



**RESEARCH
REPORT**

BETWEEN RHETORIC AND REFORM
Criminal Justice Reform in the United States

By Adam Schaffer, WOLA Program Officer

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KEY FINDINGS

BECAUSE OF INCREASES IN THE NUMBER OF PROSECUTIONS AND THE IMPOSITION OF LONGER SENTENCES FOR BOTH VIOLENT AND NON-VIOLENT OFFENSES, THE U.S. PRISON POPULATION HAS SOARED OVER THE PAST FOUR DECADES. From 1973 to 2009, the number of people imprisoned in state and federal prisons grew by 700 percent. While the prison population has seen slight reductions in recent years, more than 1.5 million people remain imprisoned today. On any given day, another 731,000 are incarcerated in local jails.

THE INCARCERATION RATE FOR DRUG OFFENSES SAW A PARTICULARLY MASSIVE INCREASE. Between 1980 and 2010, the number of people incarcerated for drug offenses surged from 15 per 100,000 to 143 per 100,000, a nearly ten-fold increase.

THE RISE IN INCARCERATION DID NOT SIGNIFICANTLY IMPROVE PUBLIC SAFETY. While so-called “tough on crime” policies and long sentences were designed to reduce crime, their effects were negligible at best. Instead, they fueled distrust of police, undermined confidence in the fairness of the justice system, and contributed to wasteful spending. The disastrous effects of these policies have fallen most heavily on minority communities, who are arrested and incarcerated at significantly higher rates.

BIPARTISAN SUPPORT FOR CRIMINAL JUSTICE REFORM HAS LED TO NEW INITIATIVES TO CURB MASS INCARCERATION, PARTICULARLY FOR NON-VIOLENT OFFENDERS—BUT MUCH MORE NEEDS TO BE DONE. Growing recognition across the political spectrum of the failures of mass incarceration has fueled the momentum of reform efforts, and some initiatives have successfully reduced prison populations. Reductions to date, however, have been minimal and considerably broader reforms are needed to significantly reduce the U.S. prison population.

RECOMMENDATIONS

The United States exported much of its draconian criminal justice system to Latin America under the guise of the “War on Drugs,” encouraging countries throughout the hemisphere to emphasize the arrest and incarceration of individuals at all levels of the drug trade. In practice, this has filled Latin American prisons with farmers, drug consumers, and low-level participants in the market, while drug trafficking networks thrive. **As the United States reconsiders its own practices, Latin American countries that have been implementing similarly-flawed policies should do the same.**

Important criminal justice innovations are underway occurring at the state and federal levels in the United States, and those approaches—which seek to prioritize public health, safety, and civil liberties, and avoid arresting low-level, non-violent offenders—should be shared through U.S. international training programs and in United Nations forums. The April 2016 UN General Assembly Special Session on Drugs (UNGASS) provides a unique opportunity for the U.S. government to highlight the reforms taking place within the United States, and underscore U.S. support for drug policies that truly promote human rights, public health and safety.

INTRODUCTION

From 1973 to 2009, the total U.S. prison population increased over seven-fold. Acting in response to public safety concerns, elected officials and prosecutors sought to appear “tough on crime,” extending sentences and increasingly relying on incarceration for punishment—even for relatively minor offenses. By 2009, for the first time in history, one in one hundred adults in the United States was incarcerated.¹ Much of the change came in the context of the “War on Drugs,” and arrest and incarceration rates for drug offenses saw a particularly marked rise. From 1980 to 2010, the imprisonment rate for drug crimes grew from 15 per 100,000 to 143 per 100,000; a nearly ten-fold increase.² Since 2010, the number of people incarcerated for drug

* The term “imprisonment rate” is used to mean the number of persons imprisoned in state or federal prisons for more than one year per 100,000 U.S. residents. This excludes persons in local jails or who have not been convicted. The “incarceration rate” includes all persons in U.S. jails and prisons regardless of conviction status.

offenses at the state and federal levels has held stable at roughly 300,000.

The costs of the rise in incarceration were equally meteoric and unprecedented; state-level spending on corrections increased

by 400 percent between 1980 and 2009, outpacing every other major budget item except for Medicaid. Annual total incarceration costs per inmate vary

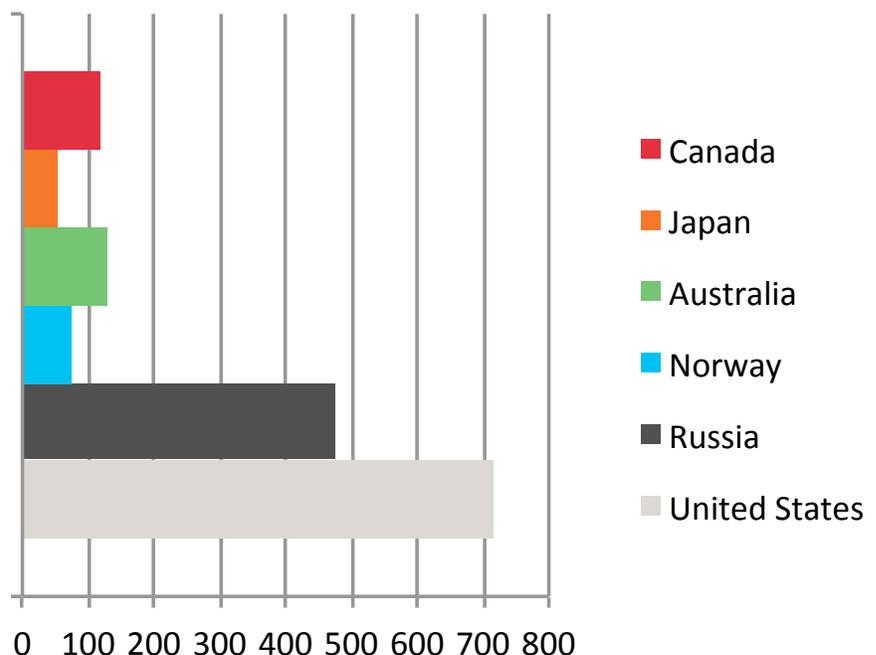
widely between states, but averaged \$31,286 in Fiscal Year 2010³—as much as triple the amount states spent per student in the same year.⁴

The United States has become a global outlier with its prison population, incarcerating at a rate five to ten times higher than that of other liberal democracies.⁵ With only 5 percent of the world’s population, the U.S. has nearly 25

“Mass incarceration makes our country worse off, and we need to do something about it.”

President Obama

Prison population rate (per 100,000 of national population)



percent of the world's prison population.⁶

Yet in recent years, the United States has begun to see a paradigm shift. Proposals are emerging to replace zero-tolerance policies, which sought to criminalize all aspects of drug-related behavior, with alternatives to incarceration and more fair sentencing policies.

Elected officials, from President Barack Obama to local leaders, have openly criticized draconian, ineffective criminal justice policies—particularly for drug offenses. Speaking before the National Association for the Advancement of Colored People (NAACP) in July 2015, Obama said:

“So our criminal justice system isn’t as smart as it should be. It’s not keeping us as safe as it should be. It is not as fair as it should be. Mass incarceration makes our country worse off, and we need to do something about it.”⁷

Calls for reform have spanned the political spectrum, as liberal groups call attention to the racial and socioeconomic disparities in the enforcement of drug laws, while conservative groups question the enormous financial costs (and questionable benefits) associated with mass incarceration. At a time when partisan rancor dominates, there is emerging bipartisan agreement that current drug laws—and sentencing practices more broadly—are ineffective, wasteful, and unjust.⁸

During Obama’s second term, the U.S. Department of Justice has advanced several initiatives to “confront over-incarceration at the same time that we continue to promote public safety,” as former Attorney General Eric Holder explained in 2015.⁹ States as politically and culturally distinct as California and Texas have passed laws intended to reduce their prison populations. Programs such as the Smart on Crime Initiative, the

Clemency Initiative, and the Drugs Minus Two Act, all described in greater detail below, are important first steps toward addressing over-incarceration. Meanwhile, state legislatures and governors have undertaken a range of initiatives to reduce prison populations—and accompanying expenses. On Capitol Hill, bills have been introduced with Republican and Democratic sponsors to advance criminal justice reform at the federal level.

Actual reductions in the nation’s prison population, though, remain elusive. As some states have secured double-digit reductions in their prison populations, others have opted to incarcerate even more people. And although far too many people are imprisoned for drug offenses, effectively reducing incarceration for these crimes will not by itself end mass incarceration in the United States—less than one quarter of the U.S. prison population is incarcerated for drug crimes.

Yet the most recent prison data offer encouraging signs. Between 2013 and 2014, the total number of people incarcerated in prisons in the United States decreased by one percent from 1,574,700 to 1,561,500, an imprisonment rate of 612 per 100,000 people 18 or older.¹⁰ Taken with the minor upward and downward fluctuations since 2009, it appears that the era of unchecked prison growth is drawing to a close.

This report begins by explaining how and why the U.S. prison population has grown in recent years, and the weak relationship between rising rates of incarceration and falling rates of crime. The paper then outlines the policy reforms currently underway, the changes they have already achieved, and what may be accomplished in the future. The paper concludes with reflections on the significance of the U.S. reforms now underway for Latin American countries currently considering criminal justice and sentencing reforms.

SENTENCING FOR DRUG CRIMES IN THE UNITED STATES

In the United States, though federal law takes precedence over state law, individuals can be charged under either state or federal systems, each with its own sentencing guidelines, mandatory minimum sentences, and laws. Certain crimes can only be tried in certain jurisdictions; if the issue is related exclusively to a state or federal law, it must be tried in state or federal courts, respectively. Similarly, certain issues affecting the country as a whole, including cases involving the federal government or bankruptcy, are heard at the federal level. Meanwhile, many conducts are illegal under both federal and state law, thus can be tried in either. Generally drug production, sale, trafficking, and possession are illegal at both the state and federal levels and can be tried at the state or federal level. Although variability exists from case to

case, states tend to prosecute lower-level offenses, and the federal government larger-scale trafficking offenses.¹¹ State and federal prosecutors decide in which jurisdiction a case will be heard and final decisions as to venue cannot be appealed.¹²

At both the federal and state level, drug-related sentences are generally guided by two provisions: mandatory minimums, which are the shortest allowable sentence for a given offense (with a few limited exceptions), and sentencing guidelines (see graphic below), which are generally non-binding guidelines for judges setting sentences. Both provisions take into account the drug in question, the quantity, the level of the defendant's involvement, and the individual's criminal history to raise or lower the sentence.

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63

Federal guidelines determine sentences based upon offense and criminal history. The guidelines continue to include 43 levels, the highest of which carry a life sentence.

EXAMPLE OF SENTENCING AT THE FEDERAL LEVEL

COURTESY OF FAMILIES AGAINST MANDATORY MINIMUMS (FAMM)

Conviction: Distribution of seven kilograms of marijuana¹³

1. The judge opens the manual to the Drug Quantity Table, which is used to determine the “base offense level,” or the starting point, for a drug sentence. The Drug Quantity table says that at least five kilograms of marijuana, but less than 10 kilograms of marijuana triggers a base offense level of 14. Level 14 is now the starting point for the judge’s sentence calculation. (The guidelines have 43 base offense levels; the higher the level, the longer the sentence.)
2. Next, the judge uses the guidelines to determine if the sentencing level should be raised or lowered. Let’s say the defendant sold marijuana with some friends. If he was the “organizer or leader” of that group, and the group contained five or more people, the guidelines manual says his sentencing level should be increased by four levels, which in this case would be level 18. If the defendant rented a garage where he stored and from where he sold marijuana, he would get the two-level enhancement for maintaining drug-involved premises, or if he asked his 17-year-old brother to keep an eye out for the cops, the guidelines add two levels for using a minor to commit a crime. Judges can also lower the defendant’s sentencing range if, for example, the defendant played a particularly minor role or has accepted responsibility for his crime.
3. The judge then takes the offense level she’s calculated and converts it to a sentence using the manual’s Sentencing Table. In the case of our marijuana defendant, the sentencing table converts a level 20 offense to a sentence of 33-41 months for someone with little or no criminal history. But let’s say our defendant has been in trouble for marijuana before; perhaps he was on probation for a smaller marijuana charge dating back a few months. That will get him at least one criminal history point for his prior conviction and an extra two points for being on probation at the time of his arrest. Three criminal history points puts him in criminal history category II, which increases the recommended sentence to 37-46 months.
4. Once the judge has come up with a guideline recommended sentence, she then considers whether any “departures” are appropriate. The Sentencing Guidelines provide for many upward and few downward departures based on a variety of factors. For example, the judge might consider the criminal history calculation overstates our young man’s true criminal history and depart back to Criminal History Category I, lowering the recommended guideline sentence as a result.
5. Finally the court consults a federal law to test whether the guideline sentence is enough, but not too much, to punish, deter, incapacitate and rehabilitate the defendant. If the judge finds the recommended guideline sentence is greater than necessary (or in some cases, not sufficient), he or she is free to “vary” below or above the recommended sentence.

While judges can vary from the sentencing guidelines, they can’t sentence below the mandatory minimums (except in very limited circumstances). If there is a mandatory minimum, it always trumps a lower guidelines sentence.

While drug possession is both a federal and state offense, many of the most draconian sentences for possession occur at the state level. In Louisiana, a man with two past non-violent drug offenses—8 and 20 years prior—was sentenced to over 13 years for the possession of two marijuana cigarettes.¹⁴ The excessive sentence came because of the application of Louisiana’s Habitual

Offender Statute, which allows for longer sentences for individuals with prior convictions (the defendant’s only past convictions were possession for personal use). Similar “enhancements” in sentencing for people with criminal histories remain common, and often fail to distinguish between violent and non-violent felony offenses.

WHY AND HOW HAS THE U.S. PRISON POPULATION GROWN?

Increases in prosecution and sentencing have been significant drivers of incarceration, though discerning which factors were the “primary” factors driving prison population growth is surprisingly difficult. Most likely, a combination of increasing use of incarceration (instead of probation, for example) for lower-level offenses and increased sentences for violent and non-violent offenders—particularly those with a criminal history—were leading factors.¹⁵ However, it must be noted that increases in crimes committed did contribute to a certain degree to growing prison populations, though crime cannot alone account for prison growth (for more on the relationship between crime and incarceration, see page 10).

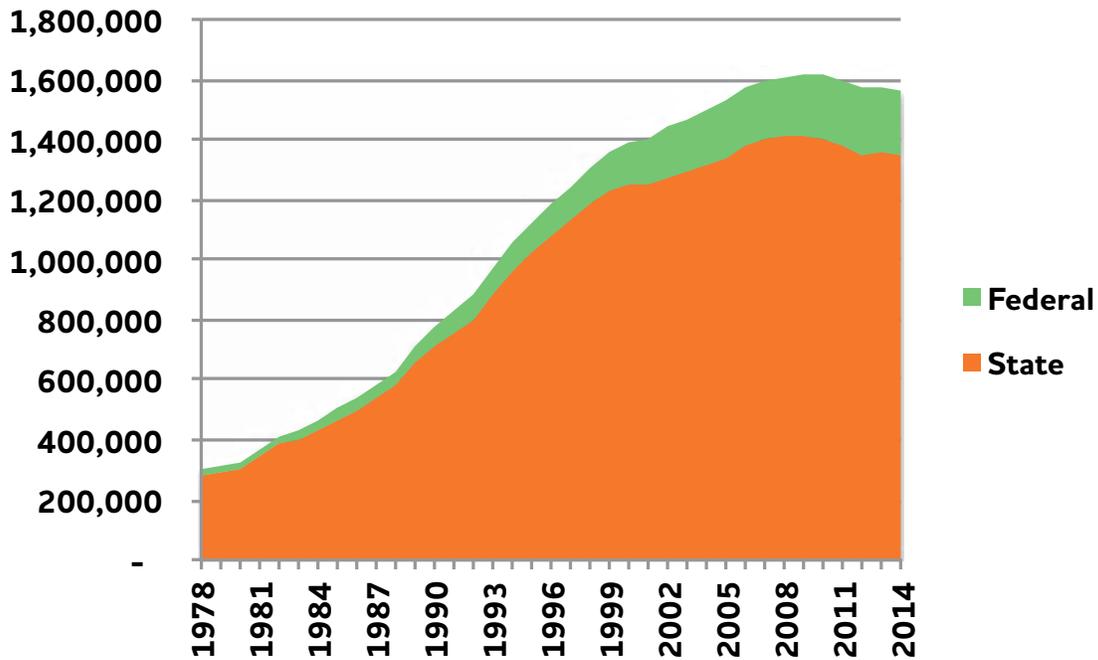
Incarceration for drug offenses surged in recent decades, though it was only one of the drivers of the steep rise in the U.S. prison population.

Incarceration for drug offenses in particular surged in recent decades. Arrest and imprisonment became increasingly common, even for non-violent, low-level offenses that previously would not have resulted in imprisonment (or in some cases, even arrest). In 2013, the most recent year for which there is complete data, 308,400 people were imprisoned on drug offenses in state and federal prisons in the United

States. As significant as that number is, it represents only 22 percent of all prisoners in the country. Drug-related incarceration was only one of the drivers of the steep rise in the U.S. prison population in recent decades. Therefore, reducing the number of people incarcerated for drug-related offenses would not directly end mass incarceration in the United States.

Even so, such a reduction would be a major step forward, because the negative consequences of the country’s emphasis on arresting and incarcerating drug offenders extend well beyond the fiscal costs. The indirect effects of drug-related incarceration growth are enormous—effects not captured in “snapshot” prison populations. Regardless of the length of sentences, drug arrests have profound negative effects by contributing to an individual’s criminal record. A criminal record increases the likelihood of longer incarceration in the event of future offenses (because criminal history is a major factor in sentence determination), limits employment and housing opportunities, and can expose individuals to psychological trauma in prison.

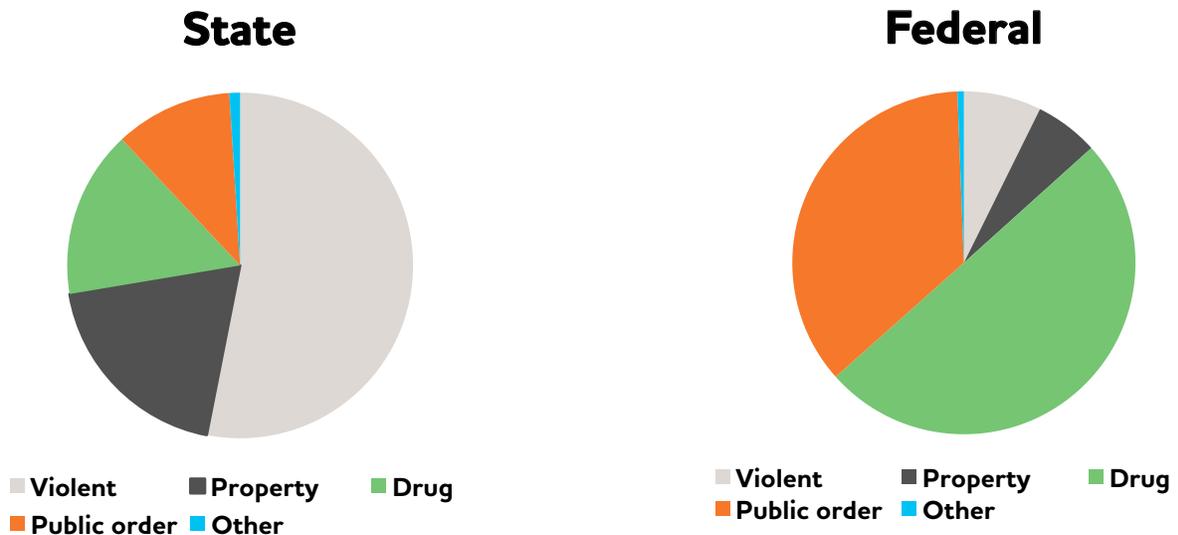
THE GROWTH OF THE U.S. PRISON POPULATION



Between 1978 and 2014, the combined state and federal prison populations increased from 307,276 to 1,561,525, an increase of over 500 percent.¹⁶

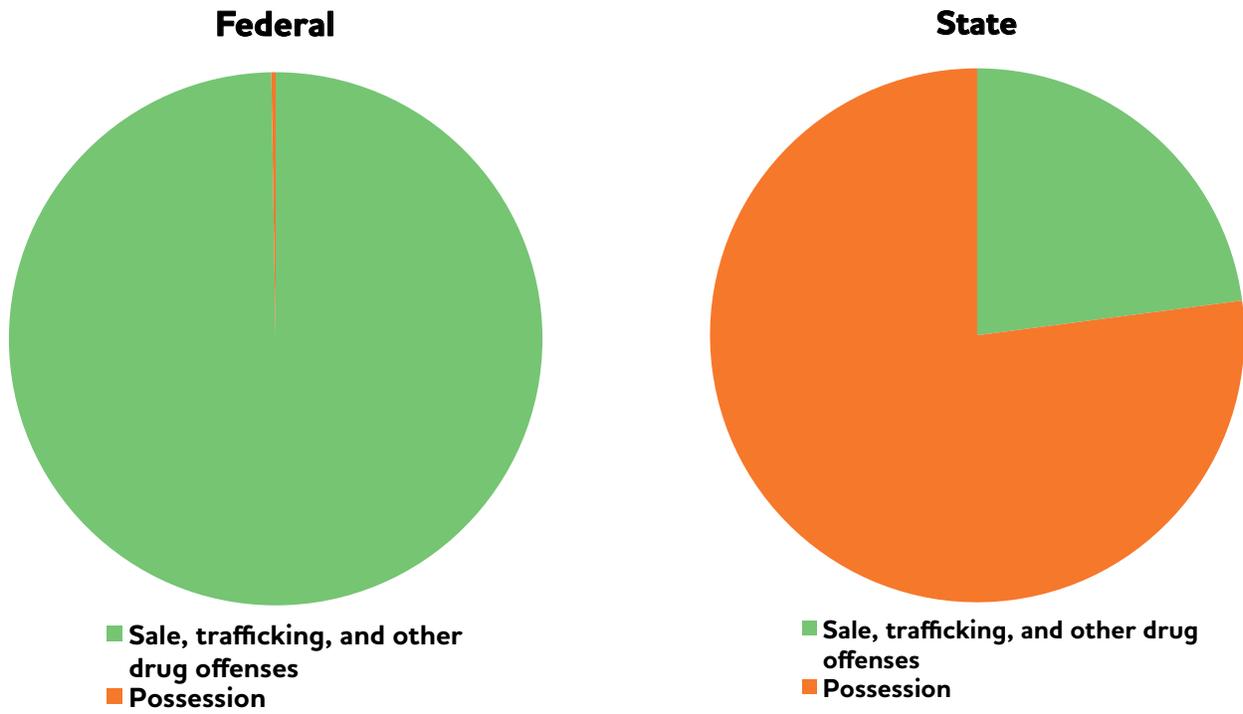
STATE VS. FEDERAL PRISON POPULATION BY OFFENSE

Today, the majority of prisoners in the United States are incarcerated at the state level, while a smaller portion are incarcerated at the federal level. For a discussion of how sentencing decisions are made, see page 6. In addition to differences in overall size, there are considerable differences in the makeup of the state versus federal prison populations—particularly for drug offenses.¹⁷ While fewer total people are incarcerated at the federal level than the state level for drug offenses, a larger proportion of federal inmates are charged on drug offenses.



STATE VS. FEDERAL PRISON POPULATION FOR DRUG CRIMES

The differences are even more stark when looking at drug offenses in particular; at the state level, significantly more prisoners were charged with possession than at the federal level.



ARRESTS FOR DRUG OFFENSES

These figures above, however, understate the continued reach of the criminal justice system as local jail populations are not included, nor are persons incarcerated but not convicted. The estimated total incarcerated population, which counts every person in local, state, and federal prisons and jails regardless of conviction status, reached 2,224,400 in 2014.¹⁸ This distinction is particularly important when analyzing the effect of drug offenses, as many arrests for drug possession in the United States do not result in long imprisonment, but nevertheless have lasting impacts. Given the immense effect of an arrest and jail stay—even a short one—on a person’s ability to work and support a family, the importance of pre-conviction jail populations must be underscored.

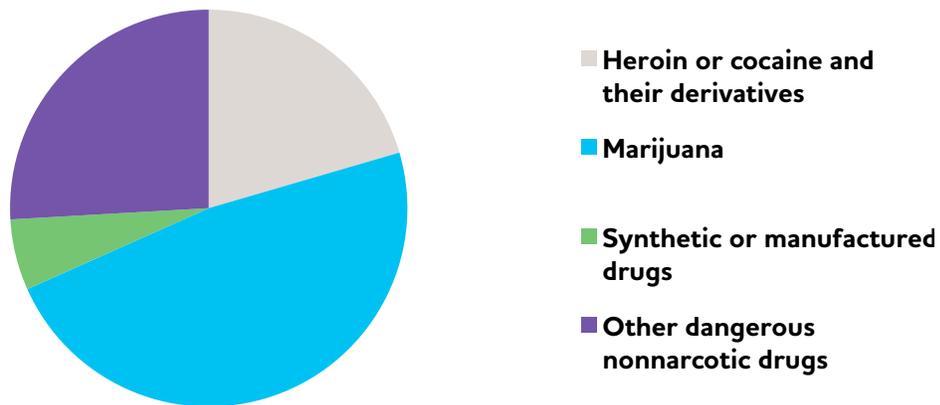
Drug-related arrests meanwhile, appear to

Arrests



be increasing. According to the FBI’s Uniform Crime Reports (UCR), 2014 saw an increase in arrests for sale or possession of controlled substances, increasing from 1,501,043 in 2013 to 1,561,231. Among arrests for possession, the vast majority are marijuana-related.

Arrests for Possession



In 2014, 83 percent of all drug-related arrests were for possession; 2014 also marked the first year since 2009 in which the number of marijuana arrests increased, reaching 619,809.¹⁹ The promising rhetoric on the need to reduce incarceration for non-violent drug crimes, including possession, has yet to transfer into changes in policing at the local level.

INCARCERATION AND CRIME

A FLIMSY RELATIONSHIP

The relationship between incarceration and crime is one of the most hotly debated in criminal justice. First, it bears mentioning that the increase in incarceration was not simply the result of more people committing crime, being apprehended, and going to prison. While crime rates did indeed increase in the early 1970s, “the increase in the use of imprisonment as a response to crime reflects a clear policy choice” made in the 1980s and 90s to adopt “tough on crime” approaches to deter would-be criminals, incarcerating more people for longer sentences.²⁰ In other words, sentencing and enforcement policies were a far larger contributor to mass incarceration than any increase in actual criminal behavior.

Did this hardline approach reduce crime? Arguments for long prison sentences—and against reforms—have often centered upon public safety. By the mid- to late-1990s, much of the country witnessed a significant drop in violent and property crime—a trend some critics attribute to the increase in incarceration and use to argue against sentencing reform. While the connection between incarceration and crime is difficult to quantify, new research suggests that

incarceration has a far lower crime-deterrent effect than once thought, and relaxing harsh penalties does not lead to increased crime as people are released.

In one of the most comprehensive empirical studies to date, the Brennan Center for Justice found that, when controlling for all relevant factors, increased incarceration was responsible for less than a six percent of the total drop in property crime in the 1990s—and had no effect in the 2000s. Mass incarceration’s crime control benefits showed diminishing marginal returns: “As more low-level offenders flood prisons, each additional individual’s incarceration has, on average, a consecutively smaller crime reduction effect.”²¹ These findings have been supported by numerous recent studies, and there is growing agreement that incarceration has a minor crime deterrent effect with diminishing returns. For some inmates, incarceration may even be criminogenic, and that incarceration—by depriving them of employment opportunities and disconnecting them from community structures—could increase the likelihood they re-offend.²²

The negligible crime-deterrent effect of incarceration has been found to be particularly true for drug offenses. Because the sale of drugs responds to market demands—unlike, for example, murder—it is more likely that arrest and incarceration leads to the actor’s replacement rather than a reduction in sale. Arrest and incarceration are intended to limit the sale of drugs and increase prices to reduce consumption; however, cocaine and heroin prices have fallen considerably since the 1980s, and both drugs remain readily available.²³

But even if increased incarceration is considered to be a relatively minor factor in decreasing crime

rates, could it be the case that releasing prisoners will lead to increases in crime? Policymakers will certainly need to be careful to protect such an outcome. But the evidence suggests that reducing the size of the prison population does not compromise public safety. In states that recently reduced their incarceration rates, the vast majority have not seen upticks in crime. In New York, New Jersey, and California—some of the most populous states to take steps to reduce their prison population—violent crime rates decreased at a higher rate than the national average.²⁴ In other words, so far, the fears that sentencing reform will lead to crime has proven to be unfounded.

THE COSTS OF INCARCERATION

In addition to questionable crime deterrent effects, incarceration carries important “opportunity costs” as well. The massive investment in incarceration—over \$39 billion per year, according to a 40-state sample by the Vera Institute—would be better spent on education, job training, and “graduated reentry” programs that provide returning citizens the tools they need to survive post-prison. According to research from the Washington State Institute for Public Policy (WSIPP), investment in juvenile family therapy returns \$11 in savings for every dollar in invested, and adult prison education programs can return nearly \$20 for every dollar invested, largely through reduced future incarceration and judicial costs.²⁵ These and other programs have been shown to be far more economically wise investments than incarceration.

The costs of mass incarceration extend beyond finances, though. Confidence in police is at its lowest point in over two decades,²⁶ and this distrust discourages some from turning to police to investigate and prosecute crime. Despite high levels of police presence in many majority-minority communities, conviction rates for serious crimes remain paradoxically low.²⁷

The Obama administration has come to openly recognize this distrust; in testimony before the

Senate Judiciary Committee, Deputy Attorney General Sally Yates acknowledged that “[W]hen we send people to prison for longer than necessary, we risk losing the public’s faith in the fairness of their own criminal justice system. This may prove the most costly price of all.”²⁸ President Obama, for his part, spoke particularly vocally in 2015 on the profoundly detrimental effects criminal justice policies have on minorities. In a visit to a federal prison—the first ever for a sitting U.S. president—he said:

“The system tilts in a direction that is unjust. And particularly when you think about nonviolent drug offenses. This is an area where the statistics are so skewed, you have to question whether we have become numb to the costs that it has on these communities, whether we think it’s somehow normal for black youth or Latino youth to be going through the system in this way. It’s not normal.”²⁹

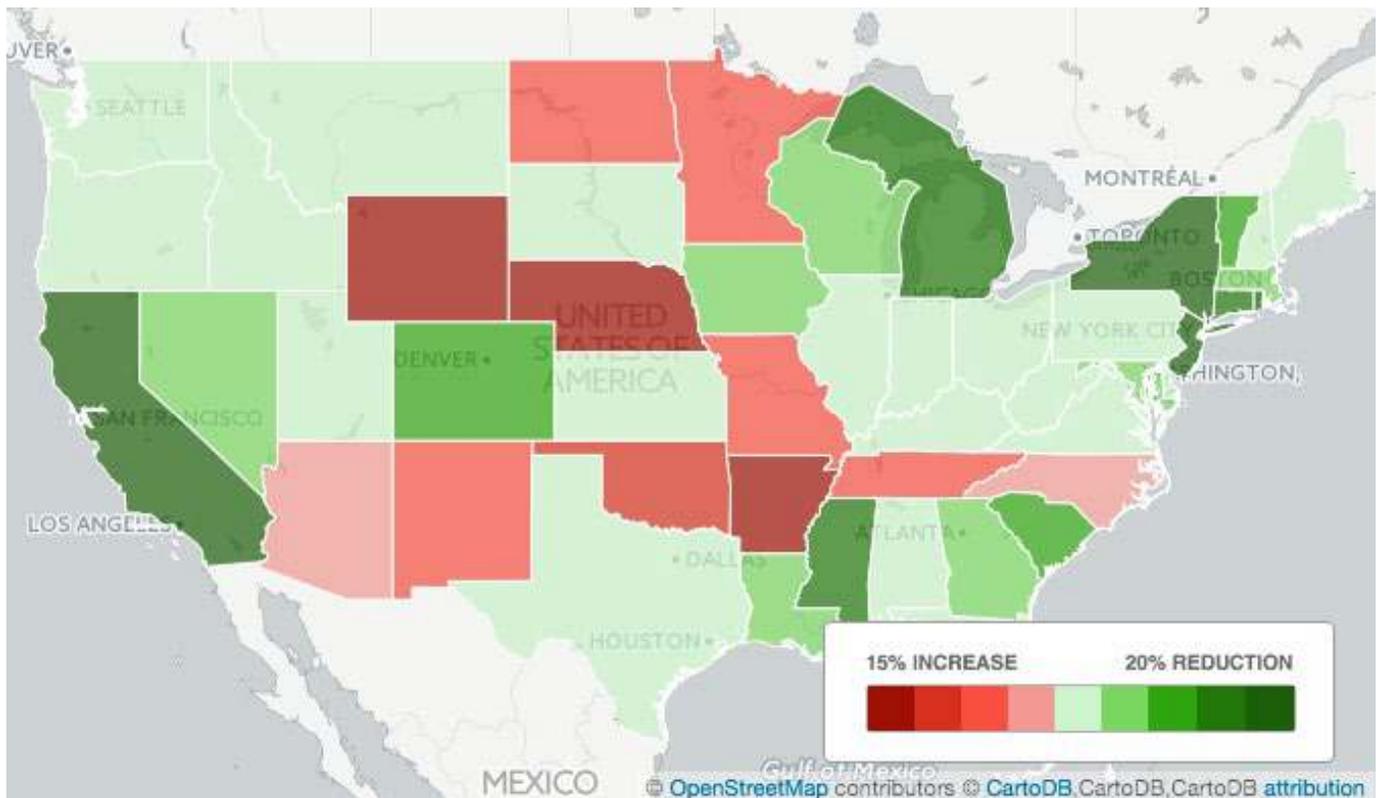
The human costs of incarceration-driven criminal justice policies are profound and continue to do more harm than good. But debate—from the grassroots “Black Lives Matter” movement, which seeks to highlight cases of police brutality against minorities, to the highest echelons of government—has grown in recent months, and appetite for reform is at its highest levels since the civil rights movement.

STATES LEADING THE WAY ON REFORM

Recognizing the immense costs and marginal benefits of incarceration, several states with the largest prison populations have taken important steps to reduce prison populations. California, amid lawsuits and ultimately a U.S. Supreme Court decision finding its prison overcrowding to be unconstitutional, reduced its prison population by over 20 percent from 2006 to 2013. Texas, once the conservative poster-child of “tough on crime” policies, has also taken steps to reduce its population, with a 2.6 percent (totaling 4,000 inmates) drop since 2010, its peak year.³⁰ The slowdown began in 2007, when Texas halted prison construction, instead investing

the \$241 million dollars it would have spent on prisons on a network of residential and community-based treatment and diversion programs. Texas has reduced its crime rate to the lowest it’s been since the 1960s and has saved taxpayers approximately \$3 billion that was to be used for the construction and maintenance of new prisons.³¹

As the map below shows, California and Texas are not alone; a number of other states have reduced prison populations (illustrated in shades of green).³² A report by the Vera Institute of Justice entitled, *Drug War Detente? A Review of State-Level Drug Law Reform 2009-2013*, analyzes the nearly



The above map shows trends in state prison populations in recent years. The increases (reds) are relative to the year 2008, and the reductions (greens) are relative to the state’s “peak” year, showing that while some large states have made significant reductions, others continue to see growth. This data was compiled by The Sentencing Project based on figures from the Bureau of Justice Statistics.

50 bills passed by 30 states that change how drug laws are defined and enforced in their localities in the past five years.³³ Both liberal and conservative states have taken steps to repeal or limit mandatory minimum sentences, improve the proportionality of drug sentencing (including legalization and decriminalization of marijuana), expand access to early release opportunities, increase community-based sanctions and alternatives to incarceration, and alleviate the burden of

civil penalties attached to drug convictions.

But despite important advances in large states like California, Texas, and New York, a handful of states have increased their prison populations in recent years, leading to net increases in state-level prison populations nationwide. Arkansas, Nebraska, and Missouri, among others, have seen gradual increases in their prison populations, though reform movements are gaining ground.

OBAMA ADMINISTRATION ELEVATES THE DEBATE AND PUSHES REFORMS

In recent years, the White House and Department of Justice have reversed their once-entrenched opposition to criminal justice reform, altering rhetoric and policy to reduce the incarceration of low-level, non-violent offenders, particularly for drug offenses.³⁴ The programs described below are directed at reducing the federal prison population; these policies do not directly affect people incarcerated at the state level who fall under each state's jurisdiction.

The Smart on Crime Initiative

The "Smart on Crime" initiative guides some federal policy regarding prison overcrowding as well as mandatory minimum sentencing. In August 2013, then-Attorney General Holder announced the initiative and the intention to deviate significantly from the "tough on crime" philosophy of past administrations. He asserted, "we cannot prosecute our way to becoming a safer nation."³⁵ The five principles of the initiative include:

1. The prioritization of prosecutions in order to focus on the most serious cases
2. Sentencing reform to eliminate unfair disparities and reduce prison overcrowding

3. The pursuit of appropriate alternatives to incarceration
4. The improvement of reentry programs to curb recidivism rates and re-victimization
5. The reallocation of resources toward violence prevention and the protection of vulnerable populations³⁶

These goals collectively aim to recalibrate the criminal justice system, with a particular focus on drug-related mandatory minimum sentences. Prosecutors have been instructed to avoid charging people who commit low-level, non-violent crimes and are not part of criminal networks with crimes that carry harsh mandatory minimums. The initiative represents a movement away from a one-size-fits-all policy and toward giving greater discretion to judges, prosecutors, and juries, with the hope that it will move toward just, individualized, and proportionate sentences. As Holder described it, the Smart on Crime Initiative encourages sentences "determined based on the facts, the law, and the conduct at issue in each individual case."³⁷ Additionally, programs promoting alternatives to incarceration are highlighted in the initiative, praising the efforts of state-led programs that have reduced costs and recidivism through diversion initiatives.

The Clemency Project and White House Leadership

During his second term in office, President Obama has emerged as a vocal critic of long sentences for non-violent drug offenses. In 2013, Obama used his executive power to grant commutations to eight people serving long drug-related sentences. The following year, the Department of Justice introduced the “Clemency Project,” a program that encourages individuals who would have received lower sentences if sentenced today to appeal for a presidential reduction or commutation of their sentences. On March 31, 2015, President Obama commuted 22 sentences of people serving excessively long sentences for non-violent drug crimes. The commutations and pardons continued on July 13 with 46 and 97 more on December 18. A new “pardon chief” was appointed to the reportedly understaffed review committee in February 2016, where he hopes to review a backlog of more than 9,000 petitions in Obama’s final year in office.³⁸

The commutations mark an important rhetorical and political step in support of sentencing reform, but those released constitute less than one tenth of one percent of the federal prison population charged for drug crimes. The political effects have far greater reach; by talking about what was once considered a “third rail” in politics, Obama has used the program to advance debate on sentencing reform and humanize incarcerated persons. In his July 2015 visit to a federal prison, Obama said of the incarcerated men he met:

“When they describe their youth, these are young people who made mistakes that aren’t that different from the mistakes I made, and the mistakes that a lot of you guys made...The

difference is that they did not have the kind of support structures, the second chances, the resources that would allow them to survive those mistakes.”³⁹

While executive clemency is unlikely to make a serious dent in the number of prisoners incarcerated on drug offenses, it is an important first step and sends a strong message.

Drugs Minus Two

The United States Sentencing Commission (USSC), an independent agency in the judicial branch of the federal government, has also taken modest but important steps to address sentencing injustices. Amendment 782, or the “Drugs Minus Two” Act, adopted by USSC in 2014, encourages considerably shorter sentences for drug offenses. The act lowers guideline sentences by two “levels” (see pages 5-6 in this report for an explanation of U.S. sentencing) for most drug offenses. For example, before the act, a defendant with 1.5 kilograms of methamphetamine would

“When they describe their youth, these are young people who made mistakes that aren’t that different from the mistakes I made.”

President Obama

be sentenced at level 34, which carries a prison term of 151 months. Under the new guidelines, the same defendant would be sentenced at level 32, which carries a sentence of 121 months.⁴⁰ While the act does not affect mandatory minimum

sentences or people incarcerated at the state level, it could provide release to as many as 46,000 incarcerated persons. The average sentence of these prisoners is 125 months, and has the potential to be reduced to 102 months. This means a reduction in prison time by 18.4 percent, saving 83,525 “bed years,” measured as imprisonment of a person for a calendar year.⁴¹ The USSC has voted to make the act retroactive, and the first releases began in November 2015 with a release of 6,000 incarcerated men and women.⁴²

CONGRESSIONAL REFORM EFFORTS

At a time when partisan division seems to dominate Congress, there is growing bipartisan support for sentencing reforms—particularly for drug offenses. Non-governmental groups from the left and right have even joined forces to push for reforms, creating in 2014 a “Coalition for Public Safety,” which unites conservative financier Koch Industries with the Center for American Progress, a left-leaning advocacy organization, the American Civil Liberties Union (ACLU), and other civil society groups. While most sentencing laws passed by Congress only affect about 15 percent of the total prison population—the vast majority of incarcerated persons are under state custody—growing support in and out of Congress for newly-introduced bills have emerged that begin to address mass incarceration.

The Fair Sentencing Act: Reducing the Crack/Cocaine Sentencing Injustice

In response to a perceived crack “epidemic” in U.S. cities in the 1980s, Congress enacted harsh punishments for the possession and sale of crack cocaine. The legislation established five and ten year mandatory minimum sentences for low-level, non-violent possession charges; defendants with as little as five grams of crack cocaine would be sentenced to five years. For powder cocaine, the amount necessary to trigger the mandatory minimum was 100 times greater; to see the same mandatory minimum, a defendant would have to possess 500 grams of powder cocaine.⁴³

The racial implications of the law’s implementation were enormous. According to official data, in 2009 African Americans made up nearly 80 percent of the defendants sentenced for crack offenses, while whites and Hispanics were approximately 10 percent each—despite the fact that more than 66 percent of crack users were white or Hispanic.⁴⁴

In 2010, Congress passed the Fair Sentencing Act, which reduced the disparity from 100-to-1 to 18-to-1—an important, but insufficient, advance toward the fair application of drug sentencing laws.⁴⁵ In a 2015 report to Congress, USSC concluded that the Fair Sentencing Act closed the gap between crack and powder cocaine sentences, from 81 months and 108 months respectively in 2010, to 78 and 96 months in 2013.⁴⁶ Additionally, fewer people have been prosecuted for crack cocaine offenses since 2010 (though the relationship is likely not causal, and is more closely linked to decreasing crack consumption).

Proposed Legislation

Bills addressing mass incarceration, non-violent drug offenses, and reentry have gained traction across party lines and in both houses of Congress. While originally only Democrats and “outsider” Republicans (especially libertarians) supported criminal justice reform, several bills have gained the support of Republican leadership.

In July 2015, John Boehner, then the embattled Speaker of the House and highest-ranking Republican in the House of Representatives, announced his support for legislation on sentencing reform.⁴⁷ Months later, Boehner was toppled by a vocal far-right minority in his party—but notably, not for his stance on criminal justice issues. Five years ago, touching the “third rail” of criminal justice reform could have spelled disaster for an elected official, but even amid eroding support from his conference, Boehner found supporting reforms to be tenable. Indeed, Congressman Paul Ryan—Boehner’s successor as House Speaker—has indicated his willingness to work with President Obama on criminal justice reform.⁴⁸

Reforms have gained the support of key Senate Republican leaders as well. Senator Charles Grassley, a longtime advocate for harsher punishments and Chairman of the Senate Judiciary Committee, introduced bipartisan legislation with liberal Democrats to enact limited but important sentencing reforms. The legislation, dubbed the “Sentencing Reform and Corrections Act of 2015,” would reduce mandatory minimum sentences for some non-violent drug offenses and expand the drug “safety valve,” which allows some non-violent drug offenders to be charged below the mandatory minimum level. Perhaps most importantly, the bill would make the historic

2010 Fair Sentencing Act, which reduced the crack/cocaine sentencing disparity, retroactive.

Few sentencing reform bills make it to the floor of Congress—let alone become law—because they typically have lacked the support of Congressional leadership. Now, with top Republicans voicing their support for reform efforts, the likelihood of real reforms is increasing. When Congress ended its 2015 session, the Sentencing Reform and Corrections Act—and a similar version in the House—had passed through each body’s respective Judiciary committee, but had yet to be scheduled for a vote on the floor.

RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM

Despite reform efforts, major hurdles remain to reducing the egregious racial disparities in the criminal justice system. Today, nearly one-third of African American men are likely to spend time in prison at some point during their lives. They make up nearly 38 percent of the state prison population charged on drug crimes, but are roughly 13 percent of the national population—all despite using drugs at the same rate as whites. Many of the discrepancies can be traced to heavier enforcement in minority communities; according to research from the ACLU, African Americans are 3.73 times more likely to be arrested on marijuana charges than whites.⁴⁹

As described above, important reforms have been proposed—and in some jurisdictions, implemented—to address disparities. Additionally, the decriminalization and legalization of marijuana holds promise to at least partially reduce the mass incarceration of minorities. Nineteen states and the District of Columbia have decriminalized or

legalized marijuana possession for personal use, and most states have seen drops in overall marijuana possession arrests. However, according to research by the Center on Juvenile and Criminal Justice, racial disparities remain. Though arrest rates declined across the board, African Americans continue to be arrested at roughly four times the rate of other ethnicities in the five-state sample.⁵⁰

Programs like racial impact statements, which require implementing jurisdictions to identify any potential for disparate racial impacts of new laws, have been used in some states and hold promise to ensure new laws are more equitable.⁵¹ Three states have implemented the statements in some form, and they have been endorsed by the American Bar Association. But as jurisdictions attempt—and succeed—in reducing arrests and incarceration for low-level offenses, it will be essential that there exist a parallel and complementary effort to reduce disparities and ensure the benefits of criminal justice reform are broad and inclusive.

CONCLUSIONS AND RECOMMENDATIONS

Long the face of the “war on drugs,” the United States is beginning to reconsider its excessively punitive approach. Latin American countries that have been implementing similarly-flawed policies should do the same.

For decades, the United States not only implemented a criminal justice-driven drug policy, but also exported it throughout the world. As a producer, transshipment, and now consumer region, Latin America adopted many of the United States’ draconian policies. Via funds channeled through the Bureau of International Narcotics and Law Enforcement Affairs (INL) and the Department of Defense, U.S. officials evangelized the importance of *mano dura*, or heavy-handed approaches to attacking all levels of drug production, consumption, shipment, and sale. Prison populations throughout Latin America swelled at alarming rates; in the last decade alone, for example, Brazil—the leading imprisoner in Latin America—more than doubled its total prison population. The increase was even more significant among drug crimes, with a 320 percent increase in the number of people incarcerated for drug offenses from 2005 to 2012.⁵²

U.S. foreign policy is now beginning to highlight domestic reforms and openly offer allies the political space to experiment with alternative policies. While Ambassador William Brownfield, who directs INL, has acknowledged that we “can’t arrest or incarcerate our way out of the drug problem,”⁵³ U.S. international cooperation has yet to prioritize alternatives to incarceration on the ground. Funding has begun to shift from drug control measures to rule of law and governance issues, though mystery continues to shroud the expanding operations run by the Department of Defense.⁵⁴

In advance of the 2016 United Nations General

Assembly Special Session on Drugs (UNGASS), the United States circulated its “non-paper” outlining priorities for the summit. Within the paper was a call to:

“Encourage the consideration of alternatives to incarceration and other criminal-justice reform for drug-related offenses with a view to deterring crime, achieving the rehabilitation and reintegration into society of drug users, advancing the well-being of individuals and communities and reducing overcrowding in prisons.”⁵⁵

This language is encouraging, and represents some of the clearest U.S. statements in international forums on the evolving U.S. approach to drug policy and criminal justice. How this shift in rhetoric is reflected in U.S. positions on the ground through its INL programming remains a key question as the United States pursues alternatives to its draconian sentencing policies.

After decades of pursuing harsh criminal justice policies, U.S. policymakers are recognizing that mass incarceration is neither just nor effective. Promising reforms have emerged throughout the country, and though minimal reductions in prison populations have been made, the atmosphere appears ripe for more momentous reforms. Long the face of the “war on drugs,” the United States is beginning to reconsider its excessively punitive approach. Latin American countries that have been implementing similarly-flawed policies should do the same.

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ABOUT WOLA

WOLA is a leading research and advocacy organization advancing human rights in the Americas. We envision a future where public policies in the Americas protect human rights, recognize human dignity, and where justice overcomes violence. WOLA tackles problems that transcend borders and that require both domestic and international solutions. Through strategic collaborations, we partner with courageous individuals working on social change—advocacy organizations, academics, religious leaders, artists, business, and government officials—and together, we advocate for more just societies in the Americas.

ABOUT CEDD

The Research Consortium on Drugs and the Law (*Colectivo de Estudios Drogas y Derecho*, CEDD) brings together researchers from nine Latin American countries with the goal of analyzing the impact of criminal law and legal practice surrounding illicit drugs, seeking to generate information and foster a debate about the effectiveness of the current drug policies and recommends policy alternatives that are more balanced and effective.

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ABOUT THE AUTHOR

Adam Schaffer is WOLA's Program Officer for Drug Policy.



Advocacy for Human Rights in the Americas

WASHINGTON OFFICE ON LATIN AMERICA

1666 CONNECTICUT AVE NW SUITE 400
WASHINGTON DC 20009

(202) 797-2171

WOLA.ORG



Colectivo de Estudios Drogas y Derecho

RESEARCH CONSORTIUM ON DRUGS AND THE LAW (CEDD)

DROGASYDERECHO.ORG