

## **Pathways to Drug Liberalization: Racial Justice, Public Health, and Human Rights**

Jonathan Lewis, Brian D. Earp & Carl L. Hart

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In our recent paper, we, together with over 60 of our colleagues, outlined a proposal for drug policy reform consisting of four specific yet interrelated strategies: (1) *de jure* decriminalization of all psychoactive substances currently deemed illicit for personal use or possession (so-called “recreational” drugs), accompanied by harm reduction policies and initiatives akin to the Portugal model; (2) expunging criminal convictions for nonviolent offenses pertaining to the use or possession of small quantities such of drugs (and releasing those serving time for these offenses), while delivering retroactive ameliorative relief; (3) the ultimate legalization and careful regulation of currently illicit drugs; and (4) the delivery of a new “Marshall Plan” focused on community-building initiatives, expanded harm reduction programs, and social and healthcare support efforts (Earp et al. 2021).

We were gratified to see so many thoughtful commentaries on our proposal, and we will respond to them in part in this reply. As noted within these commentaries, we explicitly defend strategies (1), (2) and (4) on the grounds of racial justice. Specifically, we argue that such strategies are needed to combat the harmful effects of prohibition and the practices of discrimination that continue to disproportionately affect individuals and communities of color, especially Black and Hispanic men. However, questions arise as to whether the third strategy (*i.e.*, legalization and regulation) is required to deal with the deep-seated racial injustices associated with current drug laws. In our paper, we argued that illicit drug markets generate specific harms, and current drug laws contribute to the stigmatization of drug use and drug users. Insofar as these markets and the stigmatization of drug use

disproportionately affect or disempower – or contribute to the mistreatment of – individuals in certain racialized groups, then addressing them is a matter of racial justice. And if decriminalization and harm reduction efforts alone cannot remove the harms associated with illicit markets – nor adequately deal with these stigmatizing attitudes – then full legalization (with regulation) may be required.

Similarly, if the existence of civil penalties for drug-related misdemeanors not captured by *de jure* decriminalization policies are used as a pretext for racial discrimination, then a case can be made for legalization along racial justice lines. The same claim could also be made if racial groups were found to be disproportionately impaired from accessing the support, services, and experiences afforded by decriminalization policies that would otherwise be more freely available under a regulated regime. We do not make such a case in the associated paper. Yet, as Dineen and Pendo (2021) demonstrate in their commentary on the mistreatment of people with substance use disorders in healthcare, there is evidence to support such a case.

The majority of the commentaries recognize that we do not go into the details of how drug policy reform might be implemented in practice. In their respective papers, Roberts (2021) and Rolles et al. (2021) offer some insight into the policy design process, from real-time developments in different policy models in the United States, Spain, and Uruguay to the possibility of democratically pursuing explicit policy experiments or trials in limited geographical areas along the lines of those used to gather evidence about Universal Basic Income. As we argue in our paper, the key point is that policy design must be informed by meaningful participation from relevant stakeholders, including people who use drugs and those communities that have borne the brunt of the “war on drugs” (see also Earp and Yaden, forthcoming). However, Berryessa (2021) and del Pozo et al. (2021) suggest that the long-term vision for reform that we put forward requires more immediate strategies and interventions within current legal frameworks. Rather than undermining our proposals, many of the suggestions put forward by our colleagues complement our aims to improve health and drug safety and combat racial injustice.

For instance, Berryessa argues for the employment of already established “second chance” mechanisms, including clemency, good credit systems, and the retroactive application of legislative reforms, for long-term incarcerated drug offenders. With a view to equitably improving health outcomes for all individuals and communities regardless of race, del Pozo et al. suggest that police discretion should be guided by a “public health ethic.” In turn, Dineen and Pendo (2021) acknowledge that pernicious exceptionalism toward the regulation of medical treatment for addiction

– together with practices and policies shaped by racist narratives and the construction of drug use as deviant -- contribute to the substandard and discriminatory care of people with substance use disorders as well as long-term vulnerabilities in relation to employment, housing, and service access. As a result, they call for the elimination of inequities in substance use disorder treatment in addition to the repeal and reform of laws that disproportionately harm those with such disorders.

Our proposal for the gradual, staged legalization and careful regulation of all drugs currently deemed to be illicit is primarily motivated by concerns for increased harm reduction, that is, to curtail the harms associated with illegal markets, end the stigmatization of drug use and drug users, and increase the benefits of responsible drug use and treatment options for substance use disorders. A number of commentators, however, argue that we have not taken seriously the potential public health risks associated with the legal regulation of the production, storage, handling, distribution, sale, and supply of drugs currently deemed to be illicit (Caulkins and Reuter 2021; Hall and Carter 2021; Rieder 2021). In our paper, we acknowledge that whether, and to what extent, a possible regulatory regime will lead to a reduction in relevant harms in practice will, ultimately, depend on the types of enforcement strategies that policymakers adopt to ensure compliance, and the rigor with which these strategies are carried out. But because we do not explicitly engage with the realities of legal regulation, a number of commentators have offered alternative proposals that are, ultimately, incompatible with our own.

As Caulkins and Reuter observe, the main issue seems to be that recent experiences with drug legalization -- specifically, the legalization of cannabis and prescription opioids -- show that “legalization creates a monster that can ride roughshod over regulators and public health.” The point is that licensed suppliers have a commercial interest to oppose public health measures and strict regulatory markets because profitability is promoted by heavy and regular use (Caulkins and Reuter 2021; Hall and Carter 2021). Furthermore, because the regulated industry has a strong interest in less regulation, monopolization of the market leads to political and thereby regulatory influence, which undermines the public interest (ibid.). We recognize that these are legitimate, serious concerns. How might one respond?

Firstly, and although we cannot do justice to the intricacies of this debate here, one response might be to stress that the problem is perhaps not as clear cut as critics of legal regulation make out. Careful analysis and balancing of the harms and benefits of legalization is required. For instance, although criticisms of legalization that appeal to past regulatory failures to protect public health are important considerations, they highlight the risks of “too parochial a focus on domestic policies,”

distracting from the normative issues related to drug policy particularly in the Global South, including human rights violations, structural inequalities, organized crime, and threatened national security (Rolles et al. 2021). A more holistic appreciation of the effects of current international drug control frameworks may provide us with more considered and overarching reasons for pursuing legalization.

As Fritz (2021) suggests, a second response might place greater emphasis on the notion of individual rights, specifically, one's right to control what substances one ingests for personal reasons provided that it does not harm or violate the liberty of others. Such a response turns on libertarian commitments to rights against state interference. The point is that although drug use is a public health issue, on this view, individual rights to bodily control outweigh the potential public health risks of drug legalization. A libertarian might defend their position by arguing that the nature and magnitude of public health risks cannot be accurately determined in advance as they are, ultimately, contingent on the nature of the regulatory frameworks that delineate the terms of compliance, and the nature of enforcement strategies implemented by policymakers to ensure compliance.

Thirdly, one might argue that a responsibly employed and highly regulated regime that establishes a safe supply of currently illicit drugs should, in principle, generate more harm reduction rather than less. And on that basis, legalization is the morally correct position on utilitarian grounds at least. Whether legal regulation does what we claim in our paper it should do -- and thereby whether it can reduce harms and support racial justice rather than generating more harm or injustice -- will depend on the ways in which proposals (1)-(4) are implemented in practice. In order to minimize the potential public health risks that critics of legalization have identified from previous regulatory experiences, several steps are needed.

First, it is vital that regulatory frameworks ensure the "safe supply" of drugs in accordance with their specific risks. Second, these measures must be accompanied by increased harm reduction efforts, including adequately expanded healthcare, social support programs, and rehabilitation efforts for those who struggle with substance use disorders, as well as realistic, evidence-based educational programs to dissuade minors from drug use, and promote safe and responsible drug use among adults. Of course, as Roberts (2021) and Rolles et al. (2021) respectively observe, there are a huge number of specific questions that need to be addressed in order to devise such a regulatory framework. Fortunately, as Caulkins and Reuter (2021) and Hall and Carter (2021) demonstrate, we do have evidence about how previous regulatory frameworks have failed to meet the objectives of safe, responsible, and beneficial drug supply. Thus, as we intend our proposals to be considered

within the domain of democratic politics, part of facilitating proposals (1)-(4) will involve lobbying policymakers, politicians, and regulators, and explaining the historical shortcomings in supporting public health with a view to minimizing the risks of perpetuating the same problems in new contexts (Rolles et al 2021).

Although we cannot speak for our wider group of colleagues on the original paper, none of us would fall on the libertarian sword so as to promote individual rights (*e.g.*, to unfettered access to any drug for personal use) at all costs. As one of us has recently argued in detail (Hart 2021), with increased liberty comes increased responsibility, and nuanced policy measures are required to ensure safe, responsible, and beneficial drug use. This means that regulatory regimes – in combination with the sorts of harm reduction efforts outlined in our paper – must be set up to support public health, and continuously insulated from, for example, the predations of “Big Business.” If this is not achievable in practice, then it is clear that post-decriminalization policy responses to drug liberalization will need to rely on other models.

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## **Appendix: Authors**

Jonathan Lewis\*

Postdoctoral Fellow in Bioethics

Dublin City University

**Correspondence:** jonathan.lewis@dcu.ie

Brian D. Earp\*

Associate Director,

Yale-Hastings Program in

Ethics and Health Policy

Yale University & The Hastings Center

**Correspondence:** brian.earp@yale.edu

Carl L. Hart \*

Ziff Professor in Psychology (in Psychiatry)

Columbia University

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\* Jonathan Lewis and Brian D. Earp share first authorship. The senior author is Carl L. Hart.