PRISON FELLOWSHIP

THE DRUG REPORT:

A Review of America's Disparate Possession Penalties

CHELSEA FRISKE, Legislative Research Manager

Published in 2020 by Prison Fellowship®.

TABLE OF CONTENTS

I) INTRODUCTION 3

II) TIMELINE OF REFORM 4

III) CASE STUDIES 10-28

a. Marijuana 10

b. Heroin 17

c. Cocaine 22

d. Fentanyl 27

IV) CONCLUSION 29

V) APPENDIX 1: POSSESSION OF MARIJUANA 31

VI) APPENDIX 2: POSSESSION OF HEROIN 36

Contributors: James J. Ackerman, Craig DeRoche, Heather Rice-Minus, and Kate Trammell

THE DRUG REPORT:

A Review of America's Disparate Possession Penalties

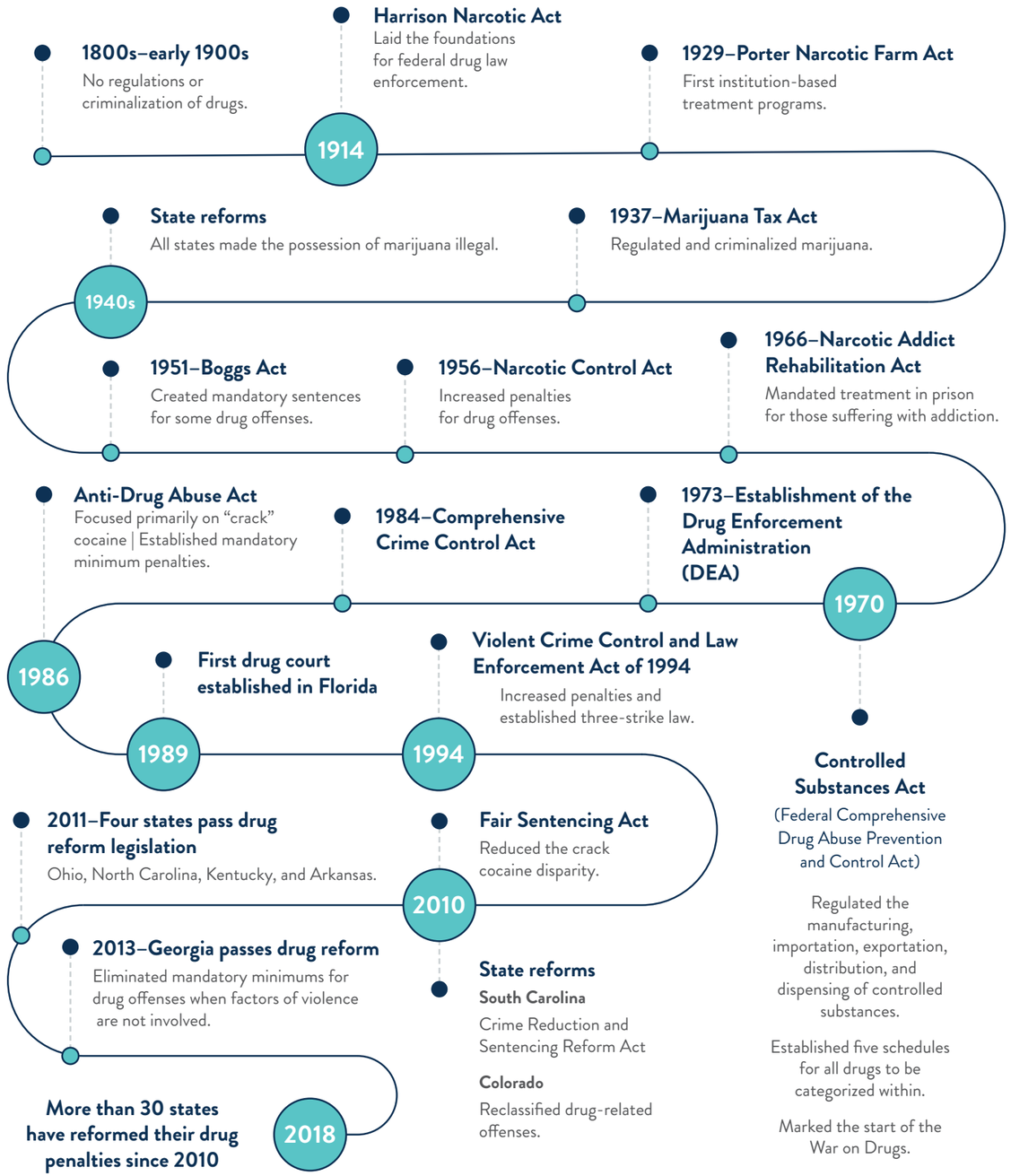
INTRODUCTION

Drug policies of the last several decades have had widespread impacts on levels of incarceration, resulting in incarceration playing a more prominent role in the culture and in American lives, families, and communities. The 1970s, '80s, and '90s brought harsh penalties for drug crimes as the U.S. launched the War on Drugs. But within the past 10 years, the federal government and most states have begun to ease penalties for nonviolent drug offenses.[1] Even with the shift in policies, drug crimes continue to account for one of the highest categories of arrest each year, with more than 1.5 million individuals arrested in 2018.[2] More than 86% of those drug arrests were for possession offenses.[3] Possession of a controlled substance is a common, low-level drug offense. The following case studies demonstrate the wide differences in language, classifications, and penalties for possession offenses across state and federal jurisdictions.

Possession of marijuana, heroin, and cocaine made up more than half of all possession arrests in 2018.[4] This report studies the variation in penalties for those three controlled substances, along with fentanyl, a drug presenting a significant challenge to states facing substance abuse crises. In this report, codified penalties for the possession of these four controlled substances have been examined across all 50 states and the federal government. Beginning with a primer on the history of law and policy reforms related to illegal drug use, this report analyzes and highlights the largest penalty discrepancies across jurisdictions as written in state statutes. We found that the dominant approach to possession crimes largely conflicts with what research has indicated: neither the use of incarceration nor the imposition of a permanent criminal record have been shown to be effective in deterring future drug possession crimes.[5]

1 Carroll Doherty, et al., *America's New Drug Policy Landscape: Two-thirds Favor Treatment, Not Jail for Use of Heroin, Cocaine*, Pew Research Center (April 2014), http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/.
2 Federal Bureau of Investigation, *2018 Crime in the United States*, Department of Justice (2019), https://ucr.fbi.gov/crime-in-the-us/2018/crime-in-the-u.s.-2018/topic-pages/persons-arrested.
3 *Id*.
4 *Id*.
5 Redonna K. Chandler, et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, National Institute of Health (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2681083/; Adam Gelb, *The Lack of a Relationship between Drug Imprisonment and Drug Problems*, The Pew Charitable Trusts (2017), https://www.pewtrusts.org/-/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf. Brian Elderbroom & Julia Durnan, *Reclassified: State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances*, Urban Institute (October 2018), https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf

TIMELINE OF REFORM



TIMELINE OF REFORM

Prior to the 1900s, drug use was not regulated or criminalized in the United States.[6] Cocaine, opium, and marijuana were easily and legally available for recreational and medicinal uses.[7] These substances were available over the counter in pharmacies, grocery stores, and by mail order, and they were even used in popular drinks.[8] Throughout the 19th century, doctors relied heavily on prescriptions for opium and morphine to treat pain in a wide variety of clients, from teething children to injured Civil War veterans.[9] The overreliance on these drugs began to be recognized as addiction at the turn of the century.[10] United States representatives attended conventions in Shanghai in 1909 and at The Hague in 1911, where the first international restrictions on opium were created.[11] Still, the United States found itself having no regulations regarding use of the drug within the country.[12]

The foundations of U.S. federal drug law enforcement were laid in 1914 with the Harrison Narcotic Act.[13] In 1929, the federal government passed the Porter Narcotic Farm Act, its first legislation aimed at controlling the use of drugs.[14] This act established the first institution-based treatment programs with hopes to combat the nationwide growth of opiate addiction caused by over-prescription of morphine and opium.[15] The Opium Poppy Control Act was then passed in 1942 to further combat the rise of opiate use.[16] At the time, more than 2,600 tons of opium were being produced in the world—only 440 tons were being used for legitimate purposes.[17] The Opium Poppy Control Act banned the production of the

6 Lisa N. Sacco, *Drug Enforcement in the United States: History, Policy, and Trends*, Congressional Research Service (October 2014), https://fas.org/sgp/crs/misc/R43749.pdf

7 *Id.*

8 Charles Stimson & Jacob Sullum, *Drug Policy, From Scratch*, The Heritage Foundation (April 2008), https://www.heritage.org/crime-and-justice/commentary/drug-policy-scratch.

9 Sacco, *supra* note 6; DEA, *The Early Years*, Drug Enforcement Administration (May 2018), https://www.dea.gov/sites/default/files/2018-05/Early%20Years%20p%2012-29.pdf

10 *Id.*

11 DEA, *supra* note 9.

12 *Id.*

13 *Id.*

14 David Shewan & John Davies, DRUG USE AND PRISON: SUBSTANCE ABUSE TREATMENT IN US PRISONS 91-93 (2013).

15 *Id*; Sacco, *supra* note 6.

16 DEA, *supra* note 9.

17 *Id.*

opium poppy without obtaining a license from the Commission of Narcotic Drugs.[18]

During the 1960s, a spike in heroin use led to a shift at the state level toward legislating treatment for those addicted to drugs.[19] California and New York each passed legislation enabling people suffering from narcotic addiction to receive treatment under a civil commitment and avoid criminal conviction.[20] In 1966, another federal rehabilitative policy, the Narcotic Addict Rehabilitation Act, was passed.[21] The act separated those in prison suffering with addiction from the general population and mandated treatment while incarcerated.[22]

18 *Id*.
19 *Id*.
20 *Id*.
21 Sacco, *supra* note 6; DEA, *supra* note 9.
22 *Id*.

SCHEDULING OF DRUGS

The Drug Enforcement Administration (DEA) has identified more than 500 controlled substances.[23] Each controlled substance is classified into one of five schedules defined by the Controlled Substance Act.[24] Generally, the actual or potential abuse of a drug is the largest determinative factor in classifying the drug within schedules.[25] Abuse is defined as "intentional, non-therapeutic use of a drug product or substance, even once, to achieve a desired psychological or physiological effect."[26] To classify a substance, the DEA requests a scientific and medical evaluation from the Department of Health and Human Services (HHS).[27] The Food and Drug Administration conducts the evaluation on behalf of HHS and in conjunction with the National Institute on Drug Abuse.[28] This evaluation, along with a classification recommendation, is then reported back to the DEA for classification of the substance under the appropriate schedule. Schedule One substances are traditionally perceived to be the most severe because they have been determined to have high abuse potential and essentially no acceptable medical uses.[29] Marijuana and heroin are both classified as schedule one drugs. Schedule Two substances also have high potential for abuse,[30] along with risk of severe psychological and physical dependence.[31] However, they also have some acceptable medical use. Schedule Three substances have intermediate potential for abuse, while those in Schedule Four and Schedule Five have lower potential for abuse. Changing a drug's schedule requires a petition to begin a reevaluation of substance classification that looks much like the original classification determination.[32] Over the last several years, the DEA has denied multiple petitions to reclassify marijuana. Although accepted for a medical purpose in some jurisdictions across the nation, marijuana remains a Schedule One substance because it does not meet the criteria established by the Controlled Substance Act for having a currently accepted medical use in the United States.[33]

23 DEA, *Controlled Substances: Alphabetical Order, Drug Enforcement Administration* (March 2018), https://www.deadiversion. usdoj.gov/schedules/orangebook/c_cs_alpha.pdf.
24 Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, National Institutes of Health (May 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3839489/.
25 Center for Drug Evaluation and Research, *Assessment of Abuse Potential of Drugs: Guidance for Industry*, U.S. Department of Health and Human Services (January 2017), https://www.fda.gov/downloads/drugs/guidances/ucm198650.pdf.
26 *Id*
27 *Id*.
28 *Id*.
29 Gabay, *supra* note 24.
30 *Id*.
31 Gabay, *supra* note 24.
32 Center for Drug Evaluation and Research, *supra* note 23; see also National Media Affairs Office, *DEA Announces Actions Related to Marijuana and Industrial Hemp*, Drug Enforcement Adminstration (August 2016), https://www.dea.gov/press-releases/2016/08/11/dea-announces-actions-related-marijuana-and-industrial-hemp.
33 *Id*.

These early steps toward drug law reform changed dramatically in 1970 when President Nixon addressed the rise in drug abuse, particularly heroin, through his Federal Comprehensive Drug Abuse Prevention and Control Act.[34] The act, commonly referred to as the Controlled Substances Act, regulated the manufacture, importation and exportation, distribution, and dispensing of controlled substances.[35] The legislation effectively organized all federally controlled substances into five "schedules"—drug classifications based on numerous factors.[36] Generally, the actual or potential abuse of a drug is the largest determinative factor in classifying the drug.[37] Abuse is defined as "intentional, non-therapeutic use of a drug product or substance, even once, to achieve a desired psychological or physiological effect."[38]

34 Sacco, *supra* note 6; Michael Gabay, *The Federal Controlled Substances Act: Schedules and Pharmacy Registration*, National Institutes of Health (May 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3839489/.
35 *Id*.
36 21 U.S.C. §811(c) (2004), These factors include the substance's actual or relative potential for abuse; scientific evidence of its known pharmacological effects; scientific knowledge about the substance; history and current patterns of abuse; scope, duration, and significance of abuse; any risk to public health; psychic or physiological dependence; and whether the substance is an immediate precursor of another substance.
37 Center for Drug Evaluation and Research, *Assessment of Abuse Potential of Drugs: Guidance for Industry*, U.S. Department of Health and Human Services (January 2017), https://www.fda.gov/downloads/drugs/guidances/ucm198650.pdf.
38 *Id*.

Today, the schedules remain in place with the same criteria. Each new drug that emerges is analyzed, and its classification must be determined and agreed upon by the Food and Drug Administration, the Department of Health and Human Services, and the Drug Enforcement Administration.[39] By the 1980s, penalties and regulations related to drug use continued to increase. President Reagan's Anti-Drug Abuse Act of 1986 established mandatory minimum penalties for many drug offenses, including simple possession.[40] The War on Drugs continued with President Clinton's Violent Crime Control and Law Enforcement Act of 1994—arguably the most sweeping legislation of its kind, which continued to increase penalties and established the so-called three-strike law.[41] Three-strike laws established a mandatory life-in-prison sentence for anyone convicted of a serious violent felony who also had at least two prior state or federal convictions, one of which was a serious violent felony.[42] Within a year of its passage, nearly half of all states had established similar three-strike penalties for drug crimes.[43]

The early 2000s witnessed a dramatic rise in state and federal correctional populations, leading to budget crises as legislatures across the nation evaluated the need to fund prison expansions. In 2010, some states began to chart a path toward more cost-effective, rehabilitative reforms in drug laws. Within six months, 15 states had proposed drug laws that took a variety of new approaches to the challenge of drug-related crime, including creating designated drug courts, restructuring criminal codes to diminish unduly long sentences, and reducing or eliminating mandatory minimums.[44]

Texas passed legislation in 2007 aimed at sentencing and correction reform. The reform invested over $200 million into evidence-based strategies, including the establishment of drug courts.[45] A majority of states, including Alabama and Virginia, have also created drug courts to provide a treatment-centered alternative to incarceration for drug offenses.[46] South Carolina implemented changes through its Crime Reduction and Sentencing Reform Act.[47] Prior to the Act's passage in 2009, the number of individuals in the state incarcerated for drug-related offenses was triple the total in 1980.[48] South Carolina restructured penalties for drug crimes so that offenses other than drug trafficking were eligible for probation, suspended sentences, parole, and good or earned time credit.[49] Colorado also reclassified some drug-related offenses in 2010 by reducing penalties for minor possession of all drugs and expanding eligibility for community-based treatment rather than incarceration.[50] In 2013, Georgia eliminated mandatory minimums for drug offenses where factors of violence are not involved.[51] Since this movement toward reclassification began in 2010, drug-related offenses have been restructured in more than 30 states.[52]

The response to drug use over the last century has resulted in disparate penalties across state lines. These discrepancies are sometimes linked to how states deviate

CONSTRUCTIVE POSSESSION

More than half of states allow for possession to be "actual" or "constructive." Actual possession is when the individual exercises personal, immediate, exclusive domain of the illicit material.[53] For example, when a person has drugs in their pockets, they are in actual possession of the drugs. Constructive possession is simply having the intent and capability to maintain control of the material.[54] A typical constructive possession example would be finding the driver or owner of a vehicle guilty of possession of drugs found within the car.[55] The same could be said for the owner of a home in which drugs are found.[56]

39 *Id*.
40 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570.
41 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322.
42 18 U.S.C. § 3559(c).
43 *Id*.
44 Alison Lawrence, *Sentencing and Corrections Policy Updates: 2010 Midyear Legislative Summary*, National Conference of State Legislatures (October 2010), http://www.ncsl.org/portals/1/Documents/cj/BulletinOct-2010.pdf.
45 Pew, *Public Safety in Texas*, The Pew Charitable Trusts (August 2015), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/01/14/public-safety-in-texas.
46 Lawrence, *supra* note 33; John Ashcroft, *Defining Drug Courts: The Key Components*, Bureau of Justice Assistance (October 2004), https://www.ncjrs.gov/pdffiles1/bja/205621.pdf.
47 Pew, *South Carolina's Public Safety Reform: Legislation Enacts Research-based Strategies to Cut Prison Growth and Costs*, Pew Center on the States (June 2010), http://www.pewtrusts.org/~/media/assets/2010/06/10/pspp_south_carolina_brief.pdf.
48 *Id*.
49 *Id*.
50 Prison Fellowship Advocacy, *Legislative Playbook: Sentencing Chapter, Reclassification of Drug Offenses*, Prison Fellowship (February 2018).
51 *Id*.
52 *Id*.
53 *People v. Eghan*, 344 Ill. App. 3d 301 (2003); *Pipkins v. State,* 878 So. 2d 119 (2004); *State ex rel. T.J.,* 800 So. 2d 969 (2001).
54 *Id*
55 *Id*.
56 *Id*.

from or follow federal law. In many cases involving significant penalty discrepancies, there is evidence demonstrating why a particular state, or in some instances a specific drug, may differ from penalties imposed in another state.

Each case study below explores the current cultural impact of a particular drug, then explores penalty disparities on the state and federal levels for possession offenses. The report analyzes codified penalties for two Schedule One and Schedule Two drugs.

CASE STUDY:
Possession of Marijuana

SOCIETAL IMPACT

Despite being a Schedule One drug, marijuana has been the focus of several reforms across the nation. Public opinion regarding the drug has changed rapidly in recent years, leading to disparate perspectives on marijuana possession and use in the U.S. In 2000, Pew Research Center found that only 31% of Americans favored the legalization of marijuana.[57] By 2018, more than half of Americans believed the drug should be legalized.[58]

In recent years, a move toward the legalization of recreational and medical marijuana has led to increasingly distinct variances in penalties across state lines. Since 2012, more than a dozen states have decriminalized possession of small amounts of marijuana, while 11 states and the District of Columbia have completely legalized the drug for recreational use.[59] In the 11 states where marijuana possession and use is legal, the amount allowed and the legal age of use varies. In Washington state, a "usable amount" can be legally possessed only by a person over the age of 21.[60] In Maine, possession of up to 70 grams is legal for a person over the age of 21.[61] Oregon's statute offers changes in the legal amount based on location, allowing persons over the age of 21 to have up to 227 grams in their home, while outside the home they may have only 28 grams on their person.[62]

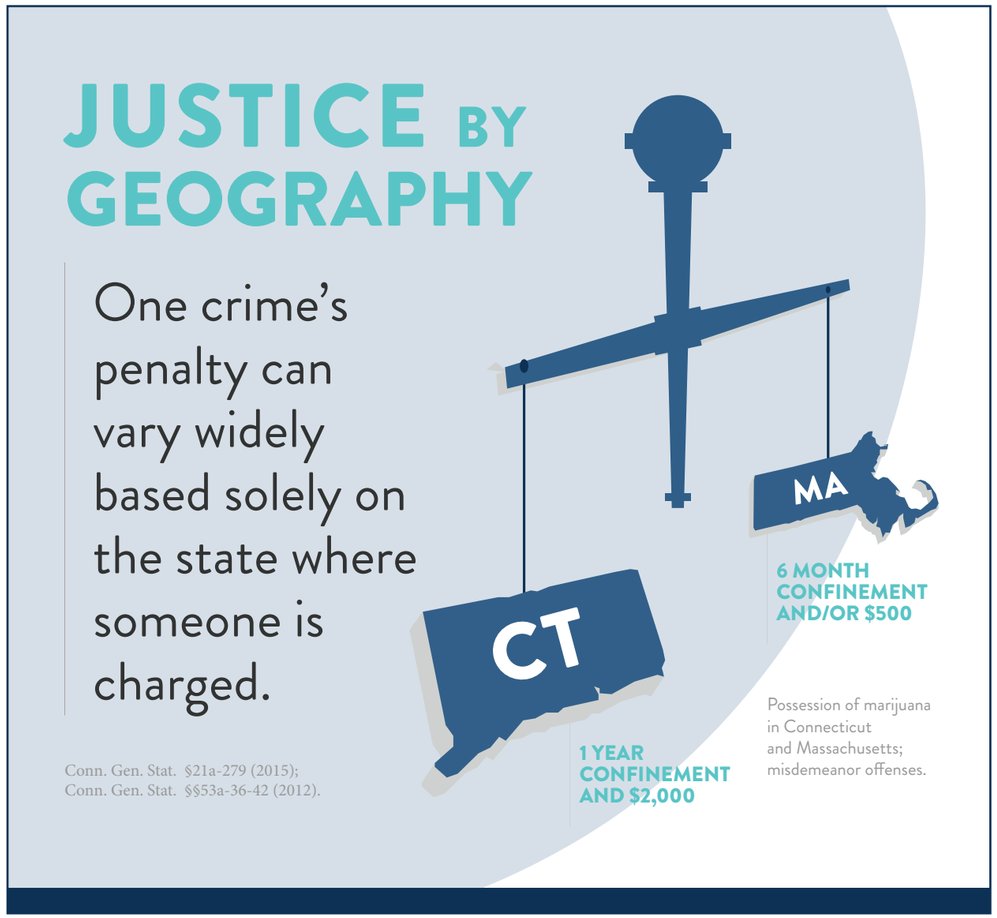
In addition to the marginal growth in legalization for recreational use, there has been an even more significant increase in the number of states that have legalized marijuana for medical use. In more than half of all states, medical marijuana is now legal for the treatment of diseases such as cancer and epilepsy.[63] For many of these states, the legalized product is a cannabis oil rather than an inhalant.[64] This trend is expected to continue as the number of citizens in favor of medical usage of marijuana continues to increase.

PENALTY DISPARITIES BASED ON CRIMINAL HISTORY

In the federal system, the severity of the penalty for marijuana possession increases depending on the number of previous offenses on a person's record.[65] A federal first offense involving possession of any amount of marijuana is a misdemeanor carrying up to a one-year imprisonment term and a minimum fine of $1,000.[66] A second offense carries a penalty of a minimum of 15 days in jail and up to two years in prison, with fines totaling $2,500.[67] For third and subsequent offenses, a person would face felony charges with a minimum of 90 days and up to three years in prison, as well as more than $5,000 in fines.[68]

While sentencing for federal marijuana possession has remained largely unchanged since 2006, state criminal codes reflect vast differences in accountability methods and sentence length. Some states follow the basic structure of the federal code, occasionally with even harsher terms of punishment. For example, first-offense penalties in Connecticut closely resemble the federal code but impose a higher fine of $2,000.[69] A second possession charge in Connecticut results in a court evaluation to determine whether the individual should enroll in a substance abuse treatment program.[70] If the court determines the individual is not eligible for the treatment, or if an individual is convicted of a subsequent offense, the

57 Andrew Daniller, *Two-thirds of Americans Support Marijuana Legalization*, Pew Research Center (November 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/.
58 *Id*.
59 *Id*.
60 Wash. Rev Code §69.50.4013 (2017).
61 Marijuana Legalization Act, LD 1719, 128th 2d Red. Sess. (Me 2018).
62 Or. Rev. Stat §475B.005 (2017).
63 Karmen Hanson, *State Medical Marijuana Laws*, National Conference of State Legislatures (June 2018), http://www.ncsl.org/ research/health/state-medical-marijuana-laws.aspx.
64 *Id*.
65 21 U.S.C. § 851 (A prior conviction for a felony drug offenses includes any offense that is punishable by imprisonment for more than one year under any law of the United States or of a state or foreign country).
66 Patti Saris, *Weighing the Charges: Simple Possession of Drugs in the Federal Criminal Justice System*, United States Sentencing Commission (September 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf.
67 *Id*.
68 *Id*.
69 Conn. Gen. Stat. §21a-279 (2015); Conn. Gen. Stat. §§53a-36-42 (2012).
70 *Id*.



penalty is that of a Class E felony, which carries a penalty of up to three years in prison.[71]

Other states adopt the loose structure of the federal code but differ in terms of penalty applied. In Mississippi, sentences for possession of marijuana escalate based on criminal history, but with significantly lighter penalties than the federal code.[72] A first-offense possession of less than 30 grams of marijuana receives a simple civil penalty carrying only a $100 to $250 fine.[73] For a second offense, a person faces between five and 60 days of confinement and a $250 fine.[74] A third or subsequent offense results in confinement of five days to six months and $1,000 in fines.[75]

71 *Id*; Conn. Gen. Stat. §53a-35a (2012).
72 Miss. Ann. Code §41-29-139 (2016).
73 *Id*.

PENALTY DISPARITIES BASED ON AMOUNT

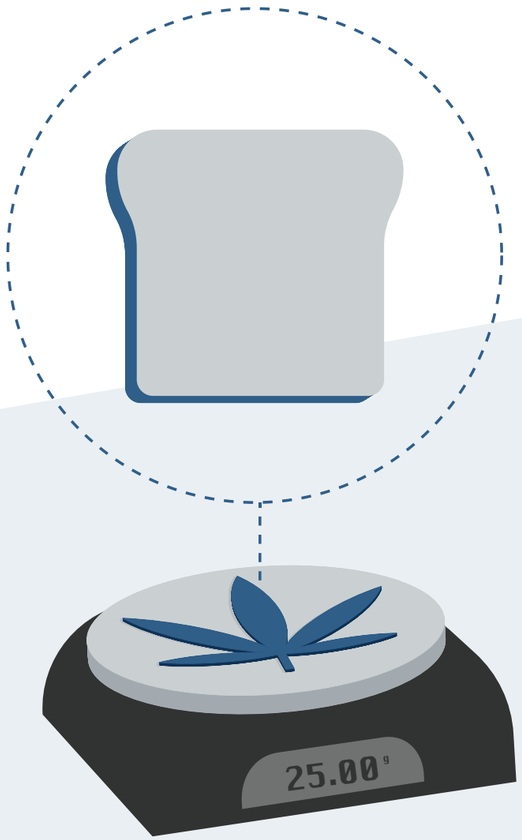
A common method among states for increasing penalties is based upon the amount of marijuana possessed. However, the amounts that lead to those increased penalties differ widely across states. In Alabama and Delaware, penalties for possession are based on an amount classified as that for "personal use." Despite using the same term, the penalties in each state vary. A first offense "personal use" possession in Alabama is a Class A misdemeanor facing up to one year of imprisonment and $6,000 in fines.[76] A subsequent offense is a Class C felony with penalties of imprisonment between one and 10 years and $15,000 in fines.[77] Possession of a "personal use" amount of marijuana in Delaware only amounts to a civil violation with a $100 fine and forfeiture of the drug.[78]

A majority of states base their penalties for marijuana possession on the amount (in ounces or grams) a person possesses at the time of offense. Almost half of all states set the initial threshold for criminal penalties at 25 to 30 grams or less of marijuana.[79] For reference, one ounce is equivalent to 28.3 grams, and a typical joint has less than half a gram in it.[80] Even among those states, however, the statutory language can differ. For example, in California the threshold for criminal penalties is "more than 28.5 grams," while in Georgia it is "less than 28 grams."[81] This means anything less than 28.5 grams is not a criminal offense in California but does carry criminal charges in Georgia. In California, a person in possession of 28.5 grams of marijuana faces six months in county jail and a potential $500 fine.[82] A person possessing the same amount in Georgia faces one year of imprisonment and a $1,000 fine.[83]

74 *Id*.
75 *Id*.
76 Ala. Code § 13A-12-214 (1987).
77 Ala. Code § 13A-12-213 (2016).
78 Del. Code Ann. Tit. 16, § 4764 (2017).
79 Calculated average based on the number of state statutes citing one ounce or 30 grams as the lowest-level offense.
80 Greg Ridgeway & Beau Kilmer, *Bayesian Inference for the Distribution of Grams of Marijuana in a Joint*, National Institutes of Health (2016), https://www.ncbi.nlm.nih.gov/pubmed/27346327.
81 Cal. Health & Safety Code § 11357 (Deering 2017); GA. Code Ann. § 16-13-30 (2017).
82 Cal. Health & Safety Code § 11357 (Deering 2017).
83 GA. Code Ann. § 16-13-30 (2017).

ALMOST HALF of all states set the initial threshold penalties for possession of marijuana at

25 TO 30 GRAMS OR LESS



OR the weight of a slice of bread.

In many states, an individual can face misdemeanor charges for a much smaller quantity of marijuana. In Missouri, for example, possessing less than 10 grams of marijuana is a Class D misdemeanor.[84] This charge carries up to $500 in fines for the first offense, but both the charge and the penalty increase based on a person's criminal history of drug crimes.[85] A little further south in Louisiana, an individual will face charges for possessing 14 grams.[86] The charge will result in up to 15 days in parish jail and a possible fine of $300.[87]

PENALTY DISPARITIES BASED ON FELONY THRESHOLD

The felony threshold for marijuana possession based solely on amount is another area where wide variance can be seen across states, with meaningful implications for the person charged. Wyoming pursues prosecution at a rather low threshold of felony possession of marijuana compared with its neighboring state. In Wyoming, more than 85 grams results in a felony charge, which carries up to five years in prison and $10,000 in fines.[88] However, the bordering state of Nebraska sets felony possession at more than one pound, or 453 grams, also incurring a penalty of five years' incarceration and $10,000 in fines.[89]

Texas has a unique approach, charging a person possessing more than 113 grams (but less than five pounds) with a state jail felony.[90] This charge involves a mandatory minimum of 180 days but up to two years imprisonment and $10,000 in fines.[91]

Only two states allow possession of multiple pounds of marijuana as misdemeanor charges. Utah's statute is unlike any other, setting its felony threshold for marijuana at possession of up to 100 pounds.[92] Any amount less than 100 pounds is a Class B misdemeanor and can result in up to six months of confinement and $1,000 in fines.[93]

84 Mo. Ann. Stat. § 579.015 (2017).
85 *Id*.
86 La. Rev. Stat. § 40.966 (2019).
87 *Id*.
88 Wyo. Stat. Ann. § 35-7-1031 (2018).
89 Neb. Rev. Stat. Ann. §28-416 (2017).
90 Tex. Health & Safety Code Ann. § 481.121 (2009).
91 *Id*.
92 Uta Code Ann. § 58-37-8 (2019); Utah Code Ann. §§ 73-3-203-204 (2019).
93 *Id*.

In Arizona, lawmakers have taken an approach that allows for more case-by-case evaluation. Possession of less than two pounds of marijuana is classified as a Class Six felony; however, a judge may exercise discretion to deviate downward and sentence as a misdemeanor.[94] Due to experimentation on legalization in the states, penalties for marijuana, as compared with other drugs, differ most across jurisdictions. These discrepancies can be observed in the units of measurements, type of crime, sentences, and even legality of marijuana, and can be seen across state, county, or local lines.

94 Ariz Rev. Stat. Ann. § 13-3405 (2019); Ariz. Rev. Stat. Ann. § 13-604 (2008).

ALTERNATIVE ACCOUNTABILITY SPOTLIGHT | CITATIONS

Over the last five years, a handful of states have moved away from criminal penalties for possession of small amounts of marijuana and instead rely on citation in lieu of arrest.[95] Citations avoid the process of arrest and the shadow of a criminal record if the individual complies with a civil penalty.[96] Though almost every state allows law enforcement officers to issue citations rather than arrest warrants for possession crimes, this authority is not widely exercised. More than 25 states have laws with a presumption of citation over arrests. In eight states, officers are permitted to issue citations for some felonies, and in seven states, there is a general authority to issue citations regardless of offense level.[97] Maryland is one of a handful of states that explicitly lists "possession of marijuana" as an eligible offense for citation.[98] In 2015, the state took legislative action to ensure that the savings from their reduced prison population is used to fund drug treatment programs.[99]

95 NCSL, *Marijuana Overview*, National Conference of State Legislatures (October 2019), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.
96 NCSL, *Citations in Lieu of Arrest*, National Conference of State Legislatures (March 2019), https://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.
97 *Id*.
98 *Id*.
99 NCSL, *Drug Sentencing Trends*, National Conference of State Legislatures (July 2016), http://www.ncsl.org/research/civil-and-criminal-justice/drug-sentencing-trends.aspx.

WHAT IS A "REASONABLE AMOUNT FOR PERSONAL USE"?

"Amount reasonable for personal use" or "quantity reasonable for personal use" are terms that courts sometimes use to distinguish between an amount of a controlled substance suggesting personal consumption from an amount sufficiently large to infer that the defendant possessed the drugs in question for the purpose of distribution.[100] The term is not well-defined by the courts or in statute, and it varies in application by state. For example, Kansas courts have ruled that one pound of marijuana may be reasonable for personal use, but seven pounds is not.[101] On the other hand, courts in Illinois have decided that less than half a pound is larger than a reasonable amount for personal use.[102] However, the general rule of thumb is that the larger the amount of drug possessed, the less likely it will be considered reasonable for personal use.

100 *United States v. Hall*, 171 F.3d 1133 (8th Cir. 1999); *People v. Robinson*, 657 N.E.2d 1020 (Ill. 1995); *People v. McCarty*, 826 N.E.2d 957 (Ill. App. 2005); *People v. 1984* BMW 528E Auto., 567 N.E.2d 654 (Ill. App. 1991).
101 *State v. Coones*, 710 P.2d 31 (Kan. App. 1985); *State v. Smith*, 603 P.2d 638 (Kan. App. 1979).
102 *McCarty*, *supra* note 89 at 969.

CASE STUDY:

Possession of Heroin

SOCIETAL IMPACT

Like marijuana, heroin is also listed as a Schedule One substance in the Controlled Substances Act. However, the use and impact of the two substances are decidedly different. Over the past decade, heroin has become one of the more prevalent and deadlier drugs in America.[103] The number of deaths related to heroin increased rapidly from about 3,000 in 2010 to more than 15,000 in 2016.[104]

Many describe our nation as being in the midst of an opioid crisis. By 2016, one person in the United States was dying from an opioid overdose every 16 minutes.[105] Heroin falls within the opioid category, but it is also used to treat other opioid addictions.[106]

103 DEA, *Intelligence Report: National Heroin Threat Assessment Summary- Updated*, Drug Enforcement Administration (June 2016), https://www.dea.gov/sites/default/files/2018-07/hq062716_attach.pdf.
104 *Id*.
105 Pew, *The Case for Medication-Assisted Treatment*, The Pew Charitable Trusts (2017), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2017/02/the-case-for-medication-assisted-treatment.
106 Shruthi Ashok, et al., *Understanding the Opioid Epidemic: A Look at its Origins, Key Players, and Potential Responses*, National Journal (May 2018); The Sentencing Project, Opioids: Treating an Illness, Ending a War, The Sentencing Project (2017), https://www.sentencingproject.org/wp-content/uploads/2017/12/Opioids-Treating-an-Illness-Ending-a-War.pdf.

FIRST-TIME OFFENSES

Alternatives to incarceration are available in half of the states and focus primarily on so-called first-time offenders. In Michigan, first-time offenders receive reduced sentences in the form of probation or drug rehabilitation.[107] The same holds true in West Virginia, Wisconsin, Wyoming, and many other states.[108] Kentucky prefers to defer prosecution for the first offense, and this option is also available for the second offense.[109] In Louisiana, an alternative is available for the first three convictions.[110] A judge has the authority to suspend the sentence and order a pre-sentence investigation to be completed.[111] At that point, a judge can place the individual on probation, with the requirement that a drug treatment program be completed.[112]

There are a few states that do not allow for people with a first-time offense to participate in treatment programs. In North Carolina, a person convicted for the first time for possession of heroin is not eligible for the state's drug diversion program.[113] Iowa's program is not reserved for individuals facing first-time offenses to enter their drug program, but instead for chronic users of controlled substances.[114] As policies begin to shift toward rehabilitation, these diversion programs will likely continue to adapt to emerging science and best practices, and state-based programs may proliferate as jurisdictions test new approaches.[115]

Eighty percent of the people who use heroin were previously addicted to prescription opioids but turned to heroin because it is more readily available.[116] In 2016, an estimated 948,000 people used heroin, and 170,000 were first-time users.[117] The following year the Department of Health and Human Services, along with President Trump, declared the United States' opioid epidemic a public health emergency.[118]

107 Mich. Comp. Laws Serv. §333.7403 (2017).
108 W. Va. Code §60A-4-407 (2002); Wis. Stat. §961.47 (1995); Wyo. Stat. Ann. §35-7-1037 (2019).
109 KY. Rev. Stat. Ann. §218A.1415 (LexisNexis 2011).
110 La. C.Cr.P. Art. 893 (2018).
111 *Id*.
112 *Id*.
113 N.C. Gen. Stat. §90-95 (2018).
114 Iowa Code §124.409 (2017).
115 Doherty, *supra* note 2.
116 *Id*; DEA, *supra* note 85.
117 HHS, *What is the U.S. Opioid Epidemic*, U.S. Department of Health and Human Services (2018), https://www.hhs.gov/opioids/about-the-epidemic/index.html.
118 *Id*.

PENALTY DISPARITIES BASED ON CRIMINAL HISTORY

In response to the opioid crisis, policymakers across the nation have set stringent penalties for heroin possession. Even so, sentences for possession of the same amount of the drug are different across jurisdictions. Whereas marijuana, also a Schedule One substance, is almost always charged as a misdemeanor in smaller amounts, possession of heroin is more likely to be charged as a felony for any amount.

Some states do allow for first-time offenders to be charged with misdemeanors rather than felonies, reflecting a hesitancy to saddle low-level users with the significant collateral consequences of a felony conviction. In both Maryland and North Dakota, the penalty for first-time possession of heroin is a misdemeanor carrying no more than one year of confinement but is attached to heavy fines between $3,000 and $5,000.[119] Massachusetts also allows for a first-time offense to be considered a misdemeanor, but with a penalty of two years' imprisonment and $2,000 in fines.[120] The neighboring state of New Hampshire has a vastly more punitive sentence for first-time offenses. A person possessing heroin in New Hampshire is met with a felony carrying up to seven years in prison and up to $25,000 in fines.[121] Despite these harsh penalties, there has been a significant increase in heroin overdose deaths over the past several years, suggesting that excessive penalties may not be an effective means of deterring the sale and use of heroin.[122]

PENALTY DISPARITIES BASED ON AMOUNT

In some states, the number of past related offenses does not matter as much as the amount possessed. In Indiana, possession of less than five grams of heroin is a Level Six felony, which carries a sentence of anywhere from six months to two-and-a-half years and fines up to $10,000.[123] However, the Hoosier State does allow one method of relief: A person can petition the court to have the charge reduced from a Level Six felony to a Class A misdemeanor, effectively cutting the penalty in half.[124]

As part of recent justice reforms, Louisiana set its criminal threshold at anything less than two grams, which results in a sentence

119 MD. Code Ann. Crim. Law § 5-601 (2017); N.D. Cent. Code § 19-03.1-23 (2017).
120 Mass. Gen. Laws Ch. 94C § 34 (2017).
121 N.H. Rev. Stat. Ann. § 318-B:26 (2017).
122 CDC, *Opioid Overdose: Heroin Overdose Data*, Centers for Disease Control and Prevention (2017), https://www.cdc.gov/drugoverdose/data/heroin.html.
123 Ind. Code Ann. § 35-48-4-6 (2014).
124 Ind. Code Ann. § 35-50-3-2 (1977).

of two to four years in prison.[125] An individual in Idaho possessing two grams of heroin would also face a felony, but with a sentence of seven years and $15,000 in fines.[126] Another distinction between the prescribed punishments in Idaho and Louisiana is that a quantity larger than two grams in Louisiana would result in higher penalties, while in Idaho it would result in an entirely new charge.[127] Possession of more than two grams of heroin in Idaho is automatically considered trafficking.[128]

In a handful of states, it is a felony to possess any amount of heroin. For example, in New Jersey, possession of any amount is a third-degree felony facing fines of up to $35,000.[129] In Nebraska, any "quantifiable" amount is a Class Four felony where an individual would serve up to five years in prison and face $5,000 in fines.[130] In Alabama, Montana, and Alaska, any amount of heroin will result in incarceration for approximately five years.[131]

125 La. Rev. Stat. Ann. § 40.966 (2019).
126 Idaho Code Ann. § 37-2732 (2010).
127 *Id*.
128 Idaho Code Ann. § 37-2732B (2006).
129 N.J. Stat. Ann. § 2C:35-10 (1997).
130 Neb. Rev. Stat. Ann. § 28-401 (LexisNexis 2017).
131 Ala. Code § 13A-12-212 (2016); Mont. Code Ann. § 45-9-102 (2017); Alaska Stat. § 11-71-040 (2016).

MEDICATION-ASSISTED TREATMENT (MAT)

Medication-assisted treatment, herein after referred to as MAT, is an emerging treatment method used to treat opioid use.[132] The treatment relies on medications administered to mitigate the symptoms of opioid withdrawal to reduce the likelihood of relapse, often combined with behavorial therapy.[133] As an approach to addiction treatment, MAT typically does not feature abstaining from drug use.[134] There are three separate approaches to MAT that are reliant on drugs. Each approach is distinct, and each method pursues different results that practitioners and policymakers have to consider regarding medication applications of this form of treatment. The most commonly associated medication with the practice of MAT is the use of replacement narcotics, such as buprenorphine and methadone, which trick the brain into believing it is still receiving opioids that had been abused.[135] The second medication is naltrexone, which differs from narcotics in that it doesn't substitute but rather prevents the euphoric effects of opioid use.[136] The third method is medication to prevent and reverse overdose. The drug most commonly used for this is naloxone and has been identified as a medication for MAT use only within the past couple of years.[137]

The MAT approach is often difficult to access, primarily due to lack of qualified medical professionals who are able to prescribe the necessary medication coupled with limited insurance coverage.[138] As a result, only 23% of publicly funded treatment programs and less than half of privately funded treatment programs are able to provide the approved medication for MAT.[139] In a 2017 study of the methods and pathways for people who had successfully recovered from addiction for more than five years, nearly 9% of the individuals in the study reported using medication for their recovery.[140] A deeper dive into reports of those individuals who had used medication as a part of their treatment revealed that medication use was more prevalent for those recently entering recovery.[141] The number of individuals using medication as a treatment who had been in recovery less than five years was more than double those who had been in recovery for more than 15 years.[142] Some evidence reflects MAT's ability to significantly increase the reduction in opioid use compared with non-drug approaches, but existing studies lack clarity on the importance of MAT's contributions to long-term results of those who successfully recover from substance addiction.[143] Though MAT can be a useful tool to address substance reliance and abuse, it should be coupled with cognitive-behavioral therapy, like 12-step and faith-based accountability programs, to achieve long-term results.[144]

132 Pew, *The Case for Medication-Assisted Treatment*, The Pew Charitable Trusts (2017), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2017/02/the-case-for-medication-assisted-treatment.
133 *Id*.
134 SAMHSA, *Medication and Counseling Treatment*, U.S. Department of Health & Human Services (May 2019), https://www.samhsa.gov/medication-assisted-treatment/treatment.
135 *Id*.
136 *Id*.
137 *Id*.
138 *Id*; Pew, *Medication-Assisted Treatment Improves Outcomes for Patients with Opioid Use Disorder*, The Pew Charitable Trusts (November 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/11/medication-assisted-treatment-improves-outcomes-for-patients-with-opioid-use-disorder.
139 Doherty, *supra* note 2; Beau Kilmer, *U.S. Cocaine Consumption Declines by Half, While Marijuana Use Jumps*, Rand Corporation (March 2014), https://www.rand.org/news/press/2014/03/10.html.
140 John Kelly, *Prevalence and Pathways of Recovery from Drugs and Alcohol Problems in the United States Populaiton: Implications for Practice, Research, and Policy*, Recovery Research Institute (2017).
141 *Id*.
142 *Id*.
143 Pew, *supra* note 120.
144 *Id*.

ALTERNATIVE ACCOUNTABILITY SPOTLIGHT | OPIOID COURTS

An emerging variety of treatment court, the first opioid court was initiated in Buffalo, New York, in 2017.[145] Opioid courts differ from more general drug court programs due to their narrow focus on preventing opioid-related overdoses. These courts offer evidence-based treatment and intensive supervision for opioid-related offenses rather than relying on lengthy terms of incarceration for overdose prevention.[146] Many participants begin the opioid court process with required medication-assisted treatment (MAT).[147] Opioid courts have been established in five states: New York, Pennsylvania, Wisconsin, Tennessee, and Arizona.[148] As the opioid crisis continues to grip the nation, the acceptance and prevalence of opioid courts is also expected to grow.

145 Center for Court Innovation, *The 10 Essential Elements of Opioid Intervention Courts*, Center for Court Innovation (2019), https://www.courtinnovation.org/sites/default/files/media/documents/2019-07/report_the10essentialelements_07092019.pdf.
146 *Id*.
147 *Id*.
148 *Id*.

CASE STUDY:

Possession of Cocaine

SOCIETAL IMPACT

In the Controlled Substances Act, cocaine is classified as a Schedule Two substance, meaning it has high abuse potential along with severe psychological or physical dependence.[149] Though cocaine has been available for centuries in powder form, a new form of the drug became available in the 1980s.[150] Cocaine base, also known as "crack cocaine," emerged as a smokable rock form of cocaine that was less expensive and came in smaller quantities.[151]

Despite being derived from the same drug, the two forms were treated very differently by law. In 1986, Congress established harsher penalties for cocaine base through the Anti-Drug Abuse Act.[152] The legislation was in response to the large-scale use of the drug in urban areas and belief that cocaine base was associated with a higher likelihood of violence.[153] The Anti-Drug Abuse Act created a large disparity between the treatment of the two forms of cocaine, which is commonly referred to as the "100-to-one disparity."[154] Five grams of cocaine base was penalized with a five-year mandatory minimum sentence—the same penalty for possessing 100 times that amount of powder cocaine.[155] In 2010, the Fair Sentencing Act reduced that disparity to 18-to-1 and eliminated the mandatory minimum sentence for simple possession of cocaine base.[156] Passed December 2018, the FIRST STEP Act allows individuals who were sentenced prior to the Fair Sentencing Act to petition for relief consistent with its provisions.[157]

When the Fair Sentencing Act was passed, there were 13 states with sentencing disparities between cocaine base and powder cocaine.[158] As of 2018, all 13 states have eliminated that disparity for a first-time simple possession offense. But in Maine, if the possession charge is a second or subsequent offense, the two forms of cocaine are treated differently. It is considered a Class B felony if the amount of cocaine possessed is 14 grams of powder cocaine, but the same goes for only four grams of cocaine base.[159] In states like Iowa and Vermont, the discrepancy in sentencing still exists for other offenses, such as trafficking or possession with the intent to sell, but has been eliminated for simple possession.[160]

PENALTY SIMILARITIES BETWEEN COCAINE AND HEROIN

Since penalty disparities for the two types of cocaine have been eliminated for the most part, today it is more common to see possession of cocaine compared to possession of heroin. Despite being classified in different schedules, possession of cocaine and heroin are treated the same in many states. In Kentucky, possession of either substance is a Class D felony punishable by up to three years in prison.[161] Possession

149 Gabay, *supra* note 23.
150 Joseph Palamar, et al., *Powder Cocaine and Crack Use in the United States: An Examination of Risk for Arrest and Socioeconomic Disparities in Use*, National Institutes of Health (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4533860/.
151 *Id*.
152 *Id*; Nicole Porter & Valerie Wright, *Cracked Justice*, The Sentencing Project (March 2011), https://www.sentencingproject.org/wp-content/uploads/2016/01/Cracked-Justice.pdf.
153 A study regarding the association of violence and cocaine base usage found that the increased likeliness of violence was nonsignificant after controlling for demographics, as well as mood and other substance abuse disorders. Palamar, *supra* note 110.
154 Porter, *supra* note 112.
155 *Id*.
156 *Id*; USSC, *Report to Congress: Impact of the Fair Sentencing Act of 2010*, United States Sentencing Commission (August 2015), https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010.
157 First Step Act of 2018, S. 756, 115th Congress (2018).
158 Porter, *supra* note 112.
159 ME. Rev. Stat. tit. 17-A, § 1107-A (2015).
160 Iowa Code § 124.401 (2018); VT Stat. Ann. Tit. 18 § 4231 (2007).
161 KY. Rev. Stat. Ann. § 218A.1415 (2011).

of heroin or cocaine in Arkansas is also a Class D felony, but only if the individual is possessing less than two grams.[162] Nevada has the same penalty for possession of cocaine as it does for heroin, which is a Class E felony for a first or second offense, and the penalty is between one and four years in prison, as well as up to $5,000 in fines.[163]

PENALTY DISPARITIES BASED ON AMOUNT

There are states where penalties for cocaine differ from those for heroin. In Maine, there is a very low threshold for heroin at 200 milligrams, while the threshold for cocaine is more than two grams, both of which result in a Class C felony.[164] The penalty for a Class C felony is up to five years in prison and a $5,000 fine.[165] In Minnesota, a person possessing a quarter of a gram of cocaine for the first time will face only gross misdemeanor charges.[166] However, the penalties increase as the amount increases.[167] Felony charges range from fifth to first degree, starting with less than 10 grams and working up to more than 50 grams.[168] The sentences range from five years to 30 years and can reach up to $1 million in fines.[169]

Cocaine use has been declining since the early 2000s, and by 2010 had dropped to nearly half the amount previously consumed in America.[170] In recent years, the trends show that cocaine use continues to become less popular.[171] The War on Drugs came down hard on cocaine users, but recent surveys show a wave of change in favor of treatment and rehabilitation for cocaine offenses.[172] A recent survey revealed more than two-thirds of American citizens believe providing treatment for those addicted to cocaine is more beneficial than prosecution.[173]

162 Ark. Code Ann. § 5-64-419 (2013).
163 Nev. Rev. Stat. Ann. § 453.336 (2015).
164 ME. Rev. Stat. tit. 17-A, § 1107-A (2015).
165 *Id*.
166 Minn. Stat. Ann. §§ 152.021-152.025 (2016).
167 *Id*.
168 *Id*.
169 *Id*.
170 Doherty, *supra* note 1; Beau Kilmer, *U.S. Cocaine Consumption Declines by Half, While Marijuana Use Jumps*, Rand Corporation (March 2014), https://www.rand.org/news/press/2014/03/10.html.
171 *Id*.
172 *Id*.
173 *Id*.

It is estimated that drug courts save states

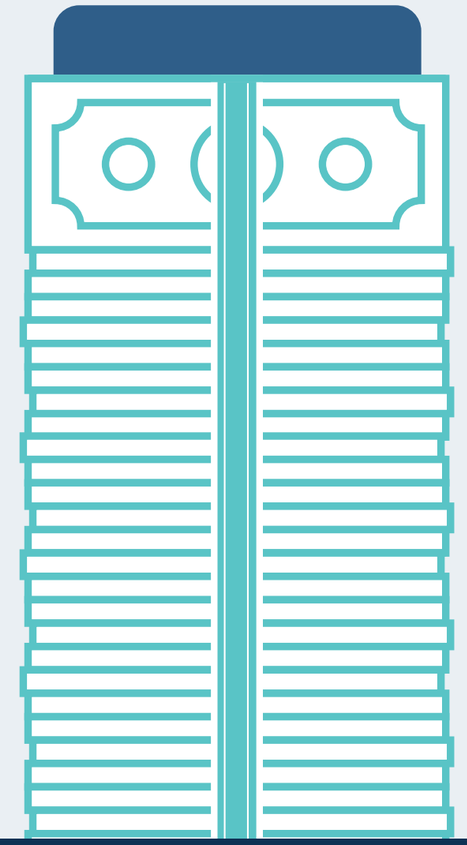
$5,680

TO

$6,208

per individual.





ALTERNATIVE ACCOUNTABILITY SPOTLIGHT | DRUG COURTS

Drug courts are specialized docket programs that offer an alternative to incarceration for cases where the individual has an alcohol or drug dependency.[174] The courts are made up of a multidisciplinary team of stakeholders, including judges, prosecutors, defense attorneys, social workers, community corrections officers, and treatment professionals.[175] Each of these stakeholders is involved in the hearings, programming, and events. Based on an individual risk and needs assessment, provided upon entrance to the drug court program, the court will determine whether to enroll that individual in a treatment program or rehabilitative service.[176] Drug court programming and services typically run between six months and two years, depending on an individual's needs and progress.[177] During this time, individuals participating must remain drug-free and not receive any new criminal charges. Upon successful completion, the criminal charge that brought the individual to the drug court is not pursued further. If an individual partakes in drug use during the program, it is up to the discretion of the stakeholders to decide whether to alter treatment or impose incarceration.

As of 2015, there were more than 3,000 drug courts across the country.[178] Where best practices are followed, drug courts have been proven not only to save money, but also to significantly reduce both use of drugs and other criminal behavior.[179] Georgia has implemented drug courts in each of its counties, and in 2017, the state reported that each graduate produced over $22,000 in economic benefits to the state.[180] Over the last five years, as these courts have been established across the state, Georgia has seen the overall number of individuals incarcerated for possession crimes decrease. The number of individuals serving time for possession of cocaine alone decreased by nearly 300.

174 Office of Justice Programs, *Drug Courts*, U.S. Department of Justice (May 2018), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf; National Institute of Justice, Drug Courts, Office of Justice Programs (2016), https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx.

175 *Id*.

176 *Id*.

177 *Id*.

178 *Id*.

179 *Id*.

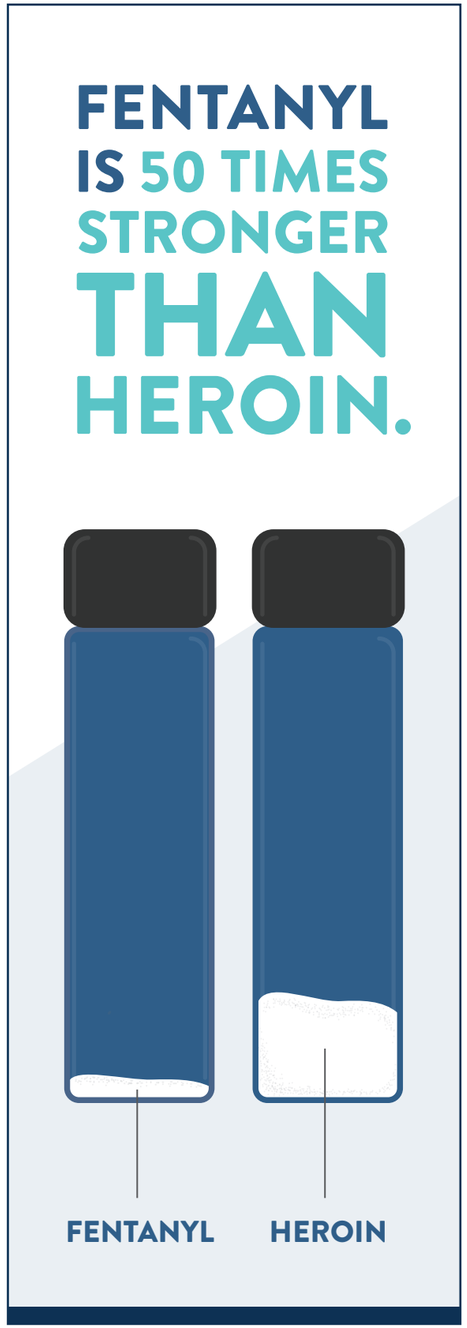
180 Carl Vinson Institute of Government, *The Estimated Economic Impacts and Benefits of Accountability Court Programs in Georgia*, University of Georgia (July 2018).

CASE STUDY:

Possession of Fentanyl

SOCIETAL IMPACT

The current abuse of fentanyl is the most recent drug epidemic to seize the nation. This Schedule Two substance is more than 50 times stronger than heroin, has caused more deaths, and can be deadly within minutes.[181] Despite being a new epidemic surfacing over the last five years, fentanyl is not a new drug. It was created more than half a century ago as a more powerful pain medication for anesthesiologic purposes.[182] It is a highly addictive drug, and a physical dependence can develop within days.[183] In 2013, fentanyl mixed with heroin began to emerge. Two years later, the drug was labeled as a threat to human safety, and at that time, only a few states had seen misuse of fentanyl.[184] Fentanyl has increasingly



181 Christine Vestal, *As Fentanyl Spreads, States Step Up Responses*, The Pew Charitable Trusts (May 2017), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/08/as-fentanyl-spreads-states-step-up-responses.

182 Ruben Vardanyan & Victor Gruby, *Fentanyl-related Compounds and Derivatives: Current Status and Future Prospects for Pharmaceutical Applications*, National Institutes of Health (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4137794/.

183 *Id*.

184 Alexis Peterson, et al., I*ncreases in Fentanyl-Related Overdose Deaths- Florida and Ohio, 2013-2015*, Centers for Disease Control and Prevention (August 2016), https://www.cdc.gov/mmwr/volumes/65/wr/mm6533a3.htm.

been used as a mixer with heroin, cocaine, and other substances due in part to its inexpensive and easy production, but more popularly to increase the potency of heroin and cocaine.[185] Between July and December of 2016, fentanyl was detected in more than half of the opioid overdose deaths. Among the overdoses, fentanyl was determined to be the cause of nearly all the deaths.[186]

PENALTY DISPARITIES

Despite the high potency and rising number of associated overdose deaths, only a handful of states have specifically addressed fentanyl possession.[187] West Virginia was among one of the first states impacted by widespread illicit use of fentanyl.[188] The state has set up ladder penalties based on the amount of fentanyl possessed.[189] For possession of less than one gram of fentanyl, an individual faces between two and 10 years in prison.[190] When the amount possessed is between one and five grams, the sentence increases to between three and 15 years.[191] Florida has also been hit hard by the fentanyl epidemic, experiencing increases in fentanyl death rates by 250% between 2010 and 2014.[192] In 2017, then-Florida Governor Rick Scott signed into law a bill that established mandatory minimums for offenses involving the drug.[193] Possession of less than four grams of fentanyl will land an individual in Florida state prison for a minimum of three years with fines reaching $50,000.[194] Other states have not added fentanyl to their lists of possession offenses, but have addressed it in other ways. In Illinois, if a substance is mixed with fentanyl, an additional three years are automatically added to the original sentence for the offense.[195]

During the past few legislative sessions, several states proposed bills addressing fentanyl offenses, including Louisiana and Alabama, which passed bills in 2018.[196] As the number of fentanyl-related deaths continues to increase, the amount of proposed legislation is expected to increase as well.[197]

185 Vestal, *supra* note 141; Julie K. O'Donnell, et al., *Deaths Involving Fentanyl, Fentanyl Analogs, and U-47700- 10 states, July-December 2016*, Centers for Disease Control and Prevention (November 2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6643e1.htm.
186 *Id*.
187 Vestal, *supra* note 141.
188 W.Va. Code § 60A-4-415 (2017).
189 *Id*.
190 *Id*.
191 *Id*.
192 Peterson, *supra* note 144.
193 2017 Fla. Laws 107.
194 *Id*.
195 720 ILL. COMP. STAT> 570/401 (2018).
196 LA HB 165 (2018); AL SB 39 (2018).
197 Vestal, *supra* note 141.

CONCLUSION

The United States has experienced more than a century of regulation and reforms regarding the possession of illegal drugs. Reforms have largely focused on restructuring felony and misdemeanor thresholds and the associated penalties, as well as altering mandatory minimum sentences.[198] Over the last several years, research reports from government sources and both partisan and non-partisan think tanks have questioned and argued against the effectiveness of those penalties in deterring future drug crime.[199] Yet, throughout this report, we see that states continue to rely on imprisonment as the statutory response to drug possession.

The discrepancy in public policy approaches to drug possession demonstrates the unique power of federalism in the United States and results in perplexing differences in penalties across state lines. States have begun to pioneer policy approaches that come closer to addressing the root cause of drug-related crime, undermining the long-held misunderstanding that lengthy terms of incarceration will deter and ultimately incapacitate those who abuse drugs. States should continue to embrace their unique capacity for crafting creative policy solutions to complex problems. As they approach possession laws and policies, lawmakers must examine the current codified penalties for offenses in their states and explore alternatives that are reflective of restorative principles and best suit their populations. Where feasible, these solutions should embrace effective accountability measures that have been shown to reduce future drug use, including alternatives that offer, through behavioral compliance, a chance to avoid a criminal record, such as citations instead of arrest or diversionary programs. A criminal record, even just an arrest record, can have lifelong effects on an individual's housing, employment, and education.[200] Individuals with a criminal record face more than 44,000 legal barriers to rebuilding their lives.[201] Citations avoid an arrest record and, upon completion of state-specified criteria like payment of civil penalty, can also prevent a public criminal record. Divisionary programs do not prevent an arrest record; however, they do provide a rehabilitative remedy to the drug behavior that led to the arrest. Successful completion of a diversionary program can result in avoidance of a criminal record.

198 Lucia Bragg, *Federal Criminal Justice Reform in 2018*, National Conference of State Legislatures (March 2018), http://www.ncsl.org/research/civil-and-criminal-justice/federal-criminal-justice-reform-in-2018.aspx.
199 Chandler, *supra* note 5.
200 Justice Center, *National Inventory of Collateral Consequences of Conviction*, Council of State Government's Justice Center (2019), https://niccc.csgjusticecenter.org/.
201 *Id*.

We recognize that in most states, possession charges remain in the criminal justice system. Therefore, where criminal penalties remain for simple possession convictions, we call for proportional sentences and the application of effective accountability programs while incarcerated that demonstrate a reduction in continued drug use. We call for this in recognition that incarceration does not achieve the goal of reducing substance use and rehabilitation.[202] Since criminal accountability models still result in a criminal record with debilitating social consequences, we support presumptive expungement of criminal records for those who complete substance abuse and rehabilitative programs.

Some jurisdictions have implemented alternative accountability models for possession crimes, such as drug and opioid courts. These programs, along with traditional methods, should be studied in order to identify best practices and achieve stronger outcomes for the participating individual and impacted community. As data on the effectiveness of alternatives rooted in accountability continue to emerge and demonstrate successful behavioral changes that deter future drug crime and use, lawmakers should examine the outcomes in order to increase the effectiveness of their own approaches to illicit drug use. Pairing each state's unique ability to test new approaches with an increased focus on decreasing the use of illicit drugs and strengthening communities could result in a reduction of wide penalty discrepancies across state lines. As lawmakers are confronted with new substances emerging in the illicit marketplace, they also have ever-increasing access to data on drug use and dependency to help inform their decision-making.

As new drugs continue to emerge and cultural views regarding drug use continue to evolve, the face of drug policy reform will also need to change. New policies regarding drug possession should aim to reduce overall demand for illegal drugs by addressing, where possible, underlying substance abuse issues. Each human life is created in the image of God, with eternal value and capacity for redemption, and the onus is on all those in the criminal justice policy field to evaluate methods of proportional accountability for these crimes that offer the best outcomes for public safety, recovery from addiction, stronger families, and personal and community restoration. Therefore, we call for a restorative approach to drug possession crimes that prevents the misuse of drugs, breaks the cycle of addiction, and invests in consistent accountability that is inclusive of treatment and rehabilitation.

202 Chandler, *supra* note 5.

APPENDIX

POSSESSION OF MARIJUANA

State	Criminal Threshold	Penalty	Felony Threshold	Penalty
Alabama	Personal use amount, first offense	Class A Misdemeanor = 1 yr and $6,000	More than "personal amount" or subsequent offense	Class C Felony = 1–10 yrs and up to $15,000
Alaska	1–4 oz.	Misdemeanor = 1 yr and/or $1,000	More than 4 oz.	Felony = Up to 5 yrs and/or $50,000
Arizona	Penalties start as felonies	N/A	Less than 2 lbs.	Class 6 Felony = 6 mo–1.5 yrs, up to $150,000
Arkansas	1–4 oz., first offense	Class A Misdemeanor = 1 yr and $2,500	1–4 oz on subsequent offense or 4 oz.–10 lbs.	Class D Felony = Up to 6 yrs and $10,000
California	More than 28.5 g	Misdemeanor = County jail for 6 mo and/or $500	N/A	N/A
Colorado	1–2 oz.	Drug Petty Offense = $100, public display of less than 2 oz. is $100 and 24 hrs community service	More than 12 oz.	Level 4 Felony = Up to 1 yr and $100,000
Connecticut	0.5–4 oz, first offense	Class A Misdemeanor = 1 yr and/or $1,000	More than 0.5 oz., subsequent offense	Class E Felony = Up to 3 yrs
Delaware	Subsequent offense	Unclassified misdemeanor = $575 and no more than 3 mo	175 g–1,500 g	Class F Felony = 3 yrs
Florida	Less than 20 g	First-Degree Misdemeanor = Up to 1 yr and a fine	**	**
Georgia	1 oz. or less	Misdemeanor = 1 yr or $1,000	More than 1 oz. but less than 10 lbs.	Felony = 1–10 yrs
Hawaii	Less than 1 oz.	Petty Misdemeanor = Up to 30 days and/or $1,000	More than 1 lb.	Class C Felony = Up to 5 yrs and/or $10,000
Idaho	Under 3 oz.	Misdemeanor = 1 yr and/or $1,000	Over 3 oz.	Felony = 5 yrs and $10,000

State	Criminal Threshold	Penalty	Felony Threshold	Penalty
Illinois	More than 30g, first offense	Class A Misdemeanor = 1 yr and up to $2,500	30–100 g or subsequent offense	Class 4 Felony = 1–3 yrs and up to $25,000
Indiana	Under 30 g	Class A Misdemeanor = 1 yr and/or $5,000	Over 30 g or subsequent offense	Level 6 Felony = More than 6 mo and $10,000
Iowa	First offense	Misdemeanor = 6 mo and/or $1,000	N/A	N/A
Kansas	First offense	Class B Misdemeanor = 6 mo and $1,000	Third possession or subsequent offense	Level 5 Felony = 10–42 mo and up to $100,000
Kentucky	Any amount	Class B Misdemeanor = No more than 45 days	**	**
Louisiana	Less than 14 g	First conviction = Up to 15 days in parish jail and/or $300	2.5 lbs.–60 lbs.	Felony = Not less than 2 yrs but not more than 10 yrs and not less than $10,000 but not more than $30,000
Maine	2.5–8 oz.	Class E Misdemeanor = Up to 6 mo and $1,000	1–20 lbs.	Class C = Up to 5 yrs and $5,000
Maryland	10 g–50 lbs.	Misdemeanor = 1 yr or $1,000	50 lbs. or more	Felony = 5 yrs and $100,000
Massachusetts	More than 1 oz.	Misdemeanor = 6 mo or $500	**	**
Michigan	More than 5 oz.	Misdemeanor = Up to 1 yr and/or $2,000	**	**
Minnesota	Less than 42.5 g	Petty Misdemeanor = $200 and possible participation in a drug education program	42.5 g–10 kg	Felony = Up to 5 yrs and $5,000
Mississippi	Less than 30 g, second offense	Misdemeanor = 5–60 days and $250	30–250 g	Felony = Up to 1–3 yrs and/or $1,000–$3,000
Missouri	Less than 10 g, first offense	Class D Misdemeanor = $500	More than 35 g	Class D Felony = 7 yrs and $10,000

State	Criminal Threshold	Penalty	Felony Threshold	Penalty
Montana	Less than 60 g	Misdemeanor = Not more than 6 mo and $100–$500	More than 60 g	Felony = 5 yrs and/or $5,000
Nebraska	Less than 1 oz., subsequent offense	Class IV Misdemeanor = 5 days and $400	More than 1 lb.	Class IV Felony = 5 yrs and $10,000
Nevada	More than 1 oz. or public use	Misdemeanor = $600	**	**
New Hampshire	More than 0.75 oz	Class A Misdemeanor = Up to 1 yr and $2,000	**	**
New Jersey	Under 50 g	Disorderly person = Up to 6 mo and $1,000	Over 50 g	Felony = Up to 18 mo and $25,000
New Mexico	Less than 1 oz.	Petty Misdemeanor = No more than 15 days, not less than $50, not more than $100	Over 8 oz.	Fourth-Degree Felony = 1.5 yrs and/or up to $5,000
New York	25 g–2 oz.	Class B Misdemeanor = Up to 3 mo and $500	8–16 oz.	Class E Felony = Up to 4 yrs and $5,000
North Carolina	0.5–1.5 oz.	Misdemeanor = No more than 45 days and/or $1,000	More than 1.5 oz.	Felony = 3–8 mo and $1,000
North Dakota	1 oz. or less	Class B Misdemeanor = Up to 30 days and/or $1,500	1 oz.–500 g	Class C Felony = 5 yrs and up to $10,000
Ohio	100 g–200 g	Fourth-Degree Misdemeanor = 30 days and up to $250	200 g–1,000 g	Fifth-Degree Felony = 1 yr and up to $2,500
Oklahoma	Any amount	Misdemeanor = Not more than 1 yr and not more than $1,000	**	**

State	Criminal Threshold	Penalty	Felony Threshold	Penalty
Oregon	2–4 oz.	Class B Misdemeanor = Up to 6 mo and $2,500	N/A	N/A
Pennsylvania	Less than 30 g	Misdemeanor = 30 days and up to $500	**	**
Rhode Island	More than 1 oz.	Misdemeanor = 1 yr or $200–$500	**	**
South Carolina	Less than 1 oz. and first offense	Misdemeanor = 30 days or $100–$200	**	**
South Dakota	2 oz. or less	Class 1 Misdemeanor = 1 yr and $2,000	2 oz.–0.5 lb.	Class 6 Felony = 2 yrs and $4,000
Tennessee	Less than 0.5 oz.	Misdemeanor = Up to 1 yr and mandatory $250	**	**
Texas	2 oz. or less	Class B Misdemeanor = 180 days and $2,000	4 oz.–5 lbs.	State Jail Felony = Mandatory min. of 180 days, up to 2 yrs, $10,000
Utah	Less than 100 lbs.	Class B Misdemeanor = 6 mo and $1,000	More than 100 lbs.	Second-Degree Felony = Not less than 1 yr but no more than 15 yrs
Vermont	1–2 oz., first offense	6 mo and/or $500	More than 2 oz.	Felony = 3 yrs and/or $10,000
Virginia	First offense	Misdemeanor = 30 days and/or $500	**	**
Washington	1 oz.–40 g	Misdemeanor = Up to 90 days	More than 40 g	Class C Felony = 5 yrs and/or $10,000

State	Criminal Threshold	Penalty	Felony Threshold	Penalty
West Virginia	Any amount	Misdemeanor = Not less than 90 days but not more than 6 mo and/or $1,000	**	**
Wisconsin	First offense	Misdemeanor = Up to 6 mo and/or $1,000	Second offense	Class 1 Felony = 3.5 yrs and/or $10,000
Wyoming	3 oz. or less	Misdemeanor = Up to 12 mo and/or $1,000	More than 3 oz.	Felony = Up to 5 yrs and/or $10,000
Federal	First offense (any amount)	Misdemeanor = Up to 1 yr and $1,000	Third offense or subsequent offense, any amount	Misdemeanor or felony = Minimum 90 days, up to 3 yrs, $5,000

** A double asterisk indicates that the correlating state does not punish possession of marijuana as a felony unless the amount possessed is large enough for the offense to be considered possession with intent to sell or distribute.

POSSESSION OF HEROIN

State	Criminal Threshold	Criminal Penalty
Alabama	Any amount	Class D Felony = 1–5 yrs and/or $7,500
Alaska	Any amount	Class C Felony = Up to 5 yrs and/or $50,000
Arizona	Any amount	Class 4 Felony = At least 2.5 yrs
Arkansas	Less than 2 g	Class D felony = Up to 6 yrs and $10,000
California	Personal use amount	Misdemeanor = County jail for up to 1 yr and $70
Colorado	Any amount	Level 4 Felony = 6 mo–1 yr and $1,000–$500,000
Connecticut	First offense	Felony = Up to 7 yrs and/or $50,000
Delaware	1 g	Class F Felony = Up to 3 yrs
Florida	Less than 4 g	Third-Degree Felony = Up to 5 yrs and $5,000
Georgia	Less than 1 g	Felony = 1–3 yrs
Hawaii	Any amount under 0.125 oz.	Class C Felony = Up to 5 yrs and/or $10,000
Idaho	Up to 2 g	Felony = Not more than 7 yrs and/or $15,000
Illinois	Less than 15 g	Class 4 Felony = 1–3 yrs and/or $25,000
Indiana	Less than 5 g	Level 6 Felony = 6 mo–2.5 yrs and/or $10,000
Iowa	First offense (any amount)	Misdemeanor = Up to 1 yr and/or $1,875
Kansas	Any amount	Class 5 Felony = Up to 3.5 yrs and/or up to $100,000

POSSESSION OF HEROIN

State	Criminal Threshold	Criminal Penalty
Kentucky	Any amount	Class D Felony = Up to 3 yrs
Louisiana	Less than 2 g	Misdemeanor = 2–4 yrs
Maine	More than 200 mg	Class C Felony = 5 yrs and $5,000
Maryland	First offense	Misdemeanor = Up to 1 yr and/or $5,000
Massachusetts	First offense	Misdemeanor = Up to 2 yrs and/or $2,000
Michigan	Less than 50 g	Felony = Up to 4 yrs and/or $25,000
Minnesota	Less than 3 g	Fifth-Degree Felony = Up to 5 yrs and/or $10,000
Mississippi	Less than 0.1 g	Misdemeanor = Up to 1 yr and/or $1,000
Missouri	Any amount	Class D Felony = Up to 7 yrs
Montana	Any amount	Felony = Up to 5 yrs and/or $5,000
Nebraska	Any quantifiable amount	Class IV Felony = Up to 5 yrs and/or $10,000
Nevada	First or second offenses	Class E Felony = 1–4 yrs and/or $5,000
New Hampshire	First offense	Class B Felony = 3.5–7 yrs and/or $25,000
New Jersey	Any amount	Third-Degree = Up to $35,000
New Mexico	Any amount	Misdemeanor = 1 yr and/or up to $1,000

POSSESSION OF HEROIN

State	Criminal Threshold	Criminal Penalty
New York	0.125 oz. or more	Class C Felony = Up to 15 yrs and/or $15,000
North Carolina	Up to 4 g	Class I Felony = 6–12 mo, fines, and potential loss of license
North Dakota	First offense	Class A Misdemeanor = Up to 1 yr and/or $3000
Ohio	Less than 1 g	Fifth-Degree Felony = 6–12 mo
Oklahoma	Any amount	Misdemeanor = 1 yr and $1,000
Oregon	Less than 1 g	Class A Misdemeanor = Up to 1 yr and/or $6,250
Pennsylvania	First offense, less than 1 g	Misdemeanor = 1 yr and/or $5,000
Rhode Island	First offense	Felony = 3yrs, min. $500 and not more than $5,000
South Carolina	First offense	Misdemeanor = Up to 2 yrs and/or $5,000
South Dakota	Any amount	Class 5 Felony = 5 yrs and/or $10,000
Tennessee	Less than 0.5 oz.	Class A Misdemeanor = Up to 1 yr and $2,500
Texas	Less than 1 g	State Jail Felony = 180 days–2 yrs, and up to $10,000
Utah	First or second offenses	Class A Misdemeanor = Up to 1 yr and $2,500
Vermont	Less than 200 mg	Misdemeanor = 1 yr and/or $2,000
Virginia	Any amount	Class 5 Felony = Not less than 1 yr but up to 10 yrs and/or $2,500

POSSESSION OF HEROIN

State	Criminal Threshold	Criminal Penalty
Washington	Any amount	Class C Felony = Up 5 yrs and/ or $10,000
West Virginia	Personal use amount, first offense	Misdemeanor = 90 days–6 mo and/or $1,000
Wisconsin	Any amount	Class I Felony = 3.5 yrs and/or $10,000
Wyoming	No more than 3 g	Misdemeanor = Up to 1 yr and/or $1,000



Remember those in prison