



Submission of

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To the United Nations Human Rights Council
Special Rapporteur on the Right to Health
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“Drug policies and responses: a right to health framework on harm reduction”

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1. **While the concept of harm reduction has traditionally been applied to drug use, the Special Rapporteur is taking a broadened approach to harm reduction. What types of harm reduction policies, programmes, and practices are in place in your community, and what is their purpose or aim? How successful have they been at achieving that aim? Please provide data, as possible.**

I am a longtime public defender practicing in New York County (Manhattan) for nearly 30 years. My comments will focus on what I see in my practice of law in New York County criminal courts and focus not only on the application of traditional drug use harm reduction principles in our community, but more broadly, on efforts to limit the harm of mass incarceration and criminal legal system involvement.

One area in particular that I would like to highlight is the existence of problem solving courts to divert people with criminal charges from jail or prison. In 2009, New York State enacted Criminal Procedure Law 216 creating Judicial Diversion courts throughout the state. This statute

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created a legal mechanism to divert people charged with mostly drug-related and property-crime felonies into treatment programs instead of jail and prison.¹ People who succeed by completing all prescribed treatment may also emerge from participation without conviction of the top charge (or any charge, depending on the terms of their plea agreement). These courts are now in existence in every county in New York State, thanks to this law.

Other specialty courts in New York County were created without statutory mandate: such as Veterans Treatment Court, Alternatives to Incarceration Court, Mental Health Court, and Misdemeanor Mental Health Court with similar driving principles. (Other New York State counties have other specialty courts including those for people involved in sex work or who are survivors of sex trafficking.)

Judicial diversion, or problem-solving courts, are a critical tool to divert people with substance use or mental health issues away from the carceral system and make our communities safer and healthier. These courts are successful: recidivism rates are cut in half by successful diversion.² Problem solving courts are also fiscally responsible. Investing in mental health courts, community treatment and housing is a far more cost-effective use of state resources than incarceration. New York City spends \$556,539 per year to incarcerate just one person in its jail system.³ The New York State Office of Court Administration reports that every \$1 invested in treatment courts yields \$2.21 in savings.⁴ Moreover, the use of treatment courts receives support

¹ N.Y. Criminal Procedure Law Article 216, available at <https://www.nysenate.gov/legislation/laws/CPL/216.00>.

² Michael Mueller-Smith & Kevin T. Schnepel, Diversion in the Criminal Justice System, 8 THE REV. OF ECON. STUD. 2, 883–936 (2021), <https://doi.org/10.1093/restud/rdaa030> (finding that diversion cuts reoffending rates in half and grows quarterly employment rates by nearly 50% over 10 years); Amanda Agan, Jennifer Doleac & Anna Harvey, Misdemeanor Prosecution (Nat’l Bureau of Econ. Res., Working Paper No. 28600, 2021), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf (finding non-prosecution of a nonviolent misdemeanor offense leads to large reductions in the likelihood of a new criminal complaint over the next two years); David Huizinga & Kimberly L. Henry, The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies, in, THE LONG VIEW ON CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH 244 (Akiva M. Liberman, ed., 2008); John Laub & Robert Sampson, Life-Course and Developmental Criminology: Looking Back, Moving Forward, J. OF DEV. AND LIFE-COURSE CRIMINOLOGY (2020); Shelli B. Rossman, Janeen Buck Willison, Kamala Mallik-Kane, KiDeuk Kim, Sara Debus Sherrill, P. Mitchell Downey, Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York, Nat’l Inst. of Justice (April 2012), <https://www.ojp.gov/pdffiles1/nij/grants/238264.pdf>.

³ New York City Comptroller, Press Release: Cost of Incarceration per Person in New York City Skyrockets to All-Time High (Dec. 6, 2021), available at <https://comptroller.nyc.gov/newsroom/comptroller-stringer-cost-of-incarceration-per-person-in-new-york-city-skyrocks-to-all-time-high-2/>.

⁴ New York State Unified Court System, The Future of Drug Courts in New York State: A Strategic Plan (2017), https://www.nycourts.gov/legacyPDFS/courts/problem_solving/drugcourts/The-Future-of-Drug-Courts-in-NY-State-A-Strategic-Plan.pdf.

from both Democrats and Republicans,⁵ is favored by members of the American public,⁶ as well as crime victim survivors.⁷

The courts are not the only avenue for harm reduction in New York City. In 2021, New York City opened two supervised drug-injection sites which provide clean needles, naloxone, and reference to treatment. Within the first 6 months they intervened in more than 300 potentially fatal overdoses. There has been effort to get this implemented statewide via the Safer Consumption Services Act, despite opposition from the Governor.⁸

Adults in New York City are also able to request naloxone, and attend free training to learn about its administration. There are a multitude of state-run and private, community-based therapeutic environments offering education, treatment and housing referrals (if not supportive housing itself) for substance use and mental health issues, and specific ones for unhoused youth. There are also community-based “clubhouses” for people with mental illness where they can work with peer specialists, access food, health and housing referrals as well, and many agencies that assist survivors of sex trafficking.⁹

2. How do legal frameworks affect the harm reduction policies, programmes, and practices (whether related to drug use or otherwise) that are available in your community, country, or region? Are there laws or policies that either facilitate or serve as a barrier to adopting or implementing certain harm reduction policies, programmes, and practices? Aside from legal and regulatory barriers, are there other obstacles in place? Please provide specific examples.

Without a statutory framework in place, the harm reduction policies, programmes and practices discussed above either do not exist, exist on a much smaller scale, or exist unevenly, as it is up to local jurisdictions to create the same on an ad-hoc basis.

This is the case in New York state with respect to mental health court. Drug treatment courts were created by statute over a decade ago, yet the statute itself has not been updated to reflect innovations in science, and the conclusions that must be drawn from the social science data collected since then; including codifying harm reduction principles, expanding the reach of the court to accept all individuals with substance use issues charged with any crime, allowing pre-plea models of participation (which would not automatically exclude people with immigration concerns or job licensing issues, as it does in its current iteration), and ensuring

⁵ United States Republican Party Committee, Bipartisan Safer Communities Act (Sept. 2022) <https://www.rpc.senate.gov/policy-papers/the-bipartisan-communities-acts-treatment-court-funding>.

⁶ National Center for State Courts, State of the State Courts: 2022 Poll, https://www.ncsc.org/_data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf

⁷ Alliance for Safety and Justice, Crime Survivors Speak: National Survey of Victim’s Views on Safety and Justice (2022), available at [Crime Survivors Speak Report.pdf \(allianceforsafetyandjustice.org\)](https://allianceforsafetyandjustice.org/Crime-Survivors-Speak-Report.pdf).

⁸ New York State Senate, Bill S.399A (introduced by State Senator Gustavo Rivera), available at <https://www.nysenate.gov/legislation/bills/2023/S399/amendment/A>.

⁹ See, e.g., Fountain House, <https://www.fountainhouse.org/about/clubhouse-model>.

decision making as to who is accepted and who is not and the appropriate treatment informed by clinicians and not be attorneys enmeshed in the adversarial process.

Other barriers to adopting/implementing certain practices relate to ignorance, stigma, fear mongering and scapegoating. For example, where someone has a mental health or dual diagnosis of mental illness and chemical addiction, stigma and ignorance persist.

Both issues of physical health and those of mental illness alike should be governed by public health – yet the symptoms of mental illness are too often criminalized versus treated, resulting in approximately half of our state and city’s carceral population having mental health needs (the Rikers Island facility houses more people with mental illness than any psychiatric hospital in the entire country).

People with mental illness are frequently assumed to be dangerous despite the fact that those with mental illness are statistically 10-11 times more likely to be a *victim* of violence - as opposed to a perpetrator;¹⁰ that only three to five percent of violent crimes are attributed to people with mental illness;¹¹ and that people charged with violent crimes are just as likely to succeed and rehabilitate in problem-solving courts as those charged with non-violent crimes.¹²

3. How does the jurisdiction in place in your region/country/state approach the criminalization (or decriminalization) of drug use? Please provide disaggregated data, including but not limited to gender, age, race/ethnicity, status of poverty, sexual orientation and the number of persons deprived of liberty for drug possession or consumption.

In 2021 New York state legalized cannabis, allowing New Yorkers aged 21 and older to consume or possess up to 3 ounces of cannabis for recreational use, store up to five pounds of cannabis, or give them to others aged 21 and older.¹³ People with certain marijuana-related convictions were to have their records expunged immediately, making it easier for previously-convicted offenders to have greater access to opportunities in employment, housing, and even civic engagement for some. The state’s 2014 medical marijuana law was further expanded in terms of eligible conditions and permitted forms of ingestion.

Prior to legalization, Hispanic people in New York City were arrested for low-level marijuana charges at five times the rates of white people; and Black people were arrested between eight and

¹⁰ Durham, The Myth Of Violence and Mental Illness, available at <http://cmhadurham.ca/finding-help/the-myth-of-violence-and-mental-illness/>.

¹¹ Mental Health Myths and Facts, MentalHealth.Org, <https://www.mentalhealth.org/basics/myths-facts>.

¹² Naples, Michelle and Steadman, Henry, “Can Persons with Co-occurring Disorders and Violent Charges Be Successfully Diverted?” Intl J. on Forensic Mental Health, 2(2):137-143 (Oct. 2003), https://www.researchgate.net/publication/232426982_Can_Persons_with_Co-occurring_Disorders_and_Violent_Charges_Be_Successfully_Diverted.

¹³ New York State Office of Cannabis Management, “Adult-Use Cannabis Legalization: What You Need to Know,” available at https://cannabis.ny.gov/system/files/documents/2022/02/adult-use-cannabis-legalization_0_1.pdf.

15 times the rate of white people,¹⁴ despite the fact that white and Black people had similar rates of usage.¹⁵ Overall, 87 percent of those arrested in recent years were black or Hispanic.¹⁶

There are additional bills currently pending in the New York State legislature that would take further steps to decriminalize substance use, sex work, or mental health crises, but they do not appear likely to pass in the 2024 legislative session.¹⁷

I defer to other New York experts on the answers to questions #4-8 listed on the questionnaire.

If you have any questions about my submission, you can reach me at kbajuk@nycds.org.

¹⁴ Mueller, Benjamin, Robert Gebeloff, and Sahil Chinoy. “Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic.” *The New York Times* (May, 2018), available at <https://www.nytimes.com/2018/05/13/nyregion/marijuana-arrests-nyc-race.html>.

¹⁵ Center for Behavioral Health Statistics and Quality. 2016 National Survey on Drug Use and Health: Detailed Tables. Substance Abuse and Mental Health Services Administration, Rockville, MD (2016) <https://www.samhsa.gov/data/sites/default/files/NSDUH-DefTabs-2016/NSDUH-DefTabs-2016.pdf>.

¹⁶ Drug Policy Alliance. <https://drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional>.

¹⁷ See, e.g. NYSenate.gov. “2023-S2340,” <https://www.nysenate.gov/legislation/bills/2023/S2340>; NYSenate.gov. “2023-S4396,” <https://www.nysenate.gov/legislation/bills/2023/S4396>; Sydney Rockwood, “Lawmakers Want to Decriminalize Adult Consensual Sex Work,” *The Legislative Gazette* (Mar. 2023) legislativegazette.com/lawmakers-want-to-decriminalize-adult-consensual-sex-work.