

Policing and Drug Policy: A Working Roundtable Discussion

Problem Statement

In 1971, in a special message to Congress, President Nixon declared that drug abuse was “public enemy number one.” Within a day, media outlets coined Nixon’s declaration “the War on Drugs.” Nixon’s message included an ask for \$155 million to launch federal drug enforcement programs and policies consistent with the enforcement of the Controlled Substances Act (CSA) he signed in to law in the previous year. Codified at 21 USC §§ 801-904, the CSA repealed nearly all previous federal substance control law and replaced it with a new, comprehensive regulatory scheme.¹ In 1973, Nixon formed the Drug Enforcement Administration as the enforcement arm of the CSA.

Though Nixon is often credited with launching the War on Drugs, Ronald Reagan’s presidency, which occurred contemporaneous to the crack cocaine epidemic, catalyzed the government-led strict enforcement and sentencing for drug related offenses across the nation. In 1982, using the national platform of her husband’s presidency, First Lady Nancy Reagan became the face of the “Just Say No” campaign that was promoted in classrooms throughout the country. Then, in 1986, President Reagan ushered in the Anti-Drug Abuse Act.

With \$1.7 billion in funding, the Anti-Drug Abuse Act imposed mandatory minimum sentencing schemes; broadened the scope of civil asset forfeiture from drugs and drug equipment to cash, bank accounts, land, jewelry, cars, and more; and set the penalties for crack and powdered cocaine at 100:1 (500 grams of powdered cocaine to trigger the same mandatory minimum sentence as 5 grams of crack cocaine).² Critics of the Act have argued that these three aspects played a critical role in shaping the current state of policing drugs and mass incarceration of drug offenders.³

The increased focus on enforcing drug laws, along with mandatory sentencing schemes, largely contributed to federal prison populations tripling from 24,640 inmates in 1980 to 100,958 in 1995.⁴ In January 2022, approximately 42% (63,994) of those serving federal prison time were doing so for non-violent, drug related crimes.⁵ The socioeconomic and racial realities of the crack epidemic combined with the disproportionate sentencing for crack cocaine, resulted in equally disproportionate incarceration rates for black men.⁶ The expansion of civil asset forfeiture incentivized law enforcement “to take a more militarized approach . . . [increasing] the frequency

¹ Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATH. U.L. REV. 586, 589–93 (1973).

² Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99–570, 100 Stat. 3207.

³ NAT’L RSCH. COUNCIL, NAT’L ACADS. OF SCIS., ENG’G, AND MED., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 3* (2014) (ebook) (“The best single proximate explanation of the rise in incarceration is not rising crime rates, but the policy choices made by legislators to greatly increase the use of imprisonment as a response to crime. Mandatory prison sentences, intensified enforcement of drug laws, and long sentences contributed not only to overall high rates of incarceration, but also especially to extraordinary rates of incarceration in black and Latino communities.”).

⁴ *Past Inmate Population Totals*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops_ (last updated Mar. 9, 2023).

⁵ *Federal Offenders in Prison*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/research/quick-facts/federal-offenders-prison> (last visited Mar. 12, 2023).

⁶ *Crack Epidemic*, Encyclopedia Britannica, <https://www.britannica.com/topic/crack-epidemic> (last visited Mar. 12, 2023).

of raids and use of tactical squads,” through which they could support their budgets using seized assets without formal charges or convictions for the property owners.⁷

States soon followed the federal government’s lead. Modeled after the federal CSA, the 1990 Uniform Controlled Substances Act (UCSA) provided the states with a complimentary model of drug scheduling.⁸ Forty-six states, including Arizona, adopted the UCSA, though sentencing schemes vary from state to state.⁹ Federal support and incentives to States, especially through the 1998 Byrne Memorial State and Local Law Enforcement Assistance Program, encouraged expansion and development of narcotics task forces by providing the financial backing necessary for the staffing and equipment used by police tactical and narcotics units.¹⁰

Though states have discretion to use federal funds for non-law enforcement purposes, such as drug treatment, indigent defense, crime prevention and education, and court and prosecutorial programming, the bulk of such funds have historically been spent by state and local governments on law enforcement.¹¹ In fiscal year 2020, for example, 71% of the total allocated funds were spent on law enforcement, while no other category’s funding exceeded a single digit percentage.¹² This increased stable funding, coupled with the direct financial benefits of asset forfeiture in the asset saturated culture of drug markets resulted in significant increases to the policing of drugs, and not just at the highest levels.

In the last 7 years, the War on Drugs that brought focused criminalization on drug use collided with the epidemic of opioid addiction. In Arizona alone, the number of non-fatal opioid overdoses doubled from 1,632 in 2017, to 3,257 in 2022 and the number of confirmed opioid overdose deaths nearly doubled from 923 to 1,773 in the same time period.¹³ Law enforcement and the criminal justice system have been unable to reconcile the historical drug enforcement practices and resulting sentencing schemes—which became the norm through the CSA—with the massive public health crisis of the opioid epidemic.

Public health advocates and criminal justice scholars have been calling for shifts in police and criminal justice response to drug addiction for decades. The proliferation of opioid addiction has forced a reckoning within the criminal justice system to respond with a public health ethic. “Police discretion guided by a public health ethic takes the profession’s putative role of protecting life and delivering public safety and operationalizes it with decisions that equitably improve health outcomes.”¹⁴ This public health ethic can be implemented through a multitude of responses that can be applied individually or in combination to advance public health, officer safety, and the de facto decriminalization of drug use. When a sufficient infrastructure exists, law enforcement can

⁷ *American War on Drugs*, CRACKDOWN, <https://policing.umhistorylabs.lsa.umich.edu/s/crackdowndetroit/page/national-and-state-level-war-on-drugs1> (last visited Mar. 12, 2023).

⁸ Unif. Controlled Substances Act, 9 U.L.A. 1 (Supp.1990).

⁹ Richard L. Braun, *Uniform Controlled Substances Act of 1990*, 13 CAMPBELL L. REV. 365, 365 (1991).

¹⁰ Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARVARD L. & POL’Y REV. 77, 81 (2016).

¹¹ BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., ACTIVITY REPORT: JUSTICE ASSISTANCE GRANT PROGRAM 2 (2021), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/JAG-Activity-Report-FY-2020.pdf>.

¹² *Id.* at 2–3 (90% of all personnel allocations were directed to law enforcement; 29% of task force funding went to drug task forces).

¹³ *Opioid Prevention: Weekly Opioid Data*, ARIZ. DEP’T OF HEALTH SERVS., <https://www.azdhs.gov/opioid> (last visited Mar. 12, 2023).

¹⁴ Brandon del Pozo et al., *Beyond Decriminalization: Ending the War on Drugs Requires Recasting Police Discretion Through the Lens of a Public Health Ethic*, 21 AM. J. BIOETHICS 4, 41–44 (2021).

employ pre-arrest diversion and crisis response strategies including direct referrals to substance-use treatment, either following use of naloxone to prevent overdose deaths or in lieu of citation or arrest drug use-related calls or where there is non-drug related, low-level criminal conduct.

Studies have shown that the traditional model of criminalizing drug use through arrest and incarceration is ineffective for reducing recidivism and addiction, while harm-reduction models show notable promise through both improved public health and reduced criminal justice involvement.¹⁵ One such model is Law Enforcement Assisted Diversion (LEAD). The LEAD model is a pre-arrest diversion model that allows police to divert individuals with substance-use, mental health, and other cognitive disorders to community based and harm reduction services rather than engaging in typical criminal justice tactics.¹⁶ LEAD has been implemented in multiple cities nationally with promising results. Evaluation of Seattle’s LEAD program showed a 60% reduction in re-arrest within six-months of program participation and LEAD participants were 87% less likely to be sentenced to prison.¹⁷

In drug-use-related crimes, all actors, from manufacturers, to sellers, to users are voluntarily participating in the criminal activity of drug sales and use. Any resultant harms to individuals are seen as self-inflicted, and because they are self-inflicted, the non drug-using community’s response is often unsympathetic and punitive. Focusing on alternatives to incarceration and criminal justice involvement for use-related crimes and non-violent substance-use-driven crimes (trespass, shoplifting, minor theft) and developing processes in which police can act as agents of harm reduction in the public health crisis of opioid addiction, are critical for turning the tide.

Questions to consider:

1. How can stakeholders help law enforcement to implement harm reduction, rather than criminalization, strategies in the context of drug policy?
2. What kinds of social infrastructure would best aid officers in adopting a public health ethic when responding to substance-use or substance-use-driven crimes (e.g., crisis response teams, pre-arrest diversion programs, or substance-use treatment options)?
3. What additional legislative action would further harm reduction and alternatives to criminalization for drug-use and drug-use related activity?
4. How can law enforcement and drug policy stakeholders participate in shifting the public discourse about addiction stigma and the related criminalization of drug use?
5. What negative impacts did the “War on Drugs” have on marginalized communities?
6. Did the “War on Drugs” policy shift officers from community policing to “Us vs Them” attitude?

¹⁵ Alex Stevens, *Applying Harm Reduction Principles to the Policing of Retail Drug Markets*, INT’L DRUG POL’Y CONSORTIUM (Mar. 19, 2013), <https://idpc.net/publications/2013/03/applying-harm-reduction-principles-to-the-policing-of-retail-drug-markets>; Beckett, *supra* note 10, at 85.

¹⁶ INT’L ASSOC. OF CHIEFS OF POLICE, *ASSESSING THE IMPACT OF LAW ENFORCEMENT ASSISTED DIVERSION (LEAD): A REVIEW OF RESEARCH 3* (2020), <https://www.theiacp.org/sites/default/files/IDD/Review%20of%20LEAD%20Evaluations.pdf>.

¹⁷ *Id.* at 93.

7. How have “no knock” search warrants impacted law enforcement and marginalized communities?
8. Are “no knock” search warrants relevant today?
9. How has the “War on Drugs” rhetoric impacted society?