

# ISSUE BRIEF **08.13.21**

## Is the War on Drugs at its End? Sobering Lessons from Texas

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There were a lot of reasons to think that 2021 would be a pivotal year for criminal justice reform in Texas: widespread popularity of relaxing cannabis laws, public support for addressing police violence and systemic racism in the justice system, and the pandemic turning overcrowded jails from a simmering public health risk into a crisis too big to ignore.

Two weeks after a Minneapolis police officer killed George Floyd, a Houston native, Texas Gov. Greg Abbott indicated there was a bipartisan appetite for reform when he floated the idea of a “George Floyd Act, to make sure that we prevent police brutality like this from happening in the future in Texas.” Calling Floyd’s death “the most horrific tragedy [he had] ever personally observed,” the governor insisted that those “who have suffered because of racism for far too long” would lead the way on reform.<sup>1</sup>

During the 87th legislative session, not only did Governor Abbott neglect these concerns, he actively worked against them, opposing modest proposals to improve the justice system and prioritizing legislation that further harms the very communities he claimed to support. As other states work to address justice system inequities, recent developments in Texas expose the persistent challenges to ending the war on drugs and other policies that propagate systemic racism.

### THE 87TH LEGISLATURE: A BAD, UGLY SESSION FOR CRIMINAL JUSTICE

As the 2021 session began, polling showed that Texans shared Gov. Abbott’s professed support for justice reform. A January 2021 University of Houston Hobby School of Public Affairs survey found that 72% of Texans approved of the George Floyd Act, a package of legislation that proposed reducing penalties for marijuana possession, ending arrests for fine-only offenses, banning no-knock warrants, requiring more use-of-force training, limiting police immunity from civil lawsuits, and eliminating cash bond for misdemeanor offenses.<sup>2</sup>

Cannabis reform, an integral part of tackling racial inequality in the justice system, also has broad support. The Hobby School poll found that 77% of Texans approved of making marijuana possession a fine-only offense. Legalization for any use was supported by 61% of those polled, and 86% supported legalization for medical use, including 72% of Republicans.<sup>3</sup> A separate 2021 poll by the University of Texas/Texas Tribune found nearly identical levels of support.<sup>4</sup> Attitudes toward other drug policies are less frequently asked about by pollsters, but as far back as 2014, a Pew Research Center poll found that two-thirds of Americans favored treatment over incarceration for people who use drugs like heroin and cocaine.<sup>5</sup>



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Dozens of criminal justice bills, in addition to over 40 cannabis-specific bills, were filed in Texas this session, reflecting public desire for reform.<sup>6</sup> But law enforcement strongly objected to most substantial legislation, and on nearly all justice-related bills, the legislature bowed to their interests—except when it came to the unlicensed carrying of handguns, which the legislature enthusiastically supported over vocal opposition from police groups.

The George Floyd Act was the focal point of much law enforcement resistance, particularly its provisions aimed at limiting qualified immunity and arrest powers. As a work-around, the omnibus bill was broken into smaller, more palatable measures. In the end, only two components of the original George Floyd Act were signed into law by Abbott. S.B. 69 requires officers to intervene when fellow officers are using excessive force and bans the use of choke holds, and S.B. 2212 requires an officer to render aid to an injured person.<sup>7</sup> The Combined Law Enforcement Associations of Texas (CLEAT), a proud defender of police powers that fought every other component of the George Floyd legislation, felt it could support these measures because they “mirrored what is already in place for most Texas law enforcement agencies.”<sup>8</sup>

Cannabis reform, like broader criminal justice reform, has also faced perennial law enforcement resistance at the Texas Capitol. That opposition was somewhat less vocal this year, and many observers, the author of this brief included, thought that penalty reduction for cannabis possession stood a reasonable chance of passage. The House passed two penalty reduction bills (out of more than a dozen introduced), only one of which was considered by the Senate. H.B. 2593 would have lowered the offense for possessing personal-use amounts of cannabis concentrates, such as edibles, from a felony to a misdemeanor, bringing penalties for concentrates in line with those for other parts of the marijuana plant.<sup>9</sup> The bill had no opposition and some support from prosecutors, including Staley Heatly, a North Texas district attorney who spoke in favor of H.B. 2593 at the State Affairs Committee hearing.<sup>10</sup> (I testified in support

of the bill as well.) The bill passed out of Senate committee, but Lt. Gov. Dan Patrick prevented the Senate from voting on it and it died at the very end of the session.

Most attempts at relaxing other drug laws, such as reducing penalties for possession, as Oklahoma did in 2016, and permitting syringe service programs (H.B. 3233), which are legal in 42 states, were unsuccessful.<sup>11</sup> For the last several sessions, similar legislation has been summarily dismissed by most conservative lawmakers. This year, there was enough Republican support in the House for the syringe service bill to pass through the lower chamber, but the Senate did not consider it.

On nearly all drug- and criminal justice-related issues this session, the Senate was less open to reform than the House. One explanation is that Senate members are more conservative than their counterparts in the House. But the Senate's inhospitableness to reform also reflects Lt. Gov. Patrick's control over the upper chamber. Since he assumed office in 2007, Patrick has made full use of the unusual authority that Texas bestows on the lieutenant governor to set the Senate agenda, appoint committee members, and decide which bills get heard.<sup>12</sup> The knowledge that Patrick, and Abbott, oppose a piece of legislation stifles would-be Republican support. Few lawmakers are willing to lose a battle to the state's leadership, especially over an issue that matters little to their core constituency.

Even some of the notable reforms that managed to clear conservative legislators could not make it past Abbott, who vetoed measures that would have given officers discretion to issue citations instead of arrests for criminal trespassing and that would have let juveniles serving long sentences for violent offenses get a review for release after serving 30 years. Abbott did, however, sign into law provisions that penalize cities that reduce police budgets (H.B. 1900 and S.B. 23), that mandate local enforcement of new laws criminalizing homelessness (H.B. 1925), and that enhance criminal penalties for public protesters (H.B. 9).<sup>13</sup> All of these bills, as well as a failed attempt to make it harder for people without cash to be released on bail, which will likely

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be reconsidered in a special session called by the governor, were a reaction to the protests against police violence last summer and the steps taken by some Texas cities to respond to public demands for reform.<sup>14</sup>

### TOUGH ON CRIME: THE POLITICAL GIFT THAT KEEPS ON GIVING

Texas officials, by doubling down on law-and-order politics and dismissing pleas to address the harms caused by a punitive and unequal justice system, put cynical political calculations ahead of effective and responsive governance. This failure of leadership is not simply a product of the current administration's callous ideology, though Abbott and Patrick are at the forefront of a larger political phenomenon that Adam Serwer, a staff writer at *The Atlantic*, calls the "politics of cruelty."<sup>15</sup>

In a *New York Times* article, Serwer describes the politics of cruelty as one that "strategically exploits vulnerable Americans by portraying them as an existential threat, against whom acts of barbarism and disenfranchisement become not only justified but worthy of celebration." This tactic, as Serwer argues, dates back to the post-Civil War era, when violent suppression of Black citizens was used to exclude them from societal participation and to prevent a multiracial coalition against economic inequality.

Cruelty politics has proven to be a remarkably successful strategy. It underlies an array of conservative policy goals, from suppressing votes to gutting the welfare state, and was key to the rise of the war on drugs, first declared by President Richard Nixon in 1971 and then intensified by President Ronald Reagan in the 1980s. By exaggerating Black crime and drug use and promising its punishment, political candidates sought to attract white voters resentful of the civil rights movement and of the broader cultural changes during that time. Widespread ignorance of the harms of drug use and the risks of addiction, particularly regarding crack cocaine, prevented effective policymaking and provided opportunistic officials the chance

to use the drug war to exploit racism for bureaucratic or political gain.

There is extensive documentation of how the drug war fails to curb drug supply and demand, of how it compounds racism in the justice system and society, of how it causes violence and chaos in Mexico and South America, and of how it wastes trillions of taxpayer dollars. To a certain brand of conservative politician, these facts do not matter. Lawmakers who oppose reform know the harms caused by the drug war and either do not care or want them to continue—to quote Serwer, "the cruelty is the point."<sup>16</sup>

To be sure, the drug war's harsh logic no longer dominates. The overdose epidemic has shocked Americans into accepting that incarceration cannot solve addiction. The large and diverse makeup of the summer 2020 protests against police violence shows that more individuals, and importantly, more white individuals, are allied with the struggle for racial and social justice. Many politicians have campaigned successfully on the promise to end the drug war and fix the justice system, and some are working to fulfill these promises. There are Republican leaders at the national and state levels willing to at least consider bipartisan reforms.<sup>17</sup>

These developments suggest that the effectiveness of fearmongering and race-baiting is waning with the majority of Americans. But the summer 2020 protests that accelerated calls for a more equitable justice system also emboldened a countermovement hostile to change and ripe for political exploitation. The rise in murder rates last year, a national phenomenon affecting large progressive cities and smaller conservative ones alike, has facilitated partisan manipulation of the issues of crime and public safety.<sup>18</sup> The causes of the murder spike are complex and not fully known, though the pandemic is certainly a factor, but Abbott and like-minded Republicans have reduced it to a problem of Democratic mismanagement and the perils of "defunding" the police.<sup>19</sup> The movement to end the war on drugs, inextricably linked to criminal justice reform, is harmed by the backlash against broader demands for change. Bipartisan support

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for relaxing drug laws dissipates when it gets ensnared in the political crosshairs of the more contested issues of policing and criminal justice reforms.

Partisan gerrymandering further allows, or compels, some Republican politicians to be concerned only with their primary voters, who often hold more conservative or extreme views. In Texas, where turnout is below the national average, just 10% or so of registered voters participate in Republican primaries.<sup>20</sup> This is why, when it comes to issues like cannabis reform, even though roughly 87% of Texans support some relaxation of marijuana laws, the 13% who think cannabis should stay prohibited are the ones whose opinions count most.<sup>21</sup>

Gov. Abbott and Lt. Gov. Patrick, facing reelection and, in Abbott's case, primary challenges from the right, have responded to racial justice protests and other recent events by embracing a Trumpian ideology that eschews social justice and seeks to harm marginalized groups and their allies—immigrants, people of color, and the LGBTQ community. Central to Abbott's reelection campaign is his promise to finish former President Donald Trump's border wall. In a June 30 tweet that linked crime to border issues and glossed over the fact that most drugs come into the U.S. through legal entry points, he wrote, “Cartels, smugglers & human traffickers are profiting off Biden's dangerous open border policies ... Seizures of deadly fentanyl have increased 2100%. Texas will protect our communities, build the wall, & secure the border.”<sup>22</sup> Patrick, for his part, has repeatedly invoked his power over the Senate to prevent the upper chamber from considering popular drug reform bills, and, as the 87th session was winding down, pressured Abbott to call a special session to address, among other things, social media “censorship” of conservatives and transgender student athletes.<sup>23</sup>

For advocates, experts, and the majority of citizens who support drug and criminal justice reform, the developments in Texas exemplify one of the biggest, if not the biggest, obstacle to change, which is that the perceived political advantages of stoking fear against vulnerable communities and then endorsing policies that harm these

communities are too alluring for some conservative politicians to abandon willingly. Declarations that the drug war is at its end are increasingly commonplace, but the “end,” if one dares to call it that, is proving to be long, bumpy, and localized.<sup>24</sup>

## LOOKING AHEAD

The challenges for drug and criminal justice reform in Texas' 87th legislative session also reflect the long-standing but intensifying divide between public preferences in large, urban jurisdictions and state-level leadership. Some version of this conflict exists in many states, but of late it has been especially severe in traditionally conservative ones, like Texas, where urban population growth is driving demands for more progressive policies that are viewed with dismissive skepticism, or outright contempt, in other parts of the state. Hence, conservative lawmakers aim, explicitly at times, to enact legislation that harms large municipalities, a goal realized in 2021 through measures threatening cities with financial penalty if they reduce police spending or de-prioritize enforcement of outdoor camping bans that target unhoused individuals.<sup>25</sup> These efforts effectively handicap local decision-making and obstruct responsive governance.

But local officials still have enough discretionary power to soften the impact of state policies. Some cities may respond to the new curtailments on their budgetary and policing powers by declining to increase police spending at all, since they would not be able to reduce it in the future, or by adopting a generally *laissez-faire* approach toward banned camping activity that falls short of an official policy discouraging enforcement.<sup>26</sup> Cities already frequently exercise discretion over law enforcement practices, especially around drug enforcement. A handful of Texas counties divert or no longer prosecute individuals for misdemeanor marijuana possession, and Travis County recently went a step further by ceasing prosecution of other low-level drug offenses.<sup>27</sup> As much as they can within the confines of the law, local officials should forge ahead with similar reforms that

their constituents support and not worry about appeasing state officials, because appeasement does not work. Localities can and should collaborate with other jurisdictions to develop strategies for working within the narrow confines of state laws, both to facilitate effective governance and to demonstrate that the state's population centers are united in their commitment to sensible and equitable policy solutions.

Localities cannot expect much relief from Democratic state lawmakers, who are in the minority and have little recourse to thwart problematic legislation. But on July 12, over 50 Texas House Democrats left the state to block passage of the voting restrictions bill prioritized by Gov. Abbott for the special legislative session.<sup>28</sup> Abbott has vowed to call special sessions until a voting bill is passed, and it will likely succeed eventually. Still, the bold gesture of leaving the state is unusual for a party that has typically favored compromise, and hints at a more audacious strategy that Democrats and progressives should embrace, at least in Texas, where there is little left to lose.<sup>29</sup>

Though some opportunities remain to improve drug and criminal justice policies at the local level, the reality is that reform prospects are dim so long as Gov. Abbott and Lt. Gov. Patrick remain in charge. The ease with which these two men have ignored majority support for drug and criminal justice reform captures, with frustrating precision, the need for federal leadership on this issue. As some parts of the country try to address the myriad contributors to systemic racism in the justice system, others retreat. Whether a person experiences the life-altering effects of arrest and conviction, always dependent on one's race and class, is increasingly a function of where one lives.

Drug policy narrowly conceived may be able to avoid the political challenges of the larger justice reform debate. The EQUAL Act, for example, introduced in Congress earlier this year, proposes only to remove the crack/powder cocaine sentencing disparity.<sup>30</sup> This disparity, set at a ratio of 100–1 in 1986 and lowered to 18–1 in 2010, has become such an infamous example of an egregiously racist drug policy that

it is impossible to provide a convincing, racially neutral defense for maintaining it. The EQUAL Act has Republican support in the House, and President Joe Biden has endorsed it.<sup>31</sup>

In a recent paper for The Brookings Institution, John Hudak lays out a detailed strategy for how the Biden administration can begin to dismantle the drug war.<sup>32</sup> Hudak suggests, among other things, the creation of a federal fund to clean up areas decimated by the war on drugs, similar to Superfund sites for environmental disasters. Assuming cities could apply directly to the federal government for relief, such a plan has the benefit of circumventing state opposition. During his presidential campaign, Joe Biden, who as a senator in the 1980s played a key role in crafting and passing several pieces of harmful antidrug legislation, signaled his backing for policies that target systemic racism generally and in the criminal justice system specifically.<sup>33</sup> His administration now has the opportunity and a duty to deliver on that promise.

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## CONCLUSION

Over the last decade, we have sought to ameliorate the damages of the drug war through incremental policy changes that are necessary but nevertheless insufficient. Death by a thousand cuts is an unlikely end for the war on drugs, because the drug war is not just a policy but an ideology. And as we chip away with policy change, we simultaneously should have an entirely different conversation about drugs that takes place outside of the stale and false presumption that the criminal justice system should have a primary role in drug policy.

Instead of a zero-tolerance approach that reveres abstinence, we must accept that the use of mind-altering substances is, for many, part of the human experience and cannot be eradicated. If we start with this premise, we can better educate ourselves about the pharmacological risks of various drugs and the societal conditions that contribute to problematic use and addiction. Policies toward drug use should incorporate this knowledge to focus on reducing the

harms of drug use and drug policy itself. This is called harm reduction. Despite its proven track record in public health policy, visible in everything from requiring seat belts to promoting safe sex, harm reduction as an approach to drug use has often been dismissed as too radical or controversial. This is changing. The Biden administration recognizes harm reduction in its drug policy priorities statement, and cities such as San Francisco and Seattle have established harm reduction programs for drug use.<sup>34</sup> But most Americans still live in places where police and prohibition are the dominant response to drug use. So, until it gains broad acceptance, the Baker Institute Drug Policy Program and many, many others will continue to promote harm reduction—because without fundamental changes in how we understand and talk about drug use, the drug war will linger, as will the possibility of its revival by elected officials seeking power.

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