that

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<sup>269</sup> Barack Obama, President of the United States, Remarks by the President in Panel Discussion at the National Prescription Drug Abuse and Heroin Summit (Mar. 29, 2016), in *The White House*, President Barack Obama, <https://obamawhitehouse.archives.gov/the-press-office/2016/03/29/remarks-president-panel-discussion-national-prescription-drug-abuse-and> [<https://perma.cc/J2QZ-5QQW>].

<sup>270</sup> FACT SHEET: Obama Administration Announces Additional Actions to Address the Prescription Opioid Abuse and Heroin Epidemic, *The White House*, PRESIDENT BARACK OBAMA (Mar. 28, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/28/fact-sheet-obama-administration-announces-additional-actions-address> [<https://perma.cc/3ELS-JAXB>].

<sup>271</sup> Corey S. Davis et al., *Engaging Law Enforcement in Overdose Reversal Initiatives: Authorization and Liability for Naloxone Administration*, 105 AM. J. PUB. HEALTH 8, 1530–37 (noting that in 2015, more than 220 law enforcement agencies carried naloxone resulting in more than 10,000 administered overdose reversals administered by police officers).

<sup>272</sup> Audie Cornish & Hal Rogers, *Congress Ends Ban On Federal Funding For Needle Exchange Programs*, NPR (Jan. 28, 2016, 5:31 PM), <http://www.npr.org/2016/01/08/462412631/congress-ends-ban-on-federal-funding-for-needle-exchange-programs> [<https://perma.cc/U2YL-UU47>].

<sup>273</sup> Dickinson, *supra* note 24.

<sup>274</sup> Rose A. Rudd, et al., *Increases in Drug and Opioid Overdose Deaths—United States, 2000–2014*, 64 MORBIDITY AND MORTALITY WKLY. REP. 1378 (2016) (Figures in Table 1 report a total of 47,055 drug overdose deaths in 2014 and 37,945 drug overdose deaths involving White individuals in 2014; thus, White individuals account for 80.6% of total drug overdose deaths); Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY AND MORTALITY WKLY. REP. 1445 (2016) (Figures in Tables 1 and 2 report total and race-specific numbers of opioid overdose deaths in 2014).

the populations affected in the past were . . . stereotypically identified as poor, minority . . . . And I think that one of the things that's changed in this opioid debate is a recognition that this reaches everybody.<sup>275</sup>

Indeed, this has accompanied a marked change in how policymakers talk about drug users, moving away from focusing on “junkies” and “addicts” to discussing Americans with “opioid abuse disorders.”<sup>276</sup> This shift in rhetoric is profoundly significant in the racial context of the war on drugs, which disproportionately affected African Americans and equated inner-city minority neighborhoods with drugs and crime.<sup>277</sup> As the prevalence of opioid addiction and the rise of heroin abuse becomes somewhat normalized in non-minority communities, this shift in rhetoric around all substance use will likely continue. Moreover, as the medical use of marijuana increases, there is an opening for a change in approach to not just prescription drugs, but other illicit drugs as well.

### B. Marijuana

As noted above, state-level approaches to decriminalizing and legalizing recreational marijuana use have shifted considerably over the last fifteen years. At the same time, more than half the states have moved to legalize the medical use of marijuana. By the end of 2016, seven states had legalized recreational marijuana, seventeen states had decriminalized marijuana possession, and twenty-eight states had legalized the medical use of marijuana.<sup>278</sup> Thus, at the state level, rhetoric and practice around the use of marijuana has shifted considerably.

This shift is driven by a variety of changes in attitudes as public perceptions of marijuana use nationally have moved significantly toward legalization.<sup>279</sup> Part of this shift is the increasing support for the perceived medicinal benefits of marijuana and strong near universal support for the legalization of medicinal use of marijuana.<sup>280</sup> It is also driven by a realization of the economic benefits of marijuana legalization. Research firms estimate that the national legal market for recreational and medicinal marijuana is \$7.1 billion annually<sup>281</sup> and states have already experienced significant tax revenues from legalized recreational marijuana sales.<sup>282</sup>

The federal government's approach to marijuana, however, has not mirrored that of the states. As noted above, the Department of Justice under

<sup>275</sup> Obama, *supra* note 269.

<sup>276</sup> Dickinson, *supra* note 24.

<sup>277</sup> ALEXANDER, *supra* note 14, at 49–51.

<sup>278</sup> NORML, <http://norml.org/states> [https://perma.cc/E3K2-Q5R2].

<sup>279</sup> Quinnipiac University Poll *supra* note 216 (finding that fifty-nine percent of respondents supported legalizing marijuana in the United States).

<sup>280</sup> *Id.* (showing that ninety-three percent of survey respondents supported legalized marijuana for medical purposes if prescribed by a doctor).

<sup>281</sup> Dickinson, *supra* note 24.

<sup>282</sup> Ingraham, *supra* note 217.

President Obama declined in most cases to use federal law to prosecute state-licensed growers and retailers of marijuana<sup>283</sup> and noted tacit acceptance of legalization efforts at the state level.<sup>284</sup> However, marijuana remains listed as a Schedule I drug under federal scheduling, equivalent to heroin and other “drugs with no currently accepted medical use and a high potential for abuse.”<sup>285</sup> Moreover, the federal criminal and sentencing laws addressing marijuana remain unchanged; federal laws prohibiting the cultivation and distribution of marijuana remain in effect, which means that the recent change in administration or Justice Department policies could chill states’ efforts toward legalization.<sup>286</sup> At the very least it could create a conflict in national approaches and confusion regarding the status of medical and recreational marijuana use at the state level if federal enforcement practices change.

Despite the federal government’s conflicting approach, the decriminalization and legalization at the state level will likely continue for the reasons noted above. The question, however, is whether the changing views on marijuana will translate into efforts to decriminalize and legalize other substances. Changing perceptions of drug use and drug offenders has already resulted in shifting the possession of controlled substances from felonies to misdemeanors and the decriminalization of possession of small quantities of controlled substances (not just marijuana) in several states. Thus, states seem to be moving toward a sentencing scheme in which prison is reserved for only the most serious drug offenses—those involving very large quantities of drugs or violence. This signifies a marked change in the war on drugs and one that could be embraced by both fiscally conservative policymakers and liberal reformers.

#### CONCLUSION

The past fifteen years have witnessed a remarkable change in the U.S. war on drugs. After thirty years of increasingly harsh enforcement and sentencing policies directed as both sellers and users of drugs, policymakers have begun to repeal many of the most draconian drug policies and to rethink approaches to the least dangerous drug offenders—repealing mandatory sentences, creating mandatory probation and treatment sentences, and decriminalizing or legalizing simple possession. These changes, however, have been reserved largely to the states.

If the states are any indication, there is clear public and some policymaker support to move beyond the war on drugs and to adopt a medical, treatment-based approach to drug use consistent with most Western democracies. Although drug courts and diversion are not new tools, states are ex-

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<sup>283</sup> Cole Memorandum, *supra* note 23, at 3.

<sup>284</sup> Remnick, *supra* note 213.

<sup>285</sup> 21 U.S.C. § 812 (2012).

<sup>286</sup> Berenson, *supra* note 215.

panding eligibility requirements for drug courts and diversion to include a wider range of individuals not even charged with a drug offense. In other words, many states are seeking to change their sentencing practices regarding property offenses or other non-violent offenses when individuals have a documented substance abuse problem. The result is an embrace of treatment rather than criminalization as a more appropriate response to substance abuse and a recognition by the system of the underlying causes of criminality. This puts states on the path not just to dismantle the war on drugs, but potentially to address the problem of mass incarceration. Dismantling the war on drugs, however, is no small feat. The sentencing policies and practices established under the war on drugs took thirty years to create and require political will to alter. Moreover, the apparatus for enforcing the war on drugs is entrenched in the criminal justice system and includes sunk costs in law enforcement, courts, jails, and prisons to apprehend, process, and house large numbers of drug offenders. Nonetheless, the movement at the state level is significant and marks a clear shift in policy.

Although the rhetoric around drug offenses was moderated at the federal level under the Obama administration, harsh federal drug policies passed in the 1980s and 1990s remain largely intact, and now often conflict with the policies of many states. As the opioid epidemic continues unabated, the changing face of drug use and addiction may, in turn, change federal approaches to drug enforcement. However, there is little indication that the Trump administration or Congress has drug reforms or criminal justice reform as priorities. In fact, the new Trump administration has called for a return to law and order policies, aggressive policing tactics, and a focus on inner-city violence. These factors do not bode well for federal reforms around drugs or criminal justice. Given the rhetorical change from the previous administration and the influence of federal funding on local law enforcement, this may also create problems for state and local policymakers. The sweeping policy reforms across the states and the changes in public perception about drugs, however, have created a significant buffer that will likely insulate jurisdictions as they seek to further dismantle the war on drugs.