

A Blueprint for Reform

The following is a proposal for a new revisioning of drug policy and The Controlled Substances Act for 2020 coupled with responses from conference organizers, the Academy for Justice and the Drug Enforcement and Policy Center.

The Controlled Substances Act at 50 Years

February 20-22, 2020

Phoenix, Arizona

ASU Sandra Day O'Connor
College of Law
Arizona State University
Academy for Justice

THE OHIO STATE UNIVERSITY
MORITZ COLLEGE OF LAW
DRUG ENFORCEMENT AND POLICY CENTER

Controlled Substances Act at 50: A Blueprint for Reform

Leo Beletsky, JD, MPH

Professor of Law and Faculty Director, Health in Justice Action Lab, Northeastern University
Adjunct Professor at the UC San Diego School of Medicine

I. The Controlled Substances Act at 50

As we mark the 50th Anniversary of the passage of the Controlled Substances Act (CSA), it is fitting to reflect on the role of this landmark statute as the principal instrument for regulating psychoactive substances in the United States. By bringing together various strands of federal regulation under one organizing framework, this legislation vastly expanded the federal government's role in drug policy. It also served as a foundation for an extensive progeny of federal, state, and local legal instruments to further its regulatory scheme.

Vigorous critiques of the CSA's structure and function are as old as the Act itself. Over time, historians have presented compelling evidence casting this statute as an instrument of the culture wars, including racist and xenophobic drug panics. In the name of public security, the CSA has ushered in unprecedented governmental surveillance and intrusion, while eroding individual rights. Contrary to its stated rationale, in the years since CSA enactment, the availability of controlled substances on the American illicit markets has only increased, while prices have dropped.

In view of the United States' foundational principles, the legacy of the current Act renders it un-American due to its myriad consequences that impacted society detrimentally. This Blueprint proposes a new revisioning of drug policy and the CSA for 2020.

II. 21st Century Drug Policy Architecture: A Framers' Vision

When in the course of human events, it becomes necessary to rethink a society's approach to a public policy issue of vital importance, it is natural to return to that society's foundational vision. To that end, this Blueprint advances a three-pillar vision: Life, Liberty and the Pursuit of Happiness.

1. LIFE

Vision: To use evidence-informed policymaking to promote health benefits, while minimizing harms from psychoactive substances. This implies a focus on health promotion, investment in prevention, and a view of public safety as a population health principle. It also implies the rejection of the current rigid scheduling system, in favor of empirically risk-based principles to craft policy.

Rationale: The CSA framework and its state equivalents have contributed to extensive harms to the public's health, both through societal impact and actual health outcomes. The present overdose crisis is the latest—and perhaps the most vivid—illustration of this statute's dismal record in protecting life. Specifically, the crisis has demonstrated that the architecture of the CSA fails to functionally regulate both the pharmaceutical and illicit markets for psychoactive medications.

Under the scheduling and surveillance systems created by the Act, the Drug Enforcement Administration (DEA) tracks and exerts active authority over controlled substance manufacturing and prescribing. Yet, this Agency was poorly configured to discern and effectively respond to mounting over-production and over-utilization of opioid analgesics, benzodiazepines, and other pharmaceutical products implicated in the current crisis. Once the country was flooded with these medications, the DEA and its partners aggressively suppressed access, without regard for foreseeable collateral harms.

A documented transition from pharmaceutical to street supplies followed, delivering scores of new customers into the illicit drug market that the CSA has been unable to consistently control. Overdose morbidity and mortality skyrocketed as a result, reinvigorating hyper-punitive criminal justice responses enshrined in the CSA. Access to harm reduction supplies and treatment medications to avert overdose and facilitate recovery remains low. Drawing on the maxim that “no crisis should go to waste,” the overdose emergency is a singular opportunity to rethink the current regulatory architecture for psychoactive substances in the U.S.

2. LIBERTY

Vision: To deploy the least restrictive means and narrowly-tailored regulation to accomplish public health and public safety goals. This implies a far more limited role for criminal law and a much smaller footprint for systems of surveillance and punishment.

Rationale: The CSA and its progeny have created systems of widespread surveillance and disproportionately-harsh punishment to enforce an order arbitrarily casting drugs like alcohol and tobacco as socially acceptable, while others are anthropomorphized as an enemy.

The assault on civil liberties in the name of the War on Drugs has been so pervasive that scholars of legal doctrine were compelled to coin a catch-all “drug exception” to the Bill of Rights. The CSA and its progeny have helped make the U.S. the undisputed world leader in mass incarceration. The reach of a criminal conviction and corresponding surveillance continues beyond the walls of penal institutions, reducing employment, economic, and educational prospects. By design, the burden of this surveillance and punishment has disproportionately impacted racial and ethnic minority groups.

Outside of criminal law, the CSA has injected carceral policies into many other social structures. In the practice of medicine and pharmacy, CSA's expansive vision of law enforcement as an arbiter of appropriate health care has blurred the line between healers and disciplinarians. Surveillance in the form of drug screening is pervasive in employment, education, family law, health care, and many other contexts. Arbitrary legal norms set out by the CSA in immigration law profoundly impacted the liberty and movement of non-citizens. The footprint of the systems of intrusion and punishment supported by the current drug control regime is far-reaching.

3. PURSUIT OF HAPPINESS

Vision: To embrace and harness the social, cultural, emotional, and other benefits of substance use that lead to improved health care outcomes. This implies building systems for substance use that can repair past harms of oppressive drug policy, instead promoting harm reduction, support, inclusion, and joy.

Rationale: The use of substances to alter the human condition is as old as civilization itself. Drugs were an integral part of social and spiritual life in the Americas before colonization, and so they remained after. But under the ahistorical “drug-free world” battle cry of the War on Drugs, the CSA and related legal instruments have interfered with efforts to understand and harness drugs’ positive spiritual, mental, and physical health potential.

Today, the CSA arbitrarily over-regulates entire classes of substances, while ignoring the most popular recreational drugs—alcohol and nicotine. The emerging chaos in the realm of vaping products brings the urgency for a holistic vision of regulating recreational drugs into sharp relief.

In the 21st Century, problematic substance use has surged in response to growing isolation, hopelessness, and lack of purpose. The existential crisis in “diseases of despair” should prompt us to revisit how we harness the positive effect of mood-altering substances, while minimizing their harms—a revisioning of drug policy for the 21st Century.

III. Operational Blueprint

Operationalizing this vision would include the revision of both the legal and regulatory instruments, as well as rebuilding institutional architecture to implement policies. This will be a process of considerable complexity to reform, augment, and replace our current approaches, including:

Reform:

- a. Revamp the scheduling system and give authority to the FDA to use risk-based principles and increased flexibility to classify substances according to empirically-documented health benefits and harms;
- b. Reorganize the National Institutes on Drug Abuse to conduct syndromic, behavioral, and sentinel surveillance for substance use and more directly focus on generating objective evidence to guide policymaking, drug development, and health promotion

Augment:

- a. Integrate alcohol, tobacco, nicotine, psychedelics, and other recreational drugs under new consumer protection, taxation, and corporate design framework intended to promote the public’s interest

Replace:

- a. Substantially minimize or eliminate individual-level criminal penalties;
- b. Deregulate opioid agonist therapy, removing access barriers;
- c. Revise the DEA’s role by reorganizing health-related regulatory functions to the states, to relevant Health and Human Services entities, or to the FDA.

IV. Why Now

Today, the domestic and international drug policy landscape is shifting. Regulation of cannabis is undergoing rapid transformation. After decades of stonewalling by the CSA’s legal and administrative barriers, scientific research into the medical uses of psychedelic drugs like MDMA, LSD and psilocybin is quickly gathering momentum. Increased attention to the continued social and health harms of tobacco and alcohol has highlighted the paradox of their exclusion from the controlled substances regulatory regime. More broadly, with increasing calls to abandon a culture of mass incarceration in favor of a “public health approach” to addiction and substance use, an opportunity to re-envision the CSA has never been more urgent.

Center Responses to Professor Beletsky's *Controlled Substances Act at 50: A Blueprint for Reform*

Doug Berman

Executive Director, Drug Enforcement and Policy Center, The Ohio State University Moritz College of Law

The CSA aspired 50 years ago to bring greater order and consistency to federal drug laws and to ensure that science and medical considerations serve as the centerpiece of federal drug control policy. But a half century of experience has shown how political, social and economic forces have persistently distorted the application and enforcement of the CSA. Professor Beletsky's urgent call to "re-envision the CSA" is well founded, as is his astute declaration to place constitutional values at the heart of reform effort.

A constitutional re-imagining of federal drug law and policy should incorporate a commitment to "life, liberty and the pursuit of happiness." Additionally, structural constitutional values in our federal system – such as institutional checks and balances, placing appropriate limits on government powers, and valuing localities and states as laboratories of democracy and drug policy innovation – have too often been overlooked in modern drug policy discussions. A re-envisioned CSA would benefit from a robust commitment to federalism, especially if coupled with new vision of the federal government's drug policy role as focused principally on creating and advancing knowledge from promising (and perilous) drug policy developments at local levels. In light of the political, social and economic lessons of the last 50 years of drug policy, a bottom-up rather than top-down approach to governing individuals and drug activity may provide a more effective and more enduring blueprint for modern drug law and practice.

Valena Beety

Deputy Director, Academy for Justice, Arizona State University Sandra Day O'Connor College of Law

Rural and urban communities alike are struggling with the current American landscape, where individuals are continually observed, isolated, and punished by government forces that criminalize individual substance use behavior. Our primary concern is for rural individuals who have fewer employment opportunities, whose remote location no longer equates with protected privacy, and whose small towns have been flooded with controlled substances that offer a quick but severely punished escape. In the heart of the national overdose crisis we are losing a generation of people, driven to substance abuse by lack of happiness and purpose, and leading to loss of liberty or loss of life.

Given the failure of the federal Controlled Substances Act, we have the freedom and responsibility to recreate our vision of what constitutes an effective drug policy and reform our drug laws to follow the founding principles enshrined in our constitution. As Americans, how can we regulate controlled substances to safeguard life for all members of society; how can we protect liberty at a time when surveillance has become as controlling as it is commonplace; and how can we support values of meaningful work, a purpose-driven life, and self-determined happiness by minimizing government's punitive footprint? Professor Beletsky's Blueprint provides an opportunity to constructively evaluate the shortcomings of the Controlled Substances Act, and explore the possibility of shifting regulation from the enforcement focused DEA, integrating controlled substances into a unified health framework with nicotine and alcohol, re-establishing individual privacy, and supporting state initiatives focused on health responses and harm-reduction.

Call for Further Action

The Academy for Justice and Drug Enforcement and Policy Center are deeply committed to identifying major challenges confronting U.S. law and policy and developing and promoting non-partisan reform proposals that can engage and be advanced by stakeholders and policymakers. We believe Professor Beletsky's Blueprint can and should serve as a concept paper that invites continued discussion about how to best turn the Framers' ideals into concrete reform proposals. We invite all participants to let us know of any interest in joining us in working groups to create specific proposals for implementing effective drug policy reforms.