



**Unjust and Untenable:  
Why D.C. Must Remove Criminal Penalties  
for Drug and Paraphernalia Possession**

## Acknowledgements

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HIPS promotes the health, rights, and dignity of individuals and communities impacted by sexual exchange and/or drug use due to choice, coercion, or circumstance. HIPS provides compassionate harm reduction services, advocacy, and community engagement that is respectful, non-judgmental, and affirms and honors individual power and agency.



**Leitner Center**

for International Law and Justice

AT FORDHAM LAW SCHOOL, NEW YORK CITY

The Walter Leitner International Human Rights Clinic (“Clinic”) in the Leitner Center for International Law and Justice at Fordham University School of Law in New York City trains students to be strategic, reflective, and creative social justice advocates through real-world human rights lawyering experiences. The Clinic works in partnership and solidarity with grassroots justice organizations on human rights projects. The Clinic employs a range of advocacy methods including legal and policy analysis, human rights trainings, public interest litigation, submissions before human rights bodies, and direct legal assistance.

# HIPS

HIPS is a harm reduction organization, which promotes the health, rights, and dignity of individuals and communities impacted by drug use due to choice, circumstance, or coercion. In addition, HIPS provides compassionate harm reduction services, advocacy, and community engagement that is respectful, non-judgmental, and affirms and honors individual power and agency.<sup>1</sup>

As a frontline, harm reduction organization working directly with communities who have been affected by the War on Drugs, HIPS is calling for the removal of criminal penalties for possession of all drugs and paraphernalia for personal use in Washington D.C. (“D.C.”). Committed to the promotion of human rights of people who use drugs, HIPS believes that the removal of criminal penalties is the appropriate rights-based and public health approach to drug use. Removing criminal penalties for drug possession respects people’s right to be free from discrimination, right to bodily autonomy, right to privacy, and right to be free from cruel, inhuman, or degrading treatment.

HIPS advocates for a harm reduction-based public health approach to drug use and calls for supportive services for people who use drugs, including the provision of housing, job training, health care, and other services to decrease their political, economic, and social oppression and promote their human rights.

## Introduction

As a harm reduction organization committed to advocating for the health, rights, and dignity of people who use drugs in D.C, HIPS calls for the removal of criminal penalties for personal use of all drugs and paraphernalia in D.C.

Since Donald Trump was inaugurated as President of the United States, the Justice Department under Attorney General Jeff Sessions has reinvigorated its failed War on Drugs policy. The War on Drugs has detrimentally

impacted low income communities of color across the United States who are most directly affected by mass incarceration. This draconian policy has not only failed to reduce drug use or drug-related deaths, but also has irreparably harmed Black people who experience disproportionately high rates of arrest and conviction for drug offenses. Attorney General Jeff Sessions has repeatedly stated his support for the War on Drugs and his intention to enact policy changes that are “tough on crime,” including the prosecution of a greater number of non-violent drug related offenses and the application of mandatory minimum sentences.<sup>2</sup> The Justice Department’s call for escalating the War on Drugs threatens to further exacerbate racial disparities in the criminal justice system and to legitimize systematic discrimination on a national level.<sup>3</sup>

The War on Drugs has sought to aggressively punish people of color who use drugs, resulting in egregious human rights violations. In 2015, 85% of all drug related arrests across the United States were for possession offenses.<sup>4</sup> A disproportionate number of those arrested are people of color, despite consistent findings that rates of drug use do not differ across race or ethnicity.<sup>5</sup> For example, Black people comprise just 13% of the U.S. population, but constitute 35% of the state prison population incarcerated for simple possession charges.<sup>6</sup> The racial disparities in

2 Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017), [https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3\\_story.html?utm\\_term=.517b47c4e098](https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.517b47c4e098)

3 *Jeff Sessions Pushes New War on Drugs While Killing Obama-Era Police Reform Measures*, DEMOCRACY NOW! (Apr. 11, 2017), [https://www.democracynow.org/2017/4/11/jeff\\_sessions\\_pushes\\_new\\_war\\_on](https://www.democracynow.org/2017/4/11/jeff_sessions_pushes_new_war_on).

4 *It’s Time for the U.S. to Decriminalize Drug Possession and Drug Use*, DRUG POL’Y ALL. 6 (July 2017) [hereinafter *It’s Time*], [http://www.drugpolicy.org/sites/default/files/documents/Drug\\_Policy\\_Alliance\\_Time\\_to\\_Decriminalize\\_Report\\_July\\_2017.pdf](http://www.drugpolicy.org/sites/default/files/documents/Drug_Policy_Alliance_Time_to_Decriminalize_Report_July_2017.pdf).

5 *Racial Disparities in Arrests in the District of Columbia: Implications for Civil Rights and Criminal Justice Reform*, WASH. LAW. COMM. FOR CIV. RTS. & URB. AFF. 16 (July 2013) [hereinafter *Washington Lawyers’ Committee Report*], [https://www.washlaw.org/pdf/wlc\\_report\\_racial\\_disparities.pdf](https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf).

6 *Id.* at 8.

1 See *What We Are About*, HIPS, <http://www.hips.org/mission.html> (last visited Aug. 28, 2017).



arrests in D.C. are similarly disproportionate. Out of the 32,489 drug arrests that took place between 2010-2016, 88.84% of arrests were of Black people.<sup>7</sup> These statistics clearly indicate the gross racial disparities in arrests. Beyond the arrests themselves, criminal justice system involvement has long-term, irreversible consequences for people who use drugs, their families, and their friends.

The War on Drugs causes significant harm to people who use drugs, which amounts to egregious human rights violations. First, the inaccessibility of adequate health care during incarceration can lead to deterioration in mental or physical health. After release from incarceration, people who use drugs continue to endure negative consequences, including unemployment, difficulty obtaining essential health care and affordable housing, and high risk of homelessness. The collateral consequences of incarceration also extend beyond the impacts on the individual. Families are ripped apart where parents are separated from their children and partners are torn away from each other. In addition, challenges to financial and housing security can also negatively affect broader family and social networks. Furthermore, the War on Drugs has had devastating effects on communities of color.

In October 2016, Tess Borden authored a joint report on behalf of Human Rights Watch and the American Civil Liberties Union entitled *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States* (“Every 25 Seconds”). This report focuses on the racially discriminatory enforcement of drug possession laws, noting that police make more arrests for mere possession than for any other crime in the United States, amounting to 1.25 million arrests per year.<sup>8</sup> The deleterious consequences of these

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7 Metropolitan Police Department Data for Drug Arrests 2010-2016 (obtained by a Freedom of Information Act request submitted by the Drug Policy Alliance) [hereinafter MPD Drug Arrests 2010-2016]. This data excludes marijuana arrests during the same period.

8 *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUM. RTS. WATCH & AM. C.L. UNION 2,4 (Oct. 2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

arrests, particularly on communities of color, are evaluated in this report at length, from long periods of incarceration to being barred from essential supportive services once returning home.

In July 2017, the Drug Policy Alliance released their report calling for an end to criminal penalties for drug possession and use entitled *It's Time for the U.S. to Decriminalize Drug Use and Possession* (“It’s Time”).<sup>9</sup> This report details the failures of the War on Drugs and advocates for the removal of criminal penalties as the essential step to unwind the failings of these punitive, abstinence-based drug policies. *It's Time* also highlights how communities of color, but most specifically, the Black community, have borne the brunt of the hyper-criminalization of drug possession and use.<sup>10</sup>

To amplify the impact of these reports, HIPS, with the support of the Walter Leitner International Human Rights Clinic (“Leitner Clinic”) at the Leitner Center for International Law and Justice, is issuing *Unjust and Untenable: Why D.C. Must Remove Criminal Penalties for Drug and Paraphernalia Possession*, a report and policy statement that illuminates the harms of criminalizing drug possession in D.C. focusing on local perspectives.<sup>11</sup> While the recent decriminalization of marijuana in D.C. represents progress toward the decriminalization of personal use amounts for all drugs, many people who use

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9 See *It's Time*, *supra* note 4.

10 *Id.* at 8.

11 Law students in the Leitner Clinic conducted desk research on the War and Drugs in the United States; D.C. specific structures and policies that serve as a barrier to progressive drug policy; the case of marijuana decriminalization in D.C. and its implications; and international human rights obligations that highlight decriminalization as the paramount public health and human rights policy. In March 2017, law students in the Leitner Clinic conducted interviews in D.C. with roughly ten individuals that participate in the Chosen Few, the drug user organizing group based at HIPS; Darby Hickey, Senior Legislative Analyst for Councilman David Grosso; Shawn Hilgendorf, Legislative Director for Councilmember Robert C. White Jr.; and Kaitlyn Boecker, Policy Coordinator at Drug Policy Alliance. Clinic students also conducted a phone interview with Lieutenant Andrew Struhar of the Metropolitan Police Department.

drugs remain marginalized since possessing even small amounts are still subject to criminal penalties. The goal of *Unjust and Untenable* is to analyze the racial disparities in the enforcement of drug laws, address the harsh long-term consequences of criminalizing drug use, and suggest policy solutions to drug use through a public health and human rights lens.

## I. Impact of the War on Drugs in D.C.

The harms caused by the War on Drugs in D.C. disproportionately affect low income communities of color. Substantial racial disparities in drug-related arrests in D.C. reflect the discriminatory enforcement of drug possession laws. Data from 2010-2016 indicates that roughly nine out of ten drug possession arrests in D.C. involved Black people.<sup>12</sup>

First, this section will lay out the D.C.-specific lawmaking process and drug criminalization contexts. Then, this section will explain marijuana's unique decriminalized status. Finally, this section will conclude by discussing the racial disparities in drug arrests in D.C.

### Lawmaking Authority in D.C.

The D.C. government is constrained in its ability to pass its own laws autonomously. The Home Rule Act transferred select authority to a local D.C. government to manage its local affairs despite the fact that the U.S. Constitution states that Congress maintains legislative authority over D.C.<sup>13</sup> A thirteen-person Council and a

<sup>12</sup> See MPD Drug Arrests 2010-2016, *supra* note 7; see also *Washington Lawyers' Committee Report*, *supra* note 5, at 2.

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 17 (stating that Congress has the authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"); District of Columbia Self-Government and Governmental Reorganization Act,

Mayor are elected by D.C. residents. The D.C. Council passes laws, which must be signed by the Mayor.<sup>14</sup> After Mayoral approval, all laws are subject to Congressional Review for a specified period.<sup>15</sup> Congress can create a joint resolution that can overturn D.C.'s Act, if approved by the President.<sup>16</sup> However, if Congress does not act, or if the President does not approve the joint resolution, then the Bill becomes a law. As such, Congressional review, and the threat of the passage of a joint resolution, has often served as a barrier for progressive D.C. lawmakers.

Budgetary processes can also be used to limit D.C.'s autonomy. Congress can add riders into the federal budget, specifying how D.C. can spend federal or local taxpayer dollars. In addition, D.C.'s budget and tax revenue are subject to Congressional Review.<sup>17</sup> Congress has used these budgetary processes to prohibit federal or municipal funding for syringe exchange programs, restrict D.C. from reducing penalties associated with Schedule I drugs, and block the ability to implement a regulatory framework for marijuana.<sup>18</sup> Determining how D.C. can

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Pub. L. No.93-198, 87 Stat. 774 (1973) (codified as D.C. Code § 1-221 (1973)), renamed "The Home Rule Act" as part of The District of Columbia Revitalization Act, title XI of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>14</sup> D.C. Councilmembers, COUNCIL OF D.C., <http://dc-council.us/council> (last visited Aug. 28, 2017).

<sup>15</sup> Some criminal legislation requires a sixty-day period of Congressional Review. See *How a Bill Becomes a Law*, COUNCIL OF D.C., <http://dccouncil.us/pages/how-a-bill-becomes-a-law> (last visited Aug. 28, 2017).

<sup>16</sup> See *id.*

<sup>17</sup> Benjamin Freed, *Five Myths about D.C. Home Rule*, WASH. POST (May 20, 2016), [https://www.washingtonpost.com/opinions/five-myths-about-dc-home-rule/2016/05/20/6761a73c-1dd5-11e6-9c81-4be1c14fb8c8\\_story.html?utm\\_term=.b4217547f2fb](https://www.washingtonpost.com/opinions/five-myths-about-dc-home-rule/2016/05/20/6761a73c-1dd5-11e6-9c81-4be1c14fb8c8_story.html?utm_term=.b4217547f2fb).

<sup>18</sup> Abigail Hauslohner, *Study: Needle-Exchange Program Leads to Big Drop in D.C. HIV Infections*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/local/dc-politics/study-needle-exchange-program-leads-to-big-drop-in-dc-hiv-infections/2015/09/02/ce383e14-51a5-11e5-9812-92d5948a40f8\\_story.html?utm\\_term=.f767849a4f44](https://www.washingtonpost.com/local/dc-politics/study-needle-exchange-program-leads-to-big-drop-in-dc-hiv-infections/2015/09/02/ce383e14-51a5-11e5-9812-92d5948a40f8_story.html?utm_term=.f767849a4f44); Aaron C. Davis, *House Republicans Block Funding for D.C. Marijuana Decriminalization*, WASH. POST (June 25, 2014) [hereinafter Davis, *House Republicans Block Funding*], [https://www.washingtonpost.com/local/dc-politics/house-republicans-block-funding-for-dc-marijuana-decriminalization/2014/06/25/d6854ba8-fc6e-11e3-8176-f2c941cf35f1\\_story.html?utm\\_term=.07d7b83e4c29](https://www.washingtonpost.com/local/dc-politics/house-republicans-block-funding-for-dc-marijuana-decriminalization/2014/06/25/d6854ba8-fc6e-11e3-8176-f2c941cf35f1_story.html?utm_term=.07d7b83e4c29);

use its money through budget riders provides a lower threshold than joint resolution, still enabling Congress to intervene in D.C.'s policy development.

Congressional interference also has precluded the implementation of progressive policies in reproductive health care, public health, and harm reduction.<sup>19</sup> In a Republican-dominated Congress, drug policy is a controversial issue. House Republican opposition has stymied the implementation of progressive drug policy in D.C., as seen in vehement opposition to D.C.'s efforts to legalize marijuana in 2015.<sup>20</sup> Despite these barriers, however, D.C. Council continues to introduce and pass progressive legislation.

### Drug Laws in D.C.

In D.C., narcotics and other drugs are regulated by the Controlled Substances Act ("CSA"). CSA establishes five schedules of drugs, with Schedule I drugs defined as those with the most potential for abuse, and Schedule V as those with the least potential for abuse. Schedule I drugs, including opiates, heroin, and cocaine, carry the harshest criminal penalties. Penalties for possessing drugs for personal use vary, depending on the type and quantity. Possessing most Schedule I or II drugs are misdemeanor offenses which can result in up to a 180-day sentence and up to a \$1,000 fine.<sup>21</sup> There are two exceptions. First, PCP possession is a felony, carrying a sentence of up to three years

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Jacob Sullum, *Rider Aimed At Stopping Marijuana Legalization In Washington, D.C., Reflects Prohibitionist Weakness*, FORBES (Dec. 11, 2014), <https://www.forbes.com/sites/jacobsullum/2014/12/11/rider-aimed-at-stopping-marijuana-legalization-in-washington-d-c-is-a-prohibitionist-victory-that-signals-defeat/#7ffe90163596>.

19 Aaron C. Davis, *The District is about to Declare its Independence – from Congress*, WASH. POST (Apr. 14, 2016), [https://www.washingtonpost.com/local/dc-politics/the-district-gets-ready-to-declare-independence--from-congress-2016/04/14/bc61776c-00d4-11e6-b823-707c79ce3504\\_story.html?tid=a\\_inl&utm\\_term=.150f404a3774](https://www.washingtonpost.com/local/dc-politics/the-district-gets-ready-to-declare-independence--from-congress-2016/04/14/bc61776c-00d4-11e6-b823-707c79ce3504_story.html?tid=a_inl&utm_term=.150f404a3774).

20 Press Release, Drug Pol'y All., White House Opposes Republican Amendment Undermining D.C. Marijuana Law Reform (July 14, 2014), <http://www.drugpolicy.org/news/2014/07/white-house-opposes-republican-amendment-undermining-dc-marijuana-law-reform>.

21 D.C. CODE § 48–904.01 (2016).

in prison.<sup>22</sup> Secondly, current marijuana laws in D.C. establish that a person over the age of twenty-one can possess up to two ounces of marijuana. Additionally, laws permit the transfer of up to one ounce of marijuana without payment, but selling marijuana remains illegal.<sup>23</sup>

Possession with Intent to Distribute results in harsher criminal penalties than simple possession. The Metropolitan Police Department and the Department of Justice have internally determined an amount for each drug that they consider to be for personal use, but it is not codified in a statute.<sup>24</sup> This subjectivity in discerning whether an individual intends to distribute can have significant ramifications on how an individual is charged and subsequently sentenced.<sup>25</sup> The maximum penalty for possession with intent to distribute Schedule I or II drugs can result in a thirty-year prison sentence and a \$75,000 fine.<sup>26</sup>

Possession of drug paraphernalia also carries criminal penalties of up to 180 days in jail and a \$1,000 fine for a first offense.<sup>27</sup> A prior conviction could increase the individual's sentence to up to two years.<sup>28</sup> Drug paraphernalia is defined broadly, including testing equipment to "identify[] or analyz[e] the strength, effectiveness, or purity of a controlled substance," any containers intended to package small amounts of controlled substances, syringes, pipes, and spoons.<sup>29</sup>

Sentences for drug-related offenses are case specific, but distribution to minors and in drug-free zones including areas 1,000 feet away from schools, on college campuses, in public swimming areas, playgrounds, public libraries, or around public housing facilities can double sentences and fines.<sup>30</sup>

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22 D.C. CODE § 48–904.01(d)(2) (2016).

23 See *District of Columbia Laws and Penalties*, NORML, <http://norml.org/laws/item/district-of-columbia-penalties>.

24 Telephone Interview with Lieutenant Andrew Struhaar of the Metropolitan Police Department, in Washington D.C. (Mar. 2017).

25 *Id.*

26 D.C. CODE § 48–904.01 (2016).

27 D.C. CODE § 48–904.10 (2016).

28 D.C. CODE § 48–1103(b)(2) (2016).

29 D.C. CODE § 48–1101 (2016).

30 D.C. CODE §§ 48–904.06, 07a (2016); see also Nicole D. Porter & Tyler Clemons, *Drug-Free Zone Laws: An Overview of State Policies*, SENT'G PROJECT 7 (Dec. 2013),



## Status of Marijuana in D.C.

The Marijuana Possession Decriminalization Amendment Act of 2014 changed marijuana and marijuana-paraphernalia possession from a criminal offense to a civil penalty.<sup>31</sup> However, it still remains a misdemeanor for anyone to consume marijuana in a public space, which includes “a street, alley, park, sidewalk, or parking area,” in a car, or any place that is open to the public.<sup>32</sup> The reasonable articulable suspicion standard that justifies a search was also amended, stating that the odor of marijuana, the possession or suspicion of possession of more than one ounce of marijuana, or the proximity of marijuana to any cash or currency without additional evidence cannot be used to establish the suspicion of a crime.<sup>33</sup> When the D.C. Council’s Judiciary and Public Safety Committee reviewed the bill to remove criminal penalties for marijuana possession, they contextualized the issue of marijuana criminalization within troubling racial disparities of arrests and convictions in D.C.<sup>34</sup>

In November 2014, Initiative 71, a ballot measure calling for the legalization of marijuana, was introduced in D.C. Roughly 65 percent of D.C. voters approved legalizing small amounts of marijuana.<sup>35</sup> Initiative 71 removed the application of the civil fine and permits the possession of up to two ounces of marijuana and the cultivation of up to six marijuana plants (of which three can be flowering).<sup>36</sup> Initiative 71 also permits transfer without payment of up to one ounce of marijuana to another person twenty-one years of age or older and decriminalizes the use and selling drug paraphernalia for the use, growing,

or processing of marijuana or cannabis.<sup>37</sup> However, under Initiative 71, it remains a crime to consume marijuana in public.<sup>38</sup>

House Republicans passed an amendment to a spending bill, known as the Harris Rider, which constrains D.C. from implementing Initiative 71 despite overwhelming support of the regulation and legalization of marijuana among D.C. voters.<sup>39</sup> While marijuana remains decriminalized, D.C. is prohibited from regulating the sale or taxation of marijuana.

## Racial Disparities in D.C.

Removing criminal penalties for drug possession and paraphernalia is a key remedy not only to address racial disparities in the criminal justice system, but also to curb mass incarceration and reframe drug policy interventions through a public health lens. Gross racial disparities in drug arrests in D.C. indicate that laws criminalizing drug possession are enforced in discriminatory ways and disproportionately harm low income communities of color.

Law enforcement has significant discretion in deciding whether to arrest, pursue charges, or sentence individuals, which can be applied in a racially discriminatory manner. Furthermore, it notes that “existing federal prosecutorial guidelines do not adequately address unwarranted racial/ethnic disparities in the criminal justice system or propose ways in which prosecutors may reduce such disparities.”<sup>40</sup> The authority

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also Justin Wm. Moyer, *D.C. Arrests for Public Use of Marijuana Nearly Tripled Last Year*, WASH. POST (July 11, 2017) (noting the continued trend of low income communities of color shouldering the disproportionate burden of arrests for smoking marijuana in public), [https://www.washingtonpost.com/local/public-safety/dc-arrests-for-public-use-of-marijuana-nearly-tripled-last-year/2017/07/11/906bea50-627d-11e7-8b2b-b6c-8c99c3bea\\_story.html?utm\\_term=.6848b04d4632](https://www.washingtonpost.com/local/public-safety/dc-arrests-for-public-use-of-marijuana-nearly-tripled-last-year/2017/07/11/906bea50-627d-11e7-8b2b-b6c-8c99c3bea_story.html?utm_term=.6848b04d4632).

<sup>39</sup> Davis, *House Republicans Block Funding*, *supra* note 18.

<sup>40</sup> The Brennan Center for Justice and the National Institute on Law and Equity co-authored a report on racial disparities in federal prosecutions, which outlines the immense influence of federal prosecutors in sentencing defendants. See James E. Johnson et al., *Racial Disparities in Federal Prosecutions*, BRENNAN CTR. FOR JUST. & NAT’L INST. ON LAW & EQUITY 2 (Mar. 2010),

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<http://sentencingproject.org/wp-content/uploads/2015/12/Drug-Free-Zone-Laws.pdf>.

<sup>31</sup> 61 D.C. Reg. 3482 §§ 101, 103 (Apr. 4, 2014).

<sup>32</sup> *Id.* §§ 301(a)(1)-(3).

<sup>33</sup> *Id.* § 407(b).

<sup>34</sup> Committee on the Judiciary & Public Safety Report, Bill 20-409, Marijuana Possession Decriminalization Amendment Act of 2014 (Jan. 15, 2014).

<sup>35</sup> See *General Election Certified Results*, D.C. Bd. OF ELECTIONS (Dec. 3, 2014), [https://www.dcboee.org/election\\_info/election\\_results/2014/November-4-General-Election](https://www.dcboee.org/election_info/election_results/2014/November-4-General-Election).

<sup>36</sup> 62 D.C. Reg. 880 §§ 2(a)(1)(A),(C), (b) (2015). Multiple individuals over the age of 21 are allowed to grow 12 plants (of which six can be flowering). *Id.*

and discretion prosecutors have allows space for implicit bias to determine how criminal defendants are sentenced and charged.<sup>41</sup> This also applies specifically in the War on Drugs context where Black people “experience discrimination at every stage of the criminal justice system and are more likely to be stopped, searched, arrested, convicted, harshly sentenced and saddled with a criminal record for mere possession.”<sup>42</sup> Prosecutorial discretion and the significant potential for racial bias pose distinct challenges to equitable prosecution.<sup>43</sup>

The Washington Lawyers’ Committee and the American Civil Liberties Union (“ACLU”) authored reports that highlight substantial racial disparities in drug arrests in D.C., which the Committee on the Judiciary and Public Safety Committee heavily cited in their findings.<sup>44</sup> In 2013, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs published a report, *Racial Disparities in Arrests in the District of Columbia: Implications for Civil Rights and Criminal Justice in the Nation’s Capital*, analyzing arrest trends from 2009 to 2011 and demonstrating that significant racial disparities for drug arrests exist in D.C. Although Black and white people use drugs at the same rate, nine out of ten drug arrests involved Black defendants.<sup>45</sup> Similarly, the rate of drug arrests in predominately white Wards was significantly higher for Black people, and there were significantly more drug arrests in Wards with higher percentages of Black residents.<sup>46</sup> These facts illustrate that drug laws are enforced in a racially discriminatory manner. Although the report declined to make policy recommendations, the police data alone revealed stark racial disparities in arrests and provided a foundation for progressive policy responses.<sup>47</sup>

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[http://www.brennancenter.org/sites/default/files/legacy/Justice/ProsecutorialDiscretion\\_report.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/ProsecutorialDiscretion_report.pdf).

41 See *id.* at ii, 4.

42 *It’s Time*, *supra* note 4, at 8.

43 See *id.* at 3.

44 See Committee on the Judiciary & Public Safety Report, *supra* note 34.

45 See *Washington Lawyers’ Committee Report*, *supra* note 5, at 2.

46 See *id.* at 2, 30.

47 Peter Hermann, *Study Cites Racial Disparities in D.C. Arrests*, WASH. POST (July 12, 2013), [https://www.washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39\\_story.html?utm\\_term=.16a460c4eced](https://www.washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39_story.html?utm_term=.16a460c4eced).

The ACLU released a report in 2013 entitled, *The War on Marijuana in Black and White*, which offers comparative analysis of marijuana possession arrests in 975 counties in all fifty states and D.C. between 2001 and 2010. The report highlights patterns of racially disparate rates of marijuana possession arrests across the United States. It notes that despite similar rates of marijuana usage among Black and white people, on average, Black people are 3.73 more likely to arrested for possession of marijuana than white people.<sup>48</sup> The report bolsters the Washington Lawyers’ Committee analysis and highlights racially disparate arrest rates for marijuana possession in D.C., noting specifically that 91% of all arrests for marijuana possession were of Black people. In 2010, D.C. had the highest per capita spending on marijuana possession law enforcement, greater than any state.<sup>49</sup> The report calls for a redirection of public funds away from the criminal justice system and into strengthening public health and harm reduction programs.<sup>50</sup>

Although possession of marijuana is now decriminalized in D.C., stark racial disparities in possession of other illicit drugs persist. The impacts of the War on Drugs continue to disproportionately harm communities of color. According to the 2010-2016 MPD arrest data, 88.84 percent of those arrested for all drug offenses in D.C. are Black.<sup>51</sup> For certain drugs, the disparities are even more pronounced: 96 percent of those arrested for PCP and synthetic marijuana are Black, and 91 percent of those arrested for crack cocaine are Black.<sup>52</sup> Disparities for drug paraphernalia arrests are slightly lower where 82 percent of the 7,049 people arrested are Black.<sup>53</sup> As was the case for

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[washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39\\_story.html?utm\\_term=.16a460c4eced](https://www.washingtonpost.com/local/study-cites-racial-disparities-in-dc-arrests/2013/07/11/02a46260-ea18-11e2-8f22-de4bd2a2bd39_story.html?utm_term=.16a460c4eced).

48 Ezekiel Edwards, Will Bunting & Lynda Garcia, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, AM. C.L. UNION 24 (June 2013), <https://www.aclu.org/files/assets/ac-lu-thewaronmarijuana-rel2.pdf>.

49 See *id.* at 23.

50 See *id.* at 90-91.

51 See MPD Drug Arrests 2010-2016, *supra* note 7.

52 *Id.*

53 See *id.*



marijuana arrests, higher percentages of arrests take place in Wards with higher percentages of Black residents. While this trend was consistent across drugs, this trend was starkest for PCP arrests: 22 percent of those arrested were in Ward 5, 28 percent were in Ward 7, and 29 percent of those were in Ward 8.<sup>54</sup> By contrast, Ward 3 which is the Ward with the highest percentage of white residents, consistently saw the lowest percentage of drug arrests even though use rates are consistent across demographics. This data shines a light on the fact that D.C.'s Black community disproportionately bears the brunt of the criminalization of drug possession and use.

## II. Harms Caused by the War on Drugs in D.C.

The War on Drugs has not only failed to reduce drug use, drug-related crime, and overdose deaths, but it also causes significant, unjustified harms to people who use drugs. The harms caused by the War on Drugs begin with police surveillance and discriminatory drug enforcement practices, continue throughout all stages of the criminal justice system, and extend through life following release from prison. One interviewee described her lived experiences as a target of the War on Drugs and stated that she “feel[s] like [she] live[s] in an occupied territory.”<sup>55</sup>

The consequences of the War on Drugs and the stigmatization of a drug conviction follow people who use drugs long after their release from prison. Brenda lamented the far-reaching harms associated with a drug conviction and stated that: “[y]ou’ve already done your time, and they’re still punishing you.”<sup>56</sup> Returning citizens face significant challenges upon re-entry. Criminalizing the possession of drugs for personal use prevents many people from full social, civil, and economic integration. Ramifications of drug convictions or arrests include barriers to obtaining employment, housing, and healthcare. The stigma associated with drug use, criminal

convictions, and incarceration can destroy family structures and broader social networks.

### A. Employment

While a criminal record can often preclude individuals from certain jobs that require background checks, the labor market in D.C. poses distinct challenges for formerly incarcerated people seeking employment. Although college equivalent programs exist in some prisons, these programs are generally underfunded.<sup>57</sup> In 2012, more than 50 percent of job vacancies in the D.C. area required a college degree, and by 2020, it is expected that more than 76 percent of jobs in D.C. will require a college degree or higher.<sup>58</sup> These high educational qualifications and a shortage of entry-level job opportunities make the employment prospects in D.C. especially difficult for returning citizens.

The Fair Criminal Record Screening Amendment Act,<sup>59</sup> known as “Ban the Box” legislation, prohibits certain public and private employers from asking about drug convictions early on in the hiring process.<sup>60</sup> However, the effectiveness of this legislation in deterring employers from discrimination is also contested.<sup>61</sup> Significant

57 Eric Westervelt, *Measuring the Power of a Prison Education*, NPR (July 31, 2015), <http://www.npr.org/sections/ed/2015/07/31/427741914/measuring-the-power-of-a-prison-education>.

58 *Beyond Second Chances: Returning Citizens’ Re-entry Struggles and Successes in the District of Columbia*, COUNCIL FOR CT. EXCELLENCE vi (2016) [hereinafter *Beyond Second Chances Report*], <http://www.courtexcellence.org/uploads/File/BSC-FINAL-web.pdf>.

59 The Fair Criminal Record Screening Amendment Act passed in D.C. in and was effective on December 17, 2014. The D.C. Office of Human Rights handles complaints of violations of the Fair Criminal Record Screening Amendment Act and it has received a greater number of complaints than it can handle in a timely manner, resulting in significant delays. An analysis of the impacts of “Ban the Box” legislation concluded that “[t]hese delays slow the enforcement of [the legislation], delay resolution for concerned complainants and do not meet OHR’s own goal for closing . . . related complaints.” See [http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report\\_0.pdf](http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf).

60 See *Returning Citizens and Employment*, OFFICE OF HUM. RTS., <https://ohr.dc.gov/page/returning-citizens-and-employment>.

61 See *Beyond Second Chances Report*, *supra* note

54 *Id.*

55 Interview at HIPS, in Washington D.C. (Mar. 2017).

56 *Id.*

barriers, including background checks and public access to criminal records online, can still preclude people who use drugs from finding jobs.

Felony charges, misdemeanor charges, and non-adjudicated arrests can be discovered through a background check process and can prevent individuals from fully participating in the formal labor market.<sup>62</sup> Modern technology and information accessibility have heightened the personal costs that come with a criminal record.<sup>63</sup> Employers can easily, and privately, search for publicly available criminal histories that may deter them from hiring previously charged or incarcerated individuals. One interviewee reflected on her search for employment and explained that “[i]n D.C., you can ‘Ban the Box,’ but you can’t ban Google. Most people look me up and toss out my resume.”<sup>64</sup> While explicit discrimination is outlawed, private, more inconspicuous discrimination is difficult to monitor and prohibit. Renee explained that her stays in jail were years apart and each consisted of a night in jail, but she was unable to find a job for ten years following her arrest because her criminal history remained on her record.<sup>65</sup> Mary explained that her drug conviction precluded her from keeping her government job. While she tried to conceal her criminal history at first, she was eventually let go once her employer discovered her conviction. Even after she received her advanced degree, she had difficulty finding a job in her field of study. Interviewees reiterated that discrimination in traditional fields of employment

produce long lasting barriers to economic stability.

Barriers to employment impede access to regular and legal income for people convicted of drug crimes. Securing a job in a traditional field of employment can be crucial to stabilize an individual’s life, irrespective of drug use or criminal history. Since engaging in street economies often involves criminalized activity, limiting interaction with the criminal justice system reduces the risk of incarceration. Criminal records, and employers’ ability to easily access information about criminal histories, can preclude people who use drugs from accessing formal labor markets and achieving economic stability, a vital prerequisite to successful reintegration and avoidance of further ensnarement in the criminal justice system.

## B. Housing

Drug arrests and convictions also impose barriers to securing housing for previously incarcerated individuals. Exclusion from rental opportunities and from certain public housing opportunities increase the likelihood of homelessness as well as subsequent contact with law enforcement and the criminal justice system. Unemployment as a result of a criminal record can impede access to stable housing. Application fees, complicated rental processes, and monetary burdens, including security deposits and furniture, can present challenges to obtaining and settling into a home.<sup>66</sup>

Housing instability is a particularly relevant issue in D.C. given the rising housing prices—D.C. is ranked as one of the most expensive cities in the United States.<sup>67</sup> These difficulties compounded by the burden of having a criminal history can create insurmountable hurdles to securing a place to live following an individual’s release from incarceration.

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58, at 49.

62 Brendan Lynch, *Never Convicted, but Held Back by a Criminal Record*, TALK POVERTY (Dec. 9, 2014), <https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/>.

63 See Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS (Dec. 2, 2014) [hereinafter *One Strike and You’re Out*], [https://www.americanprogress.org/issues/poverty/reports/2014/12/02/102308/one-strike-and-youre-out/?\\_ga=2.257437576.24648867.1493757495-616762919.1493757495](https://www.americanprogress.org/issues/poverty/reports/2014/12/02/102308/one-strike-and-youre-out/?_ga=2.257437576.24648867.1493757495-616762919.1493757495).

64 See *Beyond Second Chances Report*, *supra* note 58, at 49.

65 Interview at HIPS, *supra* note 55; see also *One Strike and You’re Out*, *supra* note 63.

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66 Interview at HIPS, *supra* note 55.

67 See *Beyond Second Chances Report*, *supra* note 58, at vi.

## Public Housing

Federal law allows public housing authorities and landlords of subsidized housing to deny individuals with drug-related criminal histories access to public housing.<sup>68</sup> For individuals already in public housing, a drug related conviction is grounds for eviction, not only for the individual, but also any other household members.<sup>69</sup> Furthermore, Section 8 housing policy prohibits drug use on the premises, putting people who use drugs at increased risk of eviction.<sup>70</sup> These risks are exacerbated by the economic marginalization that people who use drugs face, such as unemployment or low wages as a consequence of economic, institutional, or political structures.<sup>71</sup> The possibility of exclusion from public housing and the heightened risk of eviction may increase the likelihood of homelessness among people who use drugs.

## Private Rental Opportunities

Difficulties finding housing for people who use drugs are not limited to public housing, but are compounded by exclusion from private housing markets. Landlords can refuse to rent to individuals with drug-related criminal histories, limiting access to already scarce rental opportunities.<sup>72</sup> While The Fair Criminal Record Screening for Housing Act of 2016 seeks to protect rental applicants with a criminal record and prohibits landlords from inquiring about criminal history until after an offer has been made, the legislation allows landlords to withdraw offers “to achieve a substantial, legitimate, nondiscriminatory interest” which can be interpreted based on the crime and the age of the offender when the crime was committed.<sup>73</sup> However, the effectiveness of this legislation in deterring

68 See *Every 25 Seconds*, *supra* note 8, at 148.

69 See *It's Time*, *supra* note 4, at 10.

70 *Id.*

71 John Hudak, *A Reality Check on 2016's Economically Marginalized*, BROOKINGS INST. (NOV. 16, 2016), <https://www.brookings.edu/blog/fixgov/2016/11/16/economic-marginalization-reality-check/>.

72 Interview at HIPS, *supra* note 55.

73 The Fair Criminal Record Screening for Housing Act of 2016 was effective in D.C. as of April 7, 2017. See *Beyond Second Chances Report*, *supra* note 58, at 32.

discrimination will depend on the capacity of the Office of Human Rights to adjudicate complaints in a just and timely manner.<sup>74</sup> Credit checks and background checks can also reveal criminal histories. Numerous interviewees noted that the results of background checks played a role in their experiences of housing instability.<sup>75</sup>

Some landlords exploit individuals with criminal histories by soliciting application fees without any intention of renting to those tenants. Jacob discussed his own experience with rental exploitation, explaining that after he scrambled to secure the funds to pay the rental application fee, his application was denied.<sup>76</sup> Mary discussed her personal experience with rejections by landlords and explained that: “[l]andlords won't rent to you once they do a credit or background check. This makes people scared to move.”<sup>77</sup> The pervasive issue of housing instability in D.C., coupled with the discrimination faced by individuals with a criminal history, illuminate the lingering effects of criminalization on individuals' abilities to reintegrate after returning from incarceration.

## Correlation between Homelessness and Involvement in the Criminal Justice System

Interviewees discussed patterns of drug use, housing instability, and homelessness. When people with criminal histories and broken social networks are unable to secure housing, their likelihood of experiencing homelessness increases. The co-occurrence of homelessness, drug use, and incarceration in D.C. reveal the need for greater health and social services as alternatives to the criminal justice system. In the United States, the rate of incarceration of homeless individuals is 7.5 to 11.3 times higher than rates of incarceration of the general public.<sup>78</sup>

74 The D.C. Office of Human Rights is tasked to “eradicate discrimination, increase equal opportunity and protect human rights for persons who live in or visit the District of Columbia.” See *About*, OFFICE OF HUM. RTS., <https://ohr.dc.gov/page/about-ohr>.

75 Interview at HIPS, *supra* note 55.

76 *Id.*

77 *Id.*

78 See *LEAD Program Evaluation: The Impact of LEAD on Housing, Employment and Income/*



Economic marginalization, arrest and incarceration, and homelessness are interconnected. Discussing the cyclical nature of his personal struggles with drug use and access to housing, John posed the following question: “[w]hy do I use? Because I don’t have a place to live. Why don’t I have a place to live? Because of a drug conviction.”<sup>79</sup> Mary shared the personal consequences of homelessness for her family and described the trauma of being a homeless mother. She explained that “[w]hen you’re homeless with a child, you’re so overwhelmed, you can’t even advocate for yourself.”<sup>80</sup>

The homeless population is particularly vulnerable to discriminatory and exploitative treatment by the police due to the effective criminalization of homelessness.<sup>81</sup> People experiencing homelessness are at an increased risk of being detected using drugs since it is more difficult to find private places to use. Interactions with the criminal justice system, which often impose fees and other economic costs, can drive homeless people deeper into positions of instability and marginalization.<sup>82</sup>

Drug convictions, compounded by the stigmatization of homelessness, make it difficult for homeless people who use drugs to access social services, drug treatment, employment, housing, or social support.

## C. Healthcare

The criminalization of drugs for personal use has detrimental effects on the health and access to mental and physical healthcare services for people who use drugs, both while they are in prison and once they have been released. People who use drugs need access to quality mental health care, Medication Assisted Therapy (“MAT”), overdose prevention, and sterile

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*Benefits*, U. OF WASH. LEAD EVALUATION TEAM 3 (Mar. 2016), [http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing\\_employment\\_evaluation\\_final.PDF](http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing_employment_evaluation_final.PDF).

<sup>79</sup> *Id.*

<sup>80</sup> Interview at HIPS, *supra* note 55.

<sup>81</sup> *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NAT’L L. CTR. ON HOMELESSNESS & POVERTY, at 6, [HTTPS://WWW.NLCHP.ORG/DOCUMENTS/NO\\_SAFE\\_PLACE](https://www.nlchp.org/documents/NO_SAFE_PLACE).

<sup>82</sup> See *id.* at 34.

equipment for using drugs.

Drug treatment can only be effective when it is informed by harm reduction principles of meeting people where they’re at and acknowledging the social, health, and economic realities facing people who use drugs.<sup>83</sup> Evidence suggests that “using the criminal justice agencies to address problematic drug use overall causes more harm than good,” as individuals are driven “away from testing, prevention, treatment, and other effective public health services,” that are more appropriately provided by the healthcare system.<sup>84</sup> Criminalization also exacerbates stigmatization, resulting in the social isolation and discrimination of individuals who desire harm reduction services or treatment but in turn, are often discouraged from seeking them out.<sup>85</sup>

Interviewees echoed that prison sentences cannot eliminate a physical or mental dependence, but can instead worsen the physical and mental states of incarcerated people who use drugs. Sufficient drug treatments are generally unavailable in prisons.<sup>86</sup> Lamenting the lack of effective drug programs in prison or the total absence of drug treatment in prison, one interviewee noted that throughout the entirety of his prison sentence “the addiction was in [me].”<sup>87</sup>

Interviewees echoed the importance of treatment that addresses physical and mental health needs and promotes stability.<sup>88</sup> Renee noted that for some people, mental health treatment is integral to the effectiveness of a drug program, and that mental health issues and drug dependence are often coupled.<sup>89</sup> Other interviewees discussed drug use as a form of self-medication for various physical or mental conditions.

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<sup>83</sup> See *Principles of Harm Reduction*, HARM REDUCTION COALITION, <http://harmreduction.org/about-us/principles-of-harm-reduction/>.

<sup>84</sup> See *It’s Time*, *supra* note 4, at 8.

<sup>85</sup> *Id.* at 9.

<sup>86</sup> Mary Carmichael, *The Case for Treating Drug Addicts in Prison*, NEWSWEEK (June 28, 2010), <http://www.newsweek.com/case-treating-drug-addicts-prison-73561>.

<sup>87</sup> *Id.*

<sup>88</sup> Dustin DeMoss, *The Nightmare of Prison for Individuals with Mental Illness*, HUFFINGTON POST (Mar. 25, 2015), [http://www.huffingtonpost.com/dustin-demoss/prison-mental-illness\\_b\\_6867988.html](http://www.huffingtonpost.com/dustin-demoss/prison-mental-illness_b_6867988.html).

<sup>89</sup> Interview at HIPS, *supra* note 55.

Brenda noted that she “has met so many people using drugs because of the pain of living with certain diseases [and conditions]” including sickle cell anemia and physical disabilities due to work related accidents.<sup>90</sup>

While appropriate treatments may vary depending on the kind of drugs individuals use, the availability of sufficient treatment is vital to the mental and physical health of people who use drugs. Reflecting on the futility of the criminal justice system in promoting the health of people who use drugs, interviewees suggested that the money that is currently being used to arrest people should instead be spent to pay for MAT or other supportive services. The provision of MAT is of critical importance for people that are dependent on opiates. However, the provision of better MAT treatments in prison is still an insufficient solution because the act of punishing an individual for having substance use disorder is both inhumane and counterproductive.

Many interviewees also recognized the need for harm reduction programs after returning home from prison. While many people who use drugs may want to access treatment, spaces are limited. Renee explained that the programs that do exist in D.C. are “really difficult to get into.”<sup>91</sup> Additionally, these treatments are often not informed by harm reduction principles and focus on eliminating dependence on MAT treatment. This may result in a return to chaotic drug use after treatment if a person requires a maintenance-oriented treatment.

Fatal overdose poses a serious risk for people who use drugs. Fatal overdoses have been steadily rising in D.C. since 2014, where 83 people died in 2014 compared to 216 in 2016.<sup>92</sup> This steep increase is largely attributable to the presence of fentanyl in the heroin supply.<sup>93</sup> It

90 *Id.*

91 *Id.*

92 Office of the Chief Medical Examiner, Opioid-related Fatal Overdoses: January 1, 2014 to February 28, 2017 (Apr. 19, 2017), [https://ocme.dc.gov/sites/default/files/dc/sites/ocme/Opioid%20related%20Overdoses%20Deaths\\_04.19.17.pdf](https://ocme.dc.gov/sites/default/files/dc/sites/ocme/Opioid%20related%20Overdoses%20Deaths_04.19.17.pdf).

93 Nicole Lewis et al., *Fentanyl Linked to Thousands of Urban Overdose Deaths*, WASH. POST (Aug. 15, 2017), [https://www.washingtonpost.com/graphics/2017/national/fentanyl-overdoses/?utm\\_term=.012ef9b2fa44](https://www.washingtonpost.com/graphics/2017/national/fentanyl-overdoses/?utm_term=.012ef9b2fa44).

is essential for people who use drugs to have access to Narcan, the opioid antagonist that reverses overdoses.<sup>94</sup> Putting Narcan in the hands of people who use drugs ensures that people using together will be able to save each other’s lives.<sup>95</sup> Interviewees expressed their concern about the risk of overdose in light of the fentanyl epidemic, and stated the importance of consistently having affordable, accessible Narcan.<sup>96</sup>

People who use drugs also need to have access to clean equipment to use drugs to improve public health outcomes. For example, once syringe exchange programs became available in D.C. in 2008, new HIV infections dropped by seventy percent due to the availability of clean injection equipment.<sup>97</sup> Similarly, Hepatitis C is highly infectious such that sharing contaminated equipment can cause the virus to spread. Therefore, to stem the incidence of Hepatitis C, clean syringes, cookers, cottons, waters, and ties must be available to people who use drugs. Finally, availability of clean injection equipment through needle exchanges have also led to a decrease in bacterial infections and abscesses related to various injection techniques.<sup>98</sup>

A public health approach to drug use promotes the health and human rights of people who use drugs. In his reflection on the harms of the criminal justice system, John noted that “[y]ou shouldn’t be locked up for non-violent crimes” and emphasized the importance of access to voluntary treatment.<sup>99</sup> Many interviewees echoed this perspective and expressed that

94 Andrew Giambrone, *One-Hit Wonder: Why Doesn’t D.C. Have Enough of the Overdose Drug Narcan?* WASH. CITY PAPER (July 21, 2016), <http://www.washingtoncitypaper.com/news/article/20828600/narcan-prevents-heroin-overdose-deaths-why-doesnt-dc-have-enough-of-it>.

95 *See id.*

96 Interview at HIPS, *supra* note 55.

97 *See* Hauslohner, *supra* note 18. This article also notes that the 120 HIV infections that were averted during this period alone saved an estimated \$45.6 million dollars. *Id.*

98 Kristina T. Phillips, *Skin and Needle Hygiene Intervention for Injection Drug Users: Results from a Randomized, Controlled Stage I Pilot Trial*, 43(3) J. SUBST ABUSE TREAT. 313, 313–321 (Feb. 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3358564/>.

99 Interview at HIPS, *supra* note 55.

criminal justice system is a counterproductive and harmful response to drug use and accompanying health issues.

## D. Quality of Life

Incarceration for a drug offense often adversely affects quality of life of people who use drugs and their families following release from prison. Patterns of dehumanization characterize all stages of individuals' experiences with the criminal justice system and continue even after release from prison. Interviewees expressed their fundamental desire to be treated with dignity, and they lamented how the criminal justice system and the accompanying stigmatization continues to undermine their human dignity.<sup>100</sup> Oppressive stigma associated with drug use and incarceration can lead to the loss of social support, strained relationships with family and children, and feelings of social isolation. Challenges securing housing, employment, healthcare, and other basic needs highlight the enduring barriers to having a stable and secure life following a drug conviction; these challenges can also be destabilizing for children, partners, and other family members.

Many interviewees expressed their feelings of loss during and after their incarceration. Interviewees explained that they felt they had no family on whom they could rely on for assistance and support following their release. Jacob recalled that he didn't receive any letters or visits from family members during his thirty-six years of incarceration because they said that they hated him. When he returned home, he felt overwhelmed by and afraid of the burdens he encountered. Mary explained that her family abandoned her after her arrest and imprisonment, and she discovered that "[y]our street family becomes your real family."<sup>101</sup>

The criminalization of drug use on parents and children can also fundamentally destroy the family unit. Incarceration separates people who use drugs from that unit, changing internal dynamics, and requiring the creation of alternate

mechanisms for care. Even outside of incarceration, people who use drugs are at risk of losing their children. Parental separation from their children can inflict permanent damage. The government often overreaches in regulating people who use drugs' family structures and makes decisions based on their presumed best interest of children.<sup>102</sup> Instead of leaving family decisions up to the family itself, the government makes unilateral decisions based on its child safety evaluation criteria. The intervention of child protective services can often result in a child being removed from their home and placed into the foster care system. The resulting instability and trauma of displacement can have lasting effects on a child's emotional and psychological development.<sup>103</sup>

Interviewees emphasized their desire for stability following their drug convictions. Brenda explained that "[i]f you can get people stabilized, not necessarily abstinent, that takes time. But it will improve public safety and then you've changed several lives, not just one life."<sup>104</sup> Because the process of applying for and securing public benefits can be daunting, humiliating, and invasive, many interviewees stated their proclivity to find economic opportunities through street economies instead.<sup>105</sup> Economic, housing, physical and mental health, and social stability are all crucial elements of thriving in society, but the oppressive stigma of a drug conviction often precludes people who use drugs from achieving such stability for themselves and their families.

## III. Decriminalization Protects Human Rights and Improves Public Health

First, this section will describe how the War on

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102 Caroline Preston, *Parents Face Child Abuse Investigation over Pot Use*, AL JAZEERA AMERICA (Sept. 7, 2015), <http://america.aljazeera.com/articles/2015/9/7/parents-face-child-abuse-investigations-over-marijuana-use.html>.

103 *Removal from the Home: Resulting Trauma*, U. PA. COLLABORATIVE ON COMMUNITY INTEGRATION 2, <http://tucollaborative.org/wp-content/uploads/2017/04/Trauma-The-Impact-of-Removing-Children-from-the-Home.pdf>.

104 *Id.*

105 Interview at HIPS, *supra* note 55.

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100 *Id.*

101 *Id.*



Drugs violates the right to be free from discrimination; the right to bodily autonomy and the right to privacy; and the right to be free from cruel, inhuman, and degrading treatment. Then, this section will describe why drug policy should be approached from a public health perspective.

## A. Decriminalization as a Human Rights Approach

The United States government's War on Drugs, characterized by rigid, tough law enforcement and disproportionately harsh punishment for people of color, undermines the human rights of people who use drugs, and harms low-income communities of color. The decriminalization of drugs for personal use upholds the human rights of people who use drugs, including the right to be free from discrimination, right to bodily autonomy, right to privacy, and right to be free from cruel, inhuman, or degrading treatment.

Arguments in favor of marijuana decriminalization and Initiative 71 were based upon egregious disparities in arrests, disproportionately impacting D.C.'s Black community. Issues of racial inequity and discriminatory enforcement of drug laws extend to all drugs. The removal of criminal penalties for possession of all drugs for personal use promotes the dignity, health, safety, and the human rights of people who use drugs; reduces chaotic drug consumption; decreases incidence of HIV, Hepatitis C, and other infections; and creates safer, healthier communities for D.C. as a whole.

### Right to be Free from Discrimination

Under human rights legal obligations that the United States has accepted, any law or policy that has a disparate impact on a racial group constitutes unlawful discrimination.<sup>106</sup> Discriminatory enforcement of drug laws in D.C. is

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<sup>106</sup> The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and is thus prohibited from any explicit racial discrimination and indirect, implicit discrimination as a consequence of law or policy that has a disparate effect on certain racial or ethnic communities. See *L. R. et al. v. Slovakia*, Comm. No. 31/2003, Para. 10.4, U.N. Doc. CERD/C/66/D/31/2003 (2005).

reflected in the disproportionately high number of drug arrests and convictions of Black people, despite consistent drug use rates across racial and ethnic backgrounds.<sup>107</sup> From 2010 to 2016, only 911 white people were convicted of drug possession offenses, while the number of Black people convicted reached 18,506.<sup>108</sup> This closely correlates with the fact that 88.84 percent of those arrested for drug-related offenses during this same period were Black.<sup>109</sup> This stark racial disparity of drug convictions indicates the racial bias in policing. While drug-related arrests were consistently highest in the Wards with the highest percentage of Black individuals across drugs, this figures were most jarring for PCP arrests: 22 percent of those arrested were in Ward 5, 28 percent were in Ward 7, and 29 percent of those were in Ward 8.<sup>110</sup> Heroin arrests were also significantly distorted where 16 percent of those arrested were in Ward 5, 16 percent in Ward 6, 22 percent in Ward 7, and 18 percent in Ward 8.<sup>111</sup> Ward 3, the Ward with the highest percentage of white residents, consistently saw the lowest percentage of drug arrests.<sup>112</sup> These statistics indicate that Black communities in D.C. are disproportionately policed, and that these policies have the disparate impact on D.C.'s Black residents. Moreover, these policing patterns demonstrate the racially discriminatory enforcement of drug laws.

However, the disparate impact that criminalizing drug possession reaches far wider than the issue of overpolicing communities of color. A number of other discriminatory policies—including the exclusion from Section 8 housing, affordable housing, and stable employment—has significant, deleterious impacts on people who use drugs, their families, and

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<sup>107</sup> *Washington Lawyers' Committee Report*, *supra* note 5, at 16.

<sup>108</sup> Felony and Unverified Misdemeanor Data 5-6 (2010-2016) (on file with Councilmember Grosso's Office).

<sup>109</sup> See MPD Drug Arrests 2010-2016, *supra* note 7; see also *Neighborhood Profiles*, NEIGHBORHOOD INFO DC, <http://www.neighborhoodinfodc.org/wards/wards.html> (last visited Aug. 29, 2017).

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

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

<sup>112</sup> *Id.*; see also *Neighborhood Profiles*, *supra* note 105.

their communities as a whole.<sup>113</sup> The removal of criminal penalties for drug possession and paraphernalia would halt the cycle of needlessly incarcerating people who use drugs and would reduce the discriminatory hiring and rental practices that preclude people who use drugs from opportunities to stabilize their lives.<sup>114</sup> Decriminalization of drug and paraphernalia possession are essential to bring the United States into compliance with its international human rights obligations.

## Right to Bodily Autonomy and Right to Privacy

The criminalization of drug possession for personal use violates individuals' rights to bodily autonomy and privacy.<sup>115</sup> Law enforcement authorities may not arbitrarily or unlawfully infringe upon an individual's rights to privacy and bodily autonomy.<sup>116</sup> Countless people who use drugs have been searched, and subsequently arrested, under the auspices of the reasonable, articulable suspicion standard, which is not a sufficiently high standard to protect the rights of people who use drugs in the United States.<sup>117</sup> The 20,363 people that were

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113 “[I]mprisoning many individuals from a single neighborhood adversely affects the entire community because of the cumulative impact of straining multiple social network to which the inmates belong.” Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1282 (2004).

114 “Increasing incarceration of first-time, nonviolent offenders, who are likely to have valuable ties to community networks and institutions, means the loss to communities is greater today in terms of the quality as well as quantity of inmates.” See *id.* at 1283-84.

115 Article 17 of the International Covenant on Civil and Political Rights states: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...” See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N.T.S. vol. 999 (adopted Dec. 16, 1966) (entered into force Mar. 23, 1976); see *Every 25 Seconds*, *supra* note 8, at 22.

116 U.N. Hum. Rts. Comm., *General Comment No. 16, Article 17: Right to Privacy*, CCPR ¶ 1 (Apr. 8, 1988).

117 Although a full discussion of Fourth Amendment jurisprudence is outside of the scope of this article, it is important to note that while pretextual stops are not considered lawful, police officers are not obligated to turn a blind eye to contraband that is discovered in the course of a stop that occurred on the basis of reasonable, articula-

convicted between 2010-2016 for the victimless crime of drug possession clearly illustrates how the War on Drugs is structured to systematically violate the right to privacy for people who use drugs.<sup>118</sup>

Although not all drug use is harmful, the stated public policy purpose of prohibitive drug laws is to deter people from engaging in “risky behavior.”<sup>119</sup> However, these drug laws infringe upon individuals' ability to determine what happens to their own body without coercion. Because individuals who use drugs bear the risk of losing their liberty for using drugs, punitive drugs laws are—in and of themselves—coercive, and therefore contravene the right to bodily autonomy.<sup>120</sup> Moreover, the harms caused by these laws far outweigh any deterrence benefits that they may achieve.<sup>121</sup> The harms that occur as a result of the enforcement of these laws has led to rampant discrimination; high rates of incarceration, homelessness, underemployment among people who use drugs; and unacceptable public health outcomes.<sup>122</sup>

Accordingly, removing criminal penalties for drug and paraphernalia is critical to respecting the right to privacy and protecting the bodily autonomy for people who use drugs.

## Right to be Free from Cruel, Inhuman, or Degrading Treatment

People who use drugs are often subjected to pretrial detention or incarceration conditions that amount to cruel, inhuman, or degrading treatment. When people who use drugs are arrested and placed in pretrial detention, they often do not receive essential medical services, including MAT.<sup>123</sup> Without access to MAT, individuals

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ble suspicion or in a search for which there was probable cause. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1050 (1983).

118 Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 1 UTAH L. REV. 11, 26-29 (2009).

119 *Id.* at 16.

120 *Id.* at 13.

121 *Id.* at 16-22.

122 See *infra* Part II.

123 Julia Lurie, *Go to Jail. Die From Drug Withdrawal. Welcome to the Criminal Justice System.*, MOTHER JONES (Feb. 5, 2017), [14](http://www.motherjones.com/poli-</a></p></div><div data-bbox=)

risk experiencing severe withdrawal symptoms, which are painful, unpleasant, and in some cases, fatal.<sup>124</sup> Denying methadone treatment in custodial settings has been declared to be a violation of the right to be free from torture and ill-treatment.<sup>125</sup> By denying necessary MAT to people who use drugs while they are detained or incarcerated, jails and prisons violate the individual's right to be free from torture and ill-treatment. To meet the United States' human rights obligations, the facilities under the purview of the D.C. Department of Corrections and any prisons to which D.C. residents are sent must provide their inmates with access to MAT.

## B. Decriminalization as a Public Health Approach

HIPS calls for the full decriminalization of possession of all drugs and drug paraphernalia for personal use in D.C.<sup>126</sup> The removal of criminal penalties should also be coupled with a series of public health programs that focus on reducing the adverse consequences of drug use.<sup>127</sup> People who use drugs may require housing assistance, mental health care, or access to MAT, enabling them to stabilize and limit the chaos in their lives. Mary explained that “[b]eing a heroin addict is a 24-hour job. However, [o]nce you are stabilized, you could get a job. The addiction needed maintenance.”<sup>128</sup>

Addressing drug use through the criminal justice

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tics/2017/02/opioid-withdrawal-jail-deaths/.

124 See *id.*; see also *Can Heroin, Benzo or Alcohol Withdrawal Cause Death?* AM. ADDICTION CTRS., <http://americanaddictioncenters.org/withdrawal-timelines-treatments/risk-of-death/>.

125 Manfred Nowak, Special Rapporteur on Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/10/44, ¶ 57 (Jan. 14, 2009).

126 *Approaches to Decriminalizing Drug Use & Possession*, DRUG POL'Y ALL. (Feb. 2016), [http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet\\_Approaches%20to%20Decriminalization\\_%28Feb.%202016%29\\_0.pdf](http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Approaches%20to%20Decriminalization_%28Feb.%202016%29_0.pdf).

127 *Harm Reduction*, DRUG POL'Y ALL., <http://www.drugpolicy.org/harm-reduction> (last visited Aug. 29, 2017).

128 Interview at HIPS, *supra* note 55.

system has failed to reduce rates of drug use. Since the inception of the War on Drugs, the incarceration rates for drug-related crimes have increased, but rates of drug use remain stable, which demonstrates that the War on Drugs did not improve health or safety. However, public funding for incarceration continues to increase, leading to a rise of drug-related incarceration rates that wastes public resources.

As drug use continues in the face of a punitive criminal justice system, drug overdoses in the U.S. have officially “surpassed motor vehicle accidents as the leading cause of injury-related death.”<sup>129</sup> In 2016, there were 28 traffic fatalities in D.C. and 216 opioid-related deaths.<sup>130</sup> Fatal opioid overdoses have been steadily increasing since 2013.<sup>131</sup> Drug criminalization cannot effectively address the rising incidence of fatal opioid overdoses. Individuals who are present when their friends or loved ones experience an overdose often hesitate to seek out the life-saving medical attention that is required. “[F]ear of arrest is... the most common reason” witnesses of drug overdoses cite for not immediately calling 911.<sup>132</sup> People who use drugs should not have to compromise their health and safety to avoid involvement with the criminal justice system.

The removal of criminal penalties for drug possession and drug paraphernalia would reduce public expenditures on prison expansion. While the criminal justice system structurally undermines the dignity of people who use drugs, criminalization is also extremely costly for U.S. taxpayers. A 2010 report from the Cato Institute “estimated that the cost of *policing* low-level drug possession offenses exceeds \$4.28 billion annually,” which does not include the billions of dollars for costs associated with

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129 *It's Time*, *supra* note 4, at 7 (citing Rose A. Rudd et al., *Increases in Drug and Opioid Overdose Deaths – United States, 2000-2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 50-51 (2016)).

130 *Compare Traffic Fatalities*, METROPOLITAN POLICE DEP'T, <https://mpdc.dc.gov/page/traffic-fatalities> (last visited Aug. 29, 2017), with Office of the Chief Medical Examiner, *supra* note 92, at 1.

131 See Office of the Chief Medical Examiner, *supra* note 92, at 3.

132 *It's Time*, *supra* note 4, at 9.



incarceration, supervision, and court processing.<sup>133</sup> Redirecting money to public health interventions to address drug use is cost effective and essential for respecting, protecting, and fulfilling the rights of people who use drugs.<sup>134</sup>

## IV. Conclusion

The harms that people who use drugs experience constitute systematic human rights violations that disproportionately affect low income communities of color in D.C. Current drug laws in D.C. are enforced in racially discriminatory ways; undermine public health needs; and violate the fundamental human rights of people who use drugs, including the right to be free from discrimination, the rights to privacy and bodily autonomy, and the right to be free from cruel, inhuman, and degrading treatment.

People affected by the War on Drugs experience barriers to stability and reintegration long after their release from prison. Challenges accessing employment, housing, and healthcare due to a criminal record marginalize people who use drugs, their families, and their communities. The breakdown of families, the separation of children from parents, and the potential for homelessness are unjustifiable and destabilizing consequences of a drug conviction.

The widespread collateral consequences of the War on Drugs on D.C. residents have led D.C. Council to consider alternatives to harsh criminal penalties for drug use. HIPS urges the D.C. Council to remove the criminal penalties

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<sup>133</sup> *Id.* at 7.

<sup>134</sup> “In 2014 researchers studied changes in the social cost of drug use in Portugal, which they defined as ‘a sum of public expenditure on drugs, private costs (incurred by individuals who use drugs) and costs incurred by society (indirect costs, such as lost productivity).’ The study authors attribute this decrease largely to the reduction in legal system costs associated with criminalizing drug use and to savings in health-related costs resulting from decreased problematic drug use.” *Every 25 Seconds, supra* note 8, at 183; see also Ricardo Goncalves, Ana Lourenco, & Sofia Nogueira da Silva, *A Social Cost Perspective in the Wake of the Portuguese Strategy for the Fight Against Drugs*, 26 INT’L J. OF DRUG POL’Y (Feb. 2015).

associated with drug and paraphernalia possession in D.C., which are essential interventions for improving the public health of people who use drugs in D.C. and reducing the gross racial disparities in drug arrests.

HIPS acknowledges that Congressional review over D.C.’s laws and budgetary processes can serve as a barrier to the implementation of progressive drug policy. HIPS urges Congress to respect D.C.’s autonomy and to support D.C. Council in protecting the rights and health of its residents.

The collateral consequences of the War on Drugs in D.C. have disproportionately affected the Black community. Stark racial disparities in rates of arrests and incarceration reflect structural discrimination in the criminal justice system. While criminalization of drug use is a counterproductive policy and contravenes the rights of people who use drugs, it also sustains oppressive stigmas and looming criminal records that preclude people who use drugs from full economic and societal participation. Instead, investing resources in those most affected by the War on Drugs will be a more effective solution than punitive drug policies. For example, peer-to-peer Narcan distribution and syringe exchanges have been critical in promoting public health and saving the lives of people who use drugs. Reflecting on the systematic dehumanization that characterizes the War on Drugs, Mary explained that “[w]e [people who use drugs] are not throwaway dumb people. We’re making changes in lives, while [the government] is destroying lives.”<sup>135</sup> Decriminalizing drug possession and redirecting resources from the criminal justice system into supportive services would improve public health, safety, and rights of people who use drugs.

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<sup>135</sup> Interview at HIPS, *supra* note 55.

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