

# LEGALIZE DRUGS

## DIVERT ADDICTION OUT OF CRIMINAL COURT

By: Prya Murad\*

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Larry was one of my first clients<sup>1</sup>. He was in his late-50s, but looked older. He sat quietly on one of the benches in the courtroom with his folded paperwork held tightly in his hand. He said that he had family in the area, but he came to court alone. When I met Larry, he had been homeless for several decades and suffering from addiction for the better part of his life.

Larry was accused of stealing some items from Wal-Mart. The alleged crime amounted to less than \$50. The Government gave him two options: he could plead guilty and sit in a cage for 364 days or they would upfile<sup>2</sup> his case to a felony and he could risk prison time and being branded a convicted felon. He explained that he was not opposed to pleading guilty or serving time in jail if we could convince the judge or Government to offer a lower sentence, but he had other concerns beyond jail time. He needed to get his eyes examined. He was losing his vision and needed cataract surgery. His health insurance was only valid for a few more months. His brother, on the other side of the state, was dying of liver failure. Every time he talked about his brother, his eyes filled up with tears.

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<sup>1</sup> Names have been changed to protect clients' identities

<sup>2</sup> In Palm Beach County "upfiling" is a term used to describe when the Government dismisses a misdemeanor case and then files that case as a felony.

The Government refused to change the offer so I was left to ask the judge if he would be willing to allow Larry to plead guilty for less jail time and allow Larry to turn himself in at a later date. I had big dreams of successfully appealing to the judge with Larry's health and his concern for his brother. The Government attorney walked up to the podium and began rattling off Larry's criminal history. Larry had never been charged with a felony, but he had easily over thirty prior misdemeanor thefts on his record. The Government attorney also said that Larry had picked up a new theft case and made a motion to revoke his bond<sup>3</sup>. In defense of his 364 day jail offer, the Government attorney said "it's just the cost of doing business."

A condition of pre-trial release is that the accused is not permitted to pick up any new cases. Just weeks after the Wal-Mart incident, Larry was arrested for another alleged theft at Home Depot. Since Larry violated the conditions of pre-trial release, the Government was entitled to ask the judge to revoke Larry's prior bond and place him in custody with an increased bond. For Larry, any bond amount would have been too high to pay. The judge asked if I would like for the motion to be heard that day or in two days. I asked for the later date and made arrangements for Larry to speak with the social workers at my office in hopes of getting him stable housing.

Larry was devastated. He did not anticipate being taken into custody this soon, but he held out hope that the judge would be sympathetic. Though we were unable to get Larry housing, he was put on a few waitlists at local homeless shelters. At his motion hearing, I argued that Larry was not a flight risk. Despite being homeless, Larry came to all of his court dates. He had a bike packed with all of his belongings that he would ride to and from court. I implored that the judge consider Larry's health conditions and the fact that he is willing to plead guilty but needed

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<sup>3</sup> If an accused person violates any condition of pretrial release (e.g. getting arrested for a new charge), the Government may make a motion to revoke bond on the first case.

time so he could see a doctor. I begged the judge to understand that even if the Government's allegations were true, Larry was no danger; he did not have any violent crimes in his past.

The Government attorney, once again, listed case after case after case of misdemeanor theft convictions. *It's just the cost of doing business, Judge.* Larry stood there terrified and humiliated.

Larry's bond was revoked and he was ordered to sit in a cage without a monetary bond. In other words, there was no amount of money that he could pay to get out of jail. The judge offered him 270 days to resolve both of his cases. Eventually, Larry pleaded guilty to 150 days in jail in front of a different judge. He cried he was so happy. I was so disappointed in myself, the Government, the System, the metaphorical Man.

In Larry's case, jail time was not the cost of doing business; it was the cost of addiction. He, like many addicts, stole to feed his drug problem. What he did was not right, but our criminal courts' façade of a solution certainly was not productive. Larry's entire adult life – primarily since he became homeless – was a series of misdemeanor theft cases. I am certainly no advocate for stealing and I am not naïve enough to think we will ever do away with misdemeanor prosecutions, but Larry and the thousands of people like Larry suffering from addiction deserve better from their Government.

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As a young Assistant Public Defender, I have spent most of my time in misdemeanor courtrooms. I have the privilege of representing the indigent criminal accused on seemingly minor cases that have a disruptive, lasting impact on their and their families' lives. I also spend a lot of time frustrated with the failures of our criminal courts. Misdemeanors are not open and shut cases of "bad" people doing "bad" things or even "good" people doing "bad" things. Often,

they are symptoms - symptoms of homelessness, poverty, complicated family relationships, alcoholism, and drug addiction.

This paper focuses specifically on drug addiction and its symptoms in misdemeanor courtrooms. These are cases that generally do not involve the possession or sale of drugs. They do not get the amount of attention that felony drug cases do because of the relatively low stakes involved. However, they are destructive in their own right.

In general, the idea that there are a host of factors and systemic problems that cause some people to do things that our legislatures have decided are criminal is a well accepted concept. However, that understanding has not translated into productive prosecution and sentencing that addresses the root causes of crime. In fact, I propose that there is no way that misdemeanor courts can ever do anything to meaningfully treat addiction. In order to treat addiction and keep people with this health issue out of the criminal courts, drugs must be legalized.

The current model for treating addiction is an interventionist one. One in three people are recommended for treatment from within the criminal justice system.<sup>4</sup> We operate under the assumption that in order for people to help themselves get over addiction they need to be shackled or in a cage or in a program that punishes them for every mistake they make. Judges, prosecutors, and even defense attorneys have convinced themselves that their hands are tied when it comes to really helping people suffering from addiction because addicts need to have a wake-up-call-moment in order to get clean. And though that may be true to some extent, our hands are not tied because of the moral or personal failings of the accused; they are tied because our criminal courts are not designed for compassion or meaningful treatment. The flaw in our thinking is that we believe addicts keep getting arrested because they don't "get it" the first, second, or third time. The truth is that they will never get the treatment they deserve in a system

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<sup>4</sup> *Chasing Heroin*, PBS <http://www.pbs.org/wgbh/frontline/film/chasing-heroin>

that is not built to help them. The net yield is thousands of people with addiction spinning in circles between court dates and jail sentences without the treatment that would keep them out of the system in the first place.

Simply, whatever it is that we are doing, it is not working. This failure to engineer effective public health policies to address addiction has killed almost 70,000 people in this country in 2014 alone.<sup>5</sup> The solution is to legalize all drugs so addiction can be handled as a matter of health not crime. If we truly care about addiction and want to help those suffering from it, then it is time that drug use becomes a matter of individual and public health, not of criminal “justice.” As Dan Baum argues in “Legalize It All: How to Win the War on Drugs”:

We cannot begin to enjoy the benefits of managing drugs as a matter of health and safety, instead of as a matter of law enforcement, until drugs are legalized at every level of American jurisprudence, just as alcohol was relegalized when the United States repealed the Eighteenth Amendment in 1933.

In support of this proposition, I will [1] discuss the failures of drug war policies in handling addiction, [2] propose an overhaul of the current model of addiction treatment, [3] explain how misdemeanor sentencing can never be fashioned to effectively treat addiction, and [4] offer legalization as a solution.

### **The War on Drugs Was a Failure**

In 1971, President Nixon declared “America’s public enemy number one in the United States is drug abuse.” Since then, state and federal governments have created a host of draconian drug laws and sentencing statutes and guidelines that have incarcerated millions of people – primarily young black and Latino men – for nonviolent crimes.

The drug war did more than just criminalize drug possession and sale. It made salient the racism in arrests and prosecutions, it led to a mass incarceration crisis, it has distracted the

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<sup>5</sup> *Id.*

American public from effective ways to treat addiction, and it has deteriorated families and communities under the guise of caring about the relationship between drugs and violence and deaths from drug use.

In 1980, there were 503,600 people incarcerated in state and federal prisons in the United States.<sup>6</sup> By 2014, that number more than quadrupled to 2,224,400 sitting in cages in this country.<sup>7</sup> Similarly, the entire population of people in corrections – those incarcerated or released on probation or parole – increased from over 1.8 million to over 6.8 million in those three decades<sup>8</sup> immediately following the drug war. The National Association for the Advancement of Colored People (NAACP) reports that of those approximately 2.3 million people sitting in cages, just a little under one million are African American. Though they make up just a quarter of the entire United States population, African Americans and Latinos make up about 58% of the prison population.<sup>9</sup>

The drug war's failure should be of no surprise to anyone, especially its engineers. As John Ehrlichman, counsel and Assistant to President Nixon told Baum:

You want to know what this was really all about?...The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>10</sup>

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<sup>6</sup> "Total Correctional Population." Bureau of Justice Statistics. <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487>

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

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

<sup>9</sup> NAACP Criminal Justice Fact Sheet. <http://www.naacp.org/criminal-justice-fact-sheet>

<sup>10</sup> Baum, Dan. "Legalize it All." *Harper's Bazaar*. April 2016. <http://harpers.org/archive/2016/04/legalize-it-all>

The drug war has not made us safe. It has not made us healthy. It has not deterred drug use or sale. As Ehrlichman bluntly states, it was never intended to do any of these things.

In fact, it seems that the drug war has blinded us from thoughtful, effective ways to treat addiction. Since Nixon's declaration of war in 1971, addiction rates in the United States have not changed.<sup>11</sup> The number of Americans suffering from addiction has remained at a steady 1.3%.<sup>12</sup> In contrast, deaths from drug overdose have been steadily increasing. From 2001 to 2014, there was a 2.8-fold increase in deaths from prescription drugs, a 3.4-fold increase in deaths from prescription opioid pain relievers, a 5-fold increase in deaths from benzodiazepines, a 42 percent increase in deaths from cocaine, and a 6-fold increase in deaths from heroin overdose.<sup>13</sup>

These stagnant addiction rates, multiplying rates of death from overdose, and sheer volume of people in the prison/probation-industrial complex for drug crimes and the symptomatic crimes of addiction are a sign that the policies of the drug war not only did not work, they made things worse. They made a public health problem into a mass incarceration crisis and an overdose epidemic.

### **Almost Everything We Think We Know About Addiction Is Wrong**

In his TED talk, journalist and author of *Chasing the Scream* Johann Hari explains his findings about addiction after his three year journey researching the War on Drugs and causes of addiction. His conclusion: everything you think you know about addiction is wrong. Everyone that tries drugs does not become an addict. According to the Substance Abuse and Mental Health Services Administration, half of all Americans over twelve years old have tried an illicit drug.<sup>14</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> NIH: National Institute on Drug Abuse

<https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>

<sup>14</sup> Baum, Dan. "Legalize it All." *Harper's Bazaar*. April 2016. <http://harpers.org/archive/2016/04/legalize-it-all>

Of those people, only a fifth has used drugs in the past month. Moreover, the vast majority of people are only using marijuana.<sup>15</sup>

The misguided belief in the mystical powers of hyper-addictive hard drugs is an artifact of the early 20<sup>th</sup> century. Early addiction experiments falsely indicated that when faced with the option to use or not use drugs, a person would always choose drugs and then become addicted. The experiments would place rats inside of a cage and place two water bottles on each end. One bottle was filled with water and the other was filled with cocaine or heroin-laced water. The rats always chose the drugged water and used it so frequently that they eventually died. This informed the public perception of addiction for the better part of the 20<sup>th</sup> and 21<sup>st</sup> centuries.<sup>16</sup>

Current research shows that the causes of addiction are much more complex, more nuanced than previously understood. Addiction is a chronic brain disease.<sup>17</sup><sup>18</sup><sup>19</sup> Some experts argue that vulnerability to addiction is genetic, to some extent.<sup>20</sup> Others have found that environmental cues play a larger role in why some people turn to drug use and are susceptible to addiction.<sup>21</sup><sup>22</sup><sup>23</sup> In the 1980s, Bruce Alexander, Professor of Psychology at Simon Fraser

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

<sup>16</sup> "Drug Free America." <https://www.youtube.com/watch?v=7kS72J5Nlm8>

<sup>17</sup> Chandler, R.K., *et al.* "Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety." *JAMA*. 301(2): 183-90. January 14, 2009. <https://www.ncbi.nlm.nih.gov/pubmed/19141766>

<sup>18</sup> *Chasing Heroin*, PBS <http://www.pbs.org/wgbh/frontline/film/chasing-heroin>

<sup>19</sup> Uhl, G.R. and Grow, R.W. "The burden of complex genetics in brain disorders." *Arch Gen Psychiatry*. 61(3): 223-29. March 2004. <https://www.ncbi.nlm.nih.gov/pubmed/14993109>

<sup>20</sup> *Id.*

<sup>21</sup> Maté, Gabor. "The Power of Addiction and the Addiction of Power." Presented at TEDx Rio+20. <https://www.youtube.com/watch?v=-mpbBAQvrKM>

<sup>22</sup> Alexander, Bruce. "The Rise and Fall of the Official View of Addiction." Revised July 3, 2014. <http://www.brucealexander.com/articles-speeches/277-rise-and-fall-of-the-official-view-of-addiction-6>

<sup>23</sup> Hari, Johann. "Everything You Think You Know About Addiction Is Wrong." TED. [http://www.ted.com/talks/johann\\_hari\\_everything\\_you\\_think\\_you\\_know\\_about\\_addiction\\_is\\_wrong?language=en](http://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong?language=en)



University, conducted a new iteration of the rat addiction studies. His experiments involved the same two bottles of pure and drug-laced water. The cage, however, was different. Professor Alexander created a dynamic space called “rat park.” At rat park, rats could play, exercise, eat, have sex, make other rat friends; the world was their oyster. In this modified experiment, Professor Alexander found that the rats rarely went back to the drug-laced water. Hari explains the phenomenon as “bonding.” The rat park subjects bonded to one another. They found meaning and purpose in their community. The rats limited to a simple cage had nothing else, so they bonded to drugs. Professor Alexander’s work calls into question our entire understanding of how addiction is caused and how it should be treated. “[W]hat if addiction isn’t about your chemical hooks? What if addiction is about your cage?”<sup>24</sup>

Canadian doctor specializing in chemical dependency, Gabor Maté, has found that his patients with chemical dependency suffered some sort of trauma or disruption when they were children.<sup>25</sup> Drugs offered them an artificial supply of feel-good hormones that they were not naturally producing as a result of their environments.<sup>26</sup> In contrast to arguments that addiction is genetic, Maté argues that these environments pass from generation to generation. The children of addicts feel like the same isolation and loneliness that drove their parents to addiction and, therefore, may be more likely to become addicted to drugs.<sup>27</sup>

Realistically, addiction, like most diseases, probably results from a combination of the nature and nurture paradigms. Regardless of whether some people are more prone to addiction

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<sup>24</sup> Hari, Johann. “Everything You Think You Know About Addiction Is Wrong.” TED. [http://www.ted.com/talks/johann\\_hari\\_everything\\_you\\_think\\_you\\_know\\_about\\_addiction\\_is\\_wrong?language=en](http://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong?language=en)

<sup>25</sup> Maté, Gabor. “The Power of Addiction and the Addiction of Power.” Presented at TEDx Rio+20. <https://www.youtube.com/watch?v=-mpbBAQvrKM>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

because of their genome or because of their childhood environments, our understanding of addiction has enriched but our public health responses have remained, for the most part, interventionist and futile. Hari challenges current models for treatment, arguing that our response to addicts is to do the very thing that drives their addiction – isolation, loneliness, shame, and humiliation.<sup>28</sup> This outdated understanding of the causes of addiction has led to persisting ineffective models for treatment.

Take, for example, heroin addiction treatment. Heroin addiction has reached a political moment. Stakeholders, government officials, and community leaders are paying attention. Several months ago, I saw a video of Macklemore with President Obama on Facebook calling attention to the abrupt increase in deaths from opioid overdose and imploring the American public to seek help for addiction.<sup>29</sup> Just weeks ago, the United States Surgeon General released a lengthy report demanding greater focus on evidence-based treatment for addiction and a shift towards viewing addiction as a public health, not criminal, issue.<sup>30</sup> Specifically, Surgeon General Murthy states in the Report’s executive summary:

...few other medical conditions are surrounded by as much shame and misunderstanding as substance use disorders. Historically, our society has treated addiction and misuse of alcohol and drugs as symptoms of moral weakness or as a willful rejection of societal norms, and these problems have been addressed primarily through the criminal justice system. Our health care system has not given the same level of attention to substance use disorders as it has to other health concerns that affect similar numbers of people. Substance use disorder treatment in the

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<sup>28</sup> Hari, Johann. “Everything You Think You Know About Addiction Is Wrong.” TED. [http://www.ted.com/talks/johann\\_hari\\_everything\\_you\\_think\\_you\\_know\\_about\\_addiction\\_is\\_wrong?language=en](http://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong?language=en)

<sup>29</sup> Weekly Address: A Conversation about Addiction. May 14, 2016. <https://youtu.be/AZQPsD3q0pc>

<sup>30</sup> *Facing Addiction in America: The Surgeon General’s Report on Alcohol, Drugs, and Health*. U.S. Department of Health and Human Services. <https://addiction.surgeongeneral.gov/surgeon-generals-report.pdf>

United States remains largely segregated from the rest of health care and serves only a fraction of those in need of treatment.<sup>31</sup>

The reason for this moment is pretty simple – white people are dying. What was once a drug limited to urban areas and used primarily by black and Latino men is now used equally among white people living in American suburbia.<sup>32,33</sup> White Americans account for the vast majority of deaths from heroin overdose in recent years.<sup>34</sup> The benefit of this newfound face of drug addiction is a call for treatment over incarceration and compassion over punitive measures. Yet, even these efforts are in vain without effective harm reduction policies across all treatment centers and affordable access to long term treatment without the constant fear of incarceration. Journalist Jason Cherkis expresses his frustration with heroin treatment in his poignant exposé of treatment centers in Kentucky, “Dying to Be Free.” He states:

Researchers have been making breakthroughs in addiction medicine for decades. But attempts to integrate science into treatment policy have been repeatedly stymied by scaremongering politics... There’s no single explanation for why addiction treatment is mired in a kind of scientific dark age, why addicts are denied the help that modern medicine can offer.<sup>35</sup>

For many addicts, sobriety is not a viable short-term option. Even after treatment, 50% of heroin users will relapse just ninety days after release.<sup>36</sup> In order to prevent overdose and harm from

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<sup>31</sup> Executive Summary to *Addiction in America: The Surgeon General’s Report on Alcohol, Drugs, and Health*. U.S. Department of Health and Human Services. <https://addiction.surgeongeneral.gov/executive-summary>

<sup>32</sup> Cicero, T.J., Ellis, M.S., Surrat, H.L. *et al.* “The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years.” *JAMA Psychiatry*. 2014 71(7): 821-26. <http://jamanetwork.com/journals/jamapsychiatry/fullarticle/1874575>

<sup>33</sup> Cook, Lindsey. “The Heroin Epidemic, in 9 graphs.” *US News*. August 19, 2015. <http://www.usnews.com/news/blogs/data-mine/2015/08/19/the-heroin-epidemic-in-9-graphs>

<sup>34</sup> Rudd, R.A. *et al.* “Increases in Drug and Opioid Overdose Deaths – United States, 2000-2014.” *CDC Morbidity and Mortality Weekly Report*. January 1, 2016. <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm>

<sup>35</sup> Cherkis, Jason. “Dying To Be Free: There’s a Treatment for Heroin Addiction that Actually Works. Why Aren’t We Using It?” *Huffington Post*. January 28, 2016. <http://projects.huffingtonpost.com/dying-to-be-free-heroin-treatment>

<sup>36</sup> *Chasing Heroin*, PBS <http://www.pbs.org/wgbh/frontline/film/chasing-heroin>

unsafe administration, addicts require harm reduction options and maintenance therapies. These include everything from clean needle exchanges – where someone can dispose of used needles and get sterile ones – to regular methadone or Suboxone treatment – which allows heroin addicts to have controlled doses of the stimulation their body requires as they wean themselves off drug dependence.

### **The Revolving Door of the Misdemeanor Courtroom**

A collateral consequence of the drug war that I see every day is individuals suffering from addiction with extensive misdemeanor records. People like Larry. Unsurprisingly, the consequence of legalization that I am selfishly interested in is the help it will give my clients. The obvious result is the felony possession and sale of drugs will be an artifact of our draconian past. Ultimately, legalization will also decrease the number of people that walk into misdemeanor courtrooms with the symptoms of addictions. By creating an environment in which addicts do not have to be slapped in the face with an arrest and criminal sanctions, our government will open the door for meaningful addiction treatment.

The misdemeanors most often associated with addiction are theft, trespass, offer to commit prostitution, and possession of paraphernalia. People charged with these offenses often have an extensive misdemeanor record, some with over twenty or thirty prior misdemeanor convictions for the very same charges. They are not facing prison time and do not have to have the scarlet phrase “convicted felon” attached to their backs, but they are stuck in a revolving door.

If found guilty of a misdemeanor, a person is facing a conviction on her or his record along with the possibility of jail time, probation, court ordered drug treatment, or some combination of these sentences. None of these sentencing options can be contemplated to address

the long-term needs of a person suffering from addiction. Quite to the contrary, many of them punish and shame people suffering from normal relapses during their treatment.

Consider, for example, a probation sentence. Lisa was charged with offer to commit prostitution. Her case, like most, arose from an undercover police sting operation. I fondly refer to these operations as Government manufactured crime. Undercover officers were on duty on a particular block. An officer approached Lisa and asked her if she would give him a blow job. She said that she would for \$30. Lisa was subsequently arrested by that officer and charged with offer to commit prostitution. When I met her she was in custody, unable to afford \$200 to pay her bond for pre-trial release.

Lisa was entitled to a trial by judge or jury. However, her primary concern was being released from custody so she could see her children. The judge would not decrease her bond such that she would be released and permitted to fight her case from outside of jail. Without a reduction in bond, the only way Lisa could get released was if she pleaded guilty and was given a sentence that allowed for her immediate release.

The Government refused to offer a plea agreement that included anything except probation. I requested that the judge accept a conviction and sentence her to time served (the time she had already served in jail) so she could be released that day, but the judge also would not accept a plea without probation. Lisa, eager to be released, pleaded guilty and accepted six months of probation with required drug treatment and no contact with the area where the officers manufactured her offense.

Lisa, like many women charged with offering to commit prostitution, has a drug problem. She had similar prior charges, but most of her criminal history involves possession of paraphernalia. Realistically, she was not a good probation candidate because her addiction made

it likely that she will violate her probation terms. Once she violates probation, she faces fines that she cannot afford and/or jail time that will disrupt her life and keep her away from her children.

Probation is not designed to give people second chances. It is a stringent, invasive system of oversight in which mistakes – testing positive for drugs, missing probation appointments, picking up new charges – can, and often do, lead to jail time. In her article “The Case for Eliminating Criminal Probation,” Michel Thomson argues:

As government policy, the probation system has never been about helping people move on with their lives after committing a crime. Instead, it has enabled the government to dig deeper into peoples’ private lives in search of punishable flaws. Eliminating probation would immediately reduce the number of ways a person can wind up in prison, make it easier to re-enter society without the stigma of ongoing oversight and free up a huge amount of money that could be used to fund community welfare programs. The alternative is to continue with a biased and socially destructive surveillance program whose main long-term outcome seems to be turning one-time criminals into repeat offenders.

Probation is an especially destructive sentence for someone getting treatment for addiction because it often requires probationers to stop using entirely. The cold turkey sobriety model for treatment goes against everything we know about addiction. Withdrawals and relapses are common occurrences for anyone working towards an addiction-free life. This may include using again or even committing another crime to buy drugs. By violating someone’s probation and imposing a jail sentence for these transgressions, a judge is only further alienating an addict from a supportive community and keeping her or him from treatment.

Another increasingly popular alternative is drug court. Drug courts are a viable alternative for some non-violent offenders. Most of the time, if someone completes the treatment program required by a drug court judge, her or his case will be dropped entirely. However, most drug courts place restrictions on who may qualify for the benefit of a dismissed case. In Palm

Beach County, Florida, only citizens with no prior violent crime convictions may qualify for the minimum one year long intensive addiction rehabilitation program offered by the Government.<sup>37</sup>

This program costs \$20 per week<sup>38</sup>, making it a difficult option for the indigent criminal accused.

In some counties, participation in a drug court program is an automatic waiver of one's right to trial. If someone enters drug court and fails to comply with the conditions, that person may be automatically sentenced by the judge. Temple University professor Scott Burris believes "drug courts represent in some ways a violation of fundamental human rights."<sup>39</sup> In exchange for treatment, an addict is giving up the right to challenge the Government's evidence. Palm Beach County's drug court does not require such a waiver. However, if someone fails to successfully complete drug court s/he is transferred back to a trial division and left to challenge the case against her or him on its merits. This often leaves people in the face of the ineffective treatment options characteristic of criminal sentencing.

Drug courts are advertised as a compassionate alternative incarceration for people who are committing non-violent felonies because of debilitating addiction. In theory, they address the problems this paper is focused on – people who are not getting help for their addiction but who remain stuck in the revolving door of misdemeanor court. In practice, they have the same failings as probation. They shame and punish addicts for perceived failures and hold their success and freedom contingent to following a strict program. Sure, they are more compassionate than a jail sentence, but if our maximum capacity for compassion is to hang someone's liberty in front of them in false hopes of treating a long term, debilitating illness, perhaps we should consider doing better to one another as a community.

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<sup>37</sup> <http://www.pbcgov.com/publicsafety/justiceservices/drugcourt.htm>

<sup>38</sup> *Id.*

<sup>39</sup> *Chasing Heroin*, PBS <http://www.pbs.org/wgbh/frontline/film/chasing-heroin>

Though probation and drug courts offer treatment that many addicts may not otherwise have access to, they set addicts up for failure. The dynamism, individualized attention, and patience required of efficacious drug treatment cannot be met by current misdemeanor sentencing options which, in contrast, focus on confrontation, sobriety, and punishment. It is in the interest of the criminal justice system to develop solutions that prevent the admission of people suffering from an illness into a system that is supposedly engineered – at least to some extent – to deter criminal activity. If the reason for the criminal activity is addiction and the criminal justice is unable to fashion solutions for treating addiction, then it is high time for an alternate strategy.

### **Legalize Drugs**

That strategy is *en masse* drug legalization. That's right – all of it.

While researching for and writing this article, I spent a lot of time debating with myself about whether I could in good conscience advocate for the legalization of all drugs. Even with my progressive beliefs about the need for access to clean needles and how minor drug possession should not even be a crime, I was hesitant to proclaim that all drug manufacture and sale should be legal. After all, I spend at least five days a week witnessing the tragic consequences of addiction. I have spoken with parents who are scared for their children's lives. I have witnessed people who need help unsuccessfully complete treatment. I have agonized and cried over client after client who I wish would decide that it is time for them to get clean. I do not see this issue as merely an academic exercise and I do not take this matter lightly. Legalization is the answer.

Let me explain the difference between the often confused terms “decriminalization” and “legalization.” The former is the elimination of criminal penalties for possessing small amounts



of drugs. Legalization, on the other hand, means that the possession of drugs carries no criminal penalty, though it may come with some restrictions – e.g. no public use of drugs.

Portugal is the poster child for the successes of drug decriminalization. In 2001, Portugal decriminalized everything from marijuana to methamphetamine.<sup>40</sup> The drugs are still illegal, but possession of small amounts is not per se criminal.<sup>41</sup> Moreover, the Portuguese government reallocated the money it spent on criminalizing drugs to creating safe spaces for addicts within the community.<sup>42</sup> If someone possesses a minor amount drugs – what Portuguese law defines as “less than a 10 day supply” – s/he is issued a citation and ordered to appear in front of a dissuasion panel.<sup>43</sup> These dissuasion panels make Portugal unique. They are comprised of legal, social, and psychological experts who evaluate each individual case-by-case and determine if it is necessary to prescribe treatment or if the case can be dismissed.<sup>44</sup> Unlike the court-ordered treatment in the United States, these dissuasion panels may recommend anything from counseling to opiate substitution therapy.<sup>45</sup> Additionally, rather than punishing and alienating addicts, Portugal incentivized businesses to hire people suffering from addiction, fostering a sense of belonging and purpose.<sup>46</sup> The results have been remarkable. Deaths from overdose

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<sup>40</sup> Ingraham, Christopher. “Why Hardly Anyone Dies From Drug Overdose in Portugal.” The Washington Post. June 5, 2015. <https://www.washingtonpost.com/news/wonk/wp/2015/06/05/why-hardly-anyone-dies-from-a-drug-overdose-in-portugal/>

<sup>41</sup> *Id.*

<sup>42</sup> Hari, Johann. “Everything You Think You Know About Addiction Is Wrong.” TED. [http://www.ted.com/talks/johann\\_hari\\_everything\\_you\\_think\\_you\\_know\\_about\\_addiction\\_is\\_wrong?language=en](http://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong?language=en)

<sup>43</sup> Oakford, Samuel. “Portugal’s Example: What Happened After It Decriminalized All Drugs, From Weed to Heroin.” VICE News. April 19, 2016 <https://news.vice.com/article/ungass-portugal-what-happened-after-decriminalization-drugs-weed-to-heroin>

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

decreased drastically – with only three overdose deaths on average for every one million citizens and the rate of new HIV infections declined from 1,016 cases in 2001 to 56 in 2012.<sup>47</sup>

Legalization permits drug possession in any quantity and the sale and manufacture of drugs, but even legalization may come with some restrictions. For example, in Colorado, the sale and possession of marijuana is now legal, but individuals less than 21 years old cannot grow, sell, or use marijuana; only licensed dispensaries can sell it; individuals may only possess one ounce at a time; and public use is prohibited.<sup>48</sup>

We must overcome our discomfort with this progressive model for treating addiction. Legalization is not a rubber stamp for the all-day-every-day-mass-consumption of drugs. It is not a permission slip for teenagers to freebase heroin in the streets. It is a policy measure that allows governments to regulate the substances that are killing its citizens, decrease the stigma associated with drug use and seeking treatment, and to utilize the profits generated to install structures dedicated to efficacious addiction treatment.

By legalizing drugs, state and federal governments can create meaningful, evidence-based infrastructure intended to allow for the safe consumption of drugs for those who choose to use, provide harm reduction therapy and other treatments for addicts, and install social services to mitigate the collateral consequences of addiction (that often have the cyclical effect of exacerbating addiction – e.g. homelessness). Further, legalization would allow our government to regulate drug manufacture and sale, displacing it from criminal monopolies and multi-billion dollar drug businesses.<sup>49</sup> The Economist illustrates the difference with an example from

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<sup>47</sup> *Id.*

<sup>48</sup> “Laws about Marijuana Use.” State of Colorado.

<https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use>

<sup>49</sup> “The Economist Explains: The different between marijuana legalisation and decriminalisation.” *The Economist*. July 18, 2014. <http://www.economist.com/blogs/economist-explains/2014/06/economist-explains-10>

Portugal: “the decriminalized cocaine consumed without criminal consequences in Portugal is still supplied by the gangs who cut off heads in Colombia.”<sup>50</sup>

Baum argues for legalization and a government monopoly:

A government monopoly on distribution solves the problem by making the setting of prices a matter of administration, not legislation. Government officials, whether at the state or federal level, would have infinite flexibility to adjust the price — daily, if necessary — to minimize use without inspiring a black market. The production of marijuana, cocaine, and heroin could remain in private hands, and the producers could supply the government stores, just as Smirnoff, Coors, and Mondavi provide their products to state liquor stores. If the cost of producing a drug drops because of innovation or competition, the government agency selling that drug to the public would see an increase in revenues. Likewise, it is much easier for the government to set the dosage and purity of products it sells in its own outlets than to police the dosage and purity of products that are spread throughout a free market. And the government could decide on its own to what extent it wants to permit advertising, attractive packaging, and promotions.

Finally, of course, when the government holds a monopoly, the public, not private shareholders, enjoys the profit. The states that retain control over alcohol distribution collect 82 to 90 percent more in revenue than states that license private alcohol sales collect in taxes, depending on whether they control both wholesale and retail. That the government should profit from a product it wants to discourage could be seen as hypocritical, but that’s the way things stand now with tobacco, alcohol, and gambling. States generally reduce the moral sting of those profits by earmarking them for education or other popular causes. In the case of drugs, the profits could go toward treating addicts.<sup>51</sup>

It feels counterintuitive, but it isn’t. As a country, we must accept that substance use and abuse will persist whether our government criminalizes drugs or not. Our current strategies for decreasing addiction and deaths from overdose are futile if not destructive. Legalization may be an abrupt, unfamiliar change from our current model, but it will be the most effective because it will give state and federal governments the leeway to handle addiction exclusively as a matter of

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

<sup>51</sup> Baum, Dan. “Legalize it All.” *Harper’s Bazaar*. April 2016. <http://harpers.org/archive/2016/04/legalize-it-all>

public. The benefits of this type of thinking are evident in the results from the Law Enforcement Assisted Diversion (LEAD) program in King County, Washington.

LEAD is a pre-arrest diversion program intended to direct low-level drug and prostitution crimes away from the criminal justice system and into community-based services.<sup>52</sup> The program is a partnership between law enforcement, case managers and social workers, the local American Civil Liberties Union chapter, public defenders, and prosecutors. These stakeholders came together in response to a growing heroin epidemic in their community. Just short of decriminalization, LEAD enlists law enforcement officers to take low-level drug offenders and individuals engaging in prostitution<sup>53</sup> and offer them the opportunity to have their criminal charges dropped if they participate in the program.<sup>54</sup> LEAD hired Seattle-based Evergreen Treatment Services (ETS) to provide treatment for its participants.<sup>55</sup> ETS follows harm reduction principles and attempts to provide immediate care, when possible.<sup>56</sup> Unlike drug courts or probation, LEAD offers flexible options for treatment. Its goal is not necessarily sobriety, but “to reduce the harm a drug offender causes him or herself, as well as the harm that the individual is causing the surrounding community...reduce recidivism rates for low-level offenders and preserve expensive criminal justice system resources for more serious or violent offenders.”<sup>57</sup> Further, LEAD recognizes the immense cost under our current system of prosecuting drug and

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<sup>52</sup> Law Enforcement Assisted Diversion. <http://leadkingcounty.org>

<sup>53</sup> People with certain violent charges in their criminal background are not eligible for LEAD.

<sup>54</sup> *Chasing Heroin*, PBS <http://www.pbs.org/wgbh/frontline/film/chasing-heroin>

<sup>55</sup> Law Enforcement Assisted Diversion. <http://leadkingcounty.org/about>

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

<sup>57</sup> *Id.*

drug-related offenses. “[O]ffenders cycle in and out of jail so frequently, this phenomenon is often referred to as a ‘revolving door.’”<sup>58</sup>

LEAD’s progressive work was highlighted in *Chasing Heroin*. One of the program participants that the documentary-makers followed was a 21 year old woman suffering from heroin addiction. She was a young, good looking woman with a loving father who, though frustrated with his daughter’s condition and behavior, wanted desperately for her to be healthy. When she started LEAD, she was not ordered to stop using drugs or even seek treatment. She was given an appointment with her assigned case manager. The case manager asked her questions about her life, practical questions about where she could be found in the event that she stops coming to her LEAD appointments, and what she wanted her relationship with her substance abuse to be. She broke down, visibly frustrated with herself and her inability to shake her addiction. She began going to a clinic that gave her clean needles and methadone. However, she was not ready for treatment. Throughout the documentary, she states that she does not plan on being an addict forever and wants to stop so she can go to beauty school. She explains that she is debilitated by her fear that she will fail at treatment. Her LEAD case manager did not coerce her to get treatment or punish her for choosing not to. Rather, the case manager supported her. When she did not come to her LEAD appointments for a few weeks, her case manager went out to go find her. She was living on the street, still using heroin.

This is the reality of addiction that the criminal courts cannot contemplate. The path to getting clean is a messy one and some people may never get there. In response to this documented reality, addiction must be dealt with as a matter of individual and public health not

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<sup>58</sup> Collins, S.E., *et al.* “LEAD Program Evaluation: Criminal Justice and Legal System Utilization and Associated Costs.” June 24, 2015.  
<http://static1.1.sqspcdn.com/static/f/1185392/26401889/1437170937787/June+2015+LEAD-Program-Evaluation-Criminal-Justice-and-Legal-System-Utilization-and-Associated-Costs.pdf?token=tKaAsr2eA%2BMDHqyOkxhJ6SZG7zc%3D>

crime and public health goals must shift from stone cold sobriety to the reduction of harm to oneself and others.

LEAD has been a great success. Overall, LEAD participants have less jail bookings, spend less time in jail, pick up less felony cases, and cost the criminal justice system less money than their non-LEAD counterparts.<sup>59</sup> Though there was no statistically significant difference in the average number of misdemeanor cases per year in a study of LEAD participants in June 2015, I predict that this number will also decrease as addicts get the resources they need to be healthy.

The LEAD program is just a step below decriminalization. It shows us that the acceptance of evidence-based techniques for decreasing harm from and treating addiction helps addicts, makes communities safer, and decreases costs in the criminal justice system. LEAD's success will, however, be limited by its resources. Currently, LEAD costs King County nothing. It is entirely funded by private donors. Though the program has done very well in two areas of King County over the past four years, it will need more funding to expand. Further, though LEAD contracts with ETS, it cannot always provide its participants the services they require. For example, one LEAD client waited months for a bed to open up at an inpatient treatment center. Once he received confirmation that the bed would be his, he traveled four hours by bus to find out that the center was full. In order to give LEAD longevity and develop similar community-based programs around the country, the government must intervene. These programs cannot rely on private donations alone if they are to be sustainable. It requires a radical change in policies and substance abuse health care delivery infrastructure. Legalization would allow for the community-based services LEAD provides – treatment, housing, counseling, etc. – at a larger scale and for a longer time. Moreover, a government monopoly can generate the money

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<sup>59</sup> *Id.*

necessary to create well-paying jobs for social workers, addiction specialists, case managers, etc. and centers dedicated to working with and treating addicts.

The path to legalization will require creativity and “like carefully laid military plans...probably won’t survive [its] first contact with reality.”<sup>60</sup> There will be bumps in the road. Things will not go as planned. Like all new policies, the initial results may not be perfect. However, change is necessary. Very simply, what we are doing is not working. It has not been working for several years. Legalization is an acknowledgement that the interventionalist model that uses the criminal courts as a conduit for treatment is ineffective and misguided. The “solutions” fashioned by criminal courts set people up for failure and then punish them for failing, arguably exacerbating their addiction. It is, moreover, a radical change from the status quo that sees addicts as human beings entitled to efficacious treatment, social services, compassion, and dignity.

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<sup>60</sup> Baum, Dan. “Legalize it All.” *Harper’s Bazaar*. April 2016. <http://harpers.org/archive/2016/04/legalize-it-all>