Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Briefing Paper | April 2006

Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses

"I've known syringes that have gone through 30–40 people's hands. I swear to God. They have been used by that many different people."

—Inmate referring to syringe sharing in a British Columbia prison.[1]

Introduction

The use of illegal drugs is often associated with a wide range of health, social and community problems, substantial drug-related crime, and stigma and marginalization of people who use drugs.[2] In response, policy-makers have relied heavily on law enforcement, despite evidence that certain law enforcement practices actually worsen the impact of drug use on individuals and communities, and sometimes lead to human rights violations.[3]

For example, drug policy that relies heavily on law enforcement has produced record incarceration rates of non-violent people who use drugs.[4] The imprisonment of people who use drugs may lead to injection drug use among prisoners who did not previously use illegal drugs (an issue that has been virtually ignored by policy-makers, as described below).[5] This — coupled with the lack of harm reduction measures such as prison needle exchange programs — means the potential for transmission of blood-borne diseases like human immunodeficiency virus (HIV) and hepatitis C is greater in prison.[6] Since a prison sentence should not include being sentenced to infection, and most prisoners are eventually released back into the community, the public health implications of imprisoning non-violent people who use drugs — not to mention the massive cost of a larger prison population — cannot be ignored.

Higher incarceration rates lead some people to start injecting drugs while in prison and also lead to higher rates of HIV and hepatitis C infection, resulting in greater health care costs. For example, bacterial infections among people who inject drugs can result in lengthy and expensive hospitalization. Viral infections, such as HIV and hepatitis C, also exact high costs.[7] In addition to great human suffering, it was estimated several years ago that every case of HIV infection costs the health care system at least $150,000; more recent estimates have put the figure at $250,000.[8]

Mandatory sentences: A proven failure

Recently, there have been proposals to change Canadian laws to follow the American model of including mandatory penalties — likely including incarceration — for drug offences. Political promises to introduce stiff mandatory sentences for people convicted of using illegal drugs are popular, given the mistaken belief that such measures will reduce problems associated with drug use[9] (and even reduce drug use itself). But in fact, there is no evidence to support this notion.

The United States has had mandatory minimum

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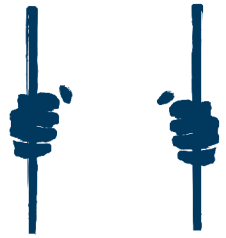

sentences for drug offences for some time. It is estimated that there are 100 000 more non-violent drug offenders in U.S. prisons than the entire prison population of the European Union — even though the EU has 100 million more people.[10] Despite tougher sentences, and the human toll and enormous cost of incarceration, the drug problem in the U.S. is only getting worse.[11]

From a health perspective, mass incarceration of people who use illegal drugs is ill advised. Research shows that the incarceration of injection drug users is a factor driving Canada's worsening HIV epidemic. A recent study found that the number of known HIV cases in Canadian prisons has risen by 35 percent in the last five years, suggesting that HIV may be spreading in prisons.[12] (Appropriately, HIV testing is voluntary in Canadian prisons; this means it is difficult to track changes in real prison HIV infection rates with precision.) According to a recent Vancouver study, incarceration more than doubled the risk of HIV infection of people who use illegal drugs.[13] An independent evaluation of this study also suggested that 21 percent of all HIV infections among Vancouver injection drug users may have been acquired in prison.[14] Other studies have revealed disturbing rates of syringe sharing among people who use drugs in Canadian prisons,[15] resulting in part from the lack of prison needle exchange programs.

There is growing evidence of high rates of new injection drug use in prison. One Irish study reported that 20 percent of people who use illegal drugs began injection drug use in prison.[16] This new drug use is perhaps unsurprising, given that prisoners live in close quarters and often in adverse conditions. In such circumstances, drug use may seem like a ready escape from adversity, not just to people already using drugs but also to people who have not previously used drugs.[17] Correctional Service Canada (CSC) admits that drugs enter prisons despite efforts to keep them out. Over a decade ago, a CSC study found that almost 40 percent of inmates in federal prisons reported having used drugs since arriving at their institution, 11 percent of whom indicated drug use by injection.[18]

The spread of HIV in prisons must be of concern to all Canadians, for several reasons. First, it clearly worsens the already precarious health and well-being of people who are incarcerated. Severe illness is not an acceptable outcome of sentencing; prisoners are sentenced to serve time, not to be infected with diseases that can kill them. HIV transmission also imposes further suffering upon the families of those who are or have been in prison.

Second, avoiding new cases of HIV infection by avoiding mass incarceration of people who use illegal drugs — and all of the extensive costs associated with additional policing and imprisonment — makes more economic sense than incurring costs for treating people after they contract HIV in prison. National cost estimates for HIV treatment are not available, but in Vancouver alone, using the older and lower estimate of cost per infection, at current rates of HIV infection among people who inject drugs, the lifetime cost of medical expenditures is estimated at $215 million. This estimated lifetime cost is projected to rise to approximately $350 million if HIV infection rates are allowed to reach levels seen in U.S. cities where law enforcement measures targeting drug users are most severe.[19] The costs of treating hepatitis C, which is much more prevalent than HIV among people who inject drugs, will be even greater.[20]

Third, the vast majority of incarcerated people who use illegal drugs will eventually be released from prison. Thus, protecting public health necessarily includes protecting prisoners' health. However, many people who contract HIV in prison may not know that they are HIV-positive. As a result, this could contribute to HIV transmission. For example, people who began injecting drugs in prison may continue to do so outside. Some of this drug use may involve sharing injection equipment, increasing the likelihood of more widespread HIV transmission.

Targeting "drug dealers": What does this mean in practice?

Sometimes it is suggested that mandatory minimum sentences target only "drug dealers," not people who use drugs. But this distinction is often artificial, particularly when harsh minimum sentences are mandated for dealing in any quantity of drugs. The real profiteers in the drug market, those who traffic in large quantities of illegal drugs, distance themselves from more visible drug-trafficking activities and are rarely captured by law enforcement efforts. Instead, it is people who are addicted and involved in small-scale, street-level drug

distribution to support their addictions who commonly end up being charged with drug trafficking and would bear the brunt of harsh mandatory minimum sentences for any drug dealing.

Evidence for this result comes from the long-running Vancouver Injection Drug Users Study (VIDUS), which sampled of some of the most vulnerable, street-involved people who use illegal drugs. Twenty percent of those surveyed reported dealing drugs, usually on a very small scale. Furthermore, characteristics that are markers of the highest levels of addiction, such as high-intensity drug use, were associated with drug dealing. The most common drug-dealing roles assumed by VIDUS participants were low-level, dangerous dealing tasks, including direct street-level selling (82%), "middling" or carrying drugs (35%), and "steering" or sending addicts towards dealers (19%). The most common reasons given for dealing drugs included getting money either to support a drug addiction or to pay off debts related to drug use. A "get tough" approach with mandatory minimum sentences will serve primarily to penalize people who are themselves addicted, rather than large-scale traffickers. High-profile efforts to target drug traffickers also inevitably end up increasing HIV risks in the community.[21]

Pretending that a policy of mandatory minimum sentences will target only "drug dealers" is misleading. In practice, mandating harsh minimum sentences for dealing in any quantity of an illegal drug has the unintended consequence of incarcerating some of the most marginalized people who use drugs, while doing little to penalize large-scale traffickers.[22] It also precludes courts from mitigating penalties to reflect the fact that small-scale dealing was done to support the person's own addiction. So is there a better way? Given the evidence showing that treatment is more cost-effective than law enforcement,[23] policy-makers should be reallocating funds from largely ineffective policing interventions towards addiction treatment strategies.[24] A better use of public funds, this approach avoids harshly penalizing people addicted to drugs and, by reducing demand for illicit drugs targets those who profit from the drug trade.[25]

Human rights issues

Mandatory minimum sentences for drug offences of the kind recently espoused by Canadian politicians have been in place in the United States for some time and have been widely studied. In a detailed 2002 examination conducted for the Department of Justice Canada,[26] mandatory minimum sentences for drug crimes were compared to similar policies for drunk driving and gun crimes. The study concluded that mandatory minimum sentences are "least effective in relation to drug offences," noting that "drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe [mandatory minimum sentences]."[27]

This study echoes many other analyses that suggest that mandatory-sentencing policies open the door to widespread discrimination against already marginalized groups, particularly people living in poverty, people of colour and women. Mandatory sentences are normally linked to the quantity of drugs involved in the offence, not to the individual's degree of involvement. Mandatory-sentencing policies in the U.S. have resulted in long sentences for women charged as conspirators or accomplices to crimes committed by their sexual or marital partners, even though they had little direct involvement in the crimes.[28]

Mandatory sentencing also takes discretion away from judges, who are ostensibly impartial and able to determine the appropriate penalty given the circumstances of each individual case. Instead, mandatory sentencing puts power in the hands of prosecutors, who are biased toward conviction and sentencing, and who can offer deals to those who provide evidence to support prosecutors' cases against other drug dealers or offenders.[29] Small-scale users are unlikely to have the kind of evidence that prosecutors in these circumstances seek, and women are often unlikely to want to turn in a sexual partner. Women in violent relationships may have a well-justified fear of betraying a sexual partner in this way. Major dealers are more likely to escape prosecution in this system as they are more likely to have information to trade. In the era of mandatory sentences in the U.S., incarceration of women for drug-related offences in state prisons has increased

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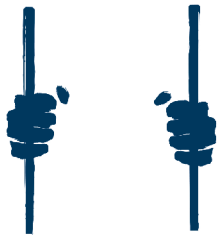
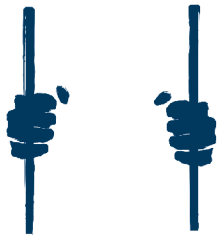


by a staggering 888 percent; the majority of this increase is accounted for by women of colour and women living in poverty.[30]

Arbitrarily linking mandatory sentences to the quantity of drugs involved in an alleged offence has also led to racial disparity in sentencing. Based on faulty or outdated science, the U.S. policy mandates long minimum sentences for tiny quantities of crack cocaine; equivalent sentences apply only for much larger — 100 times larger — quantities of cocaine powder. Crack cocaine use is more widespread among low-income inner-city drug users and African-Americans; they have borne the brunt of these policies. In 2003, a bipartisan government commission on sentencing said that adjusting this aspect of the mandatory-sentencing rules would do more to reduce the racial disparities in incarceration between African-Americans and whites "than any other single policy change," highlighting the powerful effect of mandatory sentencing in reflecting and reinforcing racial discrimination.[31]

Policy-makers should implement strategies that are based on evidence, respect human rights, and improve public health.



While it is true that Canada would not have to repeat the U.S. errors in mandatory-sentencing policy, even conservative jurists and scholars have said there is no evidence that any form of mandatory sentencing is effective for drug offences or is immune from facilitating civil rights abuses. Former U.S. Supreme Court Chief Justice William Rehnquist observed:

> These mandatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders—particularly for "mules" who played only a minor role in a drug distribution scheme. . . . Mandatory minimums . . . are frequently the result of [legislative] floor amendments to demonstrate emphatically that legislators want to "get tough on crime". Just as frequently they do not involve any careful consideration of the effect they might have. . . . [T]hey frustrate the careful calibration of sentences, from one end of the spectrum to the other.[32]

Canada's national policy on HIV/AIDS is grounded in a commitment to approaches based on human rights.[33] It is a well-established legal principle that prisoners, who are completely dependent on the state for their well-being, have a right to the same range of health services as people outside prison; prisoners retain all rights that are not taken away expressly or by necessary implication as a result of their incarceration.[34] Yet, in spite of undeniable evidence of widespread injection drug use in federal and provincial prisons in Canada, extensive evaluation of successful prison-based sterile syringe programs in other countries,[35] multiple recommendations over the years from advisory committees and various expert organizations (ranging from professional medical associations to front-line service providers),[36] and endorsement by international organizations,[37] governments in Canada have not authorized sterile syringe programs for prisons.[38] Even worse, studies have shown that basic information on HIV and Hepatitis C; condoms, lubricant, and dental dams; bleach for sterilization of injecting equipment; and uninterrupted, good-quality treatment for HIV/AIDS are not uniformly accessible in Canadian prisons.[39] Even if all these measures were available and of good quality, mandatory minimum sentences should still be avoided for the reasons noted above.

Conclusion

There has recently been a movement on the part of the newly elected federal government to consider mandatory sentences and stiff penalties for drug offenders. However, scientific evidence indicates that mandatory minimum sentences only worsen the health-related harms associated with incarceration by increasing the transmission of infectious disease in prisons. Massive public costs stemming from policing, prosecution and incarceration, and subsequent treatment of HIV infections and other harms related to drug use initiated in prisons, make mandatory sentencing an extremely expensive investment with little return and great potential to be counterproductive. The science in this area is compelling: Alternatives to enforcement and imprisonment have been shown to be many times more effective in terms of improving health and reducing the fiscal costs associated with illegal drug use.[40] The human rights evidence from other jurisdictions is equally strong. There are no reliable studies that indicate mandatory

sentences are compatible with civil rights protections, although they do seem to penalize small-scale drug dealers who are often themselves people who use drugs, discriminate against the most vulnerable and favour the biggest drug dealers who have important information to trade for lower sentences.

Canada needs a new approach to drug policy. Instead of investing in ineffective and potentially abusive approaches based on policing and imprisonment, policy-makers should implement strategies that are based on evidence, respect human rights, and improve public health. A sensible new drug policy would include pragmatic strategies to reduce harms such as HIV both to individuals who use drugs and to communities affected by drugs, as well as expanded access to humane and human rights-based addiction treatment. Continuing to ignore the wealth of evidence on truly effective drug policies will result in the further worsening of the drug problem in Canada and amounts to negligence on the part of policy-makers.

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About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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