

Briefing Memo

Date: 09/13/23
To: Teresa Mosqueda, Councilmember, Seattle City Council
Melanie Kray, Legislative Aide, Seattle City Council
Attn: Lisa Herbold, Councilmember, Seattle City Council
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From: Derrick Wheeler-Smith, Department Director, Seattle Office for Civil Rights
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Subject: SOCR Analysis of CB 120645 (Knowing Possession or Use in a Public Place)

PURPOSE

This memo is in response to Councilmember (CM) Mosqueda’s request for Seattle Office for Civil Rights (SOCR) to analyze CB 120645 (knowing possession or use in a public place). CM Mosqueda specifically requested analysis of race and social justice (RSJ) impacts, criminal legal system interactions, and the evidence comparing mandatory or criminal legal system (CLS)-based treatment to voluntary treatment.

SUMMARY & RECOMMENDATIONS

SOCR recommends the City to move toward a co-creation model of policymaking alongside communities most harmed by racism and other forms of oppression. We are committed to leading our work in this way and are interested in a continued partnership with City elected officials, policymakers, and community leaders.¹ In addition to a co-creation model, we recommend that the City Council conduct an intentional and thorough RSJ analysis prior to passing legislation, specifically prior to expanding the criminal code.

SOCR recommends the City to: (1) reduce racial disparities by prioritizing housing first models; (2) develop processes and policies to ensure people are not cycling through the criminal legal system and are provided with adequate treatment and care; and, (3) continue to invest in and further explore evidence-based supports such as permanent supportive and no barrier housing, contingency based management, and Community Health Engagement Locations (CHELs).

For additional background on the bill, please see the Council Central Staff memo(s).

RACE AND SOCIAL JUSTICE ANALYSIS

Drug prohibition has resulted in significant racial disparities both historically and currently, nationally and locally.² It is likely this ordinance will continue that pattern. Moreover, because the ordinance targets

¹ See e.g., [City’s Reentry Workgroup Report](#) and the [Community Taskforce Report on the CLS](#).

² See, e.g., for [national disparities](#); [local disparities](#), see, e.g., showing huge racial disparities in Seattle possession arrests when compared to general population and usage rates, or [this study](#), showing the same for drug delivery.

public use, it will inevitably target people who are unhoused or unstably housed. There is evidence of a nationwide movement to stigmatize the unhoused.³ This is a population that is disproportionately Black, Indigenous, and people of color (BIPOC), LGBTQ+, and disabled.⁴ It is vital for the City to continue to prioritize, expand investments, and further explore valuable housing first models, such as [permanent supportive housing](#) and [no barrier housing](#).

The history of drug prohibition in America is a history of de-medicalization and racialization. Substance use disorder was generally considered a medical issue until various racist narratives in the late 19th and early 20th centuries, after which it became a criminal issue for some people with some substances.⁵ This pattern continued as the Nixon administration rebranded drug prohibition as the “War on Drugs” and later admitted they had used drug prohibition as a pretense to target Black and leftist communities.⁶ It is important for the City to not fall into the pattern of further harming already vulnerable and marginalized groups and to address substance use disorder with a public health approach.

In addition, the ordinance invites potential racial bias by asking officers to determine who poses a threat of harm to others without defining that threat or subjecting that determination to meaningful review. The Department of Justice investigation that led to the consent decree noted signs of racially biased SPD enforcement. SPD has been found to [disproportionately stop and search Black and Native American individuals](#), even though white individuals are likeliest to carry a weapon. Lastly, BIPOC, particularly [Black men](#),⁷ people with mental illness, and substance use disorder are [frequently misperceived as violent](#), raising the possibility the threat designation will be overapplied to this stigmatized population.

RSJ Recommendation: In order to reduce racial disparities, focus on non-punitive, public health approaches by prioritizing housing first models, such as permanent supportive and no barrier housing.

CRIMINAL LEGAL SYSTEM EXPANSION IMPACTS

The ordinance has the potential to further overburden the competency and civil conversion systems,⁸ by cycling more individuals [through the system without providing stabilizing care](#). The ordinance asks officers to assess whether someone poses a threat to others and authorizes arrest if they do. It is likely that many such individuals if arrested will likely have competency issues and would be better served by contact with a designated crisis responder. An SOCR review of a one-day snapshot of people held only on

³ See, e.g. [this article from The Nation](#), or [Elon Musk’s recent call to boycott the law firm Latham Watkins](#) for representing unhoused people in a lawsuit against San Francisco. The movement may have begun with Christopher Rufo declaring Seattle “under siege” and [advocating for less compassion for and more enforcement of drug laws against the unhoused](#).

⁴ See, e.g., [See how Seattle’s homelessness crisis stacks up across the country and region \(seattletimes.com\)](#), [High rate of homelessness among King County’s LGBTQ youth | The Seattle Times](#).

⁵ For example, the criminalization of marijuana [was tied to anti-Mexican panic](#); opium prohibition [was part of a wave of anti-Chinese legislation](#); and cocaine prohibition [was tied to stereotypes of violent and sexually predatory Black men](#).

⁶ “We knew we couldn’t make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did.” [Legalize It All, by Dan Baum \(harpers.org\)](#)

⁷ [People see Black men as larger, more threatening than same-sized White men \(apa.org\)](#)

⁸ A civil conversion is when a person whose case was dismissed due to lack of competency is sent to a state hospital for civil commitment proceedings. Because of Federal rulings and delays in care, state hospitals have been discharging civil conversion patients to make room for the competency restoration patients. See, e.g., [King, 21 other WA counties file lawsuit citing state’s mental health failures | The Seattle Times](#), [Federal judge fines WA agency \\$100 million for mental health failures | The Seattle Times](#).

SMC cases found that 42% were ordered to undergo competency evaluations in their cases.⁹ Similarly, an SOCR review of available booking data found that of the 22 people with the most SMC bookings from August 2021 to April 2023, 14 (59%) were ordered to undergo competency evaluations on at least one of those bookings, and 11 (50%) were found incompetent.¹⁰ And data provided by Disability Rights Washington (DRW) shows extremely high rates of drug use and the need for drug treatment among people ordered to undergo competency evaluations.¹¹

Budgetary Concerns

Seattle is facing a budget deficit for 2024 and 2025. Moreover, it can expect the cost of many of its criminal legal system services to increase. The dissolution of Community Court means many cases that would otherwise have been dismissed quickly must now be handled either in mainstream court (a much lengthier process) or via diversion, which has a limited number of spots. This change will likely impact the budgets for Seattle City Attorney's Office (SCAO), Seattle Municipal Court (SMC), and the King County Department of Public Defense (for indigent defense services).

The ordinance is also likely to increase costs for the Seattle Police Department (SPD), which already struggle with staffing issues. Not only will the ordinance add a new law to enforce, but it will also require police officers to serve as outreach workers and to coordinate a service response for people suffering from substance use disorder. Such work is delicate, time-consuming, has the potential to increase overtime costs,¹² and might indirectly affect union contract renegotiations.

Similarly, the City is facing an overdue rate reset in its contract with King County for jail services. A single night in jail currently costs between \$250.35 and \$679.12. Those rates are projected to increase significantly. The ordinance has the potential to increase jail costs by increasing the number of people who are booked on the ordinance itself,¹³ increasing the number of people eligible for booking restriction override via SCAO's High Utilizer Initiative,¹⁴ and increasing the number of people who require medical/psychiatric services. DAJD is struggling with staffing and may not be able to meet these populations' needs.

CLS Recommendation: Develop processes and policies to ensure people experiencing mental and behavioral health disorders do not cycle through the CLS and are instead provided medical care, treatment, and other supports. This will likely improve health and public safety outcomes and reduce incarceration costs.

MANDATORY VERSUS VOLUNTARY TREATMENT

Treatment through the criminal legal system (CLS) necessarily begins with criminalized conduct. In this instance, the criminalized conduct is drug possession and public use. Before we address the questions of mandatory/CLS-driven treatment, it is important that we address criminalization itself. Criminalization of

⁹ SOCR review of July 11, 2022, booking data, available upon request.

¹⁰ SOCR review of available booking data, available upon request.

¹¹ DRW demographic analysis, available upon request.

¹² The \$31.3 million budgeted for such in 2023 was [estimated by Council Central Staff as likely to be insufficient](#).

¹³ Either via sentence or judicial warrant or an individualized exception to the misdemeanor pretrial booking restrictions, which DAJD states would prohibit booking on this ordinance. Booking increase would be much greater if/when the County lifts the booking restrictions.

¹⁴ A person qualifies for the High Utilizer Initiative by having at least 12 misdemeanor referrals in the previous five years.

drug use and personal possession is widely opposed by public health and addiction experts.¹⁵ Criminalization increases risky behaviors by forcing people to hide their drug use, steers them away from help and resources, increases overdoses through drug seizures and incarceration,¹⁶ stigmatizes people with substance use disorders,¹⁷ and leads to increased racial disparities.

Coercion in Treatment

Involuntary treatment can be either mandatory or coerced. Mandatory treatment is analogous to a civil commitment, in which a person is detained in a facility and forced to receive treatment against their will. Coerced treatment attempts to force people to accept treatment via the threat of sanction, usually criminal conviction and/or incarceration. Our health care system generally does not force treatment on people,¹⁸ and specifically does not threaten people with harm for refusing treatment. The limited scientific evidence indicates that mandatory treatment is [largely ineffective and sometimes harmful](#). Research on coerced treatment is mixed and [does not establish efficacy](#).

It is well established that jail reduces people’s ability to obtain jobs, access housing, and increases overdose rates upon release. Thus, while coerced treatment in the form of diversion and treatment courts may seem humane compared to incarceration, the approach is potentially unethical when viewed through a medical/health lens, as it involves threatening people with harm. Health professionals instead incentivize care through rewards, such as in contingency based management, where participants receive gift certificates for participation. The Mayor [recently announced](#) a contingency based management pilot program. SOCR recommends continued and increased investments for such alternatives.

Police as Outreach Workers

Making police the outreach workers for substance use treatment has several drawbacks. First, police are not trained outreach workers. The City employs and partners with skilled, trained, and trusted workers who could more effectively and efficiently perform this role. Outreach workers are most effective when they are trusted by the population they are trying to serve. The population targeted by this ordinance might be termed “overpoliced” – they are likelier to have been stopped, arrested, or subject to force than the average or median Seattle resident.¹⁹ For example, their thefts are likelier to have been investigated more than their employers’ thefts against them, which are not criminalized.²⁰ Moreover, even if they generally trust police, they may have outstanding warrants that will lead them to avoid contact or to be less than forthcoming in their interactions. And any interaction with police contains an

¹⁵ For example, the [National Institutes for Drug Abuse](#), the [United Nations](#), the [American Society for Addiction Medicine](#), the [American Public Health Association](#), [Human Rights Watch](#), the [International Red Cross and Red Crescent Societies](#), and the [World Health Organization](#), in addition to more than 100 mostly local healthcare and public health workers who previously [submitted a letter to the City Council](#).

¹⁶ For the increase in overdoses following seizures, see [Drug overdoses seem to spike in spite of police seizures: Study](#). For the increase in overdoses following incarceration, see, e.g., [this study](#) finding that people coming out of prison in Washington state were 129 times more likely to die of an overdose than the general public; or [this North Carolina study](#); or [this page](#) generally.

¹⁷ Stigma is a structural determinant of health that often leads to negative outcomes. See, e.g., [Understanding Stigma of Mental and Substance Use Disorders - NCBI Bookshelf \(nih.gov\)](#).

¹⁸ Apart from the “emergency exception,” involuntary treatment must be achieved via a court process. Similarly, when the state wishes to medicate a defendant in a criminal case to make them competent to stand trial, the state must prevail on several legal issues in a contested hearing. See RCW 71.05 and RCW 10.77 generally.

¹⁹ People charged with crimes in SMC [are almost all indigent and are disproportionately BIPOC](#). SPD was under a consent decree for a pattern of using excessive force. The DOJ investigation also found evidence of racially biased policing.

²⁰ Wage theft is investigated and enforced through a civil system that does not involve police, though it [amounts to more money than all criminalized forms of theft combined](#).

implicit threat of force, as police are armed, unlike other outreach workers. Outreach workers should be separate from the criminal legal system both to ensure an open and trusting response from the people they are trying to connect with and to avoid any conflicts in their mission.

Evidence-Based Treatment

There are many available treatment options that have been proven effective. One recommendation from the [King County Heroin and Prescription Opiate Task Force](#), the [City's Reentry Workgroup](#), and [Criminal Legal System Task Force](#) are Community Health Engagement Locations (CHELs). These [have been shown to reduce both public use and overdoses](#). CHELs also help to connect this difficult-to-reach population with necessary services. Finally, there are many other supports, such as permanent supportive housing, that have been shown to improve health outcomes.

Treatment Recommendation: Increase investments for non-criminal legal system approaches to treatment and care, including contingency based management and Community Health Engagement Locations.

OTHER CONSIDERATIONS

Democratic Process Concerns

It is vital that key stakeholders and the public are provided with thorough information and the opportunity to meaningfully participate in the deliberative process before Council finalizes and passes legislation. In this instance, the threat of harm standard that could lead to arrest is not currently defined. Two of the three workgroups have not yet met, and the ordinance preamble notes the work to come: the workgroups will identify appropriate diversion and treatment services, and a successor to Community Court. Ideally, this work would happen prior to the passage of this ordinance to minimize potential harm and reduce racial disparities.

FINAL THOUGHTS/NEXT STEPS

We value and appreciate the opportunity to provide our initial analysis, assess potential impacts, and provide recommendations on CB 120645. We are committed to a continued partnership with City Council, the Mayor, and other City leaders as thought partners, to further develop policy, and in co-creating strategies and supports alongside communities most harmed by racism and other oppressions.