

Sentinel Surveillance of Emerging Drug Decriminalization Legislation

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Introduction

More than one million people are arrested annually for drug possession across the United States.^{1,2} People charged with and convicted of criminal drug offenses can face devastating collateral consequences, including eviction, unemployment, loss of the right to vote, and deportation.³ Research shows that criminalization of drug possession does not lower rates of substance use or overdose or reduce crime recidivism generally;^{4,5,6} instead, criminalization contributes to the marginalization of people with substance use disorders,⁷ results in stark racial disparities,³ and costs billions of dollars.⁸ Additionally, the stigma related to criminalizing drug use hinders recovery efforts,⁹ and incarceration and compulsory substance use treatment increase the risk of overdose and death.^{5,10,11} Further, legal prohibitions on substances generally lead to the creation and proliferation of more dangerous illicit substances (as seen with the recent increase in fentanyl-laced drugs).¹² Given these harmful and disproportionate impacts, advocates and communities have long campaigned for the decriminalization of drug possession.⁸

In November 2020, Oregon voters approved Measure 110, which reclassified personal possession of all controlled substances from a criminal to a civil violation.¹³ The measure, which became operative February 1, 2021, also allocated funding for community-based organizations to provide substance use treatment and harm reduction services. Decriminalization efforts have gained momentum since the passage of Oregon's measure – since January 1, 2021, legislators in eight states have introduced bills that would decriminalize possession of most or all controlled substances.¹⁴

This brief provides an overview of the current legal landscape of drug decriminalization legislation, summarizes key findings of evidence evaluating the impact of criminalizing and decriminalizing drug use, and provides policy and research recommendations moving forward.

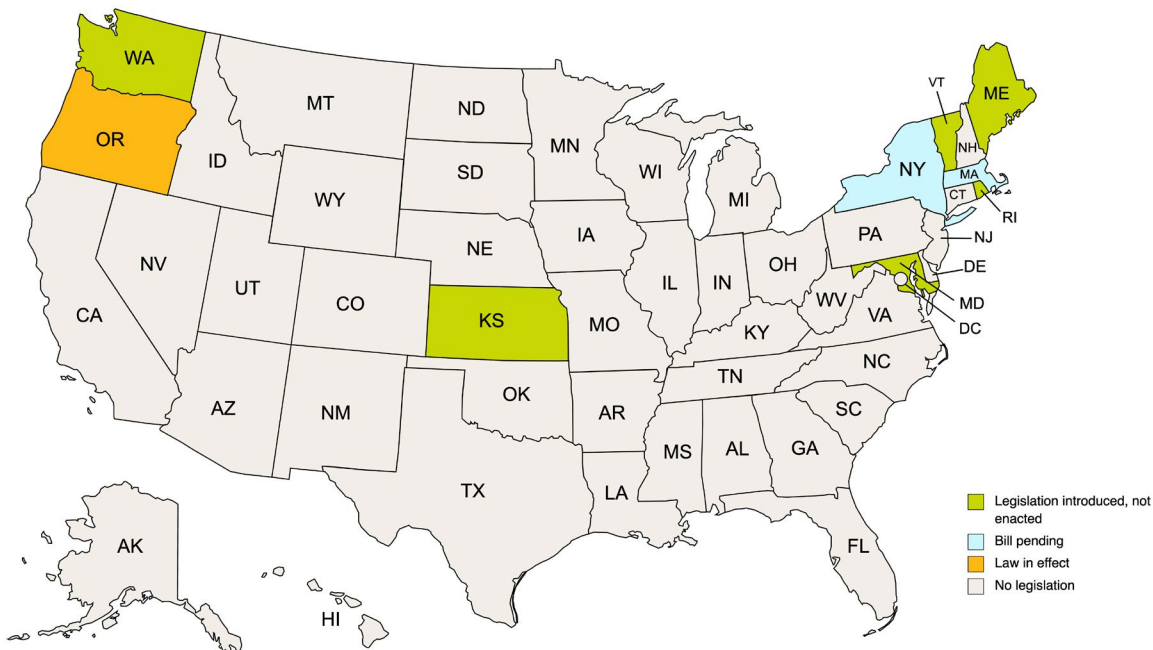


Figure 1. As of August 1, 2022, one state has broadly decriminalized possession of drugs, and two states have decriminalization bills pending in the legislature.

Although there is limited evidence on the effects of decriminalization in the United States, preliminary research of Oregon’s law shows promise. Ultimately, given the known harms of criminalization, and the success of decriminalization in Portugal and other nations,^{15,16} U.S. policymakers and researchers should continue to examine and consider implementing laws decriminalizing drug possession.

Current Legal Landscape

As of August 1, 2022, Oregon is the only state to have enacted legislation that broadly decriminalizes drug possession.¹⁴ Oregon’s law reclassified personal possession of all controlled substances (including, for example, heroin, cocaine, and methamphetamines) from a criminal misdemeanor offense to a civil violation.¹⁷ Although all controlled substances are covered by the law, the law outlines certain exceptions. For instance, possession of more than a specified amount of certain substances, and possession that qualifies as a “commercial drug offense,” remain criminal offenses.¹⁸

People who are found in possession of controlled substances are subject to a civil fine of as much as \$100.¹⁹ However, violators can complete a health assessment — which includes a substance use disorder screening and may result in recommended (not mandated) treatment — in lieu of paying the fine.²⁰ Notably, failure to pay the fine or complete the assessment does not result in further penalties (criminal or civil).²¹ Additionally, Oregon’s law provides funding for substance use treatment programs and harm reduction initiatives, to be distributed through grants to community-based organizations.²²

Although Oregon is the only state to have broadly decriminalized drug possession, several states have considered similar decriminalization efforts. Since January 2021, bills that would decriminalize drug possession have been introduced in eight states (KS, MA, MD, ME, NY, RI, VT, WA).¹⁴ As of August 1, 2022, decriminalization bills remain pending in two states (MA and NY). Bills in the other six states all failed without having reached a chamber vote.

Many of these bills — including the pending bills in Massachusetts²⁴ and New York²³ — reclassify personal possession of drugs from a criminal violation to a civil violation, subject to a fine that can be waived by completing a health assessment. Unlike Oregon’s law, some of the introduced bills imposed additional penalties upon failure to pay the initial fine.^{25,26} Kansas’s bill went even further — people found in possession of controlled substances would have been subject to a fine and required to complete a certified drug abuse treatment program, and failure to complete the treatment program would have been a misdemeanor offense.²⁷ Additionally, some of the bills would have included funding for substance use treatment and harm reduction services, much like Oregon’s law, while others (including Massachusetts’s and New York’s) would not provide any such funding. New York’s pending bills also go beyond Oregon’s law by creating a mechanism for people to vacate prior convictions for drug possession.²³

TABLE 1: MEASURES FOR DRUG DECRIMINALIZATION, AS OF AUGUST 1, 2022

LEGAL PROVISIONS	OREGON MEASURE 110, ENACTED	NEW YORK S.1284 & A.7109, PENDING	MASSACHUSETTS S.1277 & H.2119, PENDING
Reclassifies personal possession from a criminal offense to a civil offense	✓	✓	✓
Civil fine can be waived with a health assessment	✓	✓	✓
Mechanism to vacate prior convictions for drug possession	○	✓	○
Funding for substance use treatment programs and harm reduction	✓	○	○

✓ Jurisdiction has this provision

○ Jurisdiction does not have this provision

The data described above were produced using a novel legal mapping method called sentinel surveillance of emerging laws and policies (SSELP), developed by the Center for Public Health Law Research to track laws faster so researchers may more quickly evaluate the impact of law and policy on health, well-being, and equity.²⁸

Evidence

Since Oregon's measure is the first decriminalization law of its kind in the United States, and because it only recently became operative, there are no peer-reviewed studies evaluating its implementation and impact. However, early outcome data shows promise. In its first year of implementation, there was a 60% decrease in drug-related arrests and more than 16,000 people have accessed services funded by the measure.²⁹ The majority accessed harm reduction services (60%), while others accessed housing assistance (15%) and peer support services (12%).³⁰ Additionally, the Oregon Criminal Justice Commission has estimated that the law will substantially reduce the overrepresentation of Black and Indigenous Oregon residents among those arrested for and convicted of possession-related offenses.¹³

Oregon has also faced some challenges in implementing the law. Although 1,885 tickets were issued for possession in the first year of the law's implementation, the hotline (which a person may call to receive a health assessment in lieu of paying the fine) only received 91 calls in that same time period.³¹ Oregon also initially struggled to execute a grant program that provides funding for addiction recovery centers and other community-based services in every county — in its first year, only 10% of the allocated funds had been distributed,²⁹ but funding approvals have been moving swiftly in June 2022 and July 2022.³² Ultimately, supporters of the law caution that it is too soon to fully evaluate the success of the law, particularly given its novelty and the time needed to truly see the effects of newly funded services.³¹

Although it is too early to fully evaluate Oregon's decriminalization law, studies have been done on other drug decriminalization efforts. However, that research is often limited in scope. One systematic review of peer-reviewed studies evaluating the impact of decriminalization policies (many focused on marijuana) found that most studies failed to measure intended impacts or health outcomes, instead utilizing prevalence and frequency of drug use as primary metrics.³³ The studies that have focused on other metrics have found that broad decriminalization efforts are correlated with several positive public health outcomes.^{15,34} For example, after Portugal decriminalized low-level possession of all drugs and increased access to harm reduction and treatment services, rates of drug-related imprisonment, HIV infections, and opiate-related deaths all decreased.¹⁵

Policy Recommendations

Given the known harms and failures of criminalizing drug possession, as well as preliminary evidence on the success of Oregon's law and decriminalization efforts in Portugal, state legislatures should continue to consider enacting laws broadly decriminalizing drug possession. Researchers and advocates have argued that several key principles should guide future decriminalization efforts.

1. **Avoid coercion and minimize harm.** Research shows that compulsory substance use treatment can be ineffective and harmful.^{11,35} Policymakers should avoid legal provisions that mandate treatment or coerce treatment via excessive fines and threatened criminal penalties for failure to comply.³⁶
2. **Expand access to harm reduction and evidence-based treatment services.** Decriminalization efforts should be combined with expansion of voluntary and evidence-based public health interventions.^{35,36} Governments should fund harm reduction services, treatment services, and other wrap-around services, ensuring that those investments prioritize communities most impacted by criminalization.^{36,37}
3. **Eliminate exceptions and loopholes.** Policymakers should commit to broad decriminalization and avoid creating large or excess loopholes that undermine the purpose of the laws.³⁶ Excluding particular substances from decriminalization, such as Rhode Island's bill (which excluded fentanyl from decriminalization),²⁶ perpetuates the existing punitive and harmful system. Similarly, policymakers should ensure that possession of drug paraphernalia is also decriminalized (if it is not already) to ensure that people who use drugs do not continue to be criminalized.³⁶ Finally, decriminalization laws should avoid establishing low quantity thresholds, which fail to recognize the reality and complexity of drug use.^{36,38}

4. **Prioritize equitable outcomes.** Drug criminalization has had devastating and disproportionate effects on Black, Indigenous, and other communities of color, and policymakers must work toward repairing those harms.³⁶ Decriminalization laws can prioritize more equitable outcomes by including provisions allowing for the expungement of prior criminal convictions and the immediate decarceration of people serving sentences for decriminalized offenses.³⁹ Including such provisions can also help alleviate the collateral consequences that result from having a criminal record.
5. **Consider alternative enforcement options.** Given the difficulties in regulating police discretion, the law on the books does not always mirror how the law is implemented on the ground.^{40,41} Policymakers should consider reducing or eliminating police involvement in response to drug possession to help avoid the harms that come with police contact.^{35,39} Similarly, policymakers should work to ensure that police are not using other, still criminalized offenses (like loitering or public use) to continue to arrest people who use drugs.³⁶ Instead, the law's focus should be on ensuring that newly funded services are readily available and accessible throughout communities.
6. **Engage with communities that are most impacted.** Often, laws and policies are developed without meaningful input from the most impacted communities. Policymakers must engage with people who use drugs and people who have been most harmed by criminalization when developing decriminalization laws.³⁸

Research Agenda

The CPHLR dataset provides a high-level overview of the current drug decriminalization legal landscape, but it does not capture important details of Oregon's decriminalization law or other states' bills. Preliminary research on the effects of Oregon's law show that decriminalization can lead to a reduction in drug-related arrests, but further analysis is needed to more deeply understand the impact of different legal provisions on public health over time. Future research should capture the details and nuances of decriminalization laws across jurisdictions (as more jurisdictions enact such legislation) to create more comprehensive legal data. Such data could lead to more robust and nuanced evaluations of these laws.

Many studies evaluating the impact of drug decriminalization efforts utilize prevalence and frequency of drug use as primary metrics.³³ Future evaluations should broaden their scope and measure decriminalization's effects on more holistic metrics, including changes in criminal legal outcomes (e.g., incarceration rates), health outcomes (e.g., overdose rates), social outcomes (e.g., housing and employment), and stigma (e.g., healthcare provider attitudes' toward drug use).⁴² Critically, researchers should consult populations that are most directly impacted by these policies throughout their evaluation process to ensure that research is community-driven, equitable, and properly accounts for context and complexity.^{38,43}

Conclusion

Oregon has taken a bold first step toward mitigating the harms of the criminal legal system by broadly decriminalizing possession of drugs. As other states consider enacting similar decriminalization laws, researchers must engage with directly impacted communities to continue to evaluate the impacts of Oregon's law. Robust evaluations are critical to ensure that future decriminalization efforts improve public health outcomes and do not contribute to or perpetuate existing inequity. In the meantime, given the known harms of criminalization and the urgency of the overdose crisis, policymakers should continue to seriously consider enacting and implementing laws decriminalizing drug possession, taking into account the key principles outlined above.

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