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Harm Reduction is Justice

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Many of the people I meet in court who have pending criminal charges lack the housing, health care, overdose prevention help, and recovery support they need to be stable and safe. As a judge, my job is to provide justice. To do that in a true, enduring way, we in the criminal justice field need to ensure that vulnerable people can access harm reduction and other key services in their communities so they can stay safe and out of the corrections system. At the recent sentencing of a woman with significant convictions, I asked the prosecutor essentially this: How will the state connect this person to housing, counseling, and treatment in her area so she has a chance at stability when she leaves jail? He met my gaze, raised his hands, and shook his head. There were no good options.

However, soon there might be. Oregon and Washington are transforming their approaches towards drugs and addiction, and their new strategies could show us a better way to address these issues. In November 2020, Oregon voters passed Ballot Measure 110,¹ decriminalizing low-level drug possession and increasing state investment in harm reduction² and behavioral health supports.

¹ Drug Addiction Treatment and Recovery Act, 2021 Or. Laws ch. 2, § 1, *amended by* 2021 Or. Laws ch. 591. Oregon’s law, known as “Measure 110,” classifies low-level drug possession as a violation. A person who violates the law receives a citation carrying a small fine that is waivable if the person obtains a health screening. *Id.* at § 20.

² “Harm reduction” refers to interventions that minimize damage associated with a behavior – here drug use – without necessarily stopping the behavior. Forms of harm reduction include overdose prevention education, access to the overdose antidote naloxone, low-barrier housing, medication for addiction treatment (“MAT”), syringe services programs (“SSPs”), safe injection facilities (“SIFs”), drug checking, and non-stigmatizing health care. These strategies can save lives and protect health. They can also provide a bridge to recovery. *See* MAIA SZALAVITZ, UNDOING DRUGS: THE UNTOLD STORY OF HARM REDUCTION AND THE FUTURE OF ADDICTION 147-48 (2021) (positing that “recovery” is best understood as a spectrum of behavior ranging from one positive change to complete abstinence); *Naloxone for Opioid Overdose: Life Saving Science*, NAT’L INST. ON DRUG ABUSE (2017), <https://www.drugabuse.gov/publications/naloxone-opioid-overdose-life-saving-science> [<https://perma.cc/DU2N-STBP>] (showing that naloxone decreases overdose deaths); Susan Pefferele et al., *Choice Matters: Housing Models that May Promote Recovery for Individuals and Families Facing Opioid Use Disorder*, U.S. DEP’T HEALTH & HUM. SERVS. (June 23, 2019), <https://aspe.hhs.gov/reports/choice-matters-housing-models-may-promote-recovery-individuals-families-facing-opioid-use-disorder-0#note12> [<https://perma.cc/345M-BTEJ>] (showing that people in Housing First housing are more likely to continue MAT than others); *Medications to Treat Opioid Use Disorder Research Report*, NAT’L INST. ON DRUG ABUSE 4 (December 2021), <https://www.drugabuse.gov/download/21349/medications-to-treat-opioid-use-disorder-research-report.pdf?v=99088f7584dac93ddcfa98648065bfbe> [<https://perma.cc/J6HQ-K7ZX>] (showing that MAT reduces mortality and helps people stay in treatment); *Syringe Distribution Programs can Improve Public Health During Opioid Overdose Crisis*, PEW CHARITABLE TR. (March 2, 2021), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/03/syringe-distribution-programs-can-improve-public-health-during-the-opioid-overdose->

Then, in April 2021, the Washington Legislature passed Senate Bill 5476,³ directing public safety officials to divert people caught with drugs to social services at least twice before arresting or prosecuting them.⁴ These laws are driven by the need for a new approach and by evidence showing that with appropriate community-based supports, people who have behavioral health conditions can regain their place in a society that neither ignores nor demonizes them.⁵

Now we will see how these programs work. We need leaders to fully and faithfully implement them so we can learn if they are effective. The next two years will be critical: this is when officials in Oregon and Washington will launch their programs, advocates around the country will consider adopting them, and Washington legislators, whose SB 5476 partially expires July 1, 2023,⁶ will determine their next steps. It is also when communities struggling to address issues of drug overdose, homelessness, addiction, and untreated mental illness will need help keeping people safe.

crisis [<https://perma.cc/HCS4-AD3N>](showing that SSPs reduce risk of disease transmission and overdose); E. Armbrecht et al., *Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value: Final Evidence Report*, INST. CLINICAL & ECON. REV. 28 (January 8, 2021), https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf [<https://perma.cc/A95Z-3J4Z>] (showing that SIFs lowers risk of overdose and correlates with increased uptake of treatment and recovery services); Amy Lieberman, *Removing Legal Barriers to Drug Checking Can Help Reduce Drug-Related Harm*, NETWORK FOR PUB. HEALTH L. (April 8, 2020), <https://www.networkforphl.org/news-insights/removing-legal-barriers-to-drug-testing-can-help-reduce-drug-related-harm> [<https://perma.cc/67W3-ZN5D>] (showing that drug checking programs reduce risk of overdose); Jerome Adams & Nora Volkow, *Ethical Imperative to Overcome Stigma of People with Substance Use Disorders*, AMA J. OF ETHICS (2020), <https://journalofethics.ama-assn.org/article/ethical-imperatives-overcome-stigma-against-people-substance-use-disorders/2020-08> [<https://perma.cc/NXV3-ACYK>] (stating that stigma prevents people who use drugs from seeking essential health care).

³ Drug Possession-State v. Blake Decision, 2021 Wash. Sess. Laws ch. 311.

⁴ *Id.* at § 13(1)-(2). Washington’s law, hereafter “SB 5476,” classifies simple drug possession as a misdemeanor. SB 5476 was catalyzed in part by the Washington Supreme Court’s decision in *Washington v. Blake*, 481 P.3d 521 (Wash. 2021), striking down the state’s strict liability felony drug possession law because it violated state and federal Due Process Clauses. For a few months, Washington had no law criminalizing simple drug possession. Then, with passage of SB 5476, it designated the conduct a misdemeanor.

⁵ See Tawanda Rowell-Cunsolo, Meghan Bellerose & Carl Hart, *Access to Harm Reduction Treatment Among Formerly Incarcerated Individuals During the COVID-19 Era*, 19 HEALTH SEC. S-95 (2021); *Integrated Treatment for Co-Occurring Disorders: Building Your Program*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. (2009), <https://store.samhsa.gov/sites/default/files/d7/priv/ebp-kit-building-your-program-10112019.pdf> [<https://perma.cc/7DUV-T355>].

⁶ 2021 Wash. Sess. Laws ch. 311, § 29.

Our current responses to drugs and addiction generate searing inequalities. Our country lost 100,000 people to drug overdose in the year ending April 2021.⁷ People experiencing behavioral health conditions often languish in jails and prisons.⁸ As many as 65 percent of people incarcerated have an active substance use disorder.⁹ Between 33-60 percent of people in custody have both substance use and mental health disorders, compared to 14-25 percent of people who are not incarcerated.¹⁰ People leaving custody face a risk of death over 12 times greater than others, and overdose is the leading cause of death.¹¹

These inequities particularly affect communities of color and LGBTQ+ people. Many studies and statistical analyses confirm this fact. Despite roughly comparable levels of drug use,¹² Black people are arrested for drug offenses at a much higher rate than white people¹³ and are disproportionately represented in correctional settings.¹⁴ The overdose death rate for Black people

⁷ National Center for Health Statistics, *Drug Overdose Deaths in the U.S. Top 100,000 Annually*, CTRS. FOR DISEASE CONTROL & PREVENTION (November 17, 2021), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm [<https://perma.cc/4YYC-JCDE>].

⁸ Matt Ford, *America's Largest Mental Hospital is a Jail*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012> [<https://perma.cc/3B4B-PCMG>].

⁹ *Criminal Justice Drug Facts*, NAT'L INST. ON DRUG ABUSE (June 2020), <https://www.drugabuse.gov/publications/drugfacts/criminal-justice> [<https://perma.cc/Q4FL-482Z>].

¹⁰ *Guidelines for Successful Transition of People with Mental or Substance Use Disorders from Jail and Prison: Implementation Guide*, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN. 3 (2017), <https://store.samhsa.gov/product/Guidelines-for-Successful-Transition-of-People-with-Mental-or-Substance-Use-Disorders-from-Jail-and-Prison-Implementation-Guide/SMA16-4998> [<https://perma.cc/QR9U-77NQ>].

¹¹ Elizabeth Needham Waddell et al., *Reducing Overdose After Release from Incarceration: Study Protocol for an Intervention*, 8 HEALTH JUST. 18 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7349469> [<https://perma.cc/YF7T-SP6R>]; Ingrid A. Binswanger et al., *Clinical Risk Factors for Death After Release from Prison in Washington State: A Nested Case-Control Study*, 111 ADDICTION 499 (2016), <https://pubmed.ncbi.nlm.nih.gov/26476210> [<https://perma.cc/A3DG-K2AR>].

¹² Substance Abuse & Mental Health Servs. Admin., *2019 National Survey of Drug Use and Health*, U.S. DEP'T HEALTH & HUMAN SERVS. tbls.1.22B, 1.23B & 1.24B (2019), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29394/NSDUHDetailedTabs2019/NSDUHDetTabsSect1pe2019.htm> [<https://perma.cc/Q4QV-ML38>].

¹³ *Crime in the U.S. 2019*, FED. BUREAU INVESTIGATION tbls.43A & 43C (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43> [<https://perma.cc/8LEY-TPVS>].

¹⁴ *Structural Racism is a Public Health Crisis: Impact on the Black Community*, AM. PUB. HEALTH ASSOC. (Oct. 24, 2020), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2021/01/13/structural-racism-is-a-public-health-crisis> [<https://perma.cc/2ZDK-Q852>]; Zhen Zang, *Jail Inmates in 2018*, U.S. DEP'T JUST. BUREAU OF JUST. STAT. tbl.2 (2020), <https://bjs.ojp.gov/content/pub/pdf/ji18.pdf> [<https://perma.cc/SWM5-2SPS>].

is increasing at a faster pace than for whites:¹⁵ Between September 2018 and September 2020, that rate increased from 16.7 to 27.3 per 100,000.¹⁶ Black and Hispanic people experiencing addiction have less access than white people to buprenorphine, a medication that reduces cravings and helps retain people in treatment.¹⁷ They also have relatively lower utilization of substance abuse treatment, due partially to lack of health insurance.¹⁸

Between 2018 and 2020, the overdose death rate for Native American and Alaskan Native people increased the most of any racial group, rising from 11 to 29.8 per 100,000.¹⁹ People from this group are also overrepresented in correctional settings: There are 401 Native Indian/Alaskan Native people in custody per 100,000, compared to 187 per 100,000 for white people.²⁰ American Indian and Alaskan Native people also have relatively limited access to MAT, which helps prevent relapses and overdose deaths.²¹

LGBTQ+ people are also over-represented in correctional settings.²² Gay and transgender youth make up 4-6 percent of all youth, but they comprise 20 percent of people in the juvenile justice system.²³ When they enter the system, they are twice as likely as other youth to have

¹⁵ Marisa Penazola, *Black Opioid Deaths Increase Faster than Whites, Spurring Calls for Treatment Equity*, NAT'L PUB. RADIO (Sept. 10, 2021, 5:00 AM ET), <https://www.npr.org/sections/health-shots/2021/09/10/1035445899/black-opioid-overdose-deaths-increasing-faster-than-whites-study-finds> [<https://perma.cc/T95A-PYK2>].

¹⁶ Nirmita Panchal et al., *Substance Use Issues Are Worsening Alongside Access to Care*, KAISER FAM. FOUND. (Aug. 12, 2021), https://www.kff.org/policy-watch/substance-use-issues-are-worsening-alongside-access-to-care/?utm_campaign=KFF-2021-Coronavirus&utm_medium=email&_hsmi=2&_hsenc=p2ANqtz--jAmRzoOEPSIg4FGB7pgIRuJ1bknCDwGVh0OYsZpUYZI-ipNaXwePqnEXI8xh5mIBWhooQ9UKnbzU9XUERE6MH7jpmLw&utm_content=2&utm_source=hs [<https://perma.cc/FJ6W-23H3>].

¹⁷ *Id.*; Miguel Pinedo, *A Current Re-Examination of Racial/Ethnic Disparities in the Use of Substance Abuse Treatment: Do Disparities Persist?*, 202 DRUG & ALCOHOL DEPENDENCE 162, 162-67 (2019), <https://pubmed.ncbi.nlm.nih.gov/31352305> [<https://perma.cc/6ZMJ-YZFP>].

¹⁸ Panchal et al., *supra* note 116.

¹⁹ *Id.*

²⁰ ZANG, *supra* note 14, at tbl.2.

²¹ *Id.*

²² Alexi Jones, *Visualizing the Unequal Treatment of LGBTQ People in the Criminal Justice System*, PRISON POL'Y INITIATIVE (Mar. 2, 2021), <https://www.prisonpolicy.org/blog/2021/03/02/lgbtq> [<https://perma.cc/N7HA-87BE>].

²³ *Id.* (citing Jerome Hunt & Aisha Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth*, CTR. FOR AM. PROGRESS (June 29, 2012), <https://americanprogress.org/article/the-unfair-criminalization-of-gay-and->

experienced family conflict, child abuse, and homelessness.²⁴ Some information indicates overdose deaths are rising in this community.²⁵

This is the context we in criminal justice know. This is why we sometimes shake our heads in dismay at the system. But we also know that with appropriate support, many people who have behavioral health needs can live in their communities with greater stability, safety, and dignity.²⁶

People in the criminal justice field have been working for years to create a system that treats individuals who have behavioral needs as real people in complex social circumstances that are often beyond their control. The policies in Oregon and Washington can serve as case studies through which we determine how to do that most effectively. The evaluation components in the Oregon and Washington laws will provide a crucial framework for understanding their impact.²⁷

In order to learn as much as we can from these experiments, leaders working to improve drug policy should bring together a diverse group of experts—perhaps framed as a Drug Policy Innovation Council—to review outcome data and state-level evaluations of these new programs. This Council or group should compare the Oregon and Washington results with results from states that respond more traditionally to drugs and addiction, and with results from Portugal, which decriminalized drug use in 2001.²⁸

transgender-youth [<https://perma.cc/4LBJ-USJB>]; Angela Irvine & Aisha Canfield, *The Overrepresentation of Gay, Lesbian, Bisexual, Questioning, Gender Nonconforming, and Transgender Youth within the Child Welfare to Juvenile Justice Crossover Population*, 24 J. GENDER, SOC. POL'Y & L. 246, 248 (2016).

²⁴ Jerome Hunt & Aisha Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth*, CTR. FOR AM. PROGRESS (June 29, 2012), <https://americanprogress.org/article/the-unfair-criminalization-of-gay-and-transgender-youth> [<https://perma.cc/4LBJ-USJB>].

²⁵ John Ferrannini, *Castro Overdose Deaths Alarm Leaders*, BAY AREA REP. (July 21, 2021), <https://www.ebar.com/news/news//307128> [<https://perma.cc/CFY7-ZLP7>].

²⁶ See *supra* note 5.

²⁷ Both states have detailed program evaluation plans. See 2021 Or. Laws ch. 2 at §§ (4), (22)(1)-(6); 2021 Wash. Sess. Laws ch. 311, §§ 1(7)-(8), 2(5)-(8). The next step will be to compare the effectiveness of these and other strategies so we can create a model incorporating the best elements of each.

²⁸ See Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, 40 L. & SOC. INQUIRY 746, 746 (2014). In addition, it could measure program results against those from other countries that have implemented non-criminal justice responses to drug possession and addiction. See Niamh Eastwood et al., *A Quiet Revolution: Drug Decriminalization Across the Globe*, RELEASE: DRUGS, LAW & HUM. RTS. (March 2016),

We should assess these programs using consistent performance measures. Oregon has adopted meaningful standards for evaluating its new strategy, and they could be applied to other programs as well. In Oregon, evaluators will consider the demographics of individuals diverted to social services in lieu of arrest; the nature of any subsequent contact between people diverted to services and law enforcement; the change in the number of people accessing treatment, harm reduction, and/or transitional housing; the demographics of people accessing those services; the change in availability of culturally specific services; the change in availability of low-barrier behavioral health care; the change in arrest rates in areas hardest hit by the War on Drugs; the change in demographics of people arrested; and the change in criminal law involvement by people with substance use disorder.²⁹

The Council, or a group like it, could compare, integrate, and generalize from these case studies to create a framework of effective interventions. Its work product – perhaps a set of recommendations, report with detailed findings, or model legislation – could help public officials in other jurisdictions implement strategies to improve justice in their communities.

It will be important in this effort to center the perspectives of people who have been most impacted by our traditional approach to drugs and addiction, and people who have no stake in preserving the status quo. This leadership group’s membership should include people who practice harm reduction and/or recovery in their own lives, people who use drugs, and people who have been incarcerated for offenses related to drugs and behavioral health. Individuals with this life

<https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf> [https://perma.cc/3JZ4-5LLN]. While the strategies and social contexts in other countries may differ significantly from those in the United States, their experience could be instructive.

²⁹ See 2021 Or. Laws ch. 2 at §§ (4), (22)(1)-(6). Many Oregon leaders deserve recognition for their work to implement voter-approved Measure 110, including state legislators Sen. Floyd Prozanski, Sen. Kate Lieber, Rep. Rob Nosse, Rep. Raquel Moore-Green, Rep. Tawna Sanchez, and Deputy District Attorney Leslie Wu, who in 2021 served as Counsel to the Oregon Senate Judiciary and Ballot Measure 110 Implementation Committee.

experience have important perspectives, insights, and solutions that could otherwise be overlooked.³⁰ The leadership group should also include racial justice advocates, policy reformers, health care workers, social service providers, government program managers, and professionals from the criminal law field,³¹ among others.

There are non-government organizations (“NGOs”) and coalitions working in a cross-partisan way to improve our legal system that would have the capacity and expertise to lead an effort like this. There are public sector entities that would as well. Either approach could work, but some may believe NGO leadership would best serve an effort that could seek changes to established government practice.

What could we learn if we made the most of these innovative projects and this opportunity for transformation? Perhaps we would learn that many people, including the woman I recently had to sentence, could avoid repeated law violations if they had better access to harm reduction, housing, treatment, health care, and other essential community-based services. Perhaps we would learn that with help, many people could avoid the criminal justice system altogether.

Drugs and addiction are some of the most important and common life-and-death issues that our criminal justice system faces every day. We cannot afford to keep raising our hands and shaking our heads about what to do. Right now, with the experiments in Oregon and Washington, we have a unique window of opportunity to evaluate the status quo and compare it to new policies that will certainly achieve different (and perhaps better) outcomes. At a time when overdoses are rising and the addiction epidemic is getting worse, we must seize the opportunity to learn from

³⁰ See *Foundational Principles Central to Harm Reduction*, HARM REDUCTION COALITION Principle 5 (Dec. 11, 2021), <https://harmreduction.org/about-us/principles-of-harm-reduction> [<https://perma.cc/NCS5-V9RP>] (“Ensures that people who use drugs and those with a history of drug use routinely have a real voice in the creation of programs and policies designed to serve them.”).

³¹ Representatives from law enforcement, criminal defense, the prosecution, and the judiciary have on-the-ground understanding of current practices and opportunities for improvement.

new approaches so that we can further our shared goal of creating a more humane, equitable, and effective justice system.