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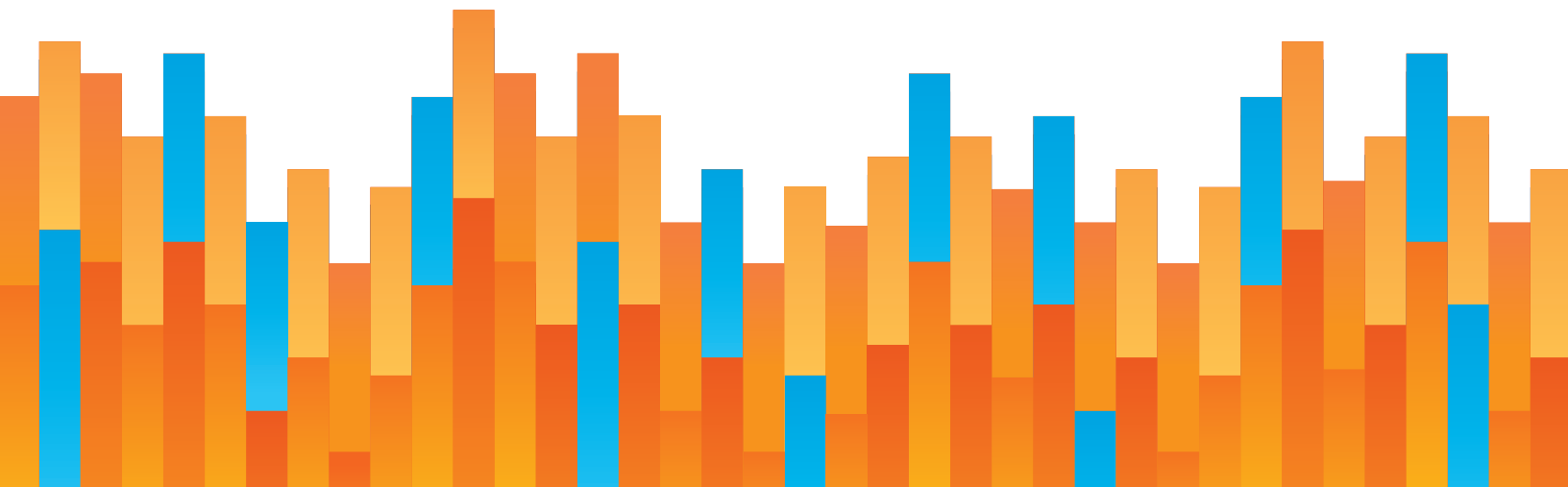
THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW

DRUG ENFORCEMENT AND POLICY CENTER

DECRIMINALIZATION AS POLICE REFORM

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PART 1

INTRODUCTION

In November 2014, police pulled over a disabled veteran in South Carolina for a minor traffic violation.¹ After searching the veteran’s car, the police discovered small amounts of cannabis. Officers gave the veteran an ultimatum: help them or face stiff charges. Out of fear of criminal punishment, the veteran agreed to a controlled purchase of cannabis—roughly 100 dollars’ worth—from her friend, Julian, in Myrtle Beach. As a result, the police had enough information to establish probable cause to obtain a search warrant for Julian’s home.

A few months later, 12 officers from a multi-jurisdictional Drug Enforcement Unit (DEU) prepared to enter Julian’s home as part of “Operation Jules”—the nickname DEU used for the raid on Julian’s apartment. The officers, dressed in face coverings and camouflage, forced open the apartment door with a battering ram and eventually fired 29 bullets at Julian, leaving him paralyzed from the waist down.²

¹ Alex Lang, “No business being alive’: Man paralyzed by cops in Myrtle Beach raid settles civil case,” *myrtlebeachonline.com, The Sun News*, 29 Feb. 2020. www.myrtlebeachonline.com/news/local/crime/article240686911.html.

² *Betton v. Knowles*, No. 415CV04638AMQKDW, 2018 WL 4404073, at *3 (D.S.C. 21 May 2018) (“[Betton] heard no one announce their presence, but he did hear the door being kicked in or rammed open, saw shadows moving and was startled. At that point he reached for the gun in his waistband, and when he regained consciousness, he was in the hospital.”).

As the result of the shooting and subsequent eight-figure settlement against the DEU and the City of Myrtle Beach, several changes to policing practices in the area were made.³ Specifically, the DEU stopped executing search warrants and using routine traffic stops to turn citizens into drug informants. While such policy changes should be lauded, reducing such overly intrusive policing tactics should not have to come at such costs.



The Myrtle Beach case encapsulates many of the problems with policing practices today: pretextual stops, militarization, and the overpolicing of low-level offenses.



The Myrtle Beach case encapsulates many of the problems with policing practices today: pretextual stops, militarization, and the overpolicing of low-level offenses.⁴ Although various policing reforms considered by lawmakers to address some of these problems may yield favorable results, such reforms fail to consider an essential aspect of modern-day policing—its inseparable link to the drug war.⁵ Because policing tactics are designed to maximize drug arrests and seizures, law enforcement initiates frequent and unwarranted contact with pedestrians and motorists. Such contact results in the overpolicing of minority communities, increased prison populations, and jeopardized public safety.

Despite the interwoven nature of drugs and policing, drug decriminalization is not often considered a reform of policing practices. However, one could argue that decriminalization

³ Heather Gale, “DEU changes tactics after raid that left Myrtle Beach man paralyzed,” *wpde.com*, American Broadcasting Company, 27 Feb. 2020. <https://wpde.com/news/local/deu-changes-tactics-after-raid-that-left-myrtle-beach-man-paralyzed>.

⁴ Jonathan Blanks, “Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy,” *Case Western Law Review* 66 (2016). 932–45; Eliav Lieblich, “The Case Against Police Militarization,” *Michigan Journal of Race and Law* 23 (2018). 115–22 (describing how the pervasiveness of police militarization has led to its normalization); Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton University Press, 2019) (describing the inegalitarian workings of the low-level policing in New York City).

⁵ Henry Gomez, “Here’s what the George Floyd Justice in Policing Act would do,” *nbcnews.com*, National Broadcasting Company, 21 Apr. 2021. www.nbcnews.com/politics/congress/here-s-what-george-floyd-justice-policing-act-would-do-n1264825 (discussing provisions of George Floyd Justice in Policing Act—none of which relate to drug policy or drug laws).

should be understood as a vital tool in limiting intrusive policing practices. Drug decriminalization is typically defined as a law that removes criminal sanctions for acquiring, possessing, or transporting small quantities of drugs for personal use and replaces them with civil sanctions. This paper adopts that definition with two additions. First, the definition includes only decriminalization laws that have been considered by courts to limit police investigative authority—i.e., laws that affect police ability to establish reasonable suspicion or probable cause. Thus, state decriminalization laws that permit custodial arrests for civil drug offenses are not included.⁶ Second, the definition also includes cannabis legalization.⁷ The definition does not include removing criminal sanctions for the production, distribution, or sale of drugs.

This paper proceeds in three parts. Part 2 discusses the substantive reform arguments and approach to the decriminalization debate. Part 3 explores how drug decriminalization affects policing practices. Specifically, it describes how drug decriminalization affects police authority to expand stops, conduct searches, and make arrests for drug possession. To illustrate these effects, three case studies are examined: New York, Oregon, and Colorado. Part 3 also examines how drug decriminalization affects departmental incentives to conduct pretextual stops and militarize police personnel and divisions. Lastly, Part 4 acknowledges and addresses how implementation issues with decriminalization affect policing practices.

⁶ For example *United States v. Perdoma*, 621 F. 3d 745, 749 (8th Cir. 2010) (upholding constitutionality of arrest for possession of less than once of marijuana, a civil infraction under Nebraska law).

⁷ Mary Fleck and Aaron Stagoff-Belfort, “Reducing Policing’s Footprint?” *vera.org*, Vera Institute of Justice, May 2021. www.vera.org/downloads/publications/reducing-policings-footprint.pdf (“Legalization goes further than decriminalization by discontinuing any legal sanctions against a particular action or behavior, ending the state’s ability to regulate and punish it.”).

PART 2

SUBSTANTIVE ARGUMENTS FOR DECRIMINALIZATION

Although the first cannabis decriminalization statutes were enacted in the 1970s,⁸ decriminalization in the United States did not emerge as a legitimate policy reform until insights from data showed that enforcement strategies are at least as, if not more, harmful than the effects of drugs themselves.⁹ Today, in a period of extreme political polarization, criminal justice reform—including drug policy—appears to be one of a few areas with growing bipartisan consensus.¹⁰ Even some law enforcement officials agree that the drug

⁸ Emily Dufton, “U.S. States Tried Decriminalizing Pot Before. Here’s Why It Didn’t Work,” *time.com*, Time, 7 Dec. 2017. time.com/5054194/legal-pot-experiment-history.

⁹ Christopher Coyne and Abigail Hall, “Four Decades and Counting: The Continued Failure of the War on Drugs,” *cato.org*, Cato Institute, 12 Apr. 2017. www.cato.org/policy-analysis/four-decades-counting-continued-failure-war-drugs.

¹⁰ Maggie Astor, “Left and Right Agree on Criminal Justice: They Were Both Wrong Before,” *nytimes.com*, *The New York Times*, 16 May 2019. www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html (citing a 2019 report about ending mass incarceration authored by politicians and leaders on both sides of the political spectrum including Bernie Sanders, Elizabeth Warren, Jared Kushner, and Mark Holden—a vice president of Koch Industries). But at the same time Benjamin Levin, “The Consensus Myth in Criminal Justice Reform,” *Michigan Law Review* 117 (2018). 265 argues that the purported bipartisan “consensus” on criminal justice reform is much more limited than it appears.

war did not work.¹¹ As of 2021, most states have at least decriminalized cannabis possession, and 19 of those states have legalized it.¹² Although Oregon is the only state to decriminalize all drugs, other states could soon follow its lead.¹³



Although federal funding has slightly shifted toward more demand-reduction programs—e.g., treatment, harm reduction, and prevention—over \$17.5 billion was devoted to interdiction and domestic drug enforcement in 2021.



Nevertheless, some say such policy corrections are too slow and incremental. Federally, all drug laws remain intact.¹⁴ Further, the drug war's infrastructure is still very much in operation. Although federal funding has slightly shifted toward more demand-reduction programs—e.g., treatment, harm reduction, and prevention—over \$17.5 billion was devoted to interdiction and domestic drug enforcement in 2021.¹⁵ Even more funds are being requested for supply-centric programs in 2022. Lastly, despite declines in the overall federal and state inmate population, one out of five people currently in jail or prison is

¹¹ Brian Mann, "After 50 Years of The War on Drugs, 'What Good Is It Doing For Us?'" *npr.org*, National Public Radio, 17 Jun. 2021. www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us.

¹² Jeremy Berke, Shayanne Gal, and Yeji Jesse Lee, "Marijuana legalization is sweeping the US. See every state where cannabis is legal," *Business Insider*, 27 May 2022. www.businessinsider.com/legal-marijuana-states-2018-1.

¹³ Ben Adlin, "New York, Virginia and Other States Consider New Drug Decriminalization Bills," *marijuanamoment.net*, Marijuana Moment LLC, Jan 13, 2021. www.marijuanamoment.net/new-york-virginia-and-other-states-consider-new-drug-decriminalization-bills.

¹⁴ 21 U.S.C. § 812.

¹⁵ "National Drug Control Budget: FY 2022 Funding Highlights," *whitehouse.gov*, Office of National Drug Control Policy, May 2021. www.whitehouse.gov/wp-content/uploads/2021/05/National-Drug-Control-Budget-FY-2022-Funding-Highlights.pdf.

there for a drug offense.¹⁶ In the federal system, almost half of those incarcerated are there for drug offenses.¹⁷

The pitch for decriminalization legislation typically centers around four utilitarian arguments: (1) substance use is a public health issue, not a criminal justice one; (2) decriminalization helps address mass incarceration; (3) decriminalization helps reduce racial disparities within the justice system; and (4) decriminalization reduces the economic costs associated with drug enforcement. As described below, these four arguments for decriminalization reform are well-founded. However, they are also incomplete in that they miss an important further benefit—decriminalization’s effect on policing.



... extensive research shows that substance use disorders are not only treatable but that criminal sanctions are counterproductive in preventing and addressing such disorders.



First, extensive research shows that substance use disorders are not only treatable but that criminal sanctions are counterproductive in preventing and addressing such disorders.¹⁸ Moreover, a 10% increase in drug treatment availability has been shown to reduce robbery and theft rates by 3% and aggravated assault by 4%–9%.¹⁹ Conversely, heavy-handed enforcement efforts have negligible effects on crime, let alone an impact on drug consumption, as shown in Figure 1 regarding the experiences of Tennessee and New

¹⁶ Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” *prisonpolicy.org*, Prison Policy Initiative, 24 Mar. 2020. www.prisonpolicy.org/reports/pie2020.html.

¹⁷ “Inmate Statistics: Offenses,” *bop.gov*, Federal Bureau of Prisons, 25 Jun. 2022. www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

¹⁸ Nora D. Volkow et al., “Drug Use Disorders: impact of a public health rather than a criminal justice approach,” *World Psychiatry* 16 (2017). 213–14.

¹⁹ Hefei Wen, Jason M. Hockenberry, and Janet R. Cummings, “The Effect of Substance Use Disorder Treatment Use on Crime: Evidence from Public Insurance Expansions and Health Insurance Parity Mandates,” *nber.org*, National Bureau of Economic Research, Oct. 2014, www.nber.org/papers/w20537.

Jersey.²⁰ Thus, in a country where drug overdoses have hit record highs,²¹ refashioning drug policy to focus on prevention, treatment, and harm reduction appears prudent.

FIGURE 1: DRUG USE AND IMPRISONMENT RANKINGS FOR TENNESSEE AND NEW JERSEY



Source: Pew’s analysis of 2014 data from the states of New Jersey and Tennessee, the federal Bureau of Justice Statistics National Corrections Reporting Program, the Federal Bureau of Prisons, the Centers for Disease Control and Prevention, the Federal Bureau of Investigation’s Uniform Crime Reporting (UCR) Program, and the Substance Abuse and Mental Health Services Administration’s National Survey on Drug Use and Health

Source: 2008, The Pew Charitable Trust

Second, because the drug war continues to mandate long and punitive criminal sentencing across federal and many state systems, decriminalization could help address the mass incarceration trends that started in the 1980s.²² However, even if decriminalization was

²⁰ “More Imprisonment Does Not Reduce State Drug Problems: Data show no relationship between prison terms and drug misuse,” *pewtrusts.org*, The Pew Charitable Trusts, 8 Mar. 2018. www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems; Carlos Dobkins, Nancy Nicosia, and Matthew Weinberg, “Are supply-side drug control efforts effective? Evaluating OTC regulations targeting methamphetamine precursors,” *Journal of Public Economics* 120 (2014). 48; Jim Parsons, “Tougher Drug Law Enforcement Does Not Increase Public Safety,” *vera.org*, Vera Institute of Justice, 5 Jan. 2018. www.vera.org/blog/tougher-drug-law-enforcement-does-not-increase-public-safety.

²¹ Brian Mann, “Overdose Deaths Surged in Pandemic, As More Drugs Were Laced with Fentanyl,” *npr.org*, National Public Radio, 22 Apr. 2021. www.npr.org/sections/health-shots/2021/04/22/989833102/overdose-deaths-surged-in-pandemic-as-more-drugs-were-laced-with-fentanyl.

²² Emily Widra and Tiana Herring, “States of Incarceration: The Global Context 2021,” *prisonpolicy.org*, Prison Policy Initiative, Sep. 2021. www.prisonpolicy.org/global/2021.html; Phillip Smith, “Guess which state has the worst drug laws in America,” *Salon.com*, Salon.com, 5 Oct. 2019. www.salon.com/2019/10/05/guess-

implemented nationwide and included the release of all people incarcerated for drug offenses, mass incarceration would remain intact.²³ As mentioned above, four out of five people incarcerated are there for something other than drug crimes.



... it is widely documented and understood that the drug war produces profoundly unequal results across racial and ethnic minority groups.



Third, it is widely documented and understood that the drug war produces profoundly unequal results across racial and ethnic minority groups.²⁴ To highlight the racial bias, the crack-to-powder cocaine sentencing disparity is often raised.²⁵ Under the Anti-Drug Abuse Act of 1986, five grams of crack cocaine was considered the same as 500 grams of powder cocaine for sentencing determinations. Because crack cocaine is more affordable and thus accessible in impoverished minority communities, African-American defendants have been disproportionately punished for crack-cocaine offenses. The disproportionate impact is even more apparent in the face of evidence suggesting that there are more white crack users than black users. Although the crack-to-powder cocaine sentencing ratio was reduced in 2010, the disparity remains 18 to one.²⁶

Moreover, despite evidence that drug offenses are committed at equal rates across racial groups, a disproportionate level of police contact occurs in minority communities.²⁷ Such

which-state-has-the-worst-drug-laws-in-america_partner (“South Dakota is spending millions of dollars to incarcerate people not for drug dealing or drug possession, but for having used drugs and still having traces of them in their system.”).

²³ Sawyer and Wagner, “Mass Incarceration: The Whole Pie 2020.”

²⁴ Graham Boyd, “The Drug War is the New Jim Crow,” *aclu.org*, American Civil Liberties Union, July/Aug. 2021, www.aclu.org/other/drug-war-new-jim-crow.

²⁵ Nkechi Taifa, “Race, Mass Incarceration, and the Disastrous War on Drugs,” *brennancenter.org*, Brennan Center for Justice, 10 May 2021. www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs.

²⁶ 21 U.S.C. § 841.

²⁷ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press, 2012). 123–25.

disparity in contact can be traced to racially biased police discretion.²⁸ Further, police sometimes see minority communities as more convenient and efficient locations to concentrate efforts and resources.²⁹ Decriminalization arguably serves as a mechanism to reverse some of the racial disparities in policing. This argument was recently used in Oregon to rally support for its 2020 decriminalization proposal. In particular, a racial impact statement was included in the description of the proposed law in the state’s voter pamphlet.³⁰

“

Decriminalization arguably serves as a mechanism to reverse some of the racial disparities in policing.

”

Lastly, proponents of decriminalization frequently point to the economic impacts of the drug war, such as shown in Figure 2. Specifically, over a trillion dollars have been spent fighting it in the past 50 years.³¹ When accounting for drug incarceration expenses, the cost is further expanded. For instance, in 2015, North Carolina spent over \$70 million incarcerating people for drug possession alone.³² There are also intangible costs—i.e., the

²⁸ “A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform,” *aclu.org*, American Civil Liberties Union, 2020. www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf (finding that black people are more than 3.5 times more likely to be arrested for marijuana than white people and that “in over 95% of counties with more than 30,000 people in which at least 1% of the residents are black, black people are arrested at higher rates than white people for marijuana possession”).

²⁹ Alexander, *The New Jim Crow*. 123–25 (discussing a Seattle study that found law enforcement’s decision to focus enforcement resources on “outdoor drug markets in downtown areas rather than drug markets located indoors in predominantly white communities.”).

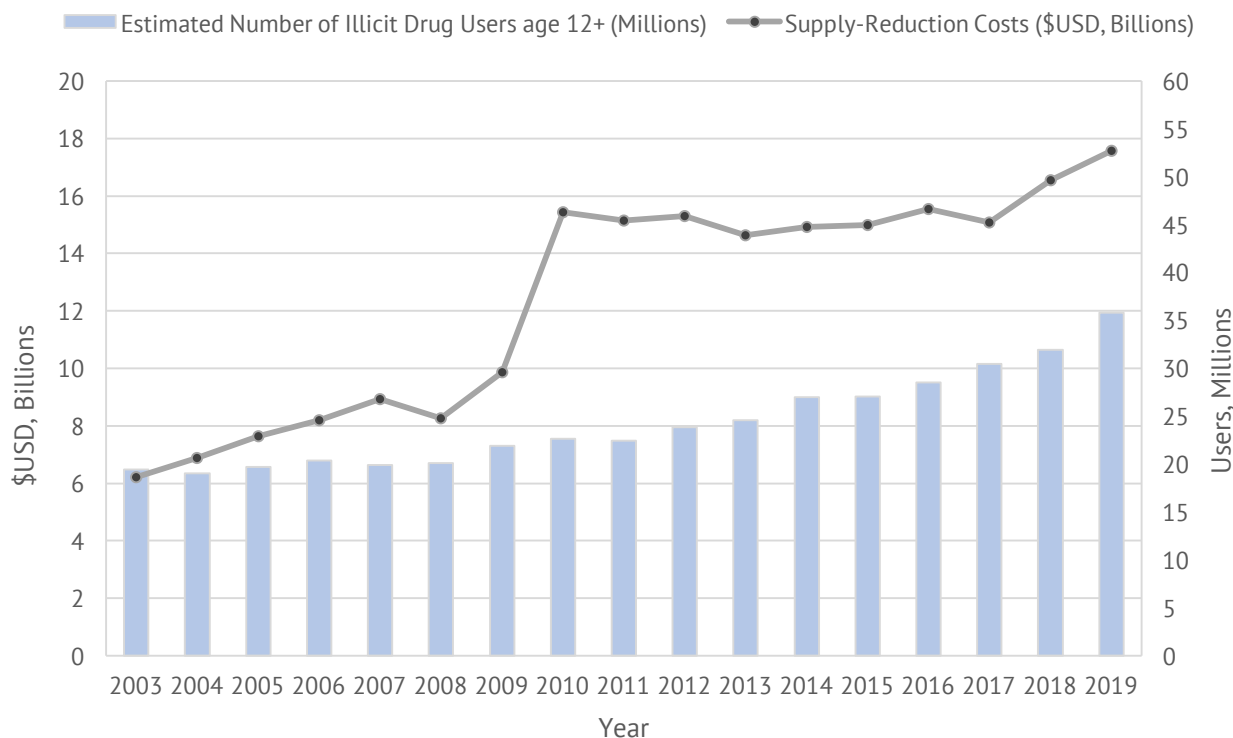
³⁰ “Measure Reduces Black Arrests by 94%,” *portlandobserver.com*, The Portland Observer, 22 Oct. 2020. portlandobserver.com/news/2020/oct/22/measure-reduces-black-arrests-94.

³¹ Nathaniel Lee, “America has spent over a trillion dollars fight the war on drugs. 50 years later, drug use in the U.S. is climbing again,” *cnbc.com*, CNBC, 17 Jun. 2021. www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html; Supply-reduction expenditure includes the federal funding allocated for (1) domestic law enforcement, (2) interdiction, and (3) international enforcement activities. For definitions of each, see “National Drug Control Budget: FY 2022 Funding Highlights.” 12–15. www.whitehouse.gov/wp-content/uploads/2021/05/National-Drug-Control-Budget-FY-2022-Funding-Highlights.pdf.

³² Betsy Pearl, “End the War on Drugs: By the Numbers,” *americanprogress.org*, Center for American Progress, 27 Jun. 2018. www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers (“In 2015, the average annual cost of incarceration per inmate in North Carolina was

cost of loss of opportunity sustained after people charged with drug offenses are removed from the mainstream economy. Thus, taxpayer dollars—as the argument goes—could be put to better use.

FIGURE 2: THE NUMBER OF DRUG USERS VS. DRUG ENFORCEMENT EXPENDITURE, 2003–2019



Source: Substance Abuse and Mental Health Services Administration (SAMHSA) National Survey on Drug Use and Health; ONDCP National Drug Control Budget Summaries (Fiscal Years 2003-2019).

Although these arguments support decriminalization, examining the reform’s effect on policing provides an additional utilitarian benefit. First, reducing law enforcement’s investigative authority means fewer drug arrests. As of 2016, police were arresting a person for drug possession—nearly half of which were for cannabis possession—every 25 seconds.³³ Fewer drug arrests thus equate to a shrunken carceral state. Second, racial

\$30,180. On June 30, 2015, North Carolina’s correctional population included 2,428 inmates incarcerated for nontrafficking drug offenses.”).

³³ Adam Bates, “Every 25 Seconds: Human Rights Watch and the ACLU Document More Harms from Drug Prohibition,” *cato.org*, Cato Institute, 19 Oct. 2016. www.cato.org/blog/every-25-seconds-human-rights-watch-aclu-document-more-harms-drug-prohibition (“More than one out of every nine state-level arrests are for drug possession, amounting to 1.25 million arrests per year.”).

disparities in police contact and enforcement are diminished. As the Oregon Criminal Justice Commission found in a study requested by the state legislature leading up to the state's vote for decriminalization, the law would reduce racial disparities in drug possession arrests by 95%.³⁴ Although the study focused on conviction and arrest data, it alluded to the law's effect on inequities in police contact. Third, because decriminalization limits police authority to investigate drug activity, fewer resources and funding are needed for enforcement. Such funding can then be reallocated toward treatment and other demand-reduction programs, reducing the economic burden of enforcement. For example, Oregon's decriminalization law funnels some of its legalized marijuana tax revenue, as well as expected savings from arrest reductions, to drug abuse treatment programs.³⁵

³⁴ "IP 44 Racial and Ethnic Impact Statement," Oregon Criminal Justice Commission, *opb.org*, 5 Aug. 2020. www.opb.org/pdf/IP44 - REI Statement Supplement_1602708982790.pdf.

³⁵ Eric Westervelt, "Oregon's Pioneering Drug Decriminalization Experiment Now Facing the Hard Test," *npr.org*, National Public Radio, 18 Jun. 2021. www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test.

PART 3

DRUG DECRIMINALIZATION'S EFFECT ON POLICING TACTICS AND DEPARTMENTAL INCENTIVES

For decades, the Supreme Court's Fourth Amendment jurisprudence has consistently favored law enforcement when judging the validity of searches and seizures.³⁶ For instance, in its 2016 ruling in *Utah v. Strieff*, the Court held that even unconstitutional police detentions are valid so long as they lead to discovering a valid arrest warrant.³⁷ As a result of decisions like *Strieff*, tremendous power is granted to police to investigate low-level offenses, such as illegal drug use, allowing them “to arbitrarily (and even unconstitutionally) stop people, ask them for their identification, have a dispatcher search their record, find an arrest warrant for a long-unpaid parking ticket or a missed appointment with a probation officer, and use that ticket as a reason to conduct any

³⁶ Rachel A. Harmon, “The Problem of Policing,” *Michigan Law Review* 110 (2012). 767 (“Since 1968, the Court has considerably loosened the constraints on the investigation and detection of crime imposed by the Fourth and Fifth Amendments, substantially narrowed the scope of the exclusionary rule, and, after expanding § 1983 liability significantly in the 1970s, contracted liability under § 1983.”).

³⁷ *Utah v. Strieff*, 579 U.S. 232, 232 (2016).

physical search that they would like to conduct.”³⁸ Albeit constitutionally permissible, such broad police discretion to make contact with people has major implications on societal quality of life—particularly in marginalized minority communities.

Consequently, law enforcement’s intrusive contact with marginalized communities has cultivated deep distrust and discontent with police and the criminal justice system.³⁹ As Justice Sotomayor puts it in a blistering dissent of *Strieff*, legitimizing intrusive police conduct “implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”⁴⁰

3.1 EFFECT ON POLICING TACTICS

3.1.1 DRUG CRIMINALIZATION'S CONNECTION TO INTRUSIVE POLICING TACTICS

The War on Drugs profoundly changed the way police operate with respect to enforcing drug laws.⁴¹ Although the Warren Court had somewhat bolstered protections against intrusive policing tactics in decisions like *Mapp v. Ohio* and *Chimel v. California*,⁴² judicial opinions started cutting in the opposite direction in the 1970s.⁴³ Further, opinions assessing such policing tactics almost always concerned people arrested for drug activity.⁴⁴

For example, in *New York v. Belton*, a police officer arrested four occupants of a vehicle after establishing probable cause with the smell of cannabis and then discovering cocaine while

³⁸ Monica C. Bell, “Police Reform and the Dismantling of Legal Estrangement,” *Yale Law Journal* 126 (2017). 2141.

³⁹ *Ibid.* at 2059.

⁴⁰ *Strieff*, 579 U.S. at 254 (2016) (Sotomayor, S., dissenting).

⁴¹ Susan F. Mandiberg, “Marijuana Prohibition and the Shrinking of the Fourth Amendment,” *McGeorge Law Review* 43 (2012). 31.

⁴² *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (establishing the Exclusionary Rule and holding that all evidence obtained in violation of the Constitution was inadmissible in court); *Chimel v. California*, 395 U.S. 752, 768 (1969) (holding that a search-incident-to-arrest was limited to the area the arrestee had immediate control over, rather than the arrestee’s entire home).

⁴³ Michael Vitiello, “The End of the War on Drugs, the Peace Dividend and the Renewed Fourth Amendment?” *Oklahoma Law Review* 73 (2021). 294–97 (discussing the Supreme Court’s shift toward upholding intrusive policing practices).

⁴⁴ *Ibid.* at 297.

searching the vehicle.⁴⁵ The Supreme Court upheld the warrantless search of the vehicle, holding that police officers have extensive authority to search a defendant's vehicle if an arrest is made. Whereas under *Chimel*, police could only search the area that the arrestee had immediate control over, *Belton* expanded the area of "immediate control" in vehicle settings to include the passenger area and compartments. Although the *Belton* doctrine was later modified in *Arizona v. Gant*, police can still search a vehicle compartment following an arrest as long as the arrestee is within reaching distance of the compartment at the time of the arrest or if the police have reason to believe the compartment contains evidence of the particular offense.⁴⁶



By the late 1980s, the United States government had taken a hardline stance toward drug use.



By the late 1980s, the United States government had taken a hardline stance toward drug use. Further, the courts ostensibly recognized the drug war as a valid justification to weaken Fourth Amendment protections. From 1982 to 1991, the Supreme Court upheld the constitutionality of police searches and seizures in 27 of 30 cases involving drugs.⁴⁷ Consequently—despite occurring during a period where drug use was declining—drug arrests increased by 227% between 1970 and 1989.⁴⁸

In 1996, the Supreme Court further expanded police authority by legitimizing pretextual stops in *Whren v. United States*.⁴⁹ The court's ruling granted police the authority to use

⁴⁵ *New York v. Belton*, 453 U.S. 454, 455–56 (1981).

⁴⁶ *Arizona v. Gant*, 556 U.S. 332, 343 (2009); Geoffrey S. Corn, "Arizona v. Gant: The Good, the Bad, and the Meaning of 'Reasonable Belief,'" *Connecticut Law Review* 45 (2012): 180 (suggesting that in many cases *Gant* actually expands police search authority in vehicle settings).

⁴⁷ Alexander, *The New Jim Crow*. 52–3 ("Between October 1988 and October 1989, the Washington Post alone ran 1,565 stories about the 'drug scourge.'").

⁴⁸ Don Stemen, "Beyond the War: The Evolving Nature of the U.S. Approach to Drugs," *Harvard Law & Police Review* 11 (2017): 397.

⁴⁹ *Whren v. United States*, 517 U.S. 806, 809–19 (1996) (holding that the detention of a driver upon establishing probable cause that the driver violated a traffic law does not violate the Fourth Amendment, even if a "reasonable" officer would not have stopped the driver for that action absent some other police purpose).

minor traffic violations—such as failing to use a turn signal—to conduct drug investigations on any motorist, regardless of whether there was evidence that the individual was engaged in drug activity.⁵⁰ As a result of the *Belton* and *Whren* decisions, police could now conduct a warrantless search of a vehicle and its compartments merely by stopping a vehicle for a minor traffic offense and then establishing probable cause by looking for drug evidence in plain view or smell.⁵¹ Further, in *Minnesota v. Dickerson*, the Court expanded upon the plain view and smell doctrines by allowing police—during a frisk for weapons—to arrest for any non-threatening object they uncover like drugs or drug paraphernalia.⁵²



Another policing tactic upheld by courts to enforce drug laws is the deployment of drug canines, a policing tool consistently upheld by the courts despite substantial evidence of frequent false positives and poor accuracy.



Another policing tactic upheld by courts to enforce drug laws is the deployment of drug canines, a policing tool consistently upheld by the courts despite substantial evidence of frequent false positives and poor accuracy.⁵³ For example, in a Seventh Circuit case from 2015, the court found that a drug dog’s overall accuracy rate was “not much better than a coin flip.”⁵⁴ As Professor Jane Bambauer puts it, “dogs are often wrong, alerting where no drugs can be found. Worse yet, dogs can be biased, picking up on subtle cues from their handlers.”⁵⁵ Nonetheless, under federal jurisprudence, probable cause is typically

⁵⁰ Alexander, *The New Jim Crow*. 108.

⁵¹ Michael C. Gizzi and R. Craig Curtis, “The Impact of *Arizona v. Gant* on Search and Seizure Law as Applied to Vehicle Searches,” *University of Denver Criminal Law Review* 1 (2011). 30–1.

⁵² *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (holding that police can seize evidence recognized through the sense of touch during a frisk if the incriminating nature of contraband is immediately apparent).

⁵³ Vitiello, “The End of the War on Drugs, the Peace Dividend and the Renewed Fourth Amendment?” 328 (discussing data indicative of frequent false positives and poor performance in the law enforcement use of drug dogs).

⁵⁴ *United States v. Bentley*, 795 F.3d 630, 635 (7th Cir. 2015).

⁵⁵ Jane Bambauer, “Defending the Dog,” *Oregon Law Review* 91 (2013). 1203 n.4.

established whenever a drug canine alerts to something on a person or property.⁵⁶ Moreover, a dog sniff does not usually constitute a search because it is “sui generis” and reveals “only the presence or absence of narcotics” rather than “noncontraband items.”⁵⁷ Thus, the use of drug-sniffing dogs during a routine stop for a minor traffic offense does not generally implicate an individual’s privacy interests.⁵⁸

Such Fourth Amendment rulings provided few meaningful limitations on the police’s ability to enforce drug laws. Although drug arrests have declined in recent years, law enforcement continues to arrest people for drug crimes at significantly high rates.⁵⁹ Further, drug arrests typically involve minor offenses, such as simple possession.⁶⁰

3.1.2. DECRIMINALIZATION AFFECTS POLICE AUTHORITY TO EXTEND STOPS, CONDUCT SEARCHES, AND MAKE ARRESTS FOR DRUG-POSSESSION ACTIVITY

Although cannabis remains outlawed in the federal system, its shifting legal status in a majority of states serves as a basis for how decriminalization affects policing tactics.⁶¹ As described above, in states where cannabis is still outlawed or used to establish probable cause, police can simply apply the traditional, drug war-centered practices endorsed by the Supreme Court. Namely, there is no clear protection against police pulling someone over deemed suspicious using a pretext, establishing probable cause by smelling cannabis or claiming to smell it,⁶² and then conduct a warrantless search of the vehicle via a search-

⁵⁶ *Florida v. Harris*, 568 U.S. 237, 250 (2013) (holding that police use of a trained drug-detection canine establishes probable cause when the canine alerts to drugs on the defendant’s person or property).

⁵⁷ *United States v. Place*, 462 U.S. 696, 707 (1983).

⁵⁸ *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

⁵⁹ Stemen, “Beyond the War.” 398 (“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.”).

⁶⁰ “2019 Crime in the United States: Arrests for Drug Abuse Violations,” *ucr.fbi.gov*, Federal Bureau of Investigation, 2019. ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/arrest-table.xls (showing that 86.7% of drug arrests were for possession and over 32% of the possession arrests were for cannabis).

⁶¹ Michael Hartman, “Cannabis Overview: Legalization,” *ncsl.org*, National Conference of State Legislatures, 31 May 2022. www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (noting that as of 2021, cannabis is decriminalized in 12 states and legalized in 19 states, two territories, and the District of Columbia).

⁶² Samuel R. Gross and Katherine Y. Barnes, “Road Work: Racial Profiling and Drug Interdiction on the Highway,” *Michigan Law Review* 101 (2002). 673 (discussing a study of car searches that showed the

incident-to-arrest. New York, Oregon, and Colorado offer three recent case studies highlighting how decriminalization affects policing practices.

New York and the MRTA: Before the Marijuana Regulation and Taxation Act (MRTA) was enacted, New York Police Department (NYPD) could simply approach a group of individuals on the street, claim they smelled cannabis, and frisk everyone in the group.⁶³ Even after a federal district court deemed New York City’s “stop-and-frisk” practice unconstitutional in 2013,⁶⁴ police ostensibly continued such racially discriminatory practices relying on cannabis odor.⁶⁵ As one New York judge put it, “So ubiquitous has police testimony about odors from cars become that it should be subject to a heightened level of scrutiny if it is to supply the grounds for a search.”⁶⁶

“

Even after a federal district court deemed New York City’s “stop-and-frisk” practice unconstitutional in 2013, police ostensibly continued such racially discriminatory practices relying on cannabis odor.

”

By allowing New Yorkers to purchase, possess, and transport up to three ounces of cannabis, the MRTA—signed into law on March 31, 2021—establishes a high threshold before law enforcement can take action on possession-based conduct.⁶⁷ For instance, within a few hours of the law’s enactment, the NYPD’s legal bureau released a department-wide

following to be typical ways in which police established probable cause: “drugs in plain view; the odor of burnt marijuana; and occasionally a ‘K-9 alert’ by a police dog trained to detect.”)

⁶³ Marco Poggio, “How NY Cannabis Law Could Redefine Policing,” *law360.com*, Law360, 6 Jun. 2021. www.law360.com/articles/1390755/how-ny-cannabis-law-could-redefine-policing.

⁶⁴ *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).

⁶⁵ “The Legacy of Stop-and-Frisk in New York’s Marijuana Arrests,” *nytimes.com*, *The New York Times*, 14 May 2018. www.nytimes.com/2018/05/14/opinion/stop-frisk-marijuana-nyc.html; Poggio, “How NY Cannabis Law Could Redefine Policing.” (“The odor of marijuana sort of became the new basis for stop-and-frisk”).

⁶⁶ Joseph Goldstein, “Officers Said They Smelled Pot. The Judge Called Them Liars.,” *The New York Times*, 12 Sep. 2019. www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html.

⁶⁷ New York Penal Law § 222.05.

memo outlining the law’s “sweeping” effects on the enforcement of cannabis offenses.⁶⁸ The memo includes two significant changes to enforcement practices.

First, the smell of burnt or unburnt cannabis no longer establishes probable cause of a crime to search a vehicle. Consequently, police can only use cannabis odor to search vehicles if the driver appears “under the influence of marihuana.” However, merely observing a driver smoke or consume cannabis or admit to doing so while driving no longer serves as a sufficient basis to establish probable cause that the driver is under the influence. Second, even if police obtain probable cause to search the vehicle due to impaired driving, “the trunk may not be searched unless the officer develops separate probable cause to believe the trunk contains evidence of a crime.”

“

... merely observing a driver smoke or consume cannabis or admit to doing so while driving no longer serves as a sufficient basis to establish probable cause that the driver is under the influence.

”

Within one month of the law’s passing, the New York Supreme Court applied the MRTA in *People v. Ponder*. After Danny Ponder was pulled over in Manhattan because his car’s tail lights were off, officers observed the presence of smoke and “detected a strong odor of burnt marijuana emanating from the vehicle.”⁶⁹ As a result, the officers searched everywhere in the car where “drugs could be secreted.” After finding a small bag of cannabis in the center console, the officers searched the trunk, uncovered a loaded firearm, and arrested Ponder and his passenger for criminal weapon possession.

Citing the MRTA, the court reversed the lower court’s decision, ruling that the presence of cannabis did not provide the requisite probable cause to justify the search. In doing so, the court went against two of its 2011 decisions reinforcing the rule that cannabis odor provided police probable cause to search a vehicle, including the vehicle’s trunk.⁷⁰ Thus, the

⁶⁸ Memorandum from New York Police Department’s Legal Bureau to all departmental police commands regarding New York’s Marijuana Regulation and Taxation Act, New York Police Department, 31 Mar. 2021.

⁶⁹ *People v. Ponder*, 195 A.D.3d 123, 125, 146 N.Y.S.3d 628, 630 (2021) at 125, 146 N.Y.S.3d at 630.

⁷⁰ *Ibid.* at 125, 146 N.Y.S.3d at 630 (“[T]o the extent *People v. Valette*, 88 A.D.3d 461, 931 N.Y.S.2d 6 (1st Dept. 2011) and *People v. Mena*, 87 A.D.3d 946, 930 N.Y.S.2d 7 (1st Dept. 2011) stand for a per se rule

MRTA shows—even in its infancy—how decriminalization can impact law enforcement’s ability to expand stops and conduct searches.

Oregon and Measure 110. In November 2021, Oregon became the first state to pass a law decriminalizing possession of all drugs.⁷¹ The new law, Measure 110, reduced the penalty for small-amount possession of any controlled substance from a criminal misdemeanor to a “Class E” civil violation. Class E violations are punishable by a fine of \$100; however, Class E violators can avoid paying the fine by completing a substance abuse health assessment. Two weeks before the law went into effect, the Oregon Department of Justice released a bulletin to all law enforcement agencies in the state, addressing the law’s impact on traditional drug enforcement practices.⁷² Specifically, the bulletin emphasized how the law’s reclassification of “possession” limits police authority to make stops, investigate, and arrest individuals based on drug possession.



Two weeks before the law went into effect, the Oregon Department of Justice released a bulletin to all law enforcement agencies in the state, addressing the law’s impact on traditional drug enforcement practices.



Although Oregon police need only reasonable suspicion to detain someone to investigate a crime, a civil violation requires probable cause.⁷³ Consequently, with Measure 110’s reclassification, officers can no longer stop an individual for drug possession without probable cause in most cases.⁷⁴ Thus, an anonymous tip that someone possesses a small bag of crystal methamphetamine or a pill bottle of oxycodone no longer justifies stopping

that the smell of marijuana alone provides probable cause to search the trunk of the vehicle, we decline to follow them.”).

⁷¹ “Measure 110 (2020) Background Brief,” *oregonlegislature.gov*, Legislative Policy and Research Office, 9 Dec. 2020. [www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](http://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf).

⁷² “Legal Bulletin from the Appellate and Criminal Justice Divisions on the Effects of Measure 110 on Investigation and Prosecution of Drug Offenses,” Oregon Department of Justice, 14 Jan. 2021.

⁷³ *State v. Aguilar*, 307 Or. App. 457, 467, 478 P.3d 558, 564 (2020).

⁷⁴ “Legal Bulletin from the Appellate and Criminal Justice Divisions on the Effects of Measure 110 on Investigation and Prosecution of Drug Offenses.”

the individual for further investigation.⁷⁵ Similarly, sudden flight or efforts to avoid being seen by law enforcement in an area known for substance use also may not be enough to justify a stop.⁷⁶

Secondly, Measure 110 limits police authority to “further investigate during an otherwise lawful stop if they suspect the person has drugs.”⁷⁷ For instance, if an officer pulls someone over for a broken taillight and subsequently sees evidence amounting to reasonable suspicion of a drug violation (e.g., a hypodermic needle in plain view⁷⁸), the officer can neither expand the stop nor search for evidence that the person possesses a criminal amount of the drug. The officer is also restricted from asking questions about the suspected violation, requesting consent to search for suspected drugs, or demanding that the drugs be handed over to the officer.⁷⁹ Moreover, an officer’s discovery of a drug violation alone does not give the officer authority to expand the stop. Without evidence of a criminal amount of the drug, the officer can only issue a civil violation.

“

...if an officer pulls someone over for a broken taillight and subsequently sees evidence amounting to reasonable suspicion of a drug violation (e.g., a hypodermic needle in plain view), the officer can neither expand the stop nor search for evidence that the person possesses a criminal amount of the drug.

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⁷⁵ *Alabama v. White*, 496 U.S. 325, 330 (1990) (holding that an anonymous tip, coupled with the officers’ corroboration of the tip’s innocent details, amounts to reasonable suspicion).

⁷⁶ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (holding that unprovoked flight in a high-crime area amounts to reasonable suspicion).

⁷⁷ “Legal Bulletin from the Appellate and Criminal Justice Divisions on the Effects of Measure 110 on Investigation and Prosecution of Drug Offenses.”

⁷⁸ *State v. Petri*, 214 Or. App. 138, 147, 162 P.3d 1053, 1058 (2007) (holding that the possession of a hypodermic needle was insufficient to establish probable cause of drug possession).

⁷⁹ “Legal Bulletin from the Appellate and Criminal Justice Divisions on the Effects of Measure 110 on Investigation and Prosecution of Drug Offenses.”

In a recent example, Oregon deputies in Lane County were initially given consent by Daniel Shaw to enter his home.⁸⁰ After seeing a pipe used to smoke methamphetamine on Shaw's coffee table, the deputies began questioning him about it. Despite Shaw revoking his consent, the deputies arrested Shaw for methamphetamine possession and subsequently found a gun that Shaw unlawfully possessed. The court vacated Shaw's conviction, holding that the presence of the meth pipe did not establish probable cause for Shaw's arrest.

Although the incident occurred before Measure 110's enactment, the court cited the new law, suggesting its implications if applied to Shaw's case. For instance, under Measure 110, the deputies' plain view of the meth pipe does not give them authority to question Shaw about it, let alone arrest him for it. At most, the presence of the pipe gives the deputies reasonable suspicion of a civil violation. Thus, the deputies would have no choice but to leave Shaw's home after he revoked his consent. Consequently, Measure 110 changes incentives for police to use some tactics in Oregon.⁸¹

Lastly, because police in Oregon do not have the authority to make custodial arrests for civil violations, Measure 110's reclassification of drug possession removes what would otherwise be lawful arrest authority for most possession-based conduct.⁸² Such a departure from traditional policing creates a trickle-down effect. First, an officer's authority to conduct a search incident to arrest is conditioned on a lawful arrest. By taking away the most arrestable offense in the country, incentives for police to use warrantless search practices is reduced.⁸³ Second, fewer possession-based arrests equate to a diminished capacity for police to capitalize on seizing assets.

Colorado and Amendment 64. In 2012, the Colorado Legislature legalized the recreational use of cannabis.⁸⁴ Under Amendment 64, the possession, purchase, or transport of an ounce or less of cannabis is legal. Although drug-sniffing dogs in the state continued to be employed as usual following the law's enactment, some departments recognized potential

⁸⁰ *State v. Shaw*, 311 Or. App. 537, 539, 489 P.3d 147, 148 (2021).

⁸¹ *State v. Olaiz*, 100 Or. App. 380, 386, 786 P.2d 734, 737 (1990) (noting that “[w]hether the officers would have stopped defendant for speeding without their desire [to gather information relating to drug activity] is irrelevant.”).

⁸² “Legal Bulletin from the Appellate and Criminal Justice Divisions on the Effects of Measure 110 on Investigation and Prosecution of Drug Offenses.”

⁸³ “2019 Crime in the United States: Persons Arrested,” *ucr.fbi.gov*, Federal Bureau of Investigation, 2019. ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested (showing that in 2019 the “highest number of arrests were for drug abuse violations (estimated at 1,558,862 arrests).”).

⁸⁴ Colorado Constitution, Article XVIII, § 16(3).

constitutional issues raised by Amendment 64 regarding cannabis-trained drug dogs.⁸⁵ Specifically, does a dog sniff intrude upon one’s privacy if it now detects noncontraband cannabis? The Colorado Supreme Court settled the issue in 2019.



Specifically, does a dog sniff intrude upon one’s privacy if it now detects noncontraband cannabis? The Colorado Supreme Court settled the issue in 2019.



In *People v. McKnight*, a police officer pulled Kevin McKnight over for failing to use a turn signal.⁸⁶ After recognizing McKnight’s passenger as “someone who had used methamphetamine at some point in the past,” a drug-detection dog named Kilo was dispatched to the scene. Kilo, trained to detect the scent of five different controlled substances, including cannabis, sniffed around the truck and quickly “alerted” near the driver-side door. The officer subsequently searched the truck and discovered “a pipe containing methamphetamine residue.” Because Kilo’s “alert”—i.e., sitting down—was the same for detecting cannabis as it would be for any of the other substances he was trained to detect, the officer had no way of knowing whether Kilo was alerting to the presence of methamphetamine or noncontraband cannabis.

The court here distinguished McKnight’s situation from federal precedent. Whereas the Supreme Court previously ruled that dog sniffs did not constitute a search because such tactics did not expose “noncontraband items,” McKnight’s case was examined under a distinct legal landscape after Amendment 64. Consequently, the *McKnight* court held that Kilo’s sniff patterns now constituted a search because—under Amendment 64—Kilo could detect noncontraband items. Further, because Kilo’s sniff patterns constituted a search, the search must be constitutionally justified via probable cause. As such, the court held that the officer’s seizure of the pipe and arrest of McKnight violated the Colorado Constitution.

⁸⁵ “Colorado Court Complicates Life for Drug-Sniffing Dogs,” *Weekend Edition Sunday*, npr.org, National Public Radio, 26 May 2019. www.npr.org/2019/05/26/727107486/colorado-court-complicates-life-for-drug-sniffing-dogs.

⁸⁶ *People v. McKnight*, 446 P.3d 397 (Colo. 2019).



As other states enact similar laws to Amendment 64, drug dogs trained to detect cannabis in those states are forced into early retirement.



As other states enact similar laws to Amendment 64, drug dogs trained to detect cannabis in those states are forced into early retirement.⁸⁷ For instance, in Washington, D.C.—where police have been instructed not to detain or search individuals based on cannabis odor since the District decriminalized cannabis in 2015—drug dogs trained to detect cannabis create problems.⁸⁸ Consequently, such dogs in the District have been retired or repurposed. In states such as Virginia, California, Michigan, and Massachusetts, law enforcement has started doing the same.

One reasonable response to the *McKnight* ruling would be for police departments to simply retire old dogs and train new ones to detect solely the drugs still criminalized in the state. Although such practice may justify the continued use of drug dogs, it fails to address several issues that would remain with their employment. First, state and local agencies frequently request federal law enforcement agencies to support various law enforcement operations in their state or jurisdiction.⁸⁹ Because many state and local agencies consider themselves under-resourced in the drug dog department, they often rely on federal agencies with ample canine detection resources to support them.⁹⁰ However, in states like Colorado, federal drug dogs present the same problem as with Kilo—they are trained to detect cannabis because it is still federally outlawed. Conversely, the laws limit state and local drug dogs from assisting

⁸⁷ Morgan Smith, “Beware of the Drug Detection Dog: The Fourth Amendment, Drug Detection Dogs, and State Legalization of Marijuana,” *SMU Law Review* 73 (2020). 631.

⁸⁸ Peter Hermann and Justin Jouvenal, “Decriminalization of marijuana is pushing pot-sniffing police dogs into retirement,” [washingtonpost.com, The Washington Post](https://www.washingtonpost.com/local/public-safety/police-canine-marijuana-washington/2021/07/14/f118eb66-e01c-11eb-ae31-6b7c5c34f0d6_story.html), 14 Jul. 2021. www.washingtonpost.com/local/public-safety/police-canine-marijuana-washington/2021/07/14/f118eb66-e01c-11eb-ae31-6b7c5c34f0d6_story.html.

⁸⁹ Geneva Sands, “Law Enforcement on High Alert for Super Bowl 50,” abcnews.go.com, American Broadcasting Company, 4 Feb. 2016. abcnews.go.com/US/law-enforcement-high-alert-super-bowl-50/story?id=36698694 (noting how federal agencies provided canine detection support during Superbowl 50 operations in California).

⁹⁰ North Carolina General Statute § 15A-406 (authorizing federal officers to provide temporary assistance to local and state law enforcement agencies and granting such officers with “the same powers as those invested . . . in a North Carolina law enforcement officer”).

with federal operations.⁹¹ Thus, decriminalization impedes law enforcement's ability to enforce drug laws by limiting interagency support.

Lastly, in Oregon—where small-amount possession of all controlled substances is decriminalized—the drug dog occupation may already be obsolete.⁹² Because drug dogs cannot discern between a decriminalized amount of drugs and a criminalized amount, the deployment of a drug dog in many situations may be unconstitutional.⁹³ For example, if the *McKnight* case occurred in Oregon and Kilo had been trained to detect only methamphetamine, Kilo would have alerted the same way to the meth-encrusted pipe as he would to a sizeable hundred-gram bag of meth. Yet, because possession of the encrusted pipe in Oregon is a civil violation, probable cause would be required to extend the stop, let alone dispatch Kilo to sniff around the truck. Thus, the *McKnight* scenario would stop there regardless of the substance in question. Consequently, as states continue to liberalize their drug laws and adopt policies akin to Oregon's Measure 110, the drug dog occupation will likely become merely a drug war relic.

3.2

EFFECT ON DEPARTMENTAL INCENTIVES

3.2.1 DRUG CRIMINALIZATION'S CONNECTION TO DEPARTMENTAL INCENTIVES

Like policing tactics, police department incentives to maximize drug enforcement activities and arrests are fundamentally tied to federal funding.⁹⁴ Initially declared by President Nixon in 1973, President Reagan's rededication to the drug war in 1982 precipitously escalated drug enforcement with various strategies, including the radical expansion of counterdrug enforcement spending.⁹⁵ Because state and local police were integral to mounting the offensive against drug activity that the federal government desired, policy

⁹¹ "Colorado Court Complicates Life for Drug-Sniffing Dogs," *Weekend Edition Sunday*.

⁹² Hannah Sievert, "Drug decriminalization law forces DCSO to retire drug-sniffing dogs," *centraloregondaily.com*, Central Oregon Daily News, 16 Jun. 2021. centraloregondaily.com/drug-decriminalization-law-forces-dcso-to-retire-drug-sniffing-dogs (explaining that with Measure 110's enactment, drug-sniffing dogs—trained only to find drugs—are no longer needed).

⁹³ Smith, "Beware of the Drug Detection Dog." 631.

⁹⁴ Bruce L. Benson and David W. Rasmussen, "Police bureaucracies, their incentives, and the war on drugs," *Public Choice* 83 (1995). 21.

⁹⁵ Hannah Cooper, "War on Drugs Policing and Police Brutality," *Substance Use & Misuse* 50 (2015). 1191.

structures were created to incentivize these nonfederal entities to prioritize drug enforcement.⁹⁶

For instance, the Comprehensive Crime Control Act of 1984 included a provision that gave local police the opportunity to receive up to 80% of the assets confiscated during federal drug investigations so long as they cooperated with federal authorities or participated in the investigation. Consequently, a substantial portion of federal forfeiture proceeds from drug investigations started flowing to nonfederal state and local agencies. The confiscation legislation thus incentivized local law enforcement to reallocate enforcement resources primarily towards drug activity and devote lesser resources to non-drug-related crime. Following the 1984 federal legislation, many states adopted similar forfeiture laws to seize assets without the requisite federal nexus. Unsurprisingly, due to the highly lucrative nature of forfeiture laws, the laws' application has been fraught with abuse.⁹⁷ Moreover, because small seizures can create informants or otherwise help lead to larger drug operations and bigger busts, police are incentivized to focus on minor possession-based crimes.

A second incentive structure created by the federal government was grant programs.⁹⁸ In 1988, Congress created the Byrne Program, which offered substantial cash grants to any local or state law enforcement agency inclined to prioritize drug enforcement. As a result of the Byrne Program and its funding, state and local narcotics task forces proliferated throughout the country. Although some Byrne funding is now spent on demand-reduction programs, such as drug treatment and education, the vast majority is still spent on drug task force operations and personnel.⁹⁹

Another grant program is the Community Oriented Policing Service (COPS) hiring program, established as part of the 1994 crime bill.¹⁰⁰ The COPS program, which has provided over \$14 billion to state and local police since its inception, was designed to promote

⁹⁶ Benson and Rasmussen, "Police bureaucracies, their incentives, and the war on drugs." 38.

⁹⁷ Alexander, *The New Jim Crow*. 80–1 (discussing various examples of police abuse of civil forfeiture, including the seizure of a Learjet after the owner unknowingly used it to transport a drug dealer).

⁹⁸ *Ibid.* at 72.

⁹⁹ "Looking at the Data: How States Invest Byrne JAG," *ncja.org*, National Criminal Justice Association, 2018. www.ncja.org/data-on-how-states-invest-byrne-jag.

¹⁰⁰ Brian Naylor, "How Federal Dollars Fund Local Police," *npr.org*, National Public Radio, 9 Jun. 2020. www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police.

community policing. However, like the Byrne Program, a substantial portion of the grant money goes to investigate state and local drug activity.¹⁰¹

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Other federal initiatives involve gifting police with military weapons, equipment, intelligence, and training for drug enforcement purposes.

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Other federal initiatives involve gifting police with military weapons, equipment, intelligence, and training for drug enforcement purposes.¹⁰² After President Reagan declared drugs a national security threat—linking drugs to terrorism¹⁰³—the transfer of military resources to domestic law enforcement was a routine practice so long as the resources were used for anti-drug activity.¹⁰⁴ Consequently, from the 1980s to the 2000s, police paramilitary units (i.e., SWAT teams) were established in approximately 80% of small towns and practically all cities.¹⁰⁵ In another example, between 2013 and 2014, it is estimated that 500 police agencies received Mine Resistant Ambush Protected (MRAP) armored vehicles from the Department of Defense.¹⁰⁶ Moreover, like the grant money, the military resources received were based on the agency’s drug arrest numbers.¹⁰⁷ Predictably, police militarization occurred more to enhance drug investigation capabilities than to support emergency situations involving genuine police and public safety threats.¹⁰⁸ Thus,

¹⁰¹ “Justice Department Releases \$58 million in Solicitations to Combat the Distribution of Illicit Drugs and Improve Officer Wellness,” *justice.gov*, United States Department of Justice, 23 Apr. 2021. www.justice.gov/opa/pr/justice-department-releases-58-million-solicitations-combat-distribution-illicit-drugs-and.

¹⁰² Alexander, *The New Jim Crow*. 77.

¹⁰³ Keith B. Richburg, “Reagan Order Defines Drug Trade as Security Threat, Widens Military Role,” *washingtonpost.com*, The Washington Post, 8 Jun. 1986. www.washingtonpost.com/archive/politics/1986/06/08/reagan-order-defines-drug-trade-as-security-threat-widens-military-role/309fdc6f-e5b8-4a64-8249-7b51182b3db1.

¹⁰⁴ Alexander, *The New Jim Crow*. 77.

¹⁰⁵ Peter B. Kraska, “Militarization and Policing—Its Relevance to 21st Century Police,” *Policing: A Journal of Policy and Practice* 1 (2007). 501–13.

¹⁰⁶ “War Comes Home: The Excessive Militarization of American Policing,” *aclu.org*, American Civil Liberties Union, 2014. 5. www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf.

¹⁰⁷ Alexander, *The New Jim Crow*. 78 (“Each arrest, in theory, would net a given city or county about \$153 in state and federal funding. Non-drug-related arrests brought no federal dollars, even for violent crime.”).

¹⁰⁸ “War Comes Home: The Excessive Militarization of American Policing.” 5.

federal incentive structures—rather than increasing illicit drug use and activity—caused police to prioritize low-level drug arrests.¹⁰⁹ Today, so long as state drug laws remain intact, police have the incentive to maximize drug arrests.

3.2.2 EFFECT ON PRETEXTUAL STOPS AND MILITARIZATION

As discussed above, pretextual stops serve as an effective tool to maximize drug arrests. As long as police observe a legitimate traffic violation, they may lawfully stop the motorist even if their sole intention is to investigate a hunch that the person has drugs.¹¹⁰ With pretextual stops facilitating such easy access to pedestrians and motorists for investigative purposes, they have become a routine practice in most police departments to boost drug arrests.¹¹¹

Pretextual stops are also strongly linked to cannabis enforcement.

Pretextual stops are also strongly linked to cannabis enforcement. First, cannabis is the most commonly used drug—e.g., approximately “48.2 million people, or about 18% of Americans, used it at least once in 2019.”¹¹² Compared to cocaine—the second most commonly used drug—the United States has roughly five times more daily cannabis users than monthly cocaine users.¹¹³ Unsurprisingly then, cannabis accounts for more than a third of all drug arrests and is the drug most likely to be detected during a pretextual stop. Second, its distinct odor provides police with an easy way to expand an investigation or validate a search during a stop. Consequently, cannabis itself has served as pretext for

¹⁰⁹ Alexander, *The New Jim Crow*. 77–8.

¹¹⁰ *Ibid.* at 67–8 (noting that “[a]ny one driving more than a few blocks is likely to commit a traffic violation of some kind, such as failing to track properly between lanes, failing to stop at precisely the correct distance behind a crosswalk, failing to pause for precisely the right amount of time at a stop sign, or failing to use a turn signal at the appropriate distance from the intersection.”).

¹¹¹ Alex Kreit, “Marijuana Legalization and Pretextual Stops,” *U.C. Davis Law Review* 50 (2016). 750–51.

¹¹² “Data and Statistics: Fast Facts,” *cdc.gov*, Centers for Disease Control and Prevention, www.cdc.gov/marijuana/data-statistics.htm.

¹¹³ Kreit, “Marijuana Legalization and Pretextual Stops.” 750–51.

police to search for more serious drugs or criminal activity.¹¹⁴ Thus, pretextual stops appeal to police departments because cannabis criminalization increases the likelihood that a police stop will lead to an arrest. In other words, as long as the practice of pretextual stops generates sufficient arrests to obtain the desired forfeitures, grants, and equipment, police departments will continue to do it.

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Cannabis decriminalization raises the opportunity cost of pretextual stops in two ways.

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On the other hand, if pretextual stops fail to yield sufficient arrest numbers, police departments may consider the practice no longer worthwhile because the opportunity cost is too high; the time and resources spent executing pretextual stops may be better spent elsewhere. Cannabis decriminalization raises the opportunity cost of pretextual stops in two ways. First, as highlighted in the case studies above, it limits law enforcement’s legal authority to expand investigations and conduct searches. Without such expanded legal authority, police investigations during stops are cut short, reducing the likelihood of arrest for other criminal activity. Second, it eliminates the resultant cannabis-related arrests and forfeitures that would have otherwise occurred during pretextual stops.¹¹⁵ Because cannabis accounts for more than a third of all drug arrests and is the drug most frequently discovered during stops,¹¹⁶ its decriminalization significantly decreases the arrest and forfeiture yield of pretextual stops. However, because police can still search for drugs that remain criminalized, it is questionable whether police departments in states like New York will still consider pretextual stops as a sensible—albeit diminished—practice.

Conversely, in Oregon with decriminalization of a broader range of drugs, the benefits of pretextual stops are likely too small to justify the costs. Preliminary arrest data in the state

¹¹⁴ Ibid. at 753 (noting that the NYPD’s focus on cannabis in the 1990’s was to find non-cannabis contraband like weapons).

¹¹⁵ Ibid. at 771.

¹¹⁶ Ibid. at 751 (citing a five-year study that showed 28.4% of searches during police stops on the I-95 corridor detected cannabis possession whereas cocaine was discovered in 7.4% of the searches).

appears to support this theory.¹¹⁷ Since Measure 110 took effect, police arrests for drug possession have decreased sixfold, from a monthly average of 1,200 to 200. Further, police have only issued 1,280 violations in the roughly seven months that the law has been active—a stark contrast to the number of arrests made for the same conduct before the law went into effect.

Because of its preliminary nature, drawing conclusions from this data would be imprudent; however, it does raise two possible interpretations. First, because the law limits police authority to investigate hunches and conduct searches during stops, police lack the tools to issue violations at the same rate arrests were made before the law’s enactment. Thus, the law raises the bar for police to detect drug activity. Second, police departments in Oregon do not have the same appetite to issue drug violations as they did for drug arrests. In other words, the incentive structures have essentially disappeared. As one former Oregon police chief put it, “If a law enforcement agency head has a stack of uninvestigated felony crimes, it’s a pretty tough bill to fill to think that [the] law enforcement executive is going to divert resources to issuing \$100 tickets that don’t appear to have an impact.”¹¹⁸



Although some police militarization is reasonable for emergencies involving officer safety, such situations are relatively rare.



Lastly, decriminalization laws may also influence departmental desire to militarize its police personnel and divisions. As discussed above, police have cashed in on federal military equipment, technology, and weaponry. Although some police militarization is reasonable for emergencies involving officer safety, such situations are relatively rare.¹¹⁹ Consequently, police paramilitary teams are primarily deployed to execute search warrants

¹¹⁷ “Delivering on Decriminalization requires a Complete Turnaround,” *newsregister.com*, Yamhill County’s News-Register, 29 Oct. 2021. [newsregister.com/article?articleTitle=delivering-on-decriminalization-requires-a-complete-turnaround--1635534760--41698--editorials](https://www.newsregister.com/article?articleTitle=delivering-on-decriminalization-requires-a-complete-turnaround--1635534760--41698--editorials).

¹¹⁸ Dirk VanderHart, “Oregon’s pioneering drug law raises more questions than answers in early months,” *opb.org*, Oregon Public Broadcasting, 27 Oct. 2021. www.opb.org/article/2021/10/27/oregon-pioneering-drug-law-raises-more-questions-than-answers-early-months.

¹¹⁹ Rosanna Smart and Terry L. Schell, “Mass Shootings in the United States,” *rand.org*, RAND Corporation, 15 Apr. 2021. www.rand.org/research/gun-policy/analysis/essays/mass-shootings.html.

for drugs. For instance, the American Civil Liberties Union (ACLU) found that out of all the paramilitary deployments studied, 79% of them were to execute search warrants, predominantly for drug purposes. On the other hand, merely 7% of the deployments were for emergencies such as an active shooter.¹²⁰ Thus, it is conceivable that police paramilitary teams and equipment will be used less in a state with drug decriminalization laws. Without the traditional legal authority to investigate drug activity, fewer search warrants will be obtained. With fewer search warrants to execute, departments may be hesitant to acquire such equipment, especially when considering shipping, maintenance, and storage costs.¹²¹

¹²⁰ “War Comes Home.” 31.

¹²¹ “1033 Program FAQs,” *dla.mil*. Defense Logistics Agency, www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs (“[P]roperty is shipped ‘as is,’ and the law enforcement agency is responsible for all costs associated with acquisition, maintenance . . .”).

PART 4

IMPLEMENTATION

4.1 HALF-MEASURE DECRIMINALIZATION

There is variation in decriminalization laws, and some laws have little to no impact on law enforcement agencies' investigative authority. In these jurisdictions, law enforcement retains the discretion to either issue a civil infraction or make an arrest for non-criminal drug possession.¹²² Here, I term this “half-measure decriminalization.”

In Nebraska, courts have held that a full custodial arrest for cannabis possession—a civil infraction in the state—is permissible.¹²³ Consequently, despite changes in their legal status, states like Nebraska fail to alter policing tactics because law enforcement can still use the sight or smell of cannabis to extend stops, establish probable cause, conduct searches, and make arrests. Before Nevada legalized cannabis in 2017, the state's decriminalization law—which allowed police to retain discretion to arrests for civil drug offenses—generated an increase in cannabis arrests by 96%. In this and similar cases, half-measure drug decriminalization may in fact produce “net-widening” effects by increasing law enforcement's reach and contact while limiting opportunities for counsel and other procedural protections.

¹²² Alexandra Natapoff, “Misdemeanor Decriminalization,” *Vanderbilt Law Review* 68 (2015). 1055.

¹²³ *Ibid.*

Although one response to this predicament is to legalize cannabis, states that do not wish to go that far can still construct decriminalization laws that have the same impact on police authority as legalization in practice.¹²⁴ For instance, before Massachusetts legalized cannabis in 2015, the state’s 2008 decriminalization law provided similar protections after courts held that cannabis possession no longer provided police officers with reasonable suspicion or probable cause to conduct stops, perform searches, or make arrests.¹²⁵ As the Massachusetts Supreme Court reasoned, “Ferreting out decriminalized conduct with the same fervor associated with the pursuit of serious criminal conduct is neither desired by the public nor in accord with the plain language of the statute.”¹²⁶

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California experienced a 47% decrease in juvenile drug arrests after the state decriminalized cannabis despite police retaining discretionary arrest authority.

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It is also important to point out that even in jurisdictions where decriminalization fails to limit police authority, there can still be a considerable drop in police contact and drug arrests.¹²⁷ For instance, California experienced a 47% decrease in juvenile drug arrests after the state decriminalized cannabis despite police retaining discretionary arrest authority.¹²⁸ Moreover, just because police have the authority to issue a civil violation for decriminalized conduct does not mean they will do so at the same rate they were arresting individuals for the same conduct before decriminalization went into effect. As observed in Oregon, the issuance of civil violations was stark compared to arrest numbers predating decriminalization. From this standpoint, the Nevada case may be an outlier but an important case study to consider.

¹²⁴ Kreit, “Marijuana Legalization and Pretextual Stops.” 767.

¹²⁵ *Commonwealth v. Cruz*, 459 Mass. 459, 945 N.E.2d 899 (2011); *Commonwealth v. Jackson*, 464 Mass. 758, 985 N.E.2d 853 (2013); *Commonwealth v. Sheridan*, 470 Mass. 752, 25 N.E.3d 875 (2015).

¹²⁶ *Cruz*, 459 Mass. at 472, 945 N.E.2d at 910.

¹²⁷ Kreit, “Marijuana Legalization and Pretextual Stops.” 767.

¹²⁸ Natapoff, “Misdemeanor Decriminalization.” 1111.

4.2

CONSENT AS AN ALTERNATIVE APPROACH

In 1991, the Supreme Court held that so long as police request and receive consent to search a person's belongings, the person is not seized in violation of the Fourth Amendment.¹²⁹ Police may conduct "consensual" searches so long as a reasonable person "would feel free to decline the officers' requests or otherwise terminate the encounter."¹³⁰ Consequently, even if decriminalization limits police investigative authority, a person may still provide consent to an expanded police inquiry or search based on unfamiliarity and the "powerlessness" of those targeted.¹³¹ Thus, police departments may continue to rely on pretextual stops based on the likelihood that individuals will consent more often than not to police requests.

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In 1991, the Supreme Court held that so long as police request and receive consent to search a person's belongings, the person is not seized in violation of the Fourth Amendment.

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However, this argument assumes that expanded police inquiries and searches via consent will detect enough possession-based activity at the criminal level to justify the practice (e.g., more than two grams of cocaine or methamphetamine in Oregon or more than three ounces of cannabis in New York). Further, habitual drug users do not typically consume enough of their preferred drug to keep that much on their person at a given time.¹³² Thus, even where a consent search leads to the detection of a controlled substance, police will be unable to capitalize on it in the manner they could pre-decriminalization.

¹²⁹ *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

¹³⁰ *Ibid.* at 429.

¹³¹ Alexander, *The New Jim Crow*. 66 (“[C]onsent searches are valuable tools for the police only because hardly anyone dares to say no.”).

¹³² Chloe Aiello, “Survey depicts a day in a drug user’s life, and it’s pretty normal,” *cncb.com*, CNBC, 29 Dec. 2017. www.cncb.com/2017/12/29/survey-depicts-a-day-in-an-drug-users-life-and-its-pretty-normal.html (“Habitual drug users spend anywhere from \$16.94 to \$35.06 per day to fuel their habits. At the high end, that breaks down to the price of about two packs of cigarettes per day.”).

PART 5

CONCLUSION

Proponents of drug decriminalization typically emphasize the reform’s utilitarian potential to reverse mass incarceration trends, reduce racial disparities within the justice system, and minimize the economic costs associated with drug enforcement. However, such arguments are incomplete because they miss an important benefit—decriminalization’s effect on policing. Recent decriminalization legislation in New York, Oregon, and Colorado affects police authority to expand stops, conduct searches, and make arrests for drug possession. Such legislation also affects departmental incentives to conduct pretextual stops and militarize police personnel and divisions. With the diminished capacity and incentive to pursue drug possession arrests, police can redirect resources toward crimes with victims, crime prevention, and public safety. More time and data are needed to assess decriminalization’s impact on policing thoroughly. Nonetheless, cannabis legalization in many states, as well as comprehensive decriminalization in Oregon, provides a natural case study for further examination of this approach.

ABOUT THE AUTHOR

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