

AFTER FIFTY YEARS OF THE WAR ON DRUGS, THE NATION LOOKS WEST: WHY OREGON REQUIRED THE DRUG ADDICTION TREATMENT AND RECOVERY ACT AND WHAT WE CAN LEARN FROM IT

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I. INTRODUCTION

Justice Louis Brandeis famously recognized that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹ With the passage of Ballot Measure 110 in November 2020, Oregon epitomized Justice Brandeis’s sentiment by becoming the first state to decriminalize small amount illicit drug possession.² The United States has viewed drug policy and substance use disorders through a criminal lens since 1971 when President Richard Nixon declared drug abuse to be “public enemy [number one]” and waged a “War on Drugs.”³ After nearly fifty years of this war, Oregon aims to “make screening, health assessment, treatment and recovery services for drug addiction available to all those who *need and want* access to those services and to adopt a health approach to drug addiction by removing criminal penalties for low-level drug possession.”⁴

Oregon Measure 110, or the Drug Addiction Treatment and Recovery Act, approved “two shifts in how the state deals with the use

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¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

² Drug Addiction Treatment and Recovery Act, 2021 Or. Laws ch. 2, *amended by* 2021 Or. Laws ch. 591.

³ See Brian Mann, *After 50 Years of the War on Drugs, ‘What Good Is it Doing for Us?’*, NPR (June 17, 2021, 5:00 AM), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us>.

⁴ Drug Addiction Treatment and Recovery Act, 2021 Or. Laws Ch. 591 (emphasis added).

of illegal drugs.”⁵ “First, the measure reduces penalties for small amount drug possession.”⁶ Second, it funds a new drug addiction treatment and recovery grant program by combining marijuana sales revenues with the anticipated savings achieved from the current cost of enforcing criminal drug possession penalties.⁷

This state law, implemented via Oregon Senate Bill 755, passed in response to a longstanding, criminal-centric, and failed public policy approach to drug use. Measure 110 addresses the need for change as Oregon law enforcement arrested more than 8,000 people in 2017 for nothing more serious than simple drug possession.⁸ This effort cost the state an average of \$15,000 per case, which is more than the average cost to provide drug treatment.⁹ Yet Oregon ranks nearly last out of the fifty states in access to treatment.¹⁰ This is troubling given that one in eleven Oregonians suffer from drug use disorder.¹¹ The Drug Addiction Treatment and Recovery Act demonstrates Oregon’s recognition that it must “shift its focus to addressing drugs through a humane, cost-effective, health approach” as drug-possession-related recidivism results from the inability to access treatment.¹²

It is important to recognize Oregon as a pioneer in drug decriminalization to encourage other states to follow suit and to push the federal government to understand and acknowledge the dire need to reframe the narrative surrounding substance use disorders. This Comment traces the development of drug policy in the United States to illustrate why Oregon enacted the Drug Addiction Treatment and Recovery Act, how the statute has been implemented, and what other states can, and should, take away from Oregon trailblazing into drug decriminalization.

Part II of this Comment provides a history of the War on Drugs as well as its intended and unintended consequences. Part III describes both foreign and domestic drug policy reform efforts. Part IV then turns to Oregon and focuses on the State’s drug decriminalization history, its drug use landscape, and key components of its most recent

⁵ OR. LEGIS. POL’Y AND RSCH. OFF., MEASURE 110 BACKGROUND BRIEF 1 (2020) [hereinafter OR., MEASURE 110 BACKGROUND BRIEF].

⁶ *Id.*

⁷ *Id.*

⁸ Drug Addiction Treatment and Recovery Act, 2021 Or. Laws ch. 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

drug reforms. Part V identifies and analyzes what other states should glean from Oregon's approach. Finally, Part VI concludes this Comment by emphasizing the necessity for widespread drug policy reform in the United States.

II. HISTORY OF THE WAR ON DRUGS

Acknowledging the history of the War on Drugs and its impact lays the foundation for understanding why Oregon enacted drastic drug policy reform aimed at enhancing access to evidence-based treatment for individuals with substance use disorders. This Part provides a history of the American War on Drugs by describing the evolution of the country's key drug policies over the past fifty years, beginning with those of the Nixon Administration. It then highlights how these policies have failed by instigating unprecedented levels of mass incarceration, racial disparities, and economic and medical turmoil in the United States.

A. *Fifty Years of United States Drug Policy*

President Nixon identified “drug abuse as ‘a serious national threat’” in July 1969, pointing to “a dramatic jump in drug-related juvenile arrests and street crime” during the 1960s.¹³ Soon thereafter, Congress passed Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly referred to as the Controlled Substances Act (CSA).¹⁴ The CSA has provided the legal basis for the government's War on Drugs since its codification. It superseded all prior federal drug laws and established the currently used five-schedule system for categorizing drugs based on their medicinal value and misuse potential.¹⁵ The CSA also established the National Commission on Marijuana and Drug Abuse—known as the Shafer Commission after its chairman, Pennsylvania Governor Raymond Shafer—to study cannabis abuse in the United States.¹⁶ Giving the

¹³ *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), <https://www.npr.org/templates/story/story.php?storyId=9252490>.

¹⁴ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 100–709, 84 Stat. 1236, 1242–84 (codified at 21 U.S.C. §§ 801–971).

¹⁵ See Controlled Substances Act, 21 U.S.C. § 812.

¹⁶ Emily Dufton, *Richard Nixon Went to War on Marijuana. Donald Trump Is Making the Same Mistake with Opioids*, WASH. POST (Apr. 20, 2018, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/04/20/richard-nixon-went-to-war-on-marijuana-donald-trump-is-making-the-same-mistake-with-opioids>.

Commission two years to interview, survey, and research, Nixon “hoped the commission would connect cannabis to the troubles of the time . . . warranting marijuana’s placement in Schedule I, the strictest and most highly punishable level of control.”¹⁷

In June 1971, Nixon officially declared a “War on Drugs” and identified drug abuse to be “public enemy number one.”¹⁸ He argued “it [was] necessary to wage a new all-out offensive” against the so-called drug scourge.¹⁹ The White House demonstrated its commitment to that strategy by ignoring scientific evidence presented by the 1972 Shafer Commission Report.²⁰ After finding no link between cannabis and criminal behavior, the Report recommended that the federal government direct its resources toward the ongoing heroin epidemic as opposed to the enforcement of cannabis criminalization.²¹

Nixon publicly dismissed these findings and rejected the Report’s recommendations to decriminalize cannabis.²² One year later, Nixon created the Drug Enforcement Agency (DEA) to coordinate the efforts of the multiple federal agencies involved with drug policy. Since its founding, the DEA’s mission has been “to enforce the controlled substances laws and regulations of the United States.”²³

Despite the Nixon Administration’s anti-drug policy efforts, “eleven states decriminalized marijuana possession” between 1973 and 1977.²⁴ Also in 1977, President Jimmy Carter was elected on a platform that included ending federal criminal penalties for possession of up to one ounce of marijuana.²⁵ But just a few years later, incarceration rates began to skyrocket under the Reagan Administration’s tough-on-crime tactics.

Shortly after President Reagan took office, Nancy Reagan began her “Just Say No” anti-drug campaign, which mirrored the zero tolerance policies of the Reagan War on Drugs that came to define the

¹⁷ *Id.*

¹⁸ The Editors of Encyclopedia Britannica, *War on Drugs*, ENCYC. BRITANNICA (Sept. 20, 2022), <https://www.britannica.com/topic/war-on-drugs>.

¹⁹ Mann, *supra* note 3.

²⁰ Dufton, *supra* note 16.

²¹ *Id.*

²² *Id.*

²³ *About*, DEA, <https://www.dea.gov/who-we-are/about> (last visited Feb. 21, 2022).

²⁴ *A History of the Drug War*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Feb. 21, 2022).

²⁵ *See Timeline: America’s War on Drugs*, *supra* note 13.

1980s.²⁶ The Comprehensive Crime Control Act of 1984 dramatically increased federal penalties for the cultivation, possession, or transfer of marijuana.²⁷ This comprehensive revision of the United States criminal code also included the Sentencing Reform Act, which created the United States Sentencing Commission (USSC) and abolished federal parole.²⁸

Two years later, Reagan signed the Anti-Drug Abuse Act of 1986, which allocated \$1.7 billion to the War on Drugs and established a series of mandatory minimum prison sentences for drug offenses.²⁹ This legislation notably included a massive 100-to-1 gap between the amounts of crack and powder cocaine that resulted in the same minimum sentence.³⁰ Crack cocaine is chemically identical to powder cocaine but was cheaper and, therefore, more popular among lower-income Americans.³¹ Congress further amended the statute in 1988 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession.³² This revision also re-established the federal death penalty and created the Office of National Drug Control Policy (ONDCP).³³

Although President Bill Clinton campaigned on a platform that promoted treatment over incarceration, he perpetuated the drug war once he entered office in 1993.³⁴ For example, Clinton signed the Violent Crime Control and Law Enforcement Act of 1994. Title VI of the legislation, the Federal Death Penalty Act, created sixty new death penalty offenses, including non-homicidal narcotics crimes.³⁵ Further,

²⁶ *A History of the Drug War*, *supra* note 24.

²⁷ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 502, 98 Stat. 1976, 2068–69.

²⁸ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551–3586).

²⁹ The Editors of Encyclopedia Britannica, *supra* note 18.

³⁰ *Id.*

³¹ See *Crack vs Cocaine: What's the Difference Between Crack & Cocaine?*, AM. ADDICTION CTRS., <https://americanaddictioncenters.org/cocaine-treatment/differences-with-crack> (last visited Nov. 13, 2022); The Editors of Encyclopedia Britannica, *supra* note 18.

³² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6371, § 404(a), 102 Stat. 4181, 4370.

³³ *Id.*

³⁴ See *Timeline: America's War on Drugs*, *supra* note 13; see also *A History of the Drug War*, *supra* note 24.

³⁵ Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Title VI, § 60001, 108 Stat. 1959 (codified at 18 U.S.C. § 3591 et. seq.).

in 1995, the USSC released a report acknowledging the racial disparities for prison sentencing for powder cocaine versus crack.³⁶ The Commission suggested reducing the sentencing discrepancy; however, the Clinton Administration rejected the USSC's recommendation for the first time in history.³⁷

At the turn of the century, President George W. Bush “arrived in the White House as the drug war was running out of steam—yet he allocated more money than ever to it.”³⁸ During President Bush's four-year term, law enforcement conducted “about 40,000 paramilitary-style SWAT raids on Americans every year—mostly for nonviolent drug law offenses, often misdemeanors.”³⁹ Although Bush's drug czar, John Walters, focused on marijuana prohibition and promoting student drug testing, state-level reforms slowed the growth of the drug war.⁴⁰

Once public concerns regarding the effectiveness of the War on Drugs increased, public support for the most draconian aspects of the drug war began to wane.⁴¹ Such public sentiment culminated in notable drug policy reforms, including state-level marijuana legislation and Congressional enactment of the Fair Sentencing Act of 2010 under the Obama Administration.⁴² The Fair Sentencing Act reduced the 100-to-1 crack-to-powder drug quantity ratio to an 18-to-1 disparity.⁴³ The Obama Administration also passed the Comprehensive Addiction and Recovery Act of 2016, which was intended to prevent substance use disorders by increasing access to treatment programs.⁴⁴ But this legislation is subject to state law, meaning state legislatures may impose additional regulations that further restrict treatment access. One such example is the state level restrictions for opioid agonist treatments.⁴⁵

³⁶ *Timeline: America's War on Drugs*, *supra* note 13.

³⁷ *Id.* *A History of the Drug War*, *supra* note 24.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The Editors of Encyclopedia Britannica, *supra* note 18.

⁴² *See id.*; *see also* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010 (2015), <https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010>.

⁴³ The Editors of Encyclopedia Britannica, *supra* note 18.

⁴⁴ *See* Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695.

⁴⁵ Kellen Russoniello, *Opioid Agonist Treatment: The Gold Standard for Opioid Use Disorder Treatment*, DRUG POL'Y ALL. 2 (2021).

Although Obama Administration reforms nudged drug policy in a direction that prevents substance use disorders rather than criminalizing them, the United States continues to refuse to implement a health-based approach. In 2017, President Donald Trump convened the White House Commission on Combating Drug Addiction and the Opioid Crisis to deal with the Administration's inability to stem the overdose tide.⁴⁶ The Commission was housed in the ONDCP and was tasked with providing recommendations aimed at improving the federal government's response to overdose deaths.⁴⁷

In July 2017, the Commission recommended that the Trump Administration declare the opioid epidemic a national emergency, which would release millions in federal funds to address the crisis.⁴⁸ Instead, Trump declared it a "public health emergency," and dedicated only \$57,000 in federal funding to the cause, which was a far cry from a reasonable investment.⁴⁹ In November 2017, the Commission made it explicit that more federal assistance was needed to tackle the opioid crisis.⁵⁰ Instead of adopting the Commission's recommendations, Trump followed in the footsteps of Nixon, publicly mocked the Commission's findings, and ultimately disbanded the group.⁵¹ President Trump also "resurrected disproven 'just say no' messaging aimed at youth."⁵²

As of 2021, President Joe Biden has admitted that it was a "mistake" to support legislation that ramped up the War on Drugs and dramatically increased incarceration, including the 1994 crime bill.⁵³ But admitting to past mistakes is not enough: Biden must now employ a compassionate approach to problematic drug use—a perspective that he claims to support.⁵⁴ Given the War on Drugs's intended and collateral consequences, the federal government must adopt real change that employs a humane approach to drug use by increasing access to treatment and harm reduction services.

⁴⁶ Dufton, *supra* note 16.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *A History of the Drug War*, *supra* note 24.

⁵³ *Id.*

⁵⁴ *Id.*

B. *Intended and Unintended Effects of the War on Drugs*

The War on Drugs has led to unprecedented levels of mass incarceration, racial and socioeconomic disparities, and economic and medical turmoil in the United States. Years after Nixon officially declared the War on Drugs, a top Nixon aide, John Ehrlichman, admitted:

You want to know what this was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. 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.⁵⁵

This sentiment marked the beginning of the United States becoming the world's leader in incarceration, and it continues to produce disastrous results today.

There are two million people in the United States' prisons and jails, which is a 500 percent increase over the past forty years.⁵⁶ The number of Americans incarcerated just for drug-related offenses increased "from 40,900 in 1980 to 430,926 in 2019."⁵⁷ Further, "[a]t the federal level, people incarcerated on a drug conviction make up nearly half the prison population."⁵⁸ And, while the number of people in prison for drug offenses at the state level has begun declining in recent years, it nonetheless "has increased nine-fold since 1980."⁵⁹ Additionally, harsh sentencing laws, including mandatory minimums, "keep many people convicted of drug offenses in prison for longer periods of time."⁶⁰ From 1986 to 2004, the average prison length for a federal drug offense increased from twenty-two months to sixty-two

⁵⁵ *Id.*

⁵⁶ THE SENT'G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (2021), <https://www.sentencingproject.org/app/uploads/2022/08/Trends-in-US-Corrections.pdf>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

months.⁶¹ The impact of mass incarceration in the United States is multifaceted, yet it has not produced the impacts its proponents championed. This is because incarcerating people for drug-related offenses neither substantially impacts rates of substance use nor significantly improves public safety.⁶²

In terms of decreasing the rate of substance use, numerous studies demonstrate that mass incarceration is not the answer. In 2014, Pew Charitable Trusts examined “data from federal and state law enforcement, corrections, and health agencies” and “found no statistically significant relationship between state drug imprisonment rates and three indicators of state drug problems: self-reported drug use, drug overdose deaths, and drug arrests.”⁶³ Simply stated, higher rates of drug-related imprisonment did not result in lower rates of drug use, arrests, or overdose deaths.

The Pew Study also provided state comparative analyses as illustrative examples; for instance, Tennessee imprisons drug offenders at more than three times the rate of New Jersey.⁶⁴ But the states’ rates of drug use are roughly equal.⁶⁵ Other studies have shown that incarceration leads to increased mortality from overdose; individuals who have been incarcerated are almost thirteen times more likely to die than the general population in the first two weeks after their release from prison.⁶⁶ Further, during that two-week period, previously incarcerated individuals are at a 129 percent greater risk of dying from an overdose than the general public.⁶⁷

In terms of public safety, mass incarceration has a negligible effect. Although crime rates have declined since 1990, “researchers attribute 75 to 100 percent of these reductions to factors other than incarceration.”⁶⁸ Notably, research indicates that “[i]ncreased

⁶¹ *Id.*

⁶² See THE SENT’G PROJECT, *supra* note 56.

⁶³ PEW RSCH. CTR., MORE IMPRISONMENT DOES NOT REDUCE STATE DRUG PROBLEMS 1 (2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems>.

⁶⁴ *Id.* at 5.

⁶⁵ *Id.*

⁶⁶ Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers>.

⁶⁷ *Id.*

⁶⁸ *Id.*

incarceration has no effect on violent crime.”⁶⁹ This is because incarceration is “ineffective at reducing certain kinds of crimes” as research “indicates that the public safety impact of incapacitating [low level offenders] is essentially nullified because they are rapidly replaced.”⁷⁰

While mass incarceration in the United States has neither improved rates of substance misuse nor increased public safety, it has led to racial disparities and economic turmoil. Black Americans constitute nearly 30 percent of all drug-related arrests but only account for 12.5 percent of all substance users.⁷¹ Further, “[a]lmost 80 percent of people serving time for a federal drug offense are black or Latino.”⁷² At the state level, 60 percent of those serving time for drug charges are people of color.⁷³ In terms of harsh sentencing laws, people of color account for 70 percent of all defendants convicted of charges that carry a mandatory minimum sentence.⁷⁴ The nation’s racial disparities connected to drug-related incarceration are simply staggering.

The steady increase in the federal prison population has fueled the increase in federal prison spending. From 1980 to 2013, spending increased 595 percent, and the War on Drugs was estimated to have cost the United States about \$1 trillion between 1971 and 2018.⁷⁵ In 2015, “the federal government spent an estimated \$9.2 million every day to incarcerate people charged with drug-related offenses.”⁷⁶ State governments spent another \$7 billion that year for drug-related charges.⁷⁷

The federal and state governments funnel exorbitant monetary resources and taxpayer dollars into a system that does not work. This nation has endured years of mass incarceration with no positive impacts on drug use or overdose epidemics. Other countries, like Portugal, faced similar issues but instead pivoted the country’s

⁶⁹ DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 5 (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

⁷⁰ PEW RSCH. CTR., *supra* note 63.

⁷¹ Pearl, *supra* note 66.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ PEW RSCH. CTR., *supra* note 63; Pearl, *supra* note 66.

⁷⁶ Pearl, *supra* note 66.

⁷⁷ *Id.*

approach and realized substantially improved outcomes. The United States must do the same.

III. ADDRESSING THE NAYSAYERS: PORTUGAL AS THE GOLD STANDARD AND MARIJUANA LEGALIZATION IN THE UNITED STATES

Opponents to progressive drug policy reform argue that drug decriminalization will increase the rate of drug use and produce other grave consequences. But Portugal became the prime example of how such progressive reform can put less people behind bars while simultaneously increasing access to treatment. Further, Portugal's decriminalization of small amount drug possession in 2001 did not result in an increase in rates of drug use.⁷⁸

Oregon acknowledged the genius of the Portuguese model and sought to replicate aspects of it in the state's own drug policy.⁷⁹ Some may argue that drug decriminalization in the European Union and the United States are not comparable. This rings hollow, however, given that state-level marijuana legalization in the U.S. has failed to produce the negative effects so many prohibitionists predicted. This Part describes why Portugal's model is the gold standard in drug decriminalization. It also examines the effects of marijuana legalization in the United States on a state level.

A. *Portugal: The Gold Standard in Drug Decriminalization*

Despite Portugal's roots as a historically Catholic, traditional, and conservative country, Portugal's government implemented a comprehensive drug policy reform that both treats drug possession as an administrative offense and includes "prevention and social education, discouraging people from further use of controlled substances, harm reduction, treatment for drug dependent people, and assistance in reintegrating them into society."⁸⁰ Portugal implemented its reforms in the midst of a serious drug crisis; while lifetime prevalence of illicit drug use had historically been low in the country, drug consumption became a subject of social concern in the late 1980s.⁸¹ This resulted from the rise of a significant population of

⁷⁸ See ARTUR DOMOSLAWSKI, DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 14–15 (Hanna Siemaszko trans., 2011).

⁷⁹ See Hilary Beaumont, *Oregon's Bold Drug Decriminalisation Sees Some Success – But Use Still Rising*, THE GUARDIAN, (Apr. 4, 2022, 2:00 PM), <https://www.theguardian.com/us-news/2022/apr/04/oregon-drugs-decriminalisation-ballot-measure-110>.

⁸⁰ *Id.* at 9.

⁸¹ *Id.* at 14.

intravenous heroin users.⁸² Rates of HIV, AIDS, Tuberculosis, Hepatitis B and C skyrocketed, necessitating the appointment of a committee of specialists to analyze the Portuguese drug issue.⁸³

In 1998, the Portuguese government appointed a committee of doctors, sociologists, psychologists, lawyers, and social activists to formulate recommendations for a national strategy.⁸⁴ Eight months after the committee was formed, it recommended the decriminalization of drug possession and use.⁸⁵ Additionally, the committee emphasized that the government should focus on “prevention and education, harm reduction, broadening and improving treatment programs for drug dependent persons, and activities that helped at-risk groups and current drug users maintain or restore their connections to family, work, and society.”⁸⁶ These recommendations—the legislative reforms and new national drug strategy—were seen as intrinsically linked.⁸⁷ Decriminalization would provide a more humane legal framework, and the new drug strategy would open up alternative methods for the field to respond to drug issues as opposed to the previous system that was failing.⁸⁸ Unlike the United States government, which has a storied history of ignoring the recommendations of appointed committees, the Portuguese government accepted almost all the specialists’ recommendations.⁸⁹

Portugal enacted Law 30/2000 in 2000.⁹⁰ Under this legal regime, Portugal refers individuals who consume, purchase, or possess up to a ten days’ supply of an illicit drug to an administrative panel, which makes recommendations for treatment, fines, warnings, or other penalties, such as community service or “suspensions on professional licenses and bans on attending designated places.”⁹¹ Proponents of this scheme argued that decriminalization was “based on the fundamental notion of ‘fighting the disease, not the patients.’”⁹²

⁸² CAITLIN ELIZABETH HUGHES & ALEX STEVENS, WHAT CAN WE LEARN FROM THE PORTUGUESE DECRIMINALIZATION OF ILLICIT DRUGS? 1001 (2010).

⁸³ *Id.*; DOMOSLAWSKI, *supra* note 78, at 20.

⁸⁴ DOMOSLAWSKI, *supra* note 78, at 17.

⁸⁵ *Id.*

⁸⁶ *Id.* at 17–18.

⁸⁷ HUGHES & STEVENS, *supra* note 82, at 1002.

⁸⁸ *Id.*

⁸⁹ DOMOSLAWSKI, *supra* note 78, at 19.

⁹⁰ *Id.* at 23, n.18.

⁹¹ HUGHES & STEVENS, *supra* note 82, at 1002.

⁹² DOMOSLAWSKI, *supra* note 78, at 19.

Further, the policies were “not about giving the green light to drug use, but rather about reducing harm, stopping senseless punishment, and achieving better control over the drug problem.”⁹³ Opponents of the scheme claimed that decriminalization would cause a sudden spike in drug use and that “Portugal would become a drug paradise.”⁹⁴ Those skeptics, however, turned out to be wrong.

Research indicates that treating addiction as a disease as opposed to criminal behavior yields a clear gain.⁹⁵ Since Portugal’s decriminalization of drugs and implementation of the new national drug strategy, the number of people who enter treatment programs has increased every year, indicating that the prevention schemes are reaching more drug-dependent people.⁹⁶ Additionally, as of 2008, “three-quarters of those with opioid use disorder were receiving medication-assisted treatment.”⁹⁷ And, while there may have been small-to-moderate increases in overall reported drug use in the general population, “the level of drug use in the most ‘sensitive’ group [those fifteen to nineteen years old] has decreased from 10.8 percent to 8.6 percent.”⁹⁸ Most significantly, the prevalence of problematic drug use (and intravenous drug use in particular) is estimated to have declined.⁹⁹ Consequently, drug-related HIV infections in Portugal, which was one of the driving forces behind the reform, have declined.¹⁰⁰ The number of people Portugal arrested for drug offenses declined by more than 60 percent annually following decriminalization.¹⁰¹ Additionally, “[a] 2015 study found that the per capita social cost of drug misuse in Portugal decreased by an average of 18 percent over the period 2000-2010.”¹⁰²

These results indicate that none of the predictions of the opponents to drug decriminalization in Portugal have come to pass.

⁹³ *Id.* at 26.

⁹⁴ *Id.* at 24.

⁹⁵ Austin Frakt, *Pointers from Portugal on Addiction and the Drug War*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/2020/10/05/upshot/portugal-drug-legalization-treatment.html>.

⁹⁶ DOMOSLAWSKI, *supra* note 78, at 34.

⁹⁷ Frakt, *supra* note 95.

⁹⁸ DOMOSLAWSKI, *supra* note 78, at 44.

⁹⁹ HUGHES & STEVENS, *supra* note 82, at 1006.

¹⁰⁰ DOMOSLAWSKI, *supra* note 78, at 13.

¹⁰¹ HUGHES & STEVENS, *supra* note 82, at 1008–09.

¹⁰² DRUG POL’Y ALL., IT’S TIME FOR THE U.S. TO DECRIMINALIZE DRUG USE AND POSSESSION 24 (2017).

Instead, Portugal provides an example for other countries in terms of developing a comprehensive public-health-centered framework for drug decriminalization. The Czech Republic, the Netherlands, and Mexico followed Portugal's lead; these countries decriminalized possession of all drugs since 2000.¹⁰³ As one study noted,

the greatest lesson of the Portuguese decriminalization policy is that it demonstrates that there are ways to overcome the lack of will among political elites and societies made afraid by the fear-mongering propaganda of the “war on drugs” and, in doing so to constructively build rational and humanitarian drug policies.¹⁰⁴

This attitude has made its way into the United States drug policy debate, but it has not yet prevailed. Opponents will continue to maintain that while drug decriminalization may be possible elsewhere, it will result in grave consequences in America. Unsurprisingly, prohibitionists advance these same arguments with respect to state-level marijuana legalization in the United States.¹⁰⁵ As the following section demonstrates, states that have legalized recreational marijuana present an example of progressive drug policy reform, casting grave doubt on ongoing prohibitionist claims about drug decriminalization.

B. *The Effects of Marijuana Legalization at the State Level*

In the last two decades, United States citizens have substantially shifted their cultural attitudes regarding both medical and recreational use of marijuana.¹⁰⁶ In fact, a 2021 study found that fewer than 10 percent of American adults say marijuana should remain entirely illegal, while 60 percent of adults say it should be legal for medical and recreational use, and 31 percent say it should be legal just for medical use.¹⁰⁷ This was not always the case.

¹⁰³ DOMOSLAWSKI, *supra* note 78, at 45.

¹⁰⁴ *Id.* at 50.

¹⁰⁵ Samuel T. Wilkinson, *More Reasons States Should Not Legalize Marijuana: Medical and Recreational Marijuana: Commentary and Review of the Literature*, 110 MO. MED. 524–528 (2013).

¹⁰⁶ Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Apr. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use>.

¹⁰⁷ *Id.*

When Colorado and Washington became the first states to legalize recreational marijuana in 2012,¹⁰⁸ the public was divided over whether use of the drug should be legalized.¹⁰⁹ In 2011, approximately 50 percent of people opposed legalization, while only about 45 percent favored it.¹¹⁰ Since then, however, public attitudes have shifted in favor of legalization, leading to twenty-one other states legalizing recreational marijuana.¹¹¹

Those opposed to marijuana legalization argue that it “spurs marijuana and other drug use or alcohol use, increases crime, diminishes traffic safety, harms public health, and lowers teen educational achievement.”¹¹² This section analyzes the impacts of marijuana legalization to demonstrate the inaccuracy of the “fear-mongering propaganda” surrounding drug reform in the United States.¹¹³

A 2021 study by the CATO Institute includes several important findings regarding the impact of marijuana legalization.¹¹⁴ The study drew four important conclusions regarding rates of marijuana and other drug and alcohol use. First, while legalizing states did in fact display increasing rates of use prevalence, such patterns existed prior to legalization.¹¹⁵ This indicates that post-legalization rates of marijuana use have not skyrocketed as opponents predicted, but rather continued from the pre-legalization trend. This further reflects the shift in the cultural attitude towards marijuana. Second, the available data on young people self-reporting marijuana use shows “no obvious effect of legalization on youth marijuana use.”¹¹⁶ This finding directly challenges a predominant concern regarding marijuana legalization’s potential negative impacts on youth. Third, opponents of legalization

¹⁰⁸ Angela Dills et al., *The Effect of State Marijuana Legalizations: 2021 Update*, POL’Y ANALYSIS (Cato Inst., Washington, D.C.), Feb. 2, 2021, at 1, 1, <https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update>.

¹⁰⁹ *Id.* Russell Heimlich, *Nearly Half Support Legalization of Marijuana*, PEW RSCH. CTR. (Nov. 12, 2012), <https://www.pewresearch.org/fact-tank/2012/11/12/nearly-half-support-legalization-of-marijuana>.

¹¹⁰ Heimlich, *supra* note 109.

¹¹¹ Casey Leins et al., *States Where Recreational Marijuana is Legal*, U.S. NEWS & WORLD REP. (July 27, 2022), <https://www.usnews.com/news/best-states/slideshows/where-is-pot-legal>.

¹¹² Dills, *supra* note 108, at 1.

¹¹³ DOMOSLAWSKI, *supra* note 78, at 50.

¹¹⁴ *See generally* Dills, *supra* note 108.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 6.

argue that marijuana is a gateway drug that leads to consumption of other drugs like cocaine, but data suggests “no clear relationship between marijuana legalization and cocaine use . . . [or] alcohol use.”¹¹⁷ Finally, although prohibitionists contend that legalization would cause marijuana prices to drop and therefore lead to increases in use, marijuana prices have barely budged.¹¹⁸

The CATO study also demonstrates that marijuana legalization did not impact crime or the economy as opponents predicted. “[V]iolent crime has neither soared nor plummeted,” and the marijuana industry created 77,000 jobs in 2020.¹¹⁹ Further, tax revenue from legal recreational marijuana has skyrocketed since its inception. For example, Colorado now collects almost \$20 million per month from recreational marijuana, whereas the State only generated \$135 million in recreational marijuana revenue during all of 2015.¹²⁰

It appears that those critical of marijuana legalization have substantially overstated their case. As the CATO Institute concluded, “[t]he absence of significant adverse consequences is especially striking given the sometimes-dire predictions made by legalization opponents.”¹²¹ These findings make clear that drug policy reform is possible in the United States.

IV. OREGON AT THE FOREFRONT OF DRUG POLICY REFORM IN THE UNITED STATES

Oregon is no stranger to leading the United States in drug policy reform efforts: the State has been at the forefront of marijuana reform. Oregon is also accustomed to leading this nation with one of the highest rates of substance use disorders. This Part provides a brief history of drug decriminalization in Oregon. It then demonstrates why Oregon enacted the Drug Addiction Treatment and Recovery Act. This Part concludes by highlighting key components of Oregon’s drug decriminalization legislation to demonstrate how drug policy will operate in the state moving forward.

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 6–7.

¹¹⁹ See generally Dills, *supra* note 108, at 9; Greg Rosalsky, *The Data on Legalizing Weed*, NPR (Mar. 16, 2021, 6:30 AM), <https://www.npr.org/sections/money/2021/03/16/976265525/the-data-on-legalizing-weed>.

¹²⁰ Dills, *supra* note 108, at 10 (Washington has realized similar increases in tax revenue).

¹²¹ *Id.* at 11.

A. *Brief History of Drug Decriminalization in Oregon*

Oregon became the first state in the nation to decriminalize marijuana in 1973.¹²² In 1986, Oregon voters rejected Ballot Measure 5, the Oregon Marijuana Legalization for Personal Use Act, which would have legalized cannabis.¹²³ The initiative garnered the support of only 26.33 percent of the voters; however, efforts to recriminalize cannabis were defeated in 1995 when Oregon House Bill 3466 died on the floor.¹²⁴ Just three years later, in 1998, Oregon voters passed Ballot Measure 67, the Oregon Medical Marijuana Act, joining a small group of states that legalized medical marijuana.¹²⁵ Oregon voters finally legalized recreational marijuana through Ballot Measure 91, the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, in 2014.¹²⁶

Oregon advanced its most progressive drug reform in November 2020 when its voters passed Ballot Measures 109 and 110. Measure 109 passed with 55.75 percent support and legalized psilocybin mushrooms for use in therapeutic settings.¹²⁷ Measure 110, the focus of this Comment, passed the vote with 58.46 percent support, making Oregon the first state to decriminalize small amount drug possession.¹²⁸ It is important to note that Oregon's last four successful drug reforms—Measure 67 of 1998, Measure 91 of 2014, and Measures 109 and 110 of 2020—came to fruition via state ballot initiatives, which require majority support from Oregon voters instead of elected legislators.

¹²² *Marijuana*, ASS'N OF OR. CNTYS., <https://oregoncounties.org/news/publications/marijuana/> (last visited Sept. 24, 2021).

¹²³ *Oregon Marijuana Legalization for Personal Use, Ballot Measure 5 (1986)*, BALLOTPEdia, [https://ballotpedia.org/Oregon_Marijuana_Legalization_for_Personal_Use,_Ballot_Measure_5_\(1986\)](https://ballotpedia.org/Oregon_Marijuana_Legalization_for_Personal_Use,_Ballot_Measure_5_(1986)) (last visited Feb. 21, 2022).

¹²⁴ *Id.*

¹²⁵ *Marijuana*, *supra* note 122.

¹²⁶ *Oregon Legalized Marijuana Initiative, Measure 91 (2014)*, BALLOTPEdia, [https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative,_Measure_91_\(2014\)](https://ballotpedia.org/Oregon_Legalized_Marijuana_Initiative,_Measure_91_(2014)) (last visited Feb. 21, 2022).

¹²⁷ *Oregon Measure 109, Psilocybin Mushroom Services Program Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/Oregon_Measure_109,_Psilocybin_Mushroom_Services_Program_Initiative_\(2020\)](https://ballotpedia.org/Oregon_Measure_109,_Psilocybin_Mushroom_Services_Program_Initiative_(2020)) (last visited Feb. 21, 2022).

¹²⁸ *Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020)*, BALLOTPEdia, [https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_\(2020\)](https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_(2020)) (last visited Feb. 21, 2022).

B. *Oregon Drug Landscape*

Oregon should undoubtedly be recognized for its valiant drug policy reform efforts. But it should also be acknowledged that Oregon enacted the Drug Addiction Treatment and Recovery Act due to previous drug policy failures on the national level. For the past fifty years, United States drug policy has centered around punitive measures, including incarceration and coerced treatment. Oregon's decriminalization and health-based approach not only reflects society's evolving attitudes towards drugs but also the dire need for change both nationally and in the State.

According to the 2021 State of Mental Health in America report, Oregon ranked 48th in the United States in prevalence of mental health and substance use disorders and access to care, indicating one of the highest rates of mental illnesses and lowest rates of access to care in the country.¹²⁹ This ranking is a troublesome result of how few state dollars were dedicated to treatment services. Oregon spends about \$6.7 billion in state dollars on issues related to substance misuse, but Oregon allocates less than 1 percent of that funding towards the prevention of misuse, treatment, or assistance for those recovering from substance use disorders.¹³⁰ Further, in 2018–2019, the estimated percentage of people needing but not receiving treatment for substance use disorder was 8.64 percent, higher than the national average of 6.88 percent.¹³¹

Oregon's rates of drug use and substance use disorder are also much higher than the national average.¹³² During 2017–2019, the annual average prevalence of past-year illicit-drug-use disorder in Oregon was 3.8 percent (or 137,000), nearly a full percentage point higher than the national average of 2.9 percent.¹³³ Throughout that same time, the annual average prevalence of past-year substance use disorder in Oregon was 10.2 percent (or 363,000), which was

¹²⁹ MADDY REINERT, THERESA NGUYEN & DANIELLE FRITZE, 2021 THE STATE OF MENTAL HEALTH IN AMERICA 9 (2020).

¹³⁰ OR. ALCOHOL AND DRUG POL'Y COMM'N, 2020-2025 OR. STATEWIDE STRATEGIC PLAN 5 (2020).

¹³¹ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH 5, 204–06 (2019), <https://www.samhsa.gov/data/report/2018-2019-nsduh-state-specific-tables>.

¹³² *Id.* at 5, 205.

¹³³ Elinore F. McCance-Katz et al., *Behavioral Health Barometer: Oregon*, 6 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. i, 24 (2019).

significantly higher than the national average of 7.4 percent.¹³⁴ In 2020, Oregon had the fourth-highest prevalence of substance use disorders among adults in the country at 9.94 percent.¹³⁵ Oregon voters recognized that these statistics indicated a need for statewide reform and that not enough was being done to mitigate the prevalence of substance use disorders.

C. *Key Components of SB 755*

Senate Bill 755 (“the Bill”) was crafted to implement and make changes to Measure 110 during the 2021 legislative session.¹³⁶ The Findings and Policy section of the enacted law from the Bill states that Oregonians “find that a health-based approach to addiction and overdose is more effective, humane and cost-effective than criminal punishments. Making people criminals because they suffer from addiction is expensive, ruins lives and can make access to treatment and recovery more difficult.”¹³⁷ This section highlights the key components of the Bill and explains how they prioritize screening, health assessment, treatment, and recovery.

The first key component of the Bill is that it expands treatment and services for those that need and want access to those resources. Section two creates Behavioral Health Resource Networks (BHRNs).¹³⁸ A BHRN is defined as “an entity or collection of entities that individually or jointly provide some or all of the services described in subsection (2)(d) of this section.”¹³⁹ Minimum services under the Bill include health screenings and assessments, intervention planning, peer counseling, mobile outreach, low barrier substance use disorder treatment, transitional and supportive housing, and harm reduction services.¹⁴⁰ The legislation requires at least one complete BHRN in each Oregon county by January 1, 2022.¹⁴¹ Each BHRN must minimally staff a certified alcohol and drug counselor, a case manager, and a certified addiction peer support or wellness specialist.¹⁴² These service

¹³⁴ *Id.* at 26.

¹³⁵ REINERT, NGUYEN & FRITZE, *supra* note 129, at 19.

¹³⁶ OR. LEGIS. POL’Y & RSCH. OFF., S. B. 755 ISSUE BRIEF 1 (2021) [hereinafter OR., S. B. 755 ISSUE BRIEF].

¹³⁷ Drug Addiction Treatment and Recovery Act, 2021 Or. Laws ch. 591.

¹³⁸ S.B. 755 § 2(1), 81st Leg., Reg. Sess. (Or. 2021).

¹³⁹ *Id.*

¹⁴⁰ S.B. 755 §2(2)(d)(A)–(H), 81st Leg., Reg. Sess. (Or. 2021).

¹⁴¹ OR., S. B. 755 ISSUE BRIEF, *supra* note 136, at 2.

¹⁴² *Id.*

and staff requirements work toward the goal of ensuring that a client's substance use and other social determinants of health are adequately addressed.

Section two of the Bill also creates the Oversight and Accountability Council (OAC), which oversees and approves grants and funding to implement the BHRNs.¹⁴³ The OAC may “provide grants to entities, whether government or community based, so long as the entity increases access to any of the following: low barrier substance use treatment, peer support and recovery services, housing for persons with substance use disorder, harm reduction interventions, or behavioral healthcare workforce supports.”¹⁴⁴ Notably, the Bill requires “that the OAC must distribute funding to ensure access to historically underserved populations and to culturally specific and linguistically responsive services.”¹⁴⁵ These provisions aim to decrease the racial and socioeconomic discrepancies perpetuated by the War on Drugs.¹⁴⁶ To that end, all grantee services (within and outside of BHRNs) must be free to all people receiving treatment.¹⁴⁷

The Bill's most significant provision categorizes the unlawful possession of small amounts of controlled substances as a Class E violation instead of a crime.¹⁴⁸ This reform draws from Portugal in terms of decriminalizing possession: instead of facing arrest, those found with personal use amounts of drugs face a civil citation, not a criminal citation.¹⁴⁹ Under the Bill, a Class E violation is a presumptive \$100 fine, with a maximum of \$100 and a minimum of \$45.¹⁵⁰ In lieu of the fine, those subject to the penalty for a Class E violation may complete a screening or any equivalent or more intensive treatment within forty-five days of the citation.¹⁵¹ Failure to pay a Class E violation fine, however, is not a basis for further penalties.¹⁵² Prosecuting attorneys, with the defendant's consent, may elect to treat certain pending charges as Class E violations by initiating a Class E violation

¹⁴³ S.B. 755 § 2(1), 81st Leg., Reg. Sess. (Or. 2021).

¹⁴⁴ OR., S. B. 755 ISSUE BRIEF, *supra* note 136, at 2.

¹⁴⁵ *Id.*

¹⁴⁶ *See* Part II.B (outlining the racial disparities and economic turmoil resulting from the War on Drugs).

¹⁴⁷ *Id.*

¹⁴⁸ S.B. 755 §§ 11–20, 81st Leg., Reg. Sess. (Or. 2021).

¹⁴⁹ *See* Part III.A.

¹⁵⁰ S.B. 755 § 13, 81st Leg., Reg. Sess. (Or. 2021).

¹⁵¹ S.B. 755 § 20(1), 81st Leg., Reg. Sess. (Or. 2021).

¹⁵² S.B. 755 § 20(3), 81st Leg., Reg. Sess. (Or. 2021).

proceeding if the pending charge was committed on or after February 1, 2021.¹⁵³

The final theme of note is funding, particularly the Drug Treatment and Recovery Fund (DTRF). The Bill requires that each quarter, any amount in excess of the first \$11.25 million in the Oregon Marijuana Fund be transferred to the DTRF.¹⁵⁴ Further, savings and revenue as a result of the implementation of the Bill must be transferred to the DTRF.¹⁵⁵ These monies are first distributed to fund administrative costs of the Oregon Health Association and then to fund grant programs administered by the OAC.¹⁵⁶ The Bill also mandates oversight and administration of the DTRF; for example, the Oregon Secretary of State must perform real-time audits and financial reviews.¹⁵⁷ Overall, the Bill represents much-needed drug policy reform that focuses on individualized health and well-being as opposed to perpetuating racial disparities and medical and economic turmoil.

V. WHAT OTHER STATES SHOULD GLEAN FROM OREGON DECRIMINALIZING SMALL AMOUNT DRUG POSSESSION

Oregon is the first—and only—state in the United States to decriminalize small amount possession of most illicit drugs. Its sister states and the federal government should look to Oregon’s new drug decriminalization scheme and its impacts to assess and understand potential additional reforms. While Oregon’s scheme is still in the early days of implementation, there is much that can be learned from the reform and its projected impacts.

A. *The Good*

Oregon’s trailblazing legislation undoubtedly includes objectives that should provoke and encourage future drug decriminalization work in the United States. This section discusses a cascade of potentially positive aims that can result from complete implementation of the Drug Addiction Treatment and Recovery Act, should Oregon give it the time necessary to reach its full potential.

The first metaphorical domino is the legislation’s elimination of drug-related criminal penalties, which aims to reduce the number of

¹⁵³ OR., S. B. 755 ISSUE BRIEF, *supra* note 136, at 7.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

people ensnared in the criminal justice system for non-violent offenses. Reflecting on the impacts of incarcerating substance users, Richard Harris, a former director of mental health and addiction services for the Oregon Health Authority, explained that “[i]f you put them in jail, you’ve only increased the mountain they have to climb because they now are unable to gain finance, work and housing unlike people who don’t have a record.”¹⁵⁸

The Oregon Criminal Justice Commission (CJC) projected that the number of felony and misdemeanor convictions for possession of controlled substances in Oregon would substantially decrease after the enactment of Measure 110.¹⁵⁹ Specifically, the CJC estimated that the total number of convictions would fall from 4,057 to 378—a nearly 91 percent reduction.¹⁶⁰ It appears that the CJC’s estimation will be validated. There were 60 percent fewer total drug arrests in Oregon over the first ten months since decriminalization compared with the same period in the previous year.¹⁶¹ Although the data does not yet show the extent to which this decline was a result of the legislation, this reduction is consistent with the CJC’s predictions.

Decreasing the number of people who are arrested for these offenses necessarily alleviates some of the racial and socioeconomic disparities that the War on Drugs has perpetuated for far too long. The CJC found that the primary source of racial and ethnic disparities is in the rate at which individuals of different races/ethnicities were convicted of possession of controlled substances.¹⁶² It therefore follows that drops in arrests and convictions would result in decreases in criminal justice-related racial and ethnic disparities.

The reduction of drug-related prosecutions also leads to less money being pumped into a system that has failed the United States

¹⁵⁸ Ben Botkin, *Ballot Measure Stresses Treatment, Not Jail Time for Drug Possession*, LUND REP. (Aug. 17, 2020), <https://www.thelundreport.org/content/ballot-measure-stresses-treatment-not-jail-time-drug-possession>.

¹⁵⁹ OR. CRIM. JUST. COMM’N, IP 44 RACIAL AND ETHNIC IMPACT STATEMENT 3 (2020), <https://maps.org/wp-content/uploads/2020/12/IP44-Racial-and-Ethnic-Impact-Analysis.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ See *One Year of Drug Decriminalization in Oregon: Early Results Show 16,000 People Have Accessed Services Through Measure 110 Funding & Thousands Have Avoided Arrest*, DRUG POL’Y ALL. (Feb. 1, 2022), <https://drugpolicy.org/press-release/2022/02/one-year-drug-decriminalization-oregon-early-results-show-16000-people-have>.

¹⁶² OR. CRIM. JUST. COMM’N, IP 44 RACIAL AND ETHNIC IMPACT STATEMENT SUPPLEMENTAL DOCUMENT 3 (Aug. 5, 2020), https://www.opb.org/pdf/IP44%20-%20REI%20Statement%20Supplement_1602708982790.pdf.

for over fifty years. Mass incarceration has proven ineffective. Coercion does not work. Drug courts are not the answer. Legislators may argue that drug courts are the solution for this nation's struggle with substance use disorders. Opponents to drug decriminalization will argue that decriminalization is pointless because drug courts can divert and treat people arrested and charged with drug offenses.

Drug courts, however, do not represent an evidence-based, health-centered response. One of the fundamental tenets of drug courts is that people with substance use disorders who "choose" to go into drug court are not making completely voluntary decisions; they are simply choosing treatment over spending years in prison.¹⁶³ Research on the impacts of drug courts is varied and inconclusive.¹⁶⁴ Even when individuals agree to undergo treatment through drug courts, they are positioned to fail because they lack necessities like housing—something that Oregon's new law provides.

Drug courts also raise economic concerns. In order to operate, they require taxpayer-funded judges, court staff, and attorneys. Proponents of drug courts cite to the savings generated by the model, but "[d]rug court participants, team members, and treatment providers all highlight[] lack of funding for treatment of substance use disorders as a massive hurdle to much-needed care both inside and outside drug courts."¹⁶⁵ The Oregon legislation expands access to evidence-informed drug treatment, peer support, and harm reduction services.¹⁶⁶ This individualized and health-centered approach provides those suffering from substance use disorder with more options for recovery and additional supports. Drug courts do no such thing.

Rerouting the savings realized from fewer prosecutions also means more funding for health interventions. This will ensure that the State can enhance its previously limited public health resources and increase access to treatment. Given that Oregon ranked poorly in terms of access to treatment, it is notable that the new reform will

¹⁶³ See Christine Mehta, *How Drug Courts Are Falling Short*, OPEN SOC'Y FOUNDATIONS. (June 7, 2017), <https://www.opensocietyfoundations.org/voices/how-drug-courts-are-falling-short>.

¹⁶⁴ See *id.*

¹⁶⁵ PHYSICIANS FOR HUM. RTS., NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES 10 (Claudia Rader ed., 2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf.

¹⁶⁶ See Part IV.C and discussion therein.

generate between \$103 to \$157 million a year.¹⁶⁷ This is four to six times more than what Oregon spent on non-Medicaid funding for addiction services.¹⁶⁸ Dr. Robert Lowe, a former instructor of emergency medicine at Oregon Health & Science University, and Dr. Ray Stangeland, a board-certified emergency physician, remarked that “anyone who wants services will be able to get them, not just those who have the funds or the ‘right’ insurance plan. Measure 110 isn’t just a good idea; it is literally a life and death matter.”¹⁶⁹ Treating addiction as a complex psychosocial medical issue as opposed to a punitive problem will save lives. Drs. Lowe and Stangeland further noted that “Measure 110 can change our broken, unjust system that criminalizes addiction instead of connecting people to care.”¹⁷⁰

The enactment of Measure 110 further demonstrates changing public attitudes towards drugs. Measure 110 passed with 58.46 percent of voter support and exemplifies that Americans are ready for change.¹⁷¹ Consistent with the Measure 110 vote, the CATO 2019 Welfare, Work, and Wealth National Survey found that 55 percent of Americans favor “recategorizing drug offenses from felonies to civil offenses.”¹⁷² Federal and state legislators who have long-crafted United States drug policy are disproportionately white and male—that is, these individuals largely belong to a group that has not been disproportionately harmed by the nation’s ongoing drug war.¹⁷³ This is obviously a problem that extends beyond drug policy, but it is important to note in light of public sentiment and the public health

¹⁶⁷ HEALTH JUST. RECOVERY ALL., THE DRUG ADDICTION TREATMENT & RECOVERY ACT FREQUENTLY ASKED QUESTIONS 3 (2020), <https://healthjusticerecovery.org/wp-content/uploads/2021/05/Alliance-FAQ.pdf>.

¹⁶⁸ *Id.*

¹⁶⁹ Robert A. Lowe & Ray G. Stangeland, *Opinion: A ‘Yes’ on Measure 110 Will Ensure Oregon Treats Addiction as the Health Care Issue it Is*, OREGONIAN (Sept. 20, 2020, 6:15 AM), <https://www.oregonlive.com/opinion/2020/09/opinion-a-yes-on-measure-110-will-ensure-oregon-treats-addiction-as-the-health-care-issue-it-is.html>.

¹⁷⁰ *Id.*

¹⁷¹ *Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative*, *supra* note 128.

¹⁷² Emily Ekins, *Poll: 55% of Americans Favor Decriminalizing Drugs*, CATO INST. (Oct. 2, 2019, 9:15 AM), <https://www.cato.org/blog/poll-55-americans-favor-decriminalizing-drugs>.

¹⁷³ See Renuka Rayasam, Nolan D. McCaskill, Beatrice Jin & Allan James Vestal, *Why State Legislatures Are Still Very White – and Very Male*, POLITICO (Feb. 23, 2021, 2:13 PM), <https://www.politico.com/interactives/2021/state-legislature-demographics>.

crisis this nation has faced for years. State and federal legislatures must listen to the people they represent.

B. *The Bad*

Most legislation will draw criticism, and Oregon's Drug Addiction Treatment and Recovery Act is no different. While it is important to recognize the successes of Oregon's reform, it is also important to recognize its shortcomings. This is particularly important because Oregon should, and likely will, serve as a model for other states attempting to enact similar reforms. This section identifies the shortcomings of Oregon's recent reforms and potential barriers other states may face.

The most prominent shortcoming of Oregon's scheme is that it appears to permit law enforcement to retain too much power. Under the new law, law enforcement agencies are tasked with issuing citations for simple possession of drugs as well as informing those subject to such citations about their option to either pay a fine or complete a screening through a statewide hotline run by OHA or another BHRN screener.¹⁷⁴ Unfortunately, "[l]aw enforcement agencies . . . have had little appetite to use a key component of Measure 110, a violation akin to a traffic ticket that can be dismissed if users call a hotline that can help them access treatment."¹⁷⁵

The statute essentially puts its own fate in the hands of law enforcement. This is especially problematic given the use of law enforcement-issued citation statistics as a key metric to measure the statute's success.¹⁷⁶ Further, decriminalization opponents are already introducing legislation to shift funding away from drug treatment and back toward law enforcement.¹⁷⁷ In the legislative session that started February 1, 2022, house members considered redirecting some of the money Measure 110 set aside for treatment back to the Oregon Criminal Justice Commission for grants to law enforcement

¹⁷⁴ See OR., S. B. 755 ISSUE BRIEF, *supra* note 136, at 4–5.

¹⁷⁵ Dirk VanderHart, *Oregon's Pioneering Drug Law Raises More Questions than Answers in Early Months*, OR. PUB. BROAD. (Oct. 27, 2021, 8:00 AM), <https://www.opb.org/article/2021/10/27/oregon-pioneering-drug-law-raises-more-questions-than-answers-early-months>.

¹⁷⁶ See *id.*

¹⁷⁷ Anthony Effinger, *Legislators Look to Mine Drug Treatment Money for Law Enforcement*, WILLAMETTE WEEK (Feb. 3, 2022, 2:11 PM), <https://www.wweek.com/news/state/2022/02/03/legislators-look-to-mine-drug-treatment-money-for-law-enforcement>.

agencies.¹⁷⁸ The Oregon legislature should consider alternate avenues of informing those with substance use disorders of their options for treatment instead of backsliding into a criminal justice-dominated approach.

The statute's treatment of drug paraphernalia presents another shortcoming. Under the new Oregon law, individuals cannot be arrested for drug paraphernalia possession. But some cities continue to fine individuals up to \$500 for possessing paraphernalia.¹⁷⁹ Such fines seem unjustifiably disproportionate considering the maximum fine for Class E violations (drug possession) is \$100.¹⁸⁰ The goal of the Oregon scheme is not to impose lofty fines for minor drug-related offenses but to increase access to treatment.¹⁸¹ The possession of drug paraphernalia should, at most, implicate the same procedures as a Class E violation.

Another shortcoming of the Oregon scheme involves the drug thresholds it sets for personal use. While a comprehensive discussion of this issue is beyond the scope of this Comment, drug thresholds require a careful analysis to distinguish between personal drug possession and drug distribution or intent to distribute. In Portugal, an individual is permitted to possess up to a ten days' supply of the drug.¹⁸² This seems to eliminate some of the ambiguity involved with delineating drug thresholds. Legislators should work with public health professionals in setting drug thresholds.

With regard to potential barriers, there are three important obstacles other states may face. First, as is evident from Portugal's drug decriminalization experience, reform of this nature requires a strong public health infrastructure and a reform-ready culture. Both Portugal and Oregon's schemes consist of a two-part methodology: drug decriminalization and implementation of a new comprehensive drug-treatment strategy. Other states interested in the successful implementation of similar legislation will also need to ensure that prevention, early intervention, treatment, and recovery support are all available to accompany decriminalization.

¹⁷⁸ *Id.*

¹⁷⁹ HEALTH JUST. RECOVERY ALL., DRUG DECRIMINALIZATION IN OREGON: KNOW YOUR RIGHTS 2 (2021), https://live-health-justice-recovery-alliance.pantheonsite.io/wp-content/uploads/2021/04/OR_decrim_quarterpager-Full-Page-4-23-21.pdf.

¹⁸⁰ S.B. 755 § 13, 81st Leg., Reg. Sess. (Or. 2021).

¹⁸¹ Drug Addiction Treatment and Recovery Act, 2021 Or. Laws ch. 591.

¹⁸² HUGHES & STEVENS, *supra* note 82, at 1002.

Second, Oregon Measure 110 passed as an initiated state statute. Many states do not have the type of ballot initiative process that Oregon voters have used to implement its three major drug reforms. Twenty-six states provide some form of initiative, but only twenty-one permit citizens to initiate state statutes.¹⁸³ Thirteen of the fifteen states that have legalized marijuana have done so through ballot initiatives.¹⁸⁴

Finally, despite all the work that has been done to legalize marijuana in the states, Schedule I drugs—including marijuana—remain illegal at the federal level. While the federal government has employed a relaxed approach to marijuana enforcement since President Obama's second term, that informal policy is subject to change at any time. Federal agencies may enforce the CSA in all states and territories.

The Josephine County, Oregon federal lawsuit presents an example of why true reform demands a change in not just state but federal drug policy. After Oregon legalized recreational marijuana in 2014, Josephine County filed a lawsuit in federal district court arguing that the State lacked the authority to prevent the county from regulating marijuana.¹⁸⁵ The lawsuit used marijuana's status as an illicit Schedule I drug under federal law to bolster its cause.¹⁸⁶ While the court ultimately dismissed the case,¹⁸⁷ this type of challenge demonstrates the threats to state decriminalization reforms that are inconsistent with federal criminal law.

C. *The Unknown*

Because it is too early to determine the definitive impacts of Oregon's reforms, this section first highlights key questions that will define the future of the new Oregon scheme. It then proposes key indicators that should be evaluated to gauge its success moving forward.

¹⁸³ *Initiated State Statute*, BALLOTPEDIA, https://ballotpedia.org/Initiated_state_statute (last visited Sept. 24, 2021).

¹⁸⁴ German Lopez, *America's War on Drugs Has Failed. Oregon Is Showing a Way Out*, VOX (Nov. 11, 2020, 8:00 AM), <https://www.vox.com/future-perfect/21552710/oregon-drug-decriminalization-marijuana-legalization>.

¹⁸⁵ *Josephine Cnty. v. Oregon*, No. 1:18-cv-00566, 2018 U.S. Dist. LEXIS 183089, at *1–4 (D. Or. Aug. 30, 2018).

¹⁸⁶ *Id.* at *1–5.

¹⁸⁷ *Josephine Cnty. v. Oregon*, No. 1:18-cv-00566, 2018 U.S. Dist. LEXIS 181685, at *1 (D. Or. Oct. 23, 2018).

In light of the American public's desire for instant gratification, it remains an open question whether Oregon will give its new scheme the time it needs to reach its full potential. The ongoing battle between the Oregon drug warriors and drug reformers raises additional questions. First, who is going to win: the police and other drug warriors who oppose the shift from criminal punishment to a health-based approach, or the reform-minded public? Second, will law enforcement stand down and make any attempt to recognize the good that can come from informing drug users of their option for treatment or work to undermine the new regime? Third, is it possible to change the statute to get the referral process working as the legislature intended?

In terms of fairly measuring the new scheme's success, the number of police citations issued simply cannot serve as a key metric. Instead, the following inquiries should determine success. First, is the reform meaningfully reducing the number of individuals who are incarcerated for non-violent offenses in Oregon? Second, is the reform reducing the racial disparities that have long attended to the arrest and conviction of individuals for possession of controlled substances? Third, has Oregon realized a return on investment from its reform? Finally, and perhaps most importantly, has the Oregon scheme increased access to evidence-based treatment services, thereby reducing the harms caused by drug prohibition and the illicit market?

VI. CONCLUSION

It has been fifty years since President Nixon declared a War on Drugs, and the impacts of this failed war have been catastrophic. Mass incarceration plagues this nation, resulting in racial and socioeconomic disparities, and medical and economic turmoil. Oregon's Drug Addiction Treatment and Recovery Act provides U.S. states with a solid example of a different approach. Reframing the narrative surrounding drug policy as a health-based approach as opposed to a punitive policy is necessary to better help those with substance use disorders. Recognizing the need for change, Oregon took a big step in becoming the first state to decriminalize small amount drug possession. While it is too early to determine the impacts of the reform, Portugal and other European countries demonstrate that drug decriminalization leads to improved public health and safety outcomes. Even U.S. state-level marijuana legalization demonstrates that anti-drug propaganda is nothing more than extreme statements meant to instill fear. The United States government must look west

and finally recognize that “public enemy number one” is the substance use disorder epidemic.

