

Uses and Abuses of Drug Decriminalization in Portugal

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In 2001, Portugal decriminalized the acquisition, possession, and use of small quantities of all psychoactive drugs. The significance of this legislation has been misunderstood. Decriminalization did not trigger dramatic changes in drug-related behavior because, as an analysis of Portugal's predecriminalization laws and practices reveals, the reforms were more modest than suggested by the media attention they received. Portugal illustrates the shortcomings of before-and-after analysis because, as is often the case, the de jure legal change largely codified de facto practices. In the years before the law's passage, less than 1 percent of those incarcerated for a drug offense had been convicted of use. Surprisingly, the change in law regarding use appears associated with a marked reduction in drug trafficker sanctioning. While the number of arrests for trafficking changed little, the number of individuals convicted and imprisoned for trafficking since 2001 has fallen nearly 50 percent.

INTRODUCTION

In 2009, the Cato Institute, a major libertarian think-tank in the United States, issued a report on the drug law reforms implemented by Portugal in 2001. Portugal's reforms decriminalized the acquisition, possession, and personal use of small quantities of all psychoactive drugs, including heroin and cocaine.¹ The Cato report, authored by Glenn Greenwald, argued that “judged by virtually every metric, the Portuguese decriminalization framework has been a resounding success.” The dire predictions of critics—“from rampant increases in drug usage among the young to the transformation of Lisbon into a haven for ‘drug tourists’”—did not come to pass (Greenwald 2009, 2). Considerable international media attention followed in the wake of Greenwald's study—the *Economist* (2009), *Time Magazine* (Szalavitz 2009), *Scientific American* (Vastag 2009), the *Observer* (Beaumont 2010), the *New Yorker* (Specter 2011), and the *Boston Globe* (2011), among others—most of it characterizing the drug reforms as a radical and successful legislative feat. Numerous editorials and blogs cited Portugal as evidence in support of a range of drug reforms, including recent state campaigns in the United States to legalize and regulate the production and sale of marijuana (e.g., Messamore 2010; Steves 2012).

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1. By drugs, this article refers to all psychoactive drugs listed in Schedules I and II of the 1961 Single Convention on Narcotic Drugs (Single Convention on Narcotic Drugs 1961, http://www.incb.org/incb/en/narcotic-drugs/1961_Convention.html).

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The US White House Office of Drug Control Policy (2010) also responded to the Cato report and the widespread coverage and applause it generated by issuing a *Fact Sheet* countering the supposed success of Portugal's experiment. The White House document highlighted select statistics showing increased drug use in Portugal among certain populations and for certain substances. More broadly, the document questioned the applicability of Portugal's experience to the US context. "It is safe to say," the *Fact Sheet* concluded, "that claims by drug legalization advocates regarding the impact of Portugal's drug policy exceed the existing scientific basis" (2010).

The story of decriminalization in Portugal has become a kind of screen onto which drug policy agendas are projected.² It has been misapplied as a precedent that can speak to questions of legalization and misconstrued as a more radical policy change than it in fact was. "The sky did not fall" (Newman 2009, paragraph 9), "[t]he apocalypse hasn't happened" (quoted in Economist 2009) as officials and advocates of decriminalization reported. However, these conclusions imply the sky *might* have fallen. The Portugal case illustrates the way in which political interpretation of legislation can take on a life of its own, independent of policy content.

Portugal's 2001 decriminalization law did not legalize drugs as is often loosely suggested (e.g., Messamore 2010; O'Neill 2011). The law did not alter the criminal penalty prohibiting the production, distribution, and sale of drugs, nor did it permit and regulate use. Rather, Portugal *decriminalized* drug use, which, as defined by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), entailed the removal of all criminal penalties' from acts relating to drug demand: acts of acquisition, possession, and consumption.³ Portugal's reform thus changed the *nature* of the sanctions imposed for personal possession and consumption of drugs from criminal to administrative. To obtain drugs, however, the user must still depend on illicit markets. Legalization, in contrast to decriminalization, involves the enactment of laws that allow and provide for the state regulation of the production, sale, and use of drugs. Under most conceptions, criminal sanctions support administrative regulation, for example, in cases involving minors or motor vehicle operation.

The distinction between a regime that regulates the production and sale of drugs and one that simply decriminalizes personal use is important. This is particularly so in a discussion of Portugal's drug reforms given the frequency with which advocates use and assume data from Portugal to be relevant to the debates in the United States concerning state-level efforts to legalize marijuana. For example, Tim Lynch, the director of the Cato Institute's Project on Criminal Justice, cited Portugal as evidence in support of California's narrowly defeated proposition in 2010 that sought to legalize and tax marijuana for the general adult population. Lynch rejected a Heritage Foundation memorandum by arguing: "the Heritage memorandum claims that 'No one knows the specifics of how marijuana decriminalization would work in practice.' This is wrong. In

2. Kleiman, Caulkins, and Hawken (2011) note this phenomenon, describing interpretations of decriminalization in Portugal as a kind of "Rorschach test . . . with the meaning read into the picture by the observer" (Kleiman, Caulkins, and Hawken 2011, 24).

3. Decriminalization is a narrower version of "depenalization," which describes a regime that either de facto or de jure reduces or removes penalties for possession of small quantities of prohibited drugs, but that continues to prosecute their sale and manufacture (MacCoun and Reuter 2001).

2001, Portugal decriminalized not only marijuana but all drugs” (Lynch 2010, 1).⁴ The details matter if we are to understand what conclusions can and cannot be drawn from Portugal’s experience.

Portugal’s reforms should also be considered in the context of other European and international laws. Specifically, both Spain and Italy ceased imposing criminal sanctions for possession of small quantities of any psychoactive substances decades ago (MacCoun and Reuter 2001).⁵ More generally, Portugal’s decriminalization statute is congruent with broader European and global trend toward the adoption of laws that reduce the penalties associated with drug use. As noted by the EMCDDA, across Europe in the last decades, there has been a movement toward “an approach that distinguishes between the drug trafficker, who is viewed as a criminal, and the drug user, who is seen more as a sick person who is in need of treatment” (EMCDDA 2008, 22).⁶ A number of Latin American countries have similarly moved to reduce the penalties associated with drug use and personal possession. Mexico, for example, enacted legislation in 2009 that removed the criminal penalties for anyone possessing small amounts of marijuana, cocaine, heroin, and methamphetamine (Luhnow and de Córdoba 2009).⁷

Portugal’s 2001 Decriminalization Act was not only modest in relation to European and international laws, it was also not radical in relation to the country’s previous law and practice. The decriminalization statute was largely an elaboration rather than a reversal of the 1993 law that it modified. The statute already contained language emphasizing treatment rather than punishment for drug users. Additionally, an examination of the actual penal practices in Portugal with respect to drug consumers reveals that drug consumption had largely been de-penalized *de facto* in the 1990s. For years before the 2001 legislation, fines served as the primary sanction for individuals arrested and convicted of drug use. Less than 1 percent of those incarcerated for a drug offense were in prison for drug possession in the year before the statute’s passage. By removing the possibility of criminal sanctions for drug use, the 2001 law primarily codified the existing practice.

As this article shows through a review of the data on Portugal’s drug use and drug-related harms, the dire consequences that critics predicted did not come to pass. These findings are consistent with the other academic studies of Portugal’s drug reforms to date (e.g., Hughes and Stevens 2007, 2010, 2012), which have mostly focused on the

4. An article posted on the Independent Voter Network entitled “If Cannabis Is Legalized, Portugal Could Be a Window into California’s Future” (Messamore June 26, 2010) is another example of the reference to Portugal in connection with California’s marijuana legalization debate. The article concluded: “If Portugal is any indication, California has nothing to fear from legalizing the possession of a small amount of pot” (para. 11). More recent editorials, published in connection with the 2012 state initiatives to legalize the sale and use of marijuana for adult recreational use, have promoted Portugal as a relevant example.

5. Italy decriminalized possession of all psychoactive drugs in 1975, recriminalized possession between 1990–1993, and then reinstated the laws decriminalizing possession. In 1983, Spain adopted, and maintained, a decriminalization policy regarding the possession of these drugs (MacCoun and Reuter 2001).

6. Portugal remains unique in its creation of a separate institution, outside of the criminal justice system, dedicated to processing drug use citations and providing support for users in need of treatment.

7. The permitted quantities of such drugs vary widely across countries: Mexico allows possession of up to 0.5 grams of cocaine without prosecution; in contrast, Portugal allows up to 2 grams of cocaine and Spain allows up to 7.5 grams. In the Netherlands, the police are directed to dismiss cases in which an individual is found carrying less than 5 grams of cannabis, and individuals found in possession of less than 0.5 g of any Schedule I drug are generally not prosecuted (EMCDDA 2014).

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postreform outcomes and putative lessons learned, rather than on the relationship between the reforms' actual content and whatever impacts they might have had.⁸ It should be noted that these studies, as well as this article's analysis, must necessarily rely on pre- and post-trends with some cross-national comparisons and, therefore, can only provide weak causal inference.⁹ Nonetheless, given the modesty of the law's changes, both *on the books* and *in action*, any observable shifts in drug markets and drug use are unlikely direct effects of the decriminalization statute.

The most dramatic change in Portugal after 2001 was not the legislation itself, nor any subsequent shifts in behavior with respect to drug use that followed. Instead, it was a change in the court system practices regarding the imposition of the criminal law for drug *trafficking*, despite the fact that such conduct remained and remains criminal. The number of arrests for trafficking changed little since passage of the decriminalization statute. However, there has been a significant decline in the number of convictions for trafficking, and an even steeper drop in prison sentences for drug trafficking. As a result, since 2001, the number of individuals incarcerated for criminal acts involving the sale, distribution, or production of drugs dropped by close to half.

What may be most significant about decriminalization in Portugal is not its prescriptive content, but what the law says about the normative valences that it both signaled and reinforced. The statute did not encompass a major change in legal sanctions. But it reflected and supported Portugal's evolving shift from a penal to a therapeutic approach to drug abuse and this, in turn, appears to have had a much broader impact on court practices.

THE LAW IN PORTUGAL: WHAT DID AND DID NOT CHANGE

How Change Happened: A Brief History of the Reform

Portugal's Decriminalization of Drug Use Act (Decree Law 30/2000) entered into force in July 2001. It was the flagship of a set of laws and policies developed in the late 1990s in response to a perceived increase in problematic drug use. Portugal, with a population of roughly 10 million, had, and continues to have, low rates of drug use in the general population compared to the United States and most European countries (World Health Organization 2000). Nonetheless, beginning in the late 1980s and increasing in the 1990s, problematic drug use, in particular, intravenous heroin use, became more prevalent. Portugal did not collect national survey data on drug use until 2001, but the statistics on drug treatment demand, drug-related AIDS/HIV, drug offense arrests, and drug seizures all offer evidence that there was a growing problem. The number of recorded incidences of treatment for drug use increased

8. Hughes and Stevens (2012) illustrate the polarized nature of the debate and the overstated claims in an essay detailing the divergence between Glen Greenwald's (2009) (MacCoun and Reuter 2002) favorable account and that of Dr. Manuel Pinto Coelho, President of the Association for a Drug Free Portugal, who claimed that decriminalization was "a failure" (2010, 1).

9. Given real-world constraints and data limitations, most of the scholarship on the consequences of drug policies must necessarily rely on weak causal inferences. Nonetheless, as MacCoun and Reuter note, "weak causal inference hardly implies that nothing can be learned" (2002, 9).

fivefold during the 1990s, from 56,438 in 1990 to 288,038 in 1999 (SPTT 1999, cited in Loo, Van Beusekom, and Kahan 2002). The 1999 episodes involved 27,750 individual drug users, the majority of whom were heroin users (Loo, Van Beusekom, and Kahan 2002). In 1999, Portugal also had the highest rate of drug-related AIDS cases in the European Union and the second highest prevalence of HIV among injecting drug users (EMCDDA 2000). Along with a growth in intravenous heroin drug use, there was a surge in the number of open-air drug markets and the use of drugs in public (Loo, Van Beusekom, and Kahan 2002; Hughes and Stevens 2010). João Goulão, head of Portugal's Intervention Services for Addictive Behaviors and Dependencies (SICAD), known between 2001–2011 as the Institute of Drugs and Drug Addiction (IDT), characterized the Lisbon neighborhood Casal Ventoso as “the biggest supermarket of drugs in Europe” (O'Brien 2011).

Law enforcement statistics on drug offenses and drug seizures corroborate public health indicators, and suggest, if not a growing drug problem, at least growing attention to drugs. The number of individuals in Portugal arrested for a drug offenses between 1990 and 1999 tripled, from 3,586 to 13,020 (EMCDDA 2004). Total drug offenses peaked in 2000, reaching 14,276. Since decriminalization, drug offenses, including what became administrative drug use offenses, ranged from 10,000 to 12,000 (IDT National Reports to the EMCDDA, 2002–2010). Finally, the number of drug seizures and the quantities of drugs seized also grew significantly during the 1990s, although these measures may reflect shifts in patterns of enforcement and changes in shipment activities more than an increase in local supply.¹⁰

In 1998, a government-appointed commission developed a comprehensive intervention strategy, adopted almost in full to form the basis of Portugal's National Strategy for the Fight Against Drugs (Resolution 46/99). The National Strategy set out a series of guiding principles, objectives, and corresponding policies, of which the decriminalization of personal drug consumption was a centerpiece.¹¹ The National Strategy was framed as a humanistic, pragmatic, and health-oriented approach explicitly recognizing the addict as a *sick person* rather than a *criminal*, and acknowledging the inefficacy of criminal sanctioning in reducing drug use (Portuguese Government 1999a; EMCDDA 2012). In addition to the removal of criminal penalties for drug consumption, the National Strategy and subsequent Action Plan called for additional resources devoted to prevention, treatment, harm reduction, and the social reintegration of drug users, as well as enhanced enforcement of laws prohibiting drug trafficking and distribution. The Action Plan suggested that, for success, these efforts would require a doubling of the investment of public funds.

10. In 1990, there were 1,347 heroin seizures in Portugal, totaling 36 kilograms of heroin. In 1998, the number of seizures increased to 3,750 and the quantity of heroin seized totaled 97 kilograms (IPDT 2000).

11. Portugal published a National Strategy in 1999, which outlined thirteen principles and purposes of the state drug policy: reinforce international cooperation; decriminalize (but still prohibit) drug use; focus on primary prevention; assure access to treatment; extend harm reduction interventions; promote social reintegration; develop treatment and harm reduction in prisons; develop treatment as an alternative to prison; increase research and training; develop evaluation methodologies; simplify interdepartmental coordination; reinforce the fight against drug trafficking and money laundering; and double public investment in the drugs field (Portuguese Government 1999a).

TABLE 1.
Portugal's Drug Laws Governing Psychoactive Drugs

	Before 2001	After 2001
Personal possession/use	Criminal Offense Law 15/93 of January 22, 1993, Chapter IV, Article 40–41	Administrative Offense— “Decriminalized” Law 30/2000 of 29 November 2000, Art 2. (Entered into force July 2001)
Production, sale, and distribution	Criminal Offense Law 15/93 of January 22, 1994, Chapter III, Article 21–28, & Chapter IV, Article 40 regarding cultivation for consumption	Criminal Offense Law 15/93 of January 22, 1992, Chapter IV, Article 40–41

Portugal's Law on Decriminalization

Table 1 provides a reference for Portugal's laws governing drugs before and after the passage of 30/2000. Prior to 2001, consumption, purchase, possession, or cultivation of drugs were criminal offenses punishable by a fine or up to three months' imprisonment or, if the quantity exceeded an amount necessary for “average individual consumption” for a three-day period, up to a year of confinement (Decree Law No. 15/93, Article 40(1)).¹² At the same time, the preamble to the criminal law governing drugs expressly stated that the law was symbolic rather than punitive and that its primary aim was treatment. “The drug consumer is sanctioned by current law in a quasi-symbolic manner, in which the contact with the formal justice system is designed to encourage him or her to seek treatment” (15/93, 93).¹³ With respect to the occasional user, the law stated: “they should, above all, not be labeled or marginalized” (94). The 1993 law also contained explicit provisions providing for the remittance of penalties for the occasional user (Article 40(3)), and allowed for the suspension of prosecution or sentence if an individual considered an addict agreed to participate in a treatment program (Article 44). In other words, the 1993 law anticipated much of the sentiment and provisions found in the 2000 decriminalization statute.

The decriminalization clause in Article 2 of the 2000 drug law did, however, eliminate entirely the possibility of criminal sanctions for use. It states: “The consumption, acquisition and possession for one's own consumption of plants, substances or preparations listed in the tables referred to in the preceding article constitute an administrative offence” (Article 2(1)). The referenced tables include all narcotics, psychotropic substances, and substances without a medical prescription criminally

12. If the offender possessed a quantity of drugs under the threshold, he or she could be sentenced to prison for a term of up to three months.

13. The emphasis on treatment rather than punishment was already in Decree Law No. 430/83, which provided for the suspension of punishment for some drug-related offenses if the offender agreed to enter a treatment program (EMCDDA 2011).

prohibited under 15/1993. The definition of “one’s own consumption” is a quantity “not exceeding the quantity required for an average individual consumption during a period of 10 days” (Article 2(2)). The quantities delineated are 1 gram of heroin, 1 gram of ecstasy, 1 gram of amphetamines, 2 grams of cocaine, or 25 grams of cannabis.¹⁴ The 2000 law is notable in its breadth—it includes *all* psychoactive drugs and does not distinguish between public and private use.

Under the new regime, individuals found using or in possession of drugs below the threshold quantities are issued a citation to appear before one of the newly devised district-level Commissions for the Dissuasion of Drug Addiction (CDTs).¹⁵ Anyone with quantities above the listed amounts can be charged with drug trafficking and subject to criminal sanctions. The 2000 law expects that the police continue to serve as the primary source of detection and referral. It specifically authorizes the police to search for drugs and seize any drugs found, and if unable to identify the individual user, to “detain the consumer in order to ensure that he or she appears before the Commission”(Article 4(2)). Public and private physicians are also authorized to notify the Commissions if they suspect one of their patients has a drug problem (Article 3).

The Decriminalization of Drug Use Act also created a framework for processing the new administrative citations. The Commissions are charged with determining what noncriminal sanction or treatment is best for each particular user. The statute advises that members of the Commissions should suspend proceedings provisionally if a user was *nonaddicted* and had no prior record, or if a user was addicted and agreed to undergo treatment (Article 11). If a Commission decides not to suspend proceedings, it can either issue a warning or impose a monetary or nonmonetary sanction (Article 17).¹⁶

With respect to the appropriate penalty, the guidelines set out in the Decriminalization Act advise the Commission members to consider the circumstances of the infraction—whether the use was in a public or private space, the type of drug, and the consumer’s frequency of use—as well as the user’s economic and financial circumstances. The Commissions can refer addicted users to treatment, and may postpone the imposition of sanctions if the drug user participates in the recommended treatment. While a Commission may issue a fine or impose nonpecuniary sanctions, such as

14. These amounts are derived from the average one-day supply outlined in Administrative Rule 94/96. Under the 2000 law, individuals found in possession of a quantity of drugs exceeding a ten-day supply can be criminally charged for trafficking or “criminal consumption.” The specific criminal penalties are those set out in the older Decree Law 15/1993, and depend on several factors: the type of controlled substance; the presence of “aggravating circumstances,” such as selling to a minor or participating in an organized distribution enterprise, and the extent to which the activity should be deemed “traffic of minor importance.” Lesser penalties are outlined for individuals who the Commissions determine are “trafficker-consumers”—users who sell small amounts of drugs solely to finance their own drug consumption habits (Article 21–25).

15. The Commissions, each of which are overseen by Portugal’s Institute for Drugs and Addiction (IDT) (now called the Intervention on Addictive Behaviors and Dependencies (SICAD)), consist of three members: two are appointed by the Minister of Health from the health care sector (e.g., physicians, psychologists, psychiatrists, or social workers), and one is a legal expert, appointed by the Minister of Justice.

16. The monetary sanctions can involve fines equal to a month of minimum wage earnings or suspension of benefits from public agencies. The nonpecuniary sanctions enumerated include: the withdrawal of the right to carry a gun, to visit certain places or people, or to maintain a professional license; the confiscation of personal possessions that “represent a risk” to the individual or the community; a requirement to report to an authorized body periodically, such as a Commission or a health services office or to engage in a specified number of hours of community service.

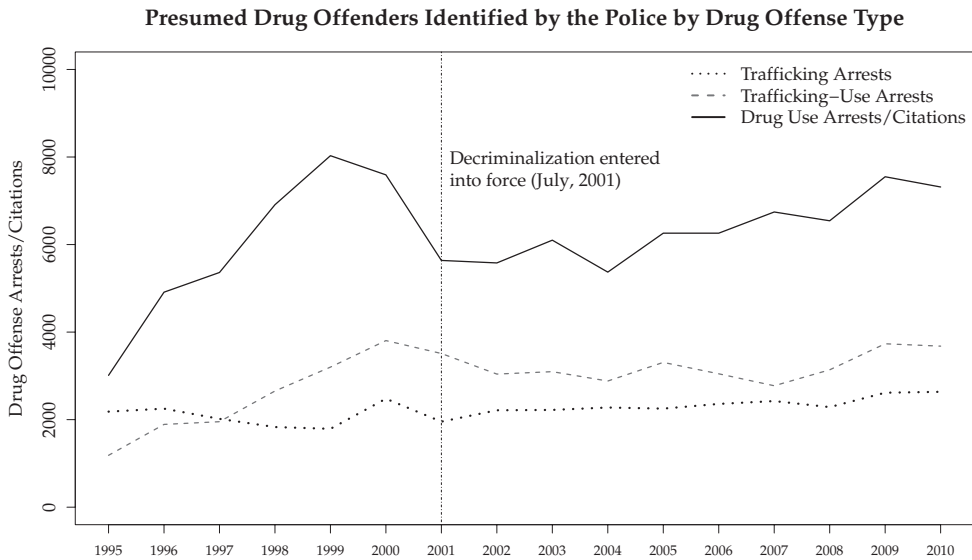


FIGURE 1.

Presumed Drug Offenders Identified by the Police by Drug Offense Type

Note: Drug use offenses are administrative after July 2001.

Source: IPDT 2000 Report; IDT; National Reports to the EMCDDA (2004–2010).

periodic reporting, it does not have the power to mandate compulsory treatment or to send a drug user to prison. The law is silent on what further sanctions can be imposed on a user who fails to comply with a Commission's orders.

Finally, while the Decriminalization Act makes drug consumption an administrative rather than a criminal offense, the law is explicit in stating that the cultivation of drugs, even for the purposes of *personal* consumption, remains criminally prohibited.¹⁷ This is an important qualification. A drug consumer must necessarily rely on the illicit market to obtain drugs.

SHIFTS IN DRUG ENFORCEMENT POLICY AND PRACTICE**Drug Arrests**

The police were and still are responsible for detecting both drug consumers and drug traffickers. Decriminalization has not changed the number of formal drug-related contacts between citizens and the police. As shown in Figure 1, the number and composition of drug arrests and administrative citations in 2010 were almost identical to the arrests for trafficking and use recorded in 2000, before the law entered into force. The number of citations for drug use declined slightly in the years immediately following the statute's passage, then increased between 2005 and 2010 to roughly the same

17. The statute states: "Article 40, save with regard to cultivation, and Article 41 of Decree-Law no. 15/93, of 22 January, are hereby repealed" (Decree-Law 30/2000, November 29, 2000).

number as before decriminalization. Trafficker and trafficker-consumer arrests consistently comprised approximately 20 and 30 percent, respectively, of all police reported drug offenses.

The fact that the volume of drug-related police contacts did not change is noteworthy given some experiences documented elsewhere subsequent to marijuana decriminalization. In South Australia, for example, following the implementation of the cannabis expiation system in 1987, there was a near tripling of cannabis expiation notices (Single, Christie, and Ali 2000). This *net widening* is thought to be the result of the relative ease with which police officers could issue notices compared to the previous system that required more extensive criminal booking procedures. As a consequence, there was actually an *increase* in criminal prosecutions for marijuana due to outstanding fines levied on those who received police notices. In California, on the other hand, Aldrich and Mikuriya (1988) documented a significant net decline in the number of marijuana arrests following the 1976 Moscone Act, which reduced the penalty for small-scale possession of marijuana from a felony to a misdemeanor punishable by a fine.

Sanctions for Personal Use and Possession

As noted above, police contacts with drug users changed little in Portugal following decriminalization. With respect to the punishment of drug users, the formal change in the criminal code had minimal effect. As Table 2 illustrates, in the years before the passage of the Decriminalization Act, although drug use was a criminal offense, almost no one arrested for use was incarcerated for the crime. In 2000, for example, the year before the decriminalization law went into effect, there were only twenty-five individuals in prison for crimes involving drug use. Another 121 individuals, roughly 3 percent of the incarcerated drug offender population, had *traffic-consumption* convictions. In other words, before decriminalization, the courts could, but rarely did, impose prison sentences on convicted drug users; after passage of the Decriminalization Act, incarceration was no longer an option.¹⁸

The nature of the nonincarcerative sanctions imposed on drug users has shifted slightly since 2001—from mostly fines to mostly nonmonetary penalties.¹⁹ Further, the venue processing the citations has clearly changed. Instead of criminal court, users now

18. Data on pretrial detainees are not available, but it is possible that individuals arrested and charged with a drug use offense prior to decriminalization may have spent time in pretrial detention. Additionally, the year-end prison population count provides the composition of individuals incarcerated on a given day, but does not capture all the individuals who may have cycled through the system in a given year. The year-end count may, therefore, understate the use of incarceration for drug consumers and consumer-traffickers who likely received shorter sentences relative to drug traffickers.

19. In 2000, there were 1,106 convictions for drug use, and most—905 individuals—were issued a fine (IPDT 2000). In 2010, of the 4,435 rulings issued by the Commissions, 84 percent involved temporary suspensions, 2 percent involved dismissals on the grounds that the alleged user was not guilty, and 14 percent (620 cases), involved some punitive sanctions (IDT 2011, 94). Of the 620 cases classified as “punitive,” the majority were nonmonetary, requiring instead that the individual report periodically to a designated location, such as a Commission or National Health Services Office.

TABLE 2.
Year-End Count of Prison Population in Portugal, by Type of Drug Offense

	1993	1994	1995	1996	1997	1998	1999	2000	Year-End 2000: % of Total Prison Population
Trafficking	1,237	1,432	1,608	2,157	3,106	3,291	3,362	3,387	38
Criminal association	19	5	10	9	13	19	12	63	1
Lesser trafficking	36	37	91	139	220	284	241	197	2
Trafficker-consumer	179	197	215	238	268	284	224	121	1
Consumer	36	12	10	14	42	4	23	25	0.3
Other	19	5	8	9	4	10	1	36	0.4
Total drug inmates	1,507	1,683	1,934	2,557	3,649	3,882	3,862	3,793	43
Total count of inmates	7,150	6,403	7,400	8,897	10,333	10,348	8,756	8,917	100

Source: IPDT (2000).

appear before one of the Commissions set up throughout the country.²⁰ Since 2001, the Commissions processed between 3,500 to 5,500 cases per year, and resolved 85 to 90 percent of them with provisional suspensions.²¹ Estimates indicate that 60 percent to 70 percent of the suspensions involved nonaddicted consumers (IDT Annual Reports, 2002–2010). As discussed previously, a concern regarding the growing population of heroin users was the primary motivation for the decriminalization initiative. Despite this impetus, in practice, most of the individuals who appeared before the Commissions have not been *problem* drug users. Instead, the majority of the issued citations for drug use have been to increasingly younger, nonaddicted, cannabis users. The proportion of cases involving cannabis has steadily grown, from approximately 50 percent of the cases during the Commission's first eighteen months of operation to 76 percent of the cases in 2009 (IDT 2002; IDT 2010).²² The composition of the Commission's caseload raises questions concerning the efficacy and efficiency of a system developed, in principle, to treat problem drug use but that, in practice, spends most of its time and resources processing nonaddicted marijuana users.²³

Finally, the reform may have produced some efficiencies by moving the resolution of police citations for drug use out of Portugal's notoriously congested criminal court system.²⁴ Hughes and Stevens's (2007) study of the first years of the reform found Commissions typically rendered decisions within four to five weeks following a police citation; whereas, under the old system, it might have taken up to two years before an individual charged with drug use appeared in criminal court. In a later study, however, Hughes and Stevens (2010) noted that implementation issues, such as a lack of quorum in several large districts, resulted in delayed processing.²⁵

Sanctions for Drug Trafficking

The number of drug arrests for traffickers and trafficker-consumers grew in the 1990s and stabilized throughout the 2000s. The constant level of arrests suggests Decree Law 30/2000 had little effect on police behavior.²⁶ Yet, with the same volume of arrests,

20. The experience of being subjected to an administrative system rather than the criminal system may be qualitatively different. Domoslawski and Siemaszko (2011) cite interviewees who reported feeling less fearful when appearing before a Commission than they had when they had appearing in the criminal court under the old system.

21. The number of administrative offenses and the number of cases processed in any given year do not match perfectly. This is likely due to documented delays in case processing (Hughes and Stevens 2007).

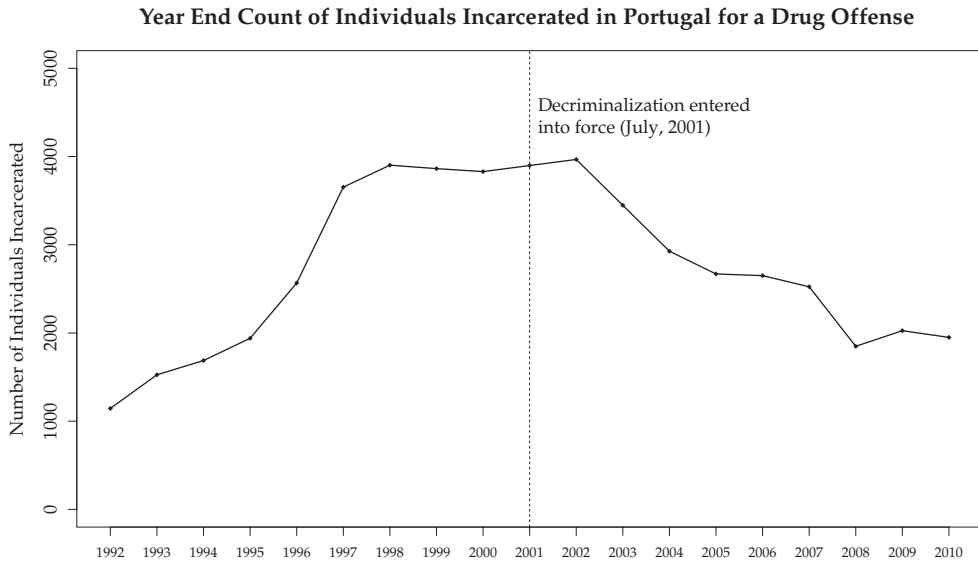
22. Specifically, the cases involving cannabis totaled 45 percent in 2001, 53 percent in 2002, 65 percent in 2003, 68 percent in 2005, 70 percent in 2006, 64 percent in 2007, and 68 percent in 2008.

23. This article's discussion regarding the Commissions' caseloads and practices relies on the official statistics and government reports. Although it is beyond the scope of this article, it would be useful to observe the Commissions actually operating on the ground.

24. Efficiency was not a central issue in the decriminalization debate, although proponents of the law maintained that the reform would lessen the burden on the police and allow them to focus on more serious drug trafficking crimes (Domoslawski and Siemaszko 2011).

25. The available data on case processing are not sufficient to enable a full assessment of the efficiency of the administrative system compared to the previous criminal justice system processing.

26. There is no reason to believe the number of "potential" drug offenders changed significantly during this period. If it had, however, the comparable level of arrests in 2000 as citations in 2010 would imply there was, in fact, a change in police behavior.

**FIGURE 2.****Year-End Count of Individuals Incarcerated for a Drug Offense**

Note: Data from 2001 and 2003 are unavailable. The line has been smoothed over these points.

Source: IPDT 2000 Report; IDT, National Reports to EMCDDA (2004–2010).

in the decade since the passage of the law, the number of drug trafficking convictions fell 40 percent and the number of offenders in prison for trafficking decreased by close to 50 percent. These declines were not a manifest function of the law—the criminal code governing drug trafficking remained untouched. Instead, the change appears to have been located in the practices of the criminal courts.

The buildup of the incarcerated drug offender population before the 2001 Decriminalization Act means that, in some part then, the drop in the number of drug convictions and prison sentences in the 2000s may be a function of *regression to the mean*. Nonetheless, the reduction suggests a retreat from the enforcement-oriented practices that had become the mode in Portugal. Drug-related arrests, convictions, and incarceration for the sale, distribution, and production of drugs all rose precipitously during the 1990s. Arrests more than doubled, from 6,280 in 1992 to 14,276 in 2000; convictions increased by 150 percent, from 1,263 in 1992 to 3,154 in 2000; and the number of people in prison for drug law violations more than tripled, from 1,145 to 3,829, during this eight-year span. By 2000, Portugal had one of the highest rates of incarceration in western Europe (145 per 100,000) and the highest proportion of drug offense prisoners (Cunha 2005).

Figure 2 illustrates the rise and fall in Portugal's drug offender prison population in the 1990s and 2000s. By 2010, close to a decade after decriminalization, only 1,950 people were in prison for a drug crime, almost half as many as the 3,647 non-use-related drug offenders in prison in 2000 (IPDT 2000; IDT 2011). In 2000, the year before the Decriminalization Act, of the total convicted prison population, 43 percent were serving time for drug law violations. In 2010, drug law violators comprised only 21 percent of the total prison population. In 2010, as was the case in 2000, most of the drug

prisoners (90 percent) had sentences for trafficking offenses, while another 8 percent were incarcerated for minor trafficking and 2 percent for traffic-use.

Both reductions in convictions for trafficking as well as in prison sentences for trafficking are responsible for the drop in drug trafficker imprisonment. There were 1,381 drug trafficking convictions in 2010 compared to 1,896 in 2000. Data on sentences broken down by specific drug offense types are unavailable, but, in 2010, among the total population of convicted drug offenders, 28 percent were sentenced to prison (*effective prison*), 48 percent received probation (*suspended prison*), and the remainder, mostly individuals convicted of *criminal use*, were given fines (IDT 2011).²⁷ By contrast, in 2002, the reform law's first year of implementation, 49 percent of the 2,014 individuals convicted of a drug offense received prison sentences and 44 percent received probation (IDT 2001). Finally, besides fewer prison admissions, shorter sentences to prison for trafficking might have contributed to the reduction in the annual number of incarcerated drug traffickers since 2001. Unfortunately, data on sentence lengths are not available.

The reduction in criminal punishment for trafficking and trafficking-use suggests that after formally acknowledging and codifying the *de facto* practice of not convicting and incarcerating drug users, the criminal courts embraced *de facto* practices of greater leniency for at least some drug users and purveyors whose behavior remained criminally sanctioned. Of course, as is always the case, the law cannot be construed purely as a cause (or an effect); rather, there are reciprocal feedback processes between the law and social and cultural norms and behaviors (see, e.g., Saguy and Stuart 2008). In Portugal, the drug reforms were, in part, an articulation of shifting sentiments and codification of penal practices already occurring with respect to drug use. There is also some, albeit small, evidence that the criminal courts' perception of the line between the consumer and trafficker was already beginning to blur before the decriminalization statute's passage. For example, in 2000 at year-end, there were 121 trafficker-consumers in prison, roughly half as many as there had been in each of the previous years of the late 1990s.

Besides the symbolic significance of the Decriminalization Act, additional practical dimensions might account for the decline in the conviction and incarceration of drug traffickers in the postdecriminalization period. By increasing the quantity of a drug considered *for personal use*, decriminalization likely made distinguishing consumers from trafficker-consumers more ambiguous. Dealers may have altered their distribution strategies in accord with provisions of Subarticle 2 of Act 30/2000 by carrying no more than the ten-day supply (Portuguese Government 2004). However, given little change in the composition and volume of drug arrests since 2001, these practical dimensions cannot explain the significant changes in the punishment of drug trafficking.

This section has shown a somewhat surprising association between the liberalization in the law regarding possession and a *de facto* reduction in punishment for

27. "Suspended prison" is the relative equivalent of probation in the United States. A "suspended" prison sentence usually involves certain conditions, such as periodic reporting, and if those conditions are violated or the individual violates any laws, he or she may be sent to prison (Newman 2010).

trafficking. At the time of this writing, other decriminalization contexts showed no documentation or tests of this association. The concerns in the literature on decriminalization have been primarily with trends in drug use prevalence rather than drug law enforcement. Examining the enforcement of decriminalization and its potentially broader impacts and manifestations in penal practice might be a fruitful topic for future research.²⁸

IMPACTS ON DRUG MARKETS, DRUG USE, AND DRUG-RELATED HARM

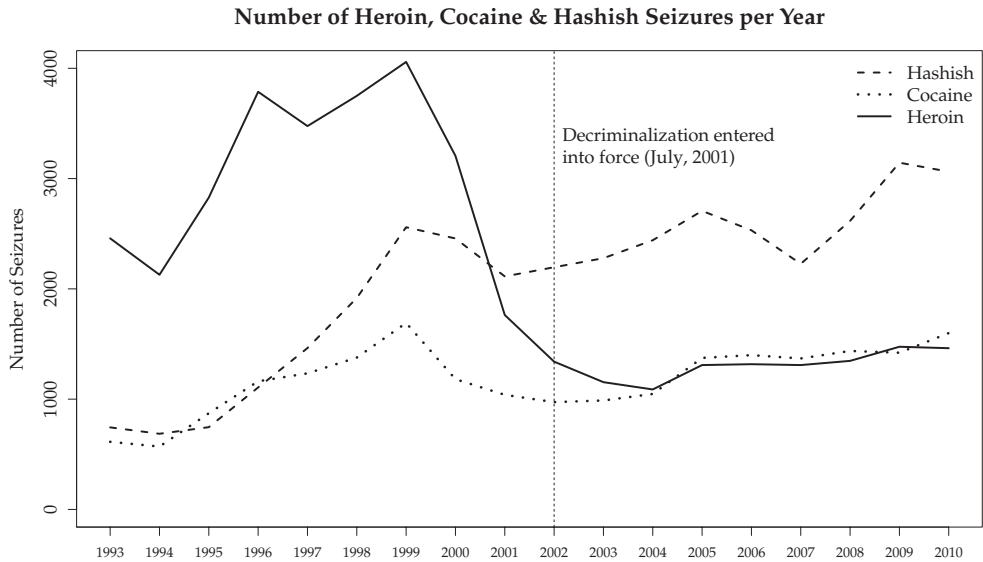
Expected Behavioral Effects

Exogenous social, economic, and cultural factors that independently influence drug use and drug-related harms always complicate attempts to estimate the behavioral effects of a drug policy change (MacCoun and Reuter 2001). What empirical evidence exists suggests that harsher punishments and increased drug law enforcement do not have a clear impact on drug use or drug markets. In the case of Portugal, however, as the above sections posited, the Decriminalization Act comprised a relatively minor change in legal sanction and an even less distinct change in punishment practice. This limits plausible inference based on analyses of longitudinal trends before and after the law changed. Decriminalization in Portugal is thus best understood not as a dramatic shift in policy, but as a symbolic and practical reinforcement of the emerging view that drug problems should be treated primarily as a public health concern rather than crime. It is with this in mind that we should consider the postdecriminalization trends. The following section reviews the usual measures of drug supply and demand commonly used in drug policy evaluation and concludes that Portugal's decriminalization law did not trigger dramatic changes in the country's drug markets, drug prices, drug use, or related harms.

Drug Markets

Drug seizures, arrests, and prices commonly serve as indicators of drug market supply, although seizures and arrests are as much indicators of law enforcement activity as they are of drug availability. In Portugal, drug seizures are a particularly problematic

28. The absence of precedent for the finding that decriminalizing possession was followed by reductions in sanctions against trafficking may simply be the result of the absence of relevant case studies or may represent something unique about Portugal. A quick look at California prison admissions before and after the passage of the 1976 Moscone Act that decriminalized the personal possession of one ounce of marijuana, for example, shows convictions for possession and sale of controlled substances other than marijuana grew after the reform. There were 387 new court convictions to prison for marijuana in California 1960, 249 in 1970, and 72 in 1980; but for other controlled substances, there were 543 new court convictions in 1960, 333 in 1970, and 565 in 1980 (California Department of Corrections 1980, 17). This, however, was a period in which drug use was increasing—so it is difficult to infer the extent to which changes reflect court behavior compared to the behavior of the citizenry.

**FIGURE 3.****Number of Heroin, Cocaine, and Hashish Seizures per Year**

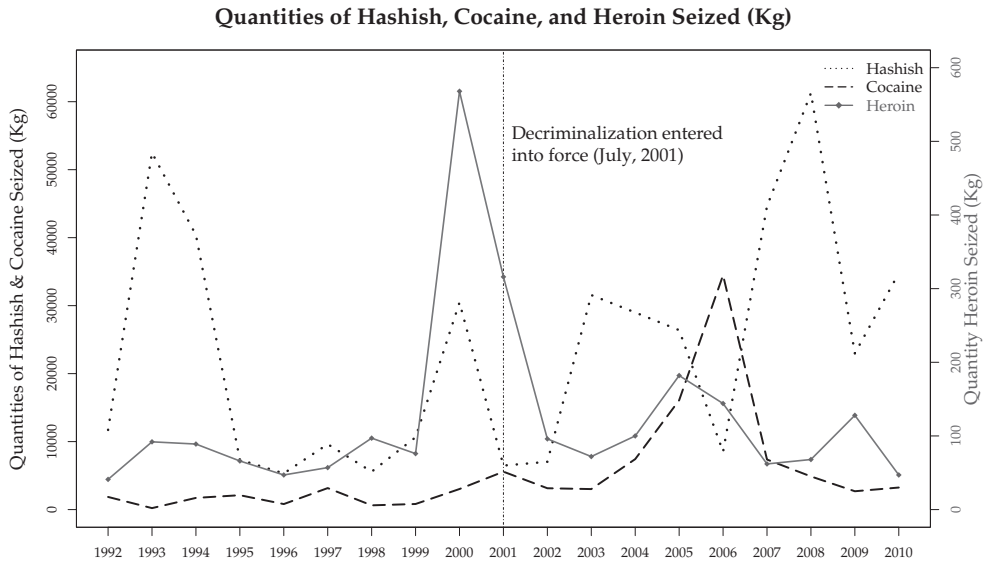
Source: IPDT 2000 Report; IDT, National Reports to EMCDDA (2004–2010).

measure of local supply because the country serves as a transit point for international trafficking; therefore, a large proportion of drugs seized are likely destined for other, mostly European, countries (EMCDDA 2012).

Trends in the annual number of drug seizures in Portugal are illustrated in Figure 3. The number of heroin seizures recorded by the police increased significantly in the 1990s, dropped at the turn of the twenty-first century, and has been essentially stable since 2002. In contrast, except for a small dip in the first couple of years following decriminalization, the annual number of hashish and cocaine seizures grew over the two decades. As shown in Figure 4, the quantities of drugs seized have varied considerably from year to year and across drug type. There was, for example, a large increase in hashish seizures between 2003 and 2005, then a decline followed by an even larger increase in 2007 and 2008. The quantity of cocaine seized also increased substantially in 2005 and in 2006, the year in which the UNODC estimated Portugal was responsible for 35 percent of all cocaine seizures in Europe (UNODC 2011). Much smaller fluctuations are found in the quantity of heroin seized, which peaked in 2005 (IPDT 2000; IDT 2003–2011).

Price

In theory, increased drug law enforcement activity should increase the seller's risks and thereby increase the nonmonetary costs of selling drugs (Reuter and Kleiman 1986). These costs should then pass along to the consumer in the form of higher drug prices. In practice, however, the connection between prices and enforcement is far less clear. Despite the rise of stringent drug law enforcement in the United States in the

**FIGURE 4.****Quantity of Heroin, Cocaine, and Hashish Seized (Kg)**

Source: IPDT 2000 Report; IDT, National Reports to EMCDDA (2004–2010).

1980s and 1990s, for example, there has been a precipitous decline in the price of cocaine and heroin (Caulkins and MacCoun 2003; Caulkins and Reuter 2010).²⁹ In the case of decriminalization in Portugal, there would be even less reason to expect a change in price given the criminal law governing drug sales did not change. Any impact on price would therefore have to be much less direct. Prices might rise if decriminalization produced an increase in demand, or caused an increase in law enforcement activities targeted at the sellers.

An analysis of drug price changes in Portugal pre- and postdecriminalization is further complicated by a change in the mode of measurement following the Decriminalization Act. Trafficker and trafficker-consumer self-reports are now used to estimate street-level prices, previously gathered by the police (UNODC 2010). In addition, as is always the case, estimates of drug price trends are complicated by changes in drug purity per ounce. Neither the UN Office of Drug Enforcement (UNODE) nor Portugal's Institute on Drugs and Drug Addiction (IDT) (the two sources of drug prices in Portugal) provide purity-adjusted estimates. Table 3 shows the drug prices between 1997 and 2008 as reported by the IDT.³⁰ According to IDT data, prices have fallen for all drugs, most dramatically for heroin, since decriminalization. The UNODE price estimates, reported in US dollars, indicate the price of cocaine increased over this period,

29. The retail price of cocaine did increase in the United States in the late 2000s from \$132.89 per gram in 2007 to \$197.77 per gram in 2009, although the estimated purity dropped from 64 percent to 47 percent over this period. The most recent estimate, from 2011, suggests the price dropped to \$177.26 per gram, and purity increased slightly to 52 percent for the year (White House 2013).

30. We cannot estimate the direction and magnitude of changes in drug purity from the data reported. Portugal's National Reports to the EMCDDA indicate annual increases and decreases in the purity of the drugs being sold to users. They do not, however, include the size of the change in any given year.

TABLE 3.
Average Drug Prices in Portugal, in Euros, by Year and Drug Type, 1997–2008*

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Heroin (g)	38.50	38.50	31.33	49.72	50.27	43.78	46.80	46.54	41.01	42.17	37.57	33.25
Cocaine (g)	45.63	45.63	40.37	60.31	53.51	38.57	41.40	42.23	45.11	45.73	44.65	45.56
Hash (g)	1.99	1.78	1.09	4.13	4.06	2.45	2.49	2.31	2.13	2.18	3.45	3.28
Ecstasy (tablet)	8.74	11.70	6.70	5.98	6.86	5.90	5.27	4.50	3.56	3.18	3.20	2.80

* These estimates are not purity-adjusted.

Source: IDT (2006, 2009).

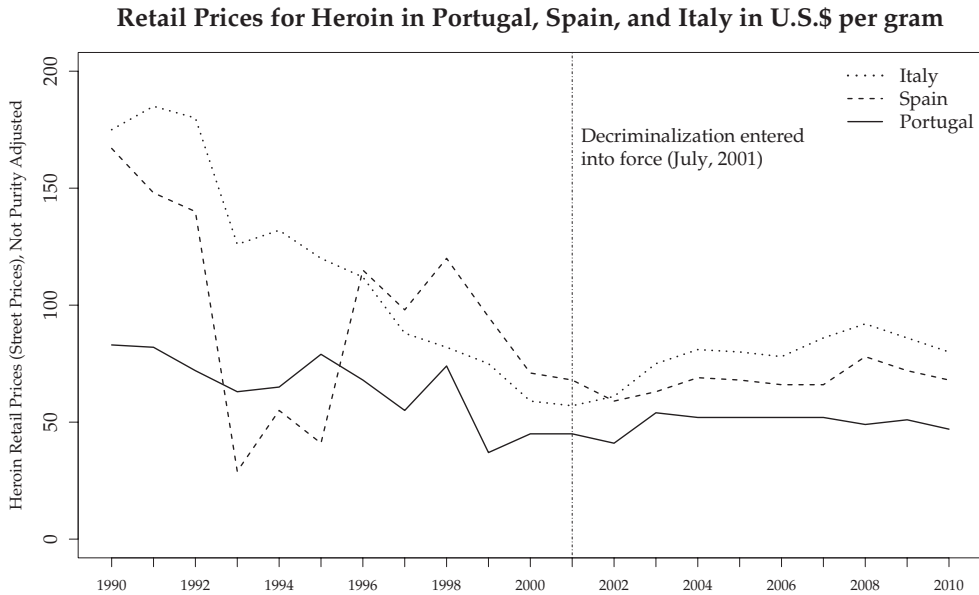


FIGURE 5.

Retail Prices for Heroin in Portugal, Spain, and Italy in US\$ per Gram

Source: www.unodc.org/unodc/secured/wdr/Cocaine_Heroin_Prices.pdf.

while the average price of hashish was essentially stable. Given the challenges of consistent measurement and the discrepancies between sources, it is particularly useful to compare price fluctuations in Portugal to trends in other countries. Comparative data for an extended period are available for the price of heroin and cocaine. Figures 5 and 6 illustrate these price trends in Portugal alongside the trends in Spain and Italy. The similarities in the trajectories suggest that whatever changes in drug prices there were in Portugal likely reflect broader trends independent of decriminalization.

Drug Policy and Drug Use

The central question in drug policy debate and in the assessment of different regimes and degrees of prohibition is the extent to which these policies have an impact on drug use and related harms. To varying degrees, drug availability, price, sanctions, and broader cultural and social trends influence the prevalence, incidence, and intensity of drug use. In theory at least, the extent to which the liberalization of drug policies should increase use depends on the policies' impact on the costs associated with use and the elasticity of demand, both of which vary depending on the regime, the type of drug, and the population. Here, the distinction between a legally regulated regime and a decriminalized system is particularly important. There is a general consensus among drug policy scholars that drug legalization would produce an overall increase in drug use (MacCoun and Reuter 2001). The legal availability of drugs would increase access to drugs, reduce the market price (except under a system of heavy taxation), and decrease nonmonetary costs—those associated with the risk of criminal sanctions and social

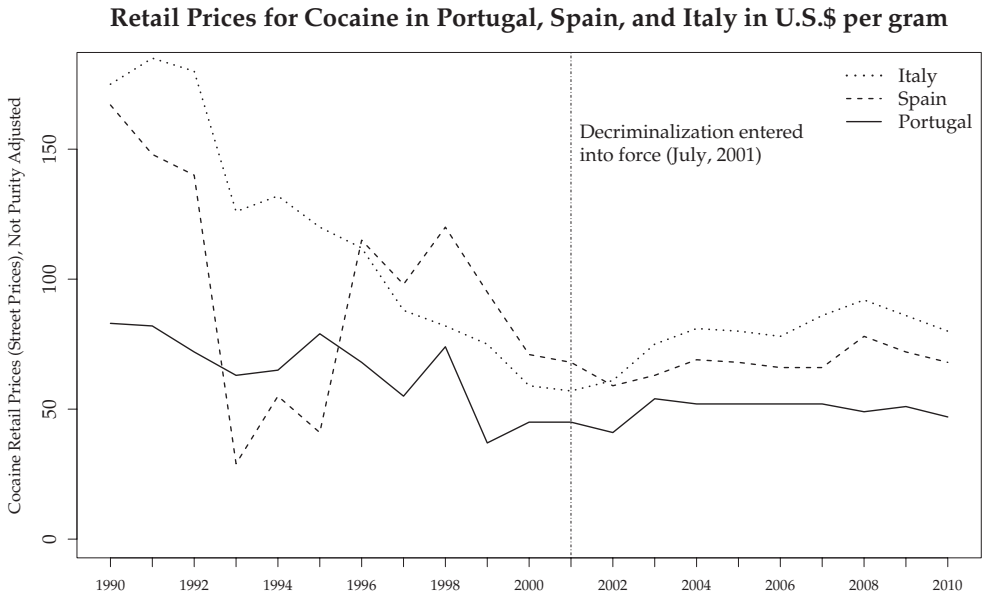


FIGURE 6.

Retail Prices for Cocaine in Portugal, Spain, and Italy in US\$ per Gram

Source: www.unodc.org/unodc/secured/wdr/Cocaine_Heroin_Prices.pdf.

sanctions associated with drug use. The legal regulation of drugs could, but need not, introduce opportunities for marketing and promotion, which would presumably further encourage use.³¹

Most scholars agree that the important question regarding legalization is not whether it would increase use but, rather, by how much (MacCoun and Reuter 2001). Empirical studies of the price elasticity of demand offer a range of estimates, typically between -0.5 and -1.0 (Kleiman, Caulkins, and Hawken 2011) with a 1 percent increase in price associated with somewhere between a 0.5 percent to 1 percent decrease in use. There is a wider range, and generally higher set of estimates, for cocaine and heroin relative to marijuana, and lower estimates for the short run as compared to the long run (Dave 2008; MacCoun and Reuter 2011; Gallet 2013). These elasticity estimates are from data on fluctuations in price under regimes in which drugs sell on the black market. As scholars have cautioned, estimates may not apply linearly to more dramatic drops in price that might occur under a legalization regime (Kilmer et al. 2010).

While there is consensus that legalization would likely increase drug use by some amount, the effects of decriminalization are less clear. Returning to Portugal, the Decriminalization Act did not alter the laws prohibiting the production and distribution of drugs, and had no direct effect on drug users' access to drug supply. Because drug trafficking and selling remain illegal under the decriminalization model, the *mark-up*

31. Uruguay offers a model of drug legalization that explicitly prohibits any advertising or promotion by the sellers (Room 2013).

TABLE 4.
Reported Use of Alcohol and Drug Use Among the General Population (15–64) in Portugal: 2001 Versus 2007

	Lifetime		Last 12 Months		Last 30 Days	
	2001	2007	2001	2007	2001	2007
Alcohol	75.6	79.1	65.9	70.6	59.1	59.6
Tobacco	40.2	48.9	28.8	30.9	28.6	29.4
Tranquilizers or sedatives	22.5	19.1	14.4	12	11	9.9
Any illicit drug	7.8	12	3.4	3.7	2.5	2.5
Cannabis	7.6	11.7	3.3	3.6	2.4	2.4
Cocaine	0.9	1.9	0.3	0.6	0.1	0.3
Amphetamines	0.5	0.9	0.1	0.2	0.1	0.1
Ecstasy	0.7	1.3	0.4	0.4	0.2	0.2
Heroin	0.7	1.1	0.2	0.3	0.1	0.2
LSD	0.4	0.6	0.1	0.1	0	0.1
Hallucinogenic mushrooms	0	0.8	0	0.1	0	0.1

Source: 2010 National Report (2009 data) to the EMCDDA, REITOX National Focal Point, Institute on Drugs and Drug Addiction (IDT, I.P). www.idt.pr

costs associated with an illicit market should, in theory, remain stable. There is, therefore, no reason to expect the change in law to affect the per-unit price of drugs. The primary mechanisms by which decriminalization might impact consumption would be through a change in the implicit costs of use—the change in the legal sanction from criminal to administrative, or a change in *social sanction* if the law reduced the cultural and social stigma associated with drug use.

Drug Use in Portugal

Portugal did not conduct a general population survey on drug and alcohol use until 2001. The second survey was done in 2007, and the third in 2012; however, at the time of this writing, the results from 2012 were not yet available.³² Researchers have frequently referenced the reports from 2001 and 2007 both in support of and cautioning against Portugal's reforms (e.g., Greenwald 2009; White House 2010). The data are in Table 4. Recent use (within the previous year) of any drug including cannabis was virtually stable (3.4 percent in 2001 compared to 3.7 percent in 2007) and current use (within the previous thirty days) was identical in the two periods (2.5 percent). Reported lifetime use of any drug increased from 7.8 percent in 2001 to 12 percent in 2007 (IDT 2009). As is always an issue with self-reported data, however, increases in reported drug use might be an artifact of greater willingness to report as a consequence of changes in the stigma rather

32. The 2001 general population survey on drug use included a sample of 15,000 individuals representative of the Portuguese population; the second survey, conducted in 2007, involved a representative sample of 12,202 (EMCDDA 2012).

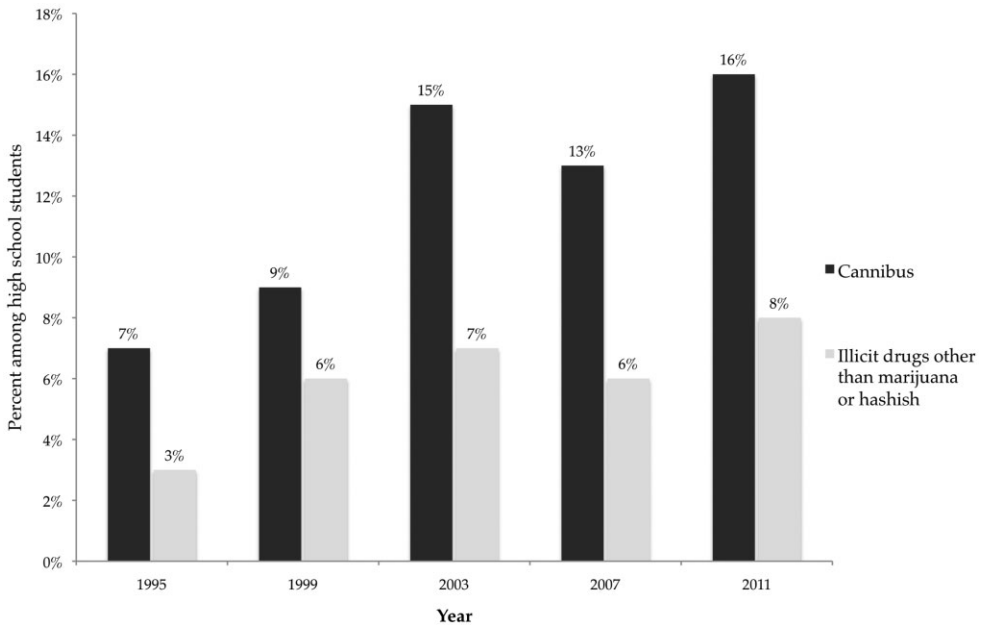


FIGURE 7.

Portugal Student Reports of Lifetime Illicit Drug Use: 1995–2011

Source: 2011 ESPAD Report on Substance Use Among Students in 36 European Countries.

than actual changes in use. Insofar as the statistics represent real change, the increase mostly in reported lifetime use suggests the change was in short-term experimentation rather than an increase in the regularly using population.³³

Several school-based surveys provide time series trends dating back to the predecriminalization period. Figure 7 shows 1995–2011 trends in self-reported drug use among high school students collected by the European School Survey Project on Alcohol and Other Drugs (ESPAD). These data show reported cannabis use increasing before the passage of the decriminalization law, and continuing into the postdecriminalization period. The rise in cannabis use corresponds to a more general pattern seen across much of Europe in the late 1990s and early 2000s in which student reports of illicit drug use, predominantly cannabis, increased (Hibell et al. 2012). In Portugal, the growth in student-reported use of drugs other than cannabis was largest in the period before decriminalization, from 3 percent in 1995 to 6 percent in 1999; since decriminalization, it has varied between 6 and 8 percent. Figure 8 offers a more detailed breakdown by drug type for the subpopulation of fifteen- to sixteen-year-old students. These data reveal extremely small changes in reported use, other than reported use of

33. Lifetime use is generally an indicator of “experimentation” (EMCDDA 2005). From a harm-reduction perspective, the distinction between brief experimentation and continuing heavy use is important because brief experimentation does not have the same harmful consequences as continuing heavy use. Supporters of Portugal’s drug reform have also noted that both recent use and current use declined for fifteen- to twenty-four-year-olds, the population generally thought of as most “at risk” to become long-term addicts. There was a small increase in recent and current use among those in the older age subgroups and the largest for the twenty-five- to thirty-four-year-olds.

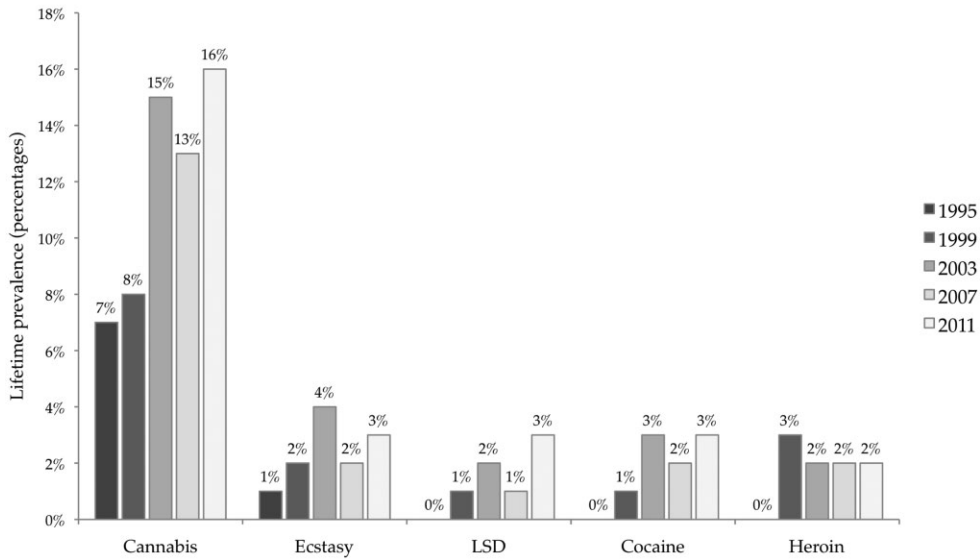


FIGURE 8.
Lifetime Reported Prevalence of Psychoactive Substance Use Among Students 15–16 Years Old: 1995–2011

Source: 2011 ESPAD Report on Substance Use Among Students in 36 European Countries.

cannabis. Between 1999 and 2003, the percent of students reporting heroin use fell 1 percentage point, from 3 to 2 percent, while the percent reporting use of cocaine, ecstasy, and LSD increased by 1–2 percentage points.

Despite whatever increases there were in reported drug use and, in particular, cannabis use, drug use in Portugal was, and remains, substantially lower than the European average. On the other hand, Portugal's rate of problem drug use, defined by the EMCDDA guidelines as injecting use or prolonged use of heroin, cocaine, and/or amphetamines, has been closer to or above the European average since the 1990s (EMCDDA 2006). This predates decriminalization and, as stated in the first section of this article, was largely the impetus for, not a consequence of, decriminalization. In the first years postreform, there was a small, although significant, decline in the population of problem drug users—from an estimated 7.6 per 1,000 in the population aged fifteen to sixty-four in 2000 to 6.8 in 2005. The estimated rate of use among injecting users fell from 3.5 in 2000 to 2.0 in 2005 (Negreiros and Magalhães 2009).³⁴

Treatment

Most accounts of the Portugal experiment have focused on the 2001 change in the criminal law regarding drug use, less on the other prongs of Portugal's drug reforms—the

34. Estimates of the number of problem drug users range from 6.8–8.5 per 1,000 population in 2000 and 6.2–7.4 per 1,000 population in 2005. The estimates of the rate of injecting drug use ranged from 2.3–4.6 per 1,000 population in 2000, to 1.8–2.2 per 1,000 population in 2005 (EMCDDA 2011).

expansion of programs providing treatment, prevention, and reintegration.³⁵ Yet, such programs are clearly central to any analyses of drug-related harms and health outcomes. We cannot evaluate decriminalization in isolation, nor was it designed to function alone. The administrative commissions were established to support broader public health efforts by providing a more integrated and efficient method for detection and referral to treatment. The removal of criminal penalties for drug use was intended to de-stigmatize addicted users and encourage treatment. According to Portuguese drug policy officials, the new system has effectively done just that. Manuel Cardoso, Deputy Director of what was formerly known as the Institute for Drugs and Drug Addiction (IDT), now the Intervention on Addictive Behaviors and Dependencies (SICAD), told the *Boston Globe*, for example, that “before decriminalization, addicts were afraid to seek treatment because they feared they would be denounced to the police and arrested, now they know they will be treated as patients with a problem and not stigmatized as criminals” (Economist 2009, para. 7). Statistics on treatment services should thus be seen as a global measure of Portugal’s efforts to tackle problem drug use and increase treatment access. These efforts involved the decriminalization statute as well as the expansion of and financial investment in harm reduction and treatment services.³⁶

Data indicate that the number of treatment centers and number of individuals receiving treatment increased with the implementation of decriminalization, although data on the country’s financial investment pre- and postreform are not available. In 1998, the first year of data collection on drug treatment centers, 23,654 drug users received some form of drug treatment. The number rose to 29,204 in 2000, the year before implementation of the Decriminalization Act; by 2008, the total number in treatment reached 38,532 (IDT 2009).³⁷ These numbers included both clients in day-treatment programs and individuals in opioid substitution treatment, the latter of which accounted for roughly three-quarters of the total treatment population count. Consistent with the explicit intention of the drug reforms to increase treatment availability, the number of reporting outpatient treatment centers grew from fifty-three in 1998 to seventy-nine in 2010.

35. The 1999 National Drug Strategy estimated a doubling of public investment in drug-related expenditures over a five-year period—which would amount to 32,000 million Escudos, roughly 159 million Euros or 218 million US dollars by 2004 (Portuguese Government 1999b). The data on actual expenditures and expenditure growth are sparse and inconsistent. According to a 2005 external evaluation of the drug law reforms, “the total budget allocated to the fight against drugs and drug addiction stated by each organization involved is not available. Therefore it is not possible to assess the evolution of the global budget assigned to the fight against drugs and drug addiction” (Tavares et al. 2005, 113). More recently, the EMCDDA profile of drug policy in Portugal stated that neither Portugal’s current drug-related public expenditures, nor trends in such spending, can be estimated (EMCDDA 2012). EMCDDA reports that, in 2005, estimated drug-related expenditures were approximately .03 percent of GDP, which would amount to approximately US \$57.6 million (World Bank 2013). Finally, a more recent study reports the IDT’s annual budget in 2010 was approximately US \$103 million (Domoslawski and Siemaszko 2011).

36. As is always the case, measures of treatment participation are subject to different interpretations. An increase in the number of cases may reflect a rise in levels of problem drug use or may be the result of an increase in the availability of treatment. In addition, the measures are sensitive to changes in tracking practices. The increased attention to drug treatment services may well have been accompanied by better reporting.

37. Portugal implemented a new national information system in 2010. According to IDT reports, because of the methodological changes accompanying the new system, particularly in the registration criteria, researchers cannot compare data from or after 2010 to previous years (IDT 2011).

In contrast to the growth in the total count of individuals participating in day-treatment programs and substitution treatments, the annual number of individuals entering a residential treatment facility declined in the years immediately following decriminalization. Specifically, the number of people entering treatment peaked in 1999, reaching 9,991, fell to a low of 4,844 in 2004, and was up to 7,643 in 2009 (IDT 2010). The initial decline from the 1999 peak marked a drop in the number of heroin users (Tavares et al. 2005). The growth since 2004 may be an indicator of the increased availability and promotion of treatment, or evidence of increases in problematic use. Hughes and Stevens (2010) suggest the rise since 2004 reflected an aging population of heavy users more ready to seek treatment rather than an influx of new drug users. The population in treatment did age: in 2000, 23 percent of drug users admitted for treatment at a facility for the first time were over thirty-four years old; by 2008, 46 percent were over thirty-four (IDT 2009).

Drug-Related Deaths and Infectious Diseases

The only consistently collected data on drug-related deaths in Portugal involve *all* postmortem toxicological analyses testing for any illicit drug as reported by the National Institute of Forensic Medicine (INML) to the Special Mortality Register (SMR). A toxicological report shows positive if traces of a drug are in the body regardless of whether drugs were the actual *cause* of death. Thus, as a measure of drug overdose deaths, the reports are a significant overcount. The IDT estimates that roughly one-quarter to slightly over one-third of positive drug autopsies are actual drug overdose deaths (IDT 2010). Figure 9 shows the trends in these positive toxicological reports from 1995–2009. The number was essentially flat for the first two years postreform, increased between 2004 and 2008, and declined slightly between 2008 and 2009, the last year for which data are available. The US White House Office of Drug Control Policy report on Portugal noted this increase, as did Dr. Manuel Pinto Coelho, the president of the Association for a Drug Free Portugal, and perhaps the most vocal critic of decriminalization in Portugal. However, neither of these accounts acknowledged that the number of recorded positive toxicology results is dependent on the total number of autopsies performed, which also increased during this period. As a proportion of total autopsies, the percent of positive toxicology reports has consistently hovered between 3 percent and 5 percent since 2003.³⁸

With respect to trends in infectious disease, Portugal's IDT tracks only newly registered cases of HIV and AIDS among drug users in treatment. While limited, these data show the number of new cases of HIV among injecting drug users dropped from 1,482 in 2000 to only 116 in 2010, and the number of individuals infected with AIDS

38. Data from the National Statistics Institute (INE) mirror the INML records. Both show a decline in drug deaths between 2003 and 2005 followed by an increase. The INE estimates are, however, much lower (ranging from nine to twenty-seven drug deaths recorded annually between 2003–2009) and suggest drugs were the actual cause of death in only 10 percent of the autopsies with positive toxicology reports. In any case, the numbers from both sources are so small that the fluctuations cannot be used to show meaningful trends in any direction.

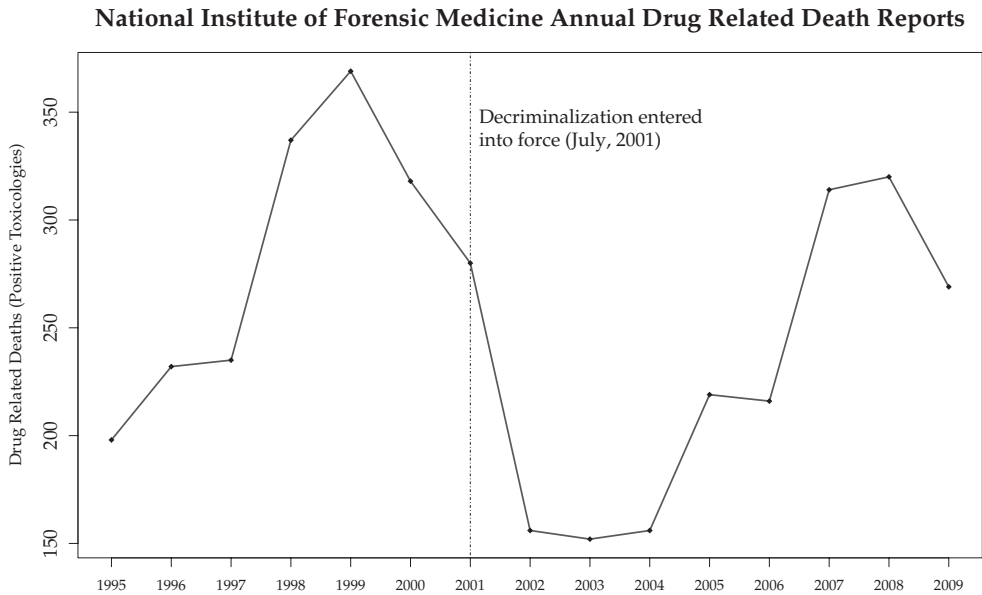


FIGURE 9.

National Institute of Forensic Medicine Annual Drug-Related Death Reports

Note: Number of drug-induced deaths recorded in EU Member States according to national definitions.

Source: Observatório das Drogas e Toxicod dependências (2003). Found at EMCDDA, Table DRD-2.

dropped from 675 new cases in 1999 to 88 in 2010 (IDT 2011).³⁹ The EMCDDA and the European Centre for Disease Prevention and Control (ECDC) report on new HIV diagnoses and HIV prevalence rates for injecting drug users among the general population, not for only those in treatment (Wiessing et al. 2011), indicates both new diagnoses and prevalence rates declined in Portugal during the 2000s.⁴⁰ New HIV infection diagnoses declined across most of the European Union during the 2000s. HIV prevalence rates were stable in eighteen European countries between 2005–2010, and declined in seven countries, among them Portugal.⁴¹

Crime and Violence

There is a well-established association between drugs and crime, although the causal mechanisms that produce this association are far less clear. Paul Goldstein's

39. The prevalence of hepatitis B virus (HBV) and hepatitis C virus (HCV) among clients in drug treatment settings also declined between 1999 and 2010.

40. While the rate of new HIV infections among injecting drug users (IDUs) in Portugal declined during the period between 2005 and 2010, Portugal was still included among the five countries in the Europe reporting the highest rates of new HIV infection diagnoses among IDUs. The other four were Estonia, Iceland, Latvia, and Lithuania. However, Portugal was the only one among the five where the rate declined (Wiessing et al. 2011).

41. The other six countries in the European Union in which HIV prevalence rates declined between 2005 and 2010, according to at least one source or region, were Germany, Spain, Italy, Latvia, Poland, and Norway (Wiessing et al. 2011).

(1985) tripartite classification scheme remains the most commonly cited framework for understanding the possible connections: (1) psychopharmacological—crimes or violence arising from the direct effects of a psychoactive drug on the user; (2) economic-compulsive—crimes arising from the need for money to purchase drugs; and (3) systemic violence—crimes arising from the illicit nature of drug markets and the absence of legal mechanisms by which to avoid and resolve disputes. The prevalence and incidence of drug use drive the first two sources of drug-related crime, while systemic violence depends on the size and nature of the market and law enforcement activity directed at suppression. Systemic violence is generally thought to be the most direct and potentially considerable source of drug-related violence.

Because the production, sale, and distribution of drugs in Portugal remained (and remain) criminal offenses, the possibility that the Decriminalization Act would affect levels of crime and violence is fairly remote. The impact on systemic violence would be indirect—if decriminalization caused law enforcement to focus more of its efforts toward closing drug markets and this led to an escalation of violence among distributors vying for market shares, or if there were significant increases in the demand for drugs and a corresponding increase in the size of the criminal markets.⁴² For the Act to have an impact on psychopharmacological or economic-compulsive crime, the legal change would have to increase the frequency of drug use or affect the price of the drugs, neither of which, as the sections above showed, changed substantially.

Portugal's annual reports and internal evaluations do not indicate that violence related to drug markets was a factor motivating the decriminalization reforms, nor has it been a central issue since the passage of the Decriminalization Act. A UN World Drug Report, reviewing Portugal's "not uncontroversial" decriminalization policy, noted there had been a 40 percent rise in homicides between 2001 and 2006 and suggested this may have related to an increase in trafficking activity (2009, 168). The increase represents a change from 105 homicides in 2001 to 155 in 2006 (UNODC 2013). Reported homicides increased to 185 in 2007, and were down to 114 in 2011, the last year for which data were available.⁴³ The UN World Drug Report noted that Lisbon, Portugal's capital city, is one of Europe's safest cities, with an average homicide rate of only 0.64 per 100,000 (Eurostat 2012).

Portugal's National Strategy (1999) included the objective "to reduce criminal activities associated with drugs by 25 percent." This was to be accomplished not through the decriminalization legislation specifically, but by deploying police toward "reinforcing the community policies of frontline policing, increasing the visibility of police and rationalizing the respective mechanisms." In the years immediately following passage of the Decriminalization Act, the IDT reported that crimes with a "high level of association to drugs"—theft, robbery, public assaults, and certain types of fraud—increased from 160,492 in 1999 to 175,502 in 2003 (IDT 2004, 56). Comparable data since 2003 have not been compiled, but accessible data indicate that, overall, crime did

42. Studies suggest that law enforcement efforts directed at drug markets may actually increase violence (Werb et al. 2011).

43. Portugal's homicide rate was 1.1 per 100,000 in 2001 and increased to 1.5 in 2006. Homicides peaked in 2007, reaching a total of 185 or a rate of 1.7. In 2011, homicides were down again to a rate of 1.1 per 100,000.

not increase significantly. Total crime rose roughly 7 percent between 2003 and 2009 and violent crime rates were flat. This small increase in total crime in Portugal during the last decade mirrors a similarly small rise in total crime in Spain and Italy (Eurostat 2012).⁴⁴

In summary, given the modesty of Portugal's legislative and penal changes, the ambiguity of any established causal links between drugs and crime to begin with (aside from violence related to drug markets), and the lack of clear crime patterns distinct from Portugal's European neighbors, there is little basis on which to attribute crime fluctuations in Portugal to its decriminalization policies.

DECRIMINALIZATION IN PORTUGAL: IMPLICATIONS FOR DRUG POLICY AND POLICY ANALYSIS

This article posited that although Portugal's 2001 drug reform law was less far reaching than implied by the media attention it received, the elimination of criminal sanctions for drug use was significant because it institutionalized the expectation to provide treatment for and support to drug addicts. Furthermore, the sentiment of the law appears to have had a latent effect, evidenced by the significant reduction in the rates at which the criminal court system convicted and incarcerated drug traffickers and trafficker-consumers whose conduct remained illegal under the reform law. The Portugal case provides lessons for thinking about legal change broadly, and about drug policy in particular.

Deterrence and the Problem of "Before-and-After" Analysis

Argument against drug decriminalization, besides principled opposition to any state acquiescence in the drug arena, usually rests on a concern that drug use will increase. Self-reported drug use in Portugal, other than lifetime reported use of cannabis, did not rise in the postreform period. This finding of minimal change is consistent with previous studies of decriminalization. MacCoun and Reuter's (2001) analysis of Italy's depenalization, repenalization, and redpenalization of all drugs in the 1990s, for example, noted little effect on the prevalence of drug use. Similarly, studies of cannabis depenalization in US states, Australia, Switzerland, and the Netherlands generally found either no or very small effects on cannabis use (see, e.g., reviews in Kilmer 2002; Pacula et al. 2005).⁴⁵

44. There were 23,414 recorded violent crimes in Portugal in 2003 and 24,421 recorded for 2009. Over the same period, the total number of crimes rose from 417,383 in 2003 to 426,040 in 2009 (Eurostat 2012).

45. Studies of marijuana decriminalization have generally found no or small positive effects on use. Early studies of marijuana decriminalization in various US states found no significant change in use (Bachman, Johnston, and O'Malley 1981); recent studies have reported a small positive association between marijuana decriminalization and marijuana use (DeSimone and Farrelly 2003; Pacula, Chriqui, and King 2003; Pacula et al. 2004). Studies of marijuana decriminalization in Australia have found minimal effect on the prevalence of use. Williams (2004), for example, examined household survey data between the late

The concern that decriminalization might lead to a rise in drug use is implicitly predicated on a theory of deterrence. All else equal, sanctions (along with the certainty and celerity of punishment) should affect compliance with the law. If criminal sanctions serve to discourage drug use by some amount, a lessening of the sanctions should lead to an increase in the use of drugs. Increasingly, theory developed in cognitive psychology and behavioral economics and the empirical literature on deterrence suggests the severity of punishment matters much less than the certainty (e.g., Nagin and Pogarsky 2004; Lee and McCrary 2005; Nagin 2013).⁴⁶ This may be explained by individuals tending toward present-oriented behavior or limited rationality, as well as gaps between objective threats and public perceptions of those threats.⁴⁷ However, in the case of drug decriminalization, the even more basic assumption that there was a detectable change in statutory penalties, and that this change corresponded with policy implementation, requires interrogation.

In Portugal, as has also been noted in the cross-state marijuana depenalization studies, the prescribed statutory change was small, and the practical import in terms of the sanctions actually imposed on drug users was even smaller. If criminal penalties against drug users in Portugal were minimally enforced before formally eliminated, the legal change should make little difference in terms of the actual risks faced by a drug user.

This highlights a broader issue inherent in any interpretation of law and policy change; the law often reflects or, at best, modestly expands on, existing practices. *De jure* legal reform frequently codifies *de facto* practice. It is not simply a problem for political pundits who often erroneously treat a legislative change as a dramatic and discrete break; the gradual nature of legal change poses an intrinsic challenge for researchers attempting to study legal effects.

The problem of trying to assess the influence of a particular statutory change by looking before and after its enactment is obviously not limited to the assessment of drug law reform. A conventional method used to test the deterrent effect of capital punishment, for example, involves comparing the rates of homicide before and after state abolition (Zimring, Fagan, and Johnson 2010). But most countries and states formally abolish the death penalty only after years of *de facto* moratoriums. Maryland legislators, for example, recently voted to repeal the death penalty. In practice, however, no one had been executed since 2005, and between 1976 and 2005, there were only five executions (Maryland Commission on Capital Punishment 2008). In a particularly pronounced case, over a quarter-century elapsed between Hong Kong's last execution in 1967, and the country's formal abolition of the death penalty in 1993. Broader cultural

1980s through the 1990s and found, except among males over twenty-five years of age, that changes in the criminal laws affected neither participation nor frequency of use of marijuana.

46. The rational actor model is particularly problematic in the case of drug users for whom, by definition, intoxication will impair rationality. Additionally, in the context of drugs, MacCoun (1993) notes that sanctions actually might have a perverse effect insofar as they create categories of more attractive "forbidden fruit."

47. MacCoun et al. (2009) find that a lack of public knowledge of state laws governing marijuana possession helps account for the inconsistent and mostly minimal findings of any effect on reported marijuana use when the laws have changed.

and political changes have a causal life independent of the particular legal formulations that articulate them.

The problem is not simply that a *de jure* change in the law focuses on the wrong date for measuring any impact, it is that jurisdictions tend to adopt policy changes compatible with existing practices. States that abolished the death penalty have usually been states with low rates of execution. Jurisdictions that have decriminalized marijuana were rarely arresting and prosecuting marijuana users before consumption was formally decriminalized.⁴⁸ In these cases, legal change serves as a *weak* intervention, and we should not expect to see major effects.⁴⁹

Considering Decriminalization in the Context of US Drug Policy

The focus of this article has been on the relatively moderate nature of Portugal's drug reforms. From the perspective of the strongly prohibitionist US regime, however, any federal or state decision to decriminalize *all* drug use would be a significant departure from existing law and practice. The United States remains unmatched among Western nations in the scale and punitive nature of its drug policies.⁵⁰ For years, reformers called for an end to the aggressive use of the criminal justice system to control drug use, pointing to its ineffectiveness, its unmistakable racial inequity, and the staggering costs in terms of financial resources, human lives, and civil liberties. In the last decade, these efforts resulted in some advances in the drug reform agenda, particularly in the area of state marijuana laws.⁵¹ In 1996, California became the first state to allow physicians to *recommend* medical marijuana for qualifying patients. Since then, twenty states and the District of Columbia have enacted similar medical marijuana statutes (NORML.org 2014). In November 2012, Colorado and Washington voters passed ballot initiatives legalizing marijuana use for a general adult population and providing for the state to regulate, tax, and control its sale, as the state does with alcohol and cigarettes. Licensed retailers opened in Colorado, and shops appeared in Washington State in the summer of 2014. Both state laws are at odds with the federal law, which continues to prohibit the possession, sale, and production of marijuana. Colorado and Washington were not only the first states to legalize marijuana, but they were also the first jurisdictions in the world

48. In many of the jurisdictions that have maintained criminal laws prohibiting the use of marijuana, the rate of arrest for marijuana possession are, in fact, very low (MacCoun and Reuter 2001).

49. This point is made by MacCoun and Reuter (2001), who caution that findings of "no difference" in drug use following depenalization of marijuana in the United States and Australia might be an artifact of a weak intervention and thus can speak little to the possible behavioral consequences of a more significant change in drug sanctioning.

50. There are non-Western nations far more punitive than the United States with respect to drug law enforcement. Laws in China and Saudi Arabia, for example, provide for the death penalty for drug traffickers and both have executed traffickers (Edwards et al. 2009).

51. Since the 1970s, a number of states in the United States have passed laws eliminating incarceration as a sanction for possession of small quantities of marijuana. Specifically, Alaska, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, and Vermont have enacted laws involving a version of marijuana decriminalization (NORML.org 2014).

to enact legislation that permits and regulates the production and the sale of marijuana. In December 2013, Uruguay became the first country in the world to legalize marijuana.⁵²

Drug policy reformers have focused on changing the legal status of marijuana in large part because of the political advantage of concentrating efforts on a drug many in the general public view as fairly benign. However, most of the organizations that support the relaxation of the laws prohibiting the use of marijuana also advocate for broader drug law repeals. The proliferation of drug courts beginning in the 1990s and other programs that seek to divert users from the criminal justice system into treatment represent another set of efforts to limit the punitive sanctions associated with the enforcement of the existing state and federal drug laws.⁵³ These diversion programs, unlike the system developed in Portugal, remain part of the criminal justice system and a drug user's failure to comply can ultimately result in incarceration.⁵⁴

There is a certain inherent tension in these US alternatives to incarceration models, and to some extent in the Portuguese model, concerning the primary purpose of the reform—is the purpose a specific aim to treat rather than punish drug use, or a more general aim to reduce or eliminate punitive sanctions? The framing of diversion programs assumes that individuals found possessing drugs are also in need of treatment. However, in many instances, the motivation behind diversion programs includes a broader driving agenda to reduce rates of incarceration irrespective of treatment need. A legalization model, by contrast, solves this tension in that we accept that people who use substances deemed legal do not need treatment unless, that is, they use too much. Portugal's statute does explicitly recognize the existence of the *occasional user* who does not need treatment and for whom drug use is not a medical problem. For these users, the Commissions suspend all proceedings and such nonaddicted users comprise the majority of the people processed through the country's administrative Commissions system. This raises a question about the chief purpose of these Commissions. The Portuguese approach is far more benign than US reliance on the criminal justice system, but it still creates what may be unnecessary administrative costs and state oversight.

Despite the Cato Institute's celebration of Portugal's drug reforms, the reforms were not a move toward liberty, but a shift from one arena of government involvement to another. Portugal's Decriminalization Act is not based on a principle of an individual's right to consume drugs free from state intrusion. The Act still prohibits drug use subject to citation, and cultivation for *personal use* remains *criminally* prohibited.

52. The Netherlands has a de facto legalization of use and sale; four states in Australia permit the production of cannabis for personal use and gifts (Reuter 2010).

53. An example of a move toward diversion outside of the drug court model is California's 2000 ballot Proposition 36, which allowed qualifying defendants convicted of nonviolent drug possession offenses to receive probation and treatment in lieu of incarceration. More recently, at the federal level, district court judges in eight states instituted diversion programs, bypassing the federal sentencing guidelines widely seen as overly punitive (Secret 2013).

54. Drug courts are not uniformly supported by drug policy reformers. The Drug Policy Alliance, for example, argues that "[d]rug courts have made the criminal justice system more punitive toward addiction—not less." Although drug courts are premised on a disease model of addiction, the courts continue to "penalize relapse with incarceration and ultimately to eject from the program those who are not able to abstain from drug use for a period of time deemed sufficient by the judge" (Drug Policy Drug Policy Alliance 2011, 2).

Instead, Portugal's Decree Law 30/2000 explicitly seeks to extend the protective function of the state by replacing criminal sanctions with the invitation to seek treatment. Portuguese drug users were almost never criminally prosecuted before the 2001 reforms, but the decriminalization statute formalized and institutionalized the expectation that problem drug users should receive treatment. Portugal offers a supportive rather than a punitive form of paternalism. However, it nonetheless remains paternalistic.

If the United States were to adopt a decriminalization statute like Portugal's, the impact might be considerable. Roughly 80 percent of drug arrests in the United States are for possession, a total of approximately 1.2 million arrests in a given year (Snyder 1990–2010). Of the individuals convicted of drug possession, roughly one-third have prison sentences and close to another third are in jail (BJS 2007).⁵⁵ Although many may have pled down from distribution charges or have concurrent convictions or technical violations, even conservative estimates suggest that approximately 5 to 15 percent of those in prison for a drug offense are there for possession rather than distribution-related charges (Sevigny and Caulkins 2004; Caulkins and Sevigny 2005). This estimate is still more than five to fifteen times more than the 1 percent found incarcerated for drug use in Portugal before decriminalization, and based on the 2011 prison population, amounts to approximately 16,000 to 48,000 individuals (Carson and Sabol 2012).⁵⁶ At the same time, removing criminal penalties for possession would not eliminate many of the serious problems stemming from the current drug prohibition policies. The violence and crime associated with black markets and the costs of law enforcement and incarceration for drug distribution would remain. To reduce these costs would require a total reorientation in law enforcement priorities and prison sentences. Nonetheless, as the Portugal case illustrates, legislative change can be practically small but generate significant symbolic import, and this, in turn, may produce dramatic change.

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55. Between 7 to 10 percent of total state prison admissions in a given year over the past two decades, roughly 40,000 to near 70,000 individuals a year, were sentenced to state prison for a drug possession conviction (Carson and Golinelli 2013).

56. Sevigny and Caulkins (2004) analyze the 1997 federal and state prison population and estimate, at most, that 15 percent of those incarcerated under a drug offense (41,047 inmates out of 274,324) were in prison for a non-distribution-related offense. They estimate 15,401 individuals (6 percent) had drug possession convictions that did not stem from a negotiated plea, and reported using sometime in their lifetime the drugs that were in their possession. Of this group, 10,350 (4 percent of the total drug offender population) had no other legally active nondrug conviction.

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