

Analysis of  
*Resolved: The abuse of illegal drugs ought  
to be treated as a matter of public health,  
not of criminal justice.*

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## 1 Introduction

Welcome to the 2010 Mean Green Debate Workshop. For this summer we will be focusing on the following debate topic:

Resolved: The abuse of illegal drugs ought to be treated as a matter of public health, not of criminal justice.

This is clearly a topic of great contemporary interest. Medical marijuana (which we will see is not *exactly* what is meant by a public health approach) has become a hotly debated topic in many states with California voting on a ballot initiative to further move away from a traditional “war on drugs” approach to marijuana.

This essay will begin with a discussion of the wording of the topic. I will then briefly survey a variety of positions on each side of the topic.

## 2 Wording Analysis

I will be blunt. The wording of this topic is very difficult to grasp. I will work through the some of the key phrases in the topic to give you a sense of the clash in the resolution. Your view of the resolution will likely evolve as you debate - as my views have evolved over just the 48 hours since I began work researching the topic. I bet I would have a different view after coaching the topic at camp for a couple of weeks.

### 2.1 “treated”

We are asked to evaluate two different ways to “treat” the abuse of illegal drugs. As is a (bad) habit in LD topics, the statement is in the passive voice. This means that it is not clear who is doing the “treating” in the resolution. We can imagine a number of actors relevant to the abuse of illegal drugs. We could be talking about law enforcement officers. We could be talking about judges or policy makers.

Without a clear agent it is not clear what it means to treat drug abuse one way or another. This ambiguity leaves us to debate at a high level of generalization. We might ask how our “society” treats issues related to drug abuse. This approach forces us to consider how a broad strategy towards drug use can have implications for many sorts of actors ranging from police officers to policy makers to social workers.

In asking about the treatment of drug issues, we are asking about how our general strategies and assumptions (what you might call our mindsets) towards drug use.

### 2.2 “public health”

The affirmative will focus on treating drug abuse as a matter of public health. It is worth looking into what public health represents. It is not synonymous with medicine or the treatment of illegal drugs as medicines. Instead, public health goes back to attempts to trace the origins of disease outbreaks. Public health focuses on the health of the entire public. This means focusing on issues like how to contain the spread of H1N1 influenza or to reduce the prevalence of obesity. The goal is a healthy public.

There is no single public health approach to drug use. Instead, there are a series of principles common to public health approaches to drug use.

1. Community based approaches - Public health proponents tend to see disease (or conditions like drug use) as a product of more than simply a bacteria or something like that. Instead, health problems are a result of a complex series of interactions with one's family, one's community, one's country, and one's natural environment. Obesity, for example, is not just an individual failure but a product of laws that subsidize high fructose corn syrup, policies that put sugary drinks in schools, family traditions that associate food with success, and many other factors. Treating the health problem involves understanding this complex set of interactions rather than simply looking for a miracle pill or surgery.
2. Education - In part because of the complex causes of health problems, public health professionals often focus on education and the recruitment of individuals to participate in their own treatment. An intervention to address a major health problem often involves the participant rather than just being something that happens to someone. There is a general skepticism of the use coercion to force people to change behaviors and education is seen as the alternative.
3. Pragmatism - Public health proponents often promote the testing of behavioral interventions (like drug treatment programs or education programs) with experiments just like one would do on a new drug. Rather than assuming that an education program works (or policies that imprison people for possessing a drug), public health proponents like to use experiments to test whether their programs actually improve health outcomes. Does the education program actually reduce drug use in children? Public health people want to know and they are more than willing to abandon approaches for which the data do not seem to show an effect.

Not everyone in public health embraces each of these characteristics. Even those that embrace all or most of these approaches mix and prioritize them in various ways. Defining a public health approach to drug use in a way that will be clear enough for your debaters will be a key challenge on this topic.

It is worth emphasizing that a public health approach is not the same as medical marijuana legalization or legalization/decriminalization. These policies are components of some public health oriented reform efforts - but they are not the entirety of the approach. In many ways, the topic would

have been much easier to analyze if the framers had just said drug decriminalization - but they did not. We instead need to address a much broader range of proposals.

In the affirmative case strategy section I will provide some more concrete advice on how to define a distinctively public health approach to drug use.

### **2.3 “criminal justice”**

We are all pretty familiar with criminal justice approaches to drug abuse. While the approach is so common as to be assumed, the typical criminal justice approach is to prohibit the use/possession/sale of drugs and to use law enforcement to back up the prohibitions. This being said, there are many within the criminal justice community that propose reductions in sentencing guidelines, treatment before imprisonment, and the like. As in public health, there is no single criminal justice approach to drug policy.

If there is a common element to criminal justice approaches it is probably the use of coercion to back up policy. A criminal justice approach to treatment would involve forcing someone into treatment. This can be backed up like probation that if a person does not complete treatment then they may be sent to jail. The coercive component seems to be the defining element. In some areas, criminal justice has embraced prevention and community based solutions (called community based policing) so these do not make good ways to differentiate criminal justice from public health approaches.

If you want to clearly differentiate public health approaches from criminal justice approaches, the key seems to be the threat of coercion in criminal justice approaches.

### **2.4 “not”**

The overall structure of the topic is not one I have seen used since 1994 - though I may have forgotten one or two. Back then, the affirmative had to defend that education was a right not a privilege. There was a significant debate over whether the negative could propose that education was neither a right or a privilege. Affirmatives wanted to force negatives to defend that education was specifically a privilege. In this case, affirmatives will want to force the negative to defend a specifically criminal justice approach. It is not clear whether the negative has to accept this burden.

Consider the following toy resolution. Resolved: that one ought to eat hamburgers not hot dogs. It would seem appropriate to reject the resolution based on an argument that one ought not eat meat at all. In this case, it is not clear whether the negative could propose treating drug use as an issue of something other than public health or criminal justice. This problem will become clearer when I talk about negative positions. For now, just think about what the construction “not of criminal justice” means in limiting the negative ground.

### **3 What the Topic Does Not Say**

It is important to note that the topic does not actually say that we are debating within the context of the United States. It does not provide a geographic or temporal context at all. There is a lot of evidence from other countries from around the world. You need to be consider whether your arguments are specific to the US context. If they are, you may be vulnerable to an opponent who proposes that the judge down-weight or disregard arguments that depend on a geographic context that is not present in the resolution. On the other hand, it is quite hard to talk about the effects of changes in drug policy without considering a specific legal context.

## **4 Affirmative Approaches**

The affirmative has a huge amount of ground. It would not be hard to imagine judging ten rounds on this topic and never hearing the same affirmative position twice. This is the reverse of most topics where there are only two or three core affirmative positions and many, many negatives. It will nice to see affirmatives have the options for a change.

### **4.1 Consequentialist Approaches**

#### **4.1.1 Legalization/Decriminalization**

The most common affirmative approach will be to say that a public health approach will lead to better consequences for society. I expect most cases to use legalization or decriminalization as their core advocacy. This is for a pretty good reason. If nothing else, it is clear that making something legal

removed it from the criminal justice system and thus provides a clear clash with the criminal justice approach.

It is important to distinguish legalization and decriminalization. Under legalization, a drug is simply made legal like many substances today. In most such proposals, the drugs become treated like alcohol or tobacco. It is not that anyone can buy them (there are often still age restrictions) or that there are no regulations on them at all (like restrictions on the sale of alcohol based on potency). Rather, the substances are legal to produce, buy, own, and consume under specific circumstances. Decriminalization would leave the status of the drugs as illegal but reduce penalties of enforcement for ownership or use of the drug. This can lead to strange situations where the drug is illegal to sell - but legal to own in small quantities or legal to use but not to transport. Most of the arguments that follow apply most strongly to legalization but also apply to vary degrees to different systems of decriminalization.

The potential advantages of legalization/decriminalization are diverse and one could imagine a variety of cases. The most prominent advantages discussed in the literature is that legalization/decriminalization will reduce the black market sale of drugs - leading to lower levels of smuggling, drug violence, and the like. If the transportation and sale of drugs becomes legal, people will not need to go outside of the law to buy drugs. As a result, the demand for a black market will dry up. If you can buy drugs at 7-11, you don't need to take the risks of dealing with some violent dealer of questionable character.

A second advantage that is gaining considerable attention is that legalization can raise revenues (this is hard to link to decriminalization). If we legalize and tax drugs, we may find new revenue sources just as we currently tax tobacco and alcohol. California is facing a major budget shortfall and many are promoting marijuana legalization as a means to raise additional funds. What better way to raise money than voluntary taxation?

A third set of advantages focuses on the connection between criminalization and prisons. Prisons are expensive to build and run. Our current system that focuses on imprisoning people for drug crimes is purported to be a primary reason that our prisons are overcrowded (and disproportionately composed of members of racial minorities). If we decriminalize, some argue, we can reduce imprisonment, save money, focus on imprisoning the truly violent offenders, and avoid the racially disparate effects of current criminal justice approaches. Decriminalization links here about as well as legalization.

This is really just the beginning. Each of these advantages could really take up a whole case. It is worth emphasizing that the relationship between public health and legalization/decriminalization is not entirely clear. You may have noticed that the term health was not prominent in the previous discussion. It is worth wondering whether legalization (though clearly not a criminal justice strategy) is actually a public health strategy. There are people within public health that defend legalization - to be sure. There are also Mac users that propose legalization but we would not call legalization a Mac strategy. I start here, though, because I expect legalization and decriminalization to be common affirmative approaches.

There is an important caveat with the legalization position. If a drug is legalized, it is no longer an illegal drug. This creates a strange paradox within the resolution. If a public health approach involves the legalization of drugs, then the initial policy is about an illegal drug but after that instant in time the policy is not about an illegal drug. The drug changes status due to the proposal of the case, which makes the relationship between the proposal in the case and the resolution strange. An alternative is to advocate decriminalization instead of full legalization - but note that decriminalization will have different connections to the various advantage areas. If you elect to advocate legalization, you need to be prepared to defend whether legalization is a policy about the treatment of illegal drugs.

#### **4.1.2 Harm Reduction**

One approach to drug treatment that has emerged from the public health literature is referred to as harm reduction. Harm reduction defines itself in contrast to criminal justice approaches that argue that the only acceptable amount of drug use is no drug use. This criminal justice orientation is referred to as an abstinence based approach. Harm reduction approaches (again, coming directly out of public health literatures) counter that abstinence programs don't work. Instead of just telling people that drugs are bad and threatening to arrest people who use drugs, harm reduction advocates say that we should provide services to drug users that will reduce the harm of the drug use to the users and others.

The clearest example of the harm reduction approach is a needle exchange program. A needle exchange program provides clean needles to injected drug users. Criminal justice proponents argued that such an approach would simply encourage, or at least fail to discourage, drug use. Harm reduction

advocates argued that needle exchange reduces the probability that a person will contract HIV from an infected needle. The harm reduction approach argues that it is better to engage drug users and to make drug use safer rather than to use arrests and coercion to discourage drug use.

There is a ton of research on harm reduction approaches to drug use - with special attention to HIV transmission. One can imagine a broad range of potential examples. Promotion of designated drivers is a harm reduction approach to alcohol use - though this may not be an example relevant to the resolution.

The advantages to such an approach focus on the effectiveness of recruitment of drug users into the program (since they are not threatened with arrest) and the education of drug users to avoid risky behaviors.

### **4.1.3 Civil Rights**

As mentioned in the section on legalization, there is a considerable literature about the racially disparate outcomes of criminal justice enforcement of drug laws. The most famous examples are in the sentencing guidelines for different drugs. Powder cocaine - a drug used disproportionately by affluent white offenders - have more lenient sentencing guidelines (recommended sentences for prison time) than crack cocaine - a drug used disproportionately by poor offenders of racial minorities. The result, some argue, is a prison system that is disproportionately composed of racial minorities. Entire generations of young male members of racial minorities are argued to be lost to this criminal justice based system.

While this is a common criticism of criminal justice approaches the link to public health approaches is not entirely clear. Given how prominent this argument is in the literature on drug policy, though, it is likely to come up in rounds.

## **4.2 Rights-based / Side Constraint Positions**

Not all critics of criminal justice approaches focus on the consequences of coercive drug policies. Some argue from a perspective of individual rights and constraints on legal action. The basic position is that criminal justice positions tend to endanger individual rights. One can argue that criminal justice approaches tend to violate individual privacy, property rights, or other

rights claims. If the public health approach is consistent with these rights (possibly by avoiding coercion), it ought to be the preferred approach.

This approach has the advantages and disadvantages of all deontological and side-constraint approaches. Such approaches can avoid big impact debates by telling judges to focus on rights first (say, rights as trumps in Dworkin's famous phrase) before one considers big impacts. However, these claims avoid direct comparison and have become tough sells in some circuits.

There is also the problem that the link between public health approaches and protecting rights is not always clear. The focus in the literature has been on how criminal justice approaches violate rights, not how public health approaches protect rights. If the negative can defend some third option, this affirmative strategy can become difficult to win on. The approach is more "anti-neg" than it is pro-aff.

The literature on rights does not deal very well with issues of addiction and even health/illness for that matter. Developing a deontological position would be intellectually interesting but quite a challenge.

### 4.3 Critical Positions

There is an ocean of critical arguments for the affirmative of this topic. Criminal justice is an area that has been subject to tremendous amounts of attention in critical social theory - behind only topics like media and economic inequality. A large number of authors have written about the assumptions that lie behind criminal justice policies related to disciplinary action and the like. The transition from criminal justice to public health is actually a subject Foucault wrote on at length, actually.

An example of this approach would be an argument that criminal justice approaches tend to institutionalize drug use rather than actually reducing their use. If this is the case, criminal justice approaches are not going to be effective in the goals they espouse. Similar positions emphasize the role of criminal justice approaches to strengthen the role of government (statist critiques) or the link between coercive criminal justice and racial disparities.

Critical approaches may also include alternative approaches to understanding problems. This topic seems like fertile ground for narratives of drug use and interactions with the criminal justice system. These narratives, drawing on standpoint epistemology, could provide a great deal of insight into drug abuse as well as abuse inherent in the criminal justice system.

The difficulty for the various critical positions on affirmative is that the

focus is more “anti-neg” than pro-affirmative - as with the deontological positions. While there are many critiques of criminal justice practice (social discipline, racial disparities, etc.), it is not clear that many of these positions are actually consistent with a public health approach. I will talk more about this when I discuss negative critical arguments.

## 5 Negative Approaches

For once, it seems that the negative has fewer choices than the affirmative does. Usually, there are many, many approaches for the negative to design cases. While there is a lot of evidence available for the negative, most of it is reactive. There is evidence to counter specific claims the affirmative may make (like evidence to counter the claim that legalization will reduce the existence of the black market and related crime). There are very few reasons actively supporting a criminal justice approach to drug use. This seems to be a situation where the role of the criminal justice system is so deeply assumed that the only people writing about it are those who are critical of it.

### 5.1 Getting Tough on Drugs

The most typical negative case will be a simple “get tough on drugs” position that drug abuse is bad and that only criminal justice approaches can reduce drug use. This position will be simple enough for a short negative case leaving the 1NC with a lot of time to turn or mitigate affirmative claims. In the absence of diverse case positions, negatives are going to have to rely on the advantages of the longer speech time and speech order (to react to the 1AC specifically) to overcome the affirmatives advantages of case positions.

I don’t need to say much about this position. All you need to do is think back to all of the “just say no” programs from school. That is what the most typical negative case will sound like.

There is some room for adaptation. As the example case will illustrate, not all criminal justice approaches focus entirely on imprisonment. There are specific criminal justice systems that focus on prevention and treatment. They retain the coercive elements of the criminal justice system (thus allowing for clash) but do not ignore the vast literature on the effectiveness of education and treatment.

My greatest concern on the topic is that it will be hard to distinguish the

affirmative from the negative. People within criminal justice have adopted what was considered public health policies about 15 years back. This has blurred the lines between the affirmative and negative of the topic. Most negatives will likely be variations on reformed criminal justice systems. I don't expect to see many people argue that the status quo criminal justice system is fine the way it is.

If only the topic had instead focused on decriminalization, we would have a relatively clear division between the sides. Instead we are in a world where courts (clearly criminal justice institutions) assign people to treatment and law enforcement is involved in education along side public health. You will need to dig deep to differentiate public health from criminal justice approaches. The cases focus on the role of coercion and voluntary action. In such a division of ground, the neg can argue that coercion is necessary to treatment. This is a tough argument to make based on the literature - but you have a tremendous time advantage, so it will work out.

## 5.2 Critical Positions

In addition to the simple “drugs are bad” position on the negative, there are some critical positions that may be appropriate for the negative - though some caveats will follow. One of my first reactions to this topic was the Foucault and other critics of biopolitics would really hate to chose between the terms in the resolution. From a biopolitical perspective, any perspective that attempts to shape the health of a population are prone to abuse. Clearly a criminal justice approach seeks to discipline the population to accept specific views of lifestyles. However, the public health approach also tries to shape the lifestyles of the public. Similarly, critiques of statist approaches may well reject both public health and criminal justice approaches to the use government to change the behavior of the people. Both public health and criminal justice communities have embraced community-based solutions recently - but both are often associated with large governmental programs (the CDC, DHHS, DOJ, DEA, etc.).

The challenge of these negative positions is that they may not be appropriate depending on how one interprets the “not” in the resolution. Almost all of critiques of public health will link (and maybe link more) to criminal justice approaches. If the negative has to defend a criminal justice approach, the critical ground shrinks substantially. If the negative can reject both approaches, the entire spectrum of statist critiques opens up. This is also the

case if you critique the resolution to say that one should reject the very notion of “illegal” drugs. Such a position can be situated within an anti-statist negative framework. This is likely to spark a debate over whether legalization is ground for the affirmative or the negative (as noted earlier).