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A MODEL PATH FOR DECRIMINALIZING SIMPLE POSSESSION OF ALL DRUGS

I. INTRODUCTION

Every twenty-five seconds, someone in the United States is arrested for possessing a personal use amount of drugs.¹ This comes at a great cost to the United States, approximating \$47 billion annually.² Criminalizing drugs creates a significant burden on the criminal justice system in terms of manpower, finances, and over-incarceration. The criminal justice system has decided those caught possessing small amounts of drugs are criminals and brands them with this social stigma.³ Studies show a small minority of those who use drugs are actually dependent on them.⁴ So for the small minority who are addicted, they are labeled as criminals for having a disease.⁵ Being labeled as a criminal comes with many consequences, including being excluded from certain social services and rejected from employment opportunities.⁶ And for those who do struggle with addiction, incarceration is not treatment.

The war on drugs has placed an immense burden on our criminal justice system. It is time to accept that the war on drugs is a failure.⁷ The United States should decriminalize simple possession of all drugs to relieve the burden on the criminal justice system. Simple possession refers to the possession of personal use amounts of drugs.⁸ This is dis-

1. TESS BORDEN, HUMAN RIGHTS WATCH, EVERY 25 SECONDS 2 (2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

2. *Drug War Statistics*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/issues/drug-war-statistics> (last visited Feb. 20, 2021).

3. Marc G. Kurzman & Hillary Magell, *Decriminalizing Possession of All Controlled Substances: An Alternative Whose Time Has Come*, 6 CONTEMP. DRUG PROBS. 245, 248 (1977).

4. DRUG POL'Y ALLIANCE, IT'S TIME FOR THE U.S. TO DECRIMINALIZE DRUG USE AND POSSESSION 15 (2017), <https://drugpolicy.org/resource/its-time-us-decriminalize-drug-use-and-possession> [hereinafter DECRIMINALIZE DRUG USE AND POSSESSION].

5. *Definition of Addiction*, AM. SOC'Y OF ADDICTION MED., <https://www.asam.org/Quality-Science/definition-of-addiction> (last visited Apr. 27, 2022). The medical community considers addiction a disease. *Id.*

6. *See infra* Part II.B.

7. The World Health Organization found that, despite having the most punitive drug policies of the seventeen countries surveyed, the United States had the highest rates of illicit drug use. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in the Age of State Reforms*, 13 CHAP. L. REV. 555, 558 (2010).

8. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 181.

tinct from possession with intent to distribute.⁹ While states are free to classify possession with intent to distribute how they see fit; the Federal Bureau of Investigation (FBI) considers possession with intent to distribute a sales or manufacturing offense.¹⁰ The United States can accomplish decriminalization of simple possession by using the Drug Policy Alliance’s Drug Policy Reform Act (DPRA).¹¹

Part II of this Comment explores the background of the war on drugs and how the United States came to criminalize the possession of personal use amounts of drugs.¹² This Part also looks at Portugal’s decriminalization law and the effect it had on the country as well as the Drug Policy Alliance’s proposed bill, the DPRA.¹³ Part III provides an analysis of how the United States could implement the DPRA, barriers to imposing the bill, and challenges that would remain.¹⁴ Part IV lays out the effects of decriminalizing simple possession of all drugs in the United States, including a decrease in the prison population, wider access to treatment, and a decrease in collateral consequences of having a drug conviction.¹⁵

II. BACKGROUND

A. *Current Drug Laws and History in the United States*

In 1969, President Richard Nixon declared drug abuse was a “growing menace to the general welfare of the United States,” and in 1971, he proclaimed drug abuse was public enemy number one.¹⁶ Nixon’s remarks kicked off the global campaign led by the U.S. government to reduce illegal drug use, commonly referred to as the “war on drugs.”¹⁷ In 1970, Congress passed the Controlled Substances Act (CSA)¹⁸ to address Nixon’s concerns. The CSA regulates the lawful production of

9. *Id.*

10. *Id.* at 41 n.66.

11. See generally DRUG POL’Y ALLIANCE, *DISMANTLING THE FEDERAL DRUG WAR: A COMPREHENSIVE DRUG DECRIMINALIZATION FRAMEWORK*, https://drugpolicy.org/sites/default/files/2020.08.06_dpa_decrim_model_0.pdf (2020) [hereinafter *DISMANTLING THE FEDERAL DRUG WAR*].

12. See generally Part II.

13. See generally Part II.

14. See generally Part III.

15. See generally Part IV.

16. RYAN S. KING, *THE SENT’G PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES* 3 (2008), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Disparity-by-Geography-The-War-on-Drugs-in-Americas-Cities.pdf>.

17. *Id.*

18. *Guide to U.S. Drug Laws*, AM. ADDICTION CTRS. (Jan. 4, 2022), <https://www.recovery.org/addiction/us-drug-laws/>.

drugs and rates their potential for abuse or misuse.¹⁹ The next major piece of drug legislation in the United States did not come until 1984 when Congress passed the Comprehensive Crime Control Act, which enhances penalties for violations under the CSA.²⁰ The Comprehensive Crime Control Act also established the United States Sentencing Commission, which now has the authority to set mandatory sentencing guidelines for all federal offenses.²¹ Mandatory minimum sentencing laws can be problematic because they limit judicial discretion and render the individual facts of a case moot.²²

President Ronald Reagan continued Nixon's crusade and in 1982, announced his administration would wage a war on drugs.²³ Interestingly, when Reagan announced his war on drugs, less than 2% of the American public felt drugs were the most important issue facing the United States.²⁴ In order to get the American public on board, Reagan launched a media campaign to highlight the ills of drug use.²⁵ This media campaign focused heavily on the dangers of crack cocaine, and it worked, because in 1986, *Time* magazine called crack the "issue of the year."²⁶ Another major impact of the media campaign was disproportionately labeling people of color as drug users. In the early 1980s, typical cocaine stories focused on the white recreational user who snorted powder cocaine.²⁷ But by 1985, the media portrayed drug users as poor, nonwhite dealers of crack cocaine.²⁸ This created an "us against them" paradigm, with whites being "us" and people of color being "them."²⁹

As a result of the new frenzy around controlling the drug war, Congress passed the Anti-Drug Abuse Act of 1986,³⁰ which established mandatory minimum sentencing laws for federal drug offenses.³¹ However, the Anti-Drug Abuse Act is most well-known for imple-

19. LISA N. SACCO, CONG. RES. SERV., DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 6 (2014), <https://fas.org/sgp/crs/misc/R43749.pdf>.

20. *Id.* at 8.

21. Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 390 (2017).

22. Shristi Devu, *Trapped in the Shackles of America's Criminal Justice System*, 20 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 217, 224 (2018).

23. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 62 (2012).

24. *Id.*

25. *Id.* at 63.

26. *Id.* at 63, 66.

27. *Id.* at 132.

28. *Id.*

29. *Id.*

30. Anti-Drug Abuse Act of 1986, 21 U.S.C. § 801 (1986).

31. Stemen, *supra* note 21, at 391.

menting the disparities between sentences for cocaine and crack-based offenses, which made sentences for possession of one gram of crack 100 times more severe than possession of 1 gram of cocaine.³² For example, someone convicted of trafficking 5 grams of crack cocaine would receive a mandatory five-year sentence, while someone would need to traffic 500 grams of powder cocaine to receive the same sentence.³³ The Anti-Drug Abuse Act also limited federal benefits, such as public housing and student loans, for those convicted of drug offenses.³⁴

From the start, the war on drugs appeared to be more about penalizing individuals than it was about helping them. This was evidenced most by the fact that during the 1980s, funding for agencies responsible for drug treatment, prevention, and education were drastically reduced, while law enforcement drug budgets significantly increased.³⁵ From 1981 to 1991, FBI antidrug funding increased from \$38 million to \$181 million, the Department of Defense antidrug budget increased from \$33 million to \$1.042 billion, and Drug Enforcement Administration (DEA) antidrug spending increased from \$86 million to \$1.026 billion.³⁶ Ironically, statistics show that during this time, drug use was actually declining. From 1978 to 1989, while the rates of illicit drug use decreased 41%, drug arrests increased 117%.³⁷ This trend of increased arrests for drug crimes only continued to increase. In 2020, 1.16 million people were arrested for drug law violations and 1 million of these violations – about 86% – were for possession alone.³⁸

In addition to rising arrests over the years, law enforcement began deploying Special Weapons and Tactics (SWAT) teams more often for drug searches. From 2011 to 2012, 62% of SWAT deployments were for drug searches.³⁹ These SWAT raids often involved twenty or more

32. *Id.* President Obama passed the Fair Sentencing Act which reduced this disparity from 100:1 down to 18:1. *President Obama Signs Bill Reducing Cocaine Sentencing Disparity*, AM. C.L. UNION (Aug. 3, 2010), <https://www.aclu.org/press-releases/president-obama-signs-bill-reducing-cocaine-sentencing-disparity>.

33. Stemen, *supra* note 21, at 391.

34. ALEXANDER, *supra* note 23, at 68.

35. *Id.* at 63.

36. *Id.*

37. Stemen, *supra* note 21, at 398.

38. *Drug War Statistics*, *supra* note 2. This statistic comes from the FBI's Uniform Crime Reporting. It breaks down drug abuse violations into possession or sale/manufacturing. Therefore, it is unclear if possession means simple possession or includes possession with intent to distribute. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 143 (2004), https://ucr.fbi.gov/additional-ucr-publications/ucr_handbook.pdf.

39. AM. CIV. LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2 (2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

officers, armed with assault rifles, who break down the front door and scream at the occupants inside.⁴⁰ A study by the American Civil Liberties Union (ACLU) found in 65% of drug searches, SWAT teams forced entry into homes using battering rams or breaching devices.⁴¹ This can be incredibly jarring for the occupants inside, especially considering these search warrants are being conducted based on probable cause and do not necessarily have any proof behind them.⁴² In fact, upon executing these search warrants, drugs are not found by the SWAT team 36 to 65% of the time.⁴³

Many of these SWAT raids are conducted using military weapons, which has contributed to the idea that it is a “war” on drugs. A look at Arizona law enforcement equipment revealed a large stockpile of military weaponry including: bomb suits, night vision equipment, hundreds of rifles, battering rams, utility trucks, helicopters, and armored vehicles.⁴⁴ This militarization of American policing is a direct result of federal programs such as the 1033 program.⁴⁵ The 1033 program, which originated in the 1990s, authorizes the Department of Defense to transfer military equipment to local law enforcement agencies.⁴⁶ Local law enforcement agencies are incentivized to use this equipment because the 1033 program requires agencies to use any equipment received within one year.⁴⁷

While many of the well-known drug laws are federal, most drug arrests occur at the state level. For example, in 2012, the DEA arrested 30,000 individuals for drug charges, while at the state level, there were 1.3 million drug arrests.⁴⁸ While some states model their drug laws off federal legislation, every state has its own drug laws, which can vary widely state to state.⁴⁹ These variations include sentencing length, different quantity thresholds for what is considered possession versus distribution, sentencing enhancements that increase penalties, and mandatory sentences.⁵⁰ States are also free to classify simple possession as a misdemeanor or a felony.⁵¹ However, in the majority of

40. *Id.* at 3.

41. *Id.*

42. *Id.* at 31.

43. *Id.* at 34.

44. *Id.* at 13.

45. *Id.* at 16.

46. *Id.*

47. *Id.*

48. *Guide to U.S. Drug Laws*, *supra* note 18.

49. *Id.*

50. Stemen, *supra* note 21, at 393–95.

51. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 34.

states, possession of a personal use amount of drugs, other than marijuana, is considered a felony offense.⁵²

Over the course of the twentieth century, federal minimum sentencing standards have continued to increase, and many states have followed suit.⁵³ For example, in 1975, statutory minimum sentences (among states) for possession of cocaine was at an average of thirteen months, but this skyrocketed to twenty-eight months in 2000 (a 115% increase).⁵⁴ States also began to adopt sentencing enhancements in the same way federal statutes do.⁵⁵ These enhancements could be doled out for anything ranging from proximity to a school, to weapons used, to involving a minor.⁵⁶ In 2000, states had an average of just under eight enhancements for each substance.⁵⁷ However, it is promising that despite these sentencing enhancements, sentences for felony drug possession in state courts decreased from thirty months in 1990 to twenty-three months by 2006.⁵⁸

Over the past decade, states have begun to change their sentencing laws and even began to decriminalize and legalize certain drugs.⁵⁹ As of July 2021, marijuana is legal for recreational use in eighteen states and medical use in thirty-seven states.⁶⁰ On November 3, 2020, Oregon became the first state to decriminalize small amounts of heroin, cocaine, methamphetamine, and other drugs.⁶¹ Oregon's law even allocates money from marijuana sales taxes to drug addiction treatment.⁶² Several states have also reclassified simple possession as a misdemeanor instead of a felony.⁶³ Reclassifying simple possession in this way eases the burden on the criminal justice system and eliminates the devastating impact of a felony conviction.⁶⁴

52. *Id.*

53. Stemen, *supra* note 21, at 393.

54. *Id.* at 394.

55. *Id.* at 395.

56. *Id.*

57. *Id.*

58. *Id.* at 399.

59. *Id.* at 404.

60. Dan Avery, *Where Marijuana is Legal in the US*, CNET.COM (Apr. 21, 2022, 6:57 AM) <https://www.cnet.com/news/politics/where-marijuana-is-legal-in-the-us/>.

61. Thomas Fuller, *Oregon Decriminalizes Small Amounts of Heroin and Cocaine; Four States Legalize Marijuana*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/11/04/us/ballot-measures-propositions-2020.html>.

62. *Id.*

63. BRIAN ELDERBROOM & JULIA DURNAN, RECLASSIFIED 4 (2018), https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf.

64. *Id.*

Despite extensive federal and state drug legislation, the United States remains one of the highest drug-using countries in the world.⁶⁵ According to the National Institute on Drug Abuse, for individuals twenty-six or older, 52.8% had used illicit drugs in their lifetime and 19.9% had used illicit drugs in the last year.⁶⁶ For the age group of eighteen to twenty-five, it was a lifetime prevalence of 53.4%, with 37% of individuals having used in the past year.⁶⁷ The National Institute on Drug Abuse classified marijuana, cocaine, crack, heroin, hallucinogens, inhalants, and methamphetamine as illicit drugs for the purposes of this study.⁶⁸ Illicit drugs generally refer to those drugs that are highly addictive and often illegal.⁶⁹

In the United States, police arrest individuals for drug possession more than any other crime.⁷⁰ Drug possession accounts for one in every nine arrests by state law enforcement officers.⁷¹ There are 1.5 million drug arrests in the United States each year; more than 80% are for possession alone and involve no violent offense.⁷² On any given day in 2015, this amounted to 87,000 people being in jail for drug possession.⁷³ In 2017, 85.4% of all arrests for drug abuse violations were just for possession.⁷⁴

Drug arrests come at a significant cost to the United States. It has been estimated that federal expenditure for drug enforcement is around \$15 billion, while state and local spending is around \$30 bil-

65. Hannah Ritchie & Max Roser, *Drug Use*, OUR WORLD IN DATA (Dec. 2019), <https://ourworldindata.org/drug-use>. The United States is ranked number one at 3.7%. *Id.*

66. *Table 1.5B-Types of Illicit Drug Use in Lifetime, Past Year, and Past Month Among People Aged 26 or Older; Percentages, 2019 and 2020*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/data/sites/default/files/reports/rpt35323/NSDUHDetailedTabs2020/NSDUHDetailedTabs2020/NSDUHDetTabsSect1pe2020.htm> (last visited Apr. 28, 2022).

67. *Table 1.4B-Types of Illicit Drug Use in Lifetime, Past Year, and Past Month Among People Aged 18 to 25; Percentages, 2019 and 2020*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/data/sites/default/files/reports/rpt35323/NSDUHDetailedTabs2020/NSDUHDetailedTabs2020/NSDUHDetTabsSect1pe2020.htm> (last visited Apr. 28, 2022).

68. *Results from the 2016 National Survey on Drug Use and Health: Detailed Tables*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.htm> (last visited Mar. 10, 2021).

69. *Illicit Drug Addiction and Abuse*, ADDICTION CTR. (Feb. 28, 2022), <https://www.addictioncenter.com/drugs/illicit-drugs/>.

70. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 37.

71. *Id.*

72. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 6.

73. *Id.* at 7.

74. *2017 Crime in the United States: Persons Arrested*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/persons-arrested> (last visited Apr. 28, 2022).

lion.⁷⁵ With expenditures for drug offenses being this high, one study estimates that if 10% of eligible offenders were diverted into drug treatment programs, it would save the criminal justice system \$4.8 billion annually.⁷⁶

B. *Racially Disparate Impact of the War on Drugs*

The war on drugs has had a disproportionate impact on communities of color. In 2014, 828 out of every 100,000 African Americans were arrested for a drug offense compared to 339 of every 100,000 whites.⁷⁷ Drug use rates do not account for this large disparity as studies show African Americans and whites use drugs at roughly the same rate (19.5% for African Americans and 16.9% for whites).⁷⁸ While African Americans comprise only 13% of the population, they comprise 29% of those arrested for drug law violations and 35% of those incarcerated at the state level for simple possession.⁷⁹ It should also be noted that Latinx individuals are also arrested more often than white offenders for drug offenses, but not at the level of Black individuals.⁸⁰

Implicit bias and prosecutorial discretion are some of the largest driving forces behind this racial disparity,⁸¹ not to mention, police discretion when it comes to certain policies such as stop and frisk.⁸² Studies have shown officers enforce stop and frisk disproportionately against people of color.⁸³ Even as of 2019, 88% of people stopped by police in New York were people of color and 66% of those stopped were innocent.⁸⁴

A racialized conception of the drug problem also contributes to discriminatory enforcement of drug laws.⁸⁵ A 2002 study in Seattle found that untrue stereotypes about crack were the driving force behind disproportionately high arrest rates of African Americans.⁸⁶ The study found that despite the fact that most Seattle residents were reporting

75. Mallory Whitelaw, *A Path to Peace in the U.S. Drug War: Why California Should Implement the Portuguese Model for Drug Decriminalization*, 40 LOY. L.A. INT'L & COMP. L. REV. 81, 85 (2017).

76. *Id.* at 87.

77. Stemen, *supra* note 21, at 401.

78. *Id.*

79. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 8.

80. *Id.*

81. ALEXANDER, *supra* note 23, at 134.

82. *Id.* at 80.

83. *Stop and Frisk Data*, N.Y. C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited on Mar. 27, 2021).

84. *Id.*

85. ALEXANDER, *supra* note 23, at 160.

86. *Id.* at 158–59.

suspected drug activity in residences, not outdoors, police devoted resources to open air drug markets and the one precinct least likely to be cited by citizen complaints for drug activity.⁸⁷ While hundreds of outdoor drug transactions were reported by citizens in predominantly white areas, police focused their drug enforcement in one downtown drug market where the frequency of reported drug transactions was actually lower.⁸⁸ And in racially mixed drug markets, Black dealers were far more likely to be arrested, despite white dealers being present and visible.⁸⁹ Police officers also focused their efforts disproportionately on crack, despite overdose death records showing more heroin deaths than crack and cocaine combined.⁹⁰ This study suggests law enforcement policies and arrests are predicated on the idea that the drug problem is confined to people of color.⁹¹

The repercussions of a drug offense extend beyond arrest and jail time, and studies show these repercussions disproportionately impact communities of color. In May 2016, Judge Frederick Block pointed out that federal law alone imposes almost 1,200 collateral consequences for convictions, and nearly 300 of these consequences are for drug offenses.⁹² First and foremost, there is the stigma associated with being a felon.⁹³ Next comes the struggle to find housing upon release from prison. This is especially challenging since the Anti-Drug Abuse Act of 1988 includes a “One Strike and You’re Out” policy, which stipulates if a person lives in public housing and someone in the house engages in drug-related or criminal activity—at all, not just in the house—the tenancy will be terminated.⁹⁴ So not only can someone with a criminal record be excluded from public housing, but their family members might hesitate to let someone newly released stay with them for fear of losing their own housing.⁹⁵

Additionally, studies have shown it is incredibly difficult to find work after being convicted of a felony. In 1987, the Equal Employment Opportunity Commission issued guidelines advising employers that discrimination against individuals with criminal records is permissible *only if* the nature of the offense, time passed since conviction,

87. *Id.* at 159.

88. *Id.*

89. *Id.*

90. *Id.* at 159.

91. *Id.* at 160.

92. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 145.

93. ALEXANDER, *supra* note 23, at 176.

94. *Id.* at 183.

95. *Id.* at 183–84.

and nature of the job were considered.⁹⁶ Despite this, one study found that many employers blatantly ignore this and explicitly place exclusions in their job listings such as: “No arrests or convictions of any kind for the past seven years,” “clean criminal record, no misdemeanors, no felonies,” and “[d]o not apply with any misdemeanors/felonies.”⁹⁷

Furthermore, those convicted of drug felonies are banned from participating in certain federal benefits programs.⁹⁸ For example, anyone with a felony drug conviction is ineligible for Supplemental Nutrition Assistance Program (SNAP), often referred to as food stamps, and Temporary Assistance for Needy Families (TANF).⁹⁹ Shockingly, a drug conviction is the only offense that makes a person ineligible for these benefits; convictions like murder or rape still allow a person to collect these benefits.¹⁰⁰ Luckily, states can opt not to enforce the drug conviction provision and many have chosen not to enforce the full ban.¹⁰¹ These bans have the effect of punishing the impoverished, and their children, for drug convictions more harshly than those who have more financial resources.¹⁰²

Felony drug convictions can also disenfranchise a person from voting. One in forty adults is disenfranchised due to his felony convictions.¹⁰³ This felony disenfranchisement affects the Black community most of all with 7.8% of Blacks being unable to vote, compared to 1.8% of the rest of the population.¹⁰⁴

Trying to challenge these laws in a court system as racially biased has also been proven futile. In *McCleskey v. Kemp*, the defendant claimed Georgia applied its capital punishment law in a racially discriminatory way, violating the Eighth and Fourteenth Amendments of the U.S. Constitution.¹⁰⁵ In support of this, the defendant provided a study that examined 2,000 murder cases in Georgia, which found that defendants charged with killing a white person received the death penalty 11% of the time, whereas defendants charged with killing a Black person received the death penalty 1% of the time.¹⁰⁶ Despite

96. *Id.* at 191.

97. *Id.* at 191–92.

98. *Id.* at 196–97.

99. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 146.

100. *Id.*

101. *Id.*

102. *Id.* at 147.

103. *Id.* at 150.

104. *Id.*

105. *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

106. *Id.*

this evidence of racial bias provided by the defendant, the Court found “discretion is essential to the criminal justice process,” and therefore, in order to challenge a law based on racial bias there must be “clear proof before we would infer that the discretion has been abused.”¹⁰⁷ If a study with a disparity of ten percentage points is not clear proof, then what is? The Court answered this too by saying, “for this claim to prevail [the defendant] would have to prove [the legislature] enacted or maintained [the law in question] *because of* a racially discriminatory effect.”¹⁰⁸

C. Portugal’s Model

1. Portugal’s Drug Policy

In 2001, Portugal implemented a radical new drug policy that decriminalized simple possession of all drugs.¹⁰⁹ But what history and circumstances led to this radical reform? Throughout the 1990s, Portugal’s drug use—specifically heroin—continued to rise, leading to high HIV rates.¹¹⁰ This led to ever-increasing arrests for drug offenses, which required more resources toward the criminal justice system. In 1990, 3,586 people were arrested for a drug offense, whereas by 2000, that number had risen to 14,276.¹¹¹ However, while arrests were increasing, very few of those arrested for drug use were being imprisoned for drug offenses.¹¹² In fact, in 2000, there were only twenty-five people in prison for crimes involving drug use.¹¹³

In 1998, the government convened a committee of doctors, lawyers, psychologists, and social activists to try and find a solution to Portugal’s drug problem.¹¹⁴ The committee criticized Portugal’s previous policies for being based on false notions about drug use.¹¹⁵ The committee felt in order to help addicts, the government needed to remove the stigma associated with treatment.¹¹⁶ The committee recommended decriminalization of drug possession and a focus on prevention/educa-

107. *Id.* at 297.

108. *Id.* at 298.

109. Decriminalisation, Law No. 30/2000 (2001) (Port.).

110. ARTUR DOMOSŁAWSKI, DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 14, 19–20 (Hannah Siemaszko trans., 2011), <https://www.opensocietyfoundations.org/publications/drug-policy-portugal-benefits-decriminalizing-drug-use>.

111. Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, 40 LAW & SOC. INQUIRY 746, 750 (2015).

112. *Id.* at 754.

113. *Id.*

114. DOMOSŁAWSKI, *supra* note 110, at 14, 21.

115. Lauren Gallagher, *Should the United States Move Towards Portugal’s Decriminalization of Drugs?*, 22 U. MIAMI INT’L & COMP. L. REV. 207, 215 (2015).

116. *Id.*

tion, harm reduction, improving treatment programs, and activities to help people connect with others.¹¹⁷ The committee felt criminalizing drug use hindered people from voluntarily seeking treatment.¹¹⁸

Creating a new drug policy was centered around the idea that addiction is a disease.¹¹⁹ Individuals addicted to drugs require treatment, not incarceration.¹²⁰ The government was honest about treatment being the primary aim of the law.¹²¹ It is also important to note, before Portugal implemented this policy, the general societal view in Portugal was that addiction was to be treated, not something a person should be marginalized for.¹²²

The Decriminalization Act made the purchase, possession, and consumption of illicit drugs an administrative offense, rather than a criminal one.¹²³ The law did not change the penalties for trafficking and distribution, and, as such, those activities are still a criminal offense.¹²⁴ The law specifically listed the amounts of each drug a person was allowed to possess before it was considered possession with intent to distribute.¹²⁵ Legislators modeled these amounts on a personal use amount for one person over a ten-day period.¹²⁶

Police officers who found persons in possession of drugs would then issue a citation that required the person to appear before the Commission for the Dissuasion of Drug Addiction.¹²⁷ Each commission had three people: one was always a legal expert and the other two could be any of the following: doctor, psychologist, sociologist, social worker, or others with expertise in drug addiction.¹²⁸ The commission had full discretion in terms of their recommendations.¹²⁹ The commission was allowed to suspend proceedings if a person was deemed to be a non-addict and had no prior criminal record.¹³⁰ Individuals who agreed to undergo treatment would also have their proceeding suspended.¹³¹ However, all treatment had to be completely voluntary.¹³²

117. DOMOSŁAWSKI, *supra* note 110, at 21–22.

118. *Id.* at 22.

119. *Id.* at 27.

120. *Id.*

121. Laqueur, *supra* note 111, at 751.

122. Gallagher, *supra* note 115, at 228.

123. DOMOSŁAWSKI, *supra* note 110, at 25.

124. Laqueur, *supra* note 111, at 752.

125. DOMOSŁAWSKI, *supra* note 110, at 25.

126. *Id.*

127. Laqueur, *supra* note 111, at 752.

128. Decriminalisation, Law No. 30/2000 (2001) art. 7, § 1–2 (Port.).

129. Gallagher, *supra* note 115, at 217.

130. Law No. 30/2000 art. 11, § 1.

131. *Id.* § 2.

132. Laqueur, *supra* note 111, at 753.

While the commission could inform a person about their treatment options and recommend treatment, they could not mandate a person to attend treatment.¹³³ This was premised on the idea that drug users were afraid to seek treatment due to fears of punishment, but decriminalization removed this barrier.¹³⁴

While the law made simple possession an administrative, rather than criminal offense, the commission is still allowed to enforce penalties.¹³⁵ When considering what penalty to enforce, the commission considers the circumstances of the infraction, whether the use was in a public or private space, the type of drug, the user's frequency of use, as well as the user's financial circumstances.¹³⁶ The penalties imposed include fines, banning a person from a certain profession, banning a person from certain places, forbidding a person to travel abroad without permission, taking away his right to own a firearm, and community service.¹³⁷ These penalties ranged in length from one month to three years.¹³⁸

In addition to making simple drug possession an administrative offense, the Decriminalization Act focused heavily on prevention and risk/harm reduction. For prevention, Portugal implemented universal drug education that specifically targeted young people and high risk groups.¹³⁹ Young people were educated around the harms of drug use, not just once, but many times from their schools, sports teams, health clinics, and popular cultural events.¹⁴⁰ Portugal implemented harm reduction by dispatching street worker teams that make daily trips to places where drug users gather.¹⁴¹ They hand out kits that include clean needles, hygiene products, condoms, and first aid supplies.¹⁴² In order to receive a new kit, users have to return used needles, which has helped prevent the spread of HIV and Hepatitis C.¹⁴³ Street teams also inform users of their treatment options and help them find psychological and medical care.¹⁴⁴

133. *Id.* 753.

134. DOMOSŁAWSKI, *supra* note 110, at 22.

135. Law No. 30/2000 art. 15.

136. Laqueur, *supra* note 111, at 752.

137. Law No. 30/2000 art. 17, §§1, 2(a)-(h).

138. Law No. 30/2000 art. 24.

139. DOMOSŁAWSKI, *supra* note 110, at 28.

140. *Id.*

141. *Id.* at 33.

142. *Id.*

143. *Id.*

144. *Id.*

For those who do seek drug treatment, social reintegration teams help the individual return to their lives post-treatment.¹⁴⁵ This includes coming up with an action plan for school or work and finding housing.¹⁴⁶ One of the biggest difficulties of reintegration is lack of housing.¹⁴⁷ To combat this challenge, Portugal keeps a small block of apartments for those exiting treatment to help the recovering individuals get back on their feet.¹⁴⁸ For those returning to their own home, the reintegration teams do psycho-education in the area around the drug user's neighborhood in order to overcome prejudices against drug-dependent individuals so people can return to their community with less of a stigma.¹⁴⁹

2. *Effects of Portugal's Model*

The impacts of Portugal's Decriminalization Act have been hotly debated.¹⁵⁰ Part of the difficulty in assessing the policy's efficacy is the lack of a control model.¹⁵¹ It is impossible to know what Portugal's numbers would look like if its current policy was not implemented. Most of the studies that look at Portugal's data compare it to other European countries.

Since the Decriminalization Act, the amount of drug-related contact police have with citizens has not changed, but arrests have declined.¹⁵² The number of individuals arrested for drug offenses decreased from 14,000 in 2000 to 5,500 to 6,000 per year once the new policy went into effect.¹⁵³ Additionally, drug offenders in Portugal's prison system decreased from over 40% in 2001, to slightly over 15% in 2019.¹⁵⁴ As mentioned above, before the policy's enactment very few people were incarcerated for simple possession. This means most of the decrease in prison population is due to drug trafficking, which is still illegal under the Decriminalization Act.¹⁵⁵ If the Act is focused on simple possession, why the decrease in drug trafficking arrests? There

145. *Id.* at 35.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Gallagher, *supra* note 115, at 219–20.

151. *Id.* at 220.

152. Laqueur, *supra* note 111, at 753.

153. Gallagher, *supra* note 115, at 220.

154. *Id.*; Drug Decriminalisation in Portugal: Setting the Record Straight, Transform Drug Pol'y Found. 1, 3 (2018), <https://transformdrugs.org/blog/drug-decriminalisation-in-portugal-setting-the-record-straight> [hereinafter DRUG DECRIMINALISATION IN PORTUGAL].

155. Laqueur, *supra* note 111, at 752. In 2000 there were 1,896 drug trafficking convictions compared to 1,381 in 2010. *Id.*

is speculation that the decreased number of trafficking convictions is due to distributors changing their tactics based on the Decriminalization Act.¹⁵⁶ The Act increased the amount a person can carry to be considered a user.¹⁵⁷ This may have made it more difficult to distinguish between a user and a trafficker.¹⁵⁸

Another positive effect the Decriminalization Act has had on the criminal justice system is that police spend less time and money interrogating and detaining drug users for possession, which has given officers more time to focus on organized crime and drug trafficking.¹⁵⁹ It is difficult to say how the Decriminalization Act affected drug use in Portugal. Portugal's levels of drug use are below the European average.¹⁶⁰ While lifetime drug use among the general population has increased slightly, this is in line with comparable nearby countries.¹⁶¹ At the very least, the data suggests decriminalization did not increase levels of drug use, as people feared.¹⁶²

Data also shows the Decriminalization Act positively affected health. Newly diagnosed HIV cases have decreased from 1,287 cases in 2001 to sixteen cases in 2019.¹⁶³ The data also suggests more individuals sought treatment once the Decriminalization Act was in place.¹⁶⁴ In 2000, 29,204 people received some form of drug treatment, whereas in 2008 that number jumped to 38,532.¹⁶⁵ This change is significant considering Portugal did not mandate treatment, and all treatment was voluntary.¹⁶⁶

D. Drug Policy Reform Act

As a reaction to the increasingly harsh punishments doled out by the war on drugs, Drug Policy Alliance has issued a framework for decriminalizing simple possession of drugs in the United States, known as the Drug Policy Reform Act (DPRA). The DPRA shifts drug regulation from a punitive model to a health focused model.¹⁶⁷ If the DPRA were to take effect, controlled substances would be regu-

156. *Id.*

157. *Id.*

158. *Id.*

159. DOMOSŁAWSKI, *supra* note 110, at 38.

160. DRUG DECRIMINALISATION IN PORTUGAL, *supra* note 154, at 4, 6.

161. *Id.* at 4.

162. *Id.* at 7.

163. *Id.* at 5.

164. Laqueur, *supra* note 111, at 768.

165. *Id.*

166. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 24.

167. *See generally* DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11.

lated by the National Institute of Health (NIH), not the DEA.¹⁶⁸ The DPRA is composed of twenty-five components aimed at eliminating inequitable and harsh sentencing constructs, decarceration and expungement of federal drug convictions, eliminating federal benefit bans due to criminal records for drug convictions, and abolishing enforcement agencies responsible for creating harmful drug enforcement strategies.¹⁶⁹

Similar to Portugal shifting addiction to a public health framework, the DPRA looks at addiction through the lens of public health. The DPRA reinvests federal funding that would have gone to arresting and incarcerating drug offenders into health-related and state initiatives.¹⁷⁰ There are four main areas into which this funding would be diverted: (1) providing social services to communities most harmed by drug law enforcement,¹⁷¹ (2) expanding access to substance use treatment,¹⁷² (3) expanding harm reduction services including safe-consumption facilities,¹⁷³ and (4) assisting states in creating non-police crisis intervention programs and pre-arrest diversion programs.¹⁷⁴

III. ANALYSIS

The best way to decriminalize simple possession of all drugs in the United States would be to use the Drug Policy Alliance's model bill, the DPRA, and push all fifty states to pass decriminalization laws as well. This Part discusses how the United States could implement the DPRA, challenges that would remain, and barriers to imposing the bill.

The DPRA is more comprehensive than just decriminalizing drugs. It is about decreasing the harmful effects of the war on drugs. In this way, it has a broader reach than Portugal's bill, as it focuses more heavily on the effects of the drug war in the United States, not just on drug use itself. The DPRA does this by including provisions that expunge current criminal records with simple possession charges, reinvest federal funds into social services, prohibit employment discrimination, and protect voting rights.¹⁷⁵

168. *Id.* at 2.

169. *See generally id.*

170. *Id.* at 1–4.

171. *Id.* at 3.

172. *Id.*

173. *Id.*

174. *Id.* at 4.

175. *Id.* at 3.

The DPRA operates by repealing criminal penalties set by the Controlled Substances Act, not by creating separate federal legislation to decriminalize drugs.¹⁷⁶ The Controlled Substances Act is one of the first pieces of legislation to kick off the war on drugs, and repealing its criminal penalties for simple possession could go a long way to ending this war.¹⁷⁷ However, for decriminalization in the United States to be as effective as Portugal's model, all fifty states would need to create legislation of their own. The most effective way to reduce the harmful effects of the war on drugs would be for federal and local drug laws to be aligned.

A. Portugal's Law Compared to the Drug Policy Reform Act

As mentioned previously in this Comment, Portugal's focus was on the health of its citizens and shifting the idea of addiction from a criminal to a health problem.¹⁷⁸ The DPRA approaches decriminalization in exactly the same health-oriented way.¹⁷⁹ The very first provision of the bill shifts regulatory authority to the NIH instead of the DEA.¹⁸⁰ The bill furthers the health approach by calling for a reinvestment of funds into health-related services, such as substance use treatment and harm reduction services.¹⁸¹ The bill also calls for amending restrictions on medications related to addiction treatment, which would give more people a wider access to treatment.¹⁸²

The differences in penalties associated with Portugal's law versus the DPRA means that within the DPRA framework, the person in possession of the drug receives no form of punishment. But this also means he or she will not have the same chance to be educated on treatment options. In Portugal, simple possession of a personal use amount of drugs was turned into an administrative offense rather than a criminal one.¹⁸³ The DPRA proposes no such administrative offense and simply repeals criminal penalties for simple possession of drugs.¹⁸⁴ So what does this really change? Making simple possession an administrative offense is what brought a person before the commission for

176. *Id.* at 2.

177. Stemen, *supra* note 21, at 390. "Passed in 1970, the CSA placed the control of certain drugs under federal jurisdiction and established the statutory framework for the federal regulation of the production, distribution, and possession of controlled substances, including the classification of drugs into five schedules of controlled substances." *Id.*

178. *See supra* Part II.C.

179. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 1.

180. *Id.* at 2.

181. *Id.* at 3.

182. *Id.* at 4.

183. Decriminalisation, Law No. 30/2000 (2020) art. 2, § 1 (Port.).

184. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 2.

the dissuasion of drug addiction.¹⁸⁵ It is this commission that talks to the individual about the harms of drug use and informs him of his treatment options.¹⁸⁶ It is hard to say whether not having these commissions will affect the implementation of the DPRA. While some individuals who went before the commission in Portugal found it made them think twice about their drug use,¹⁸⁷ there are also undoubtedly individuals who were not fazed by these commissions.

The DPRA also has a much broader scope than Portugal's law, which means it should have a larger impact in the United States. Portugal has not had the extensive criminalization of drugs as in the United States, so its law focuses solely on the decriminalization of drugs and treatment.¹⁸⁸ In contrast, the DPRA concentrates on undoing the harmful effects the war on drugs has had on those who have been convicted.¹⁸⁹ This includes repealing bans on federal benefits, expunging criminal records, protecting voting rights, and prohibiting employment discrimination.¹⁹⁰ The DPRA also calls for an expansion of the data collected on drug use as well as enforcement of drug laws.¹⁹¹

B. Differences Between the United States and Portugal

One of the big differences between implementing drug decriminalization in the United States versus Portugal would be the sheer number of individuals who have been arrested for possession in the United States. The U.S. government will need to consider the resources needed for the expungement of criminal records, the logistics of releasing individuals currently incarcerated for possession, and reintegrating them into society. In the United States, a staggering number of people are arrested for drug use violations each year.¹⁹² This means it will take a significant amount of time, money, and manpower to undo the effects of the millions of people found guilty of a drug offense. Releasing individuals incarcerated for simple possession of drugs will mean situations such as housing, job training, and reintegration will

185. Law 30/2000 art. 5 § 1, art. 10 §§ 1–3.

186. DOMOSŁAWSKI, *supra* note 110, at 30.

187. *Id.* at 31.

188. *See generally* Law No. 30/2000.

189. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 1.

190. *Id.* at 3.

191. *Id.* at 4.

192. In 2018, of the approximately 10.3 million arrests made, 1.7 million were for drug abuse violations. *Uniform Crime Report, Crime in the United States, 2018: Arrests*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/persons-arrested> (last visited May 16, 2022).

need to be considered. Arresting less individuals for simple possession means law enforcement agencies will need to reallocate officers and consider layoffs.

Another difference is that the United States imprisons more individuals for simple possession than Portugal did, which leads to higher incarceration costs. In Portugal, in 1999, of those imprisoned for drug use offenses, only 1% were for simple possession; the other 99% were for trafficking offenses.¹⁹³ In the United States, in 2016, approximately 28% of those incarcerated at the state level were for drug possession alone.¹⁹⁴ Unfortunately, federal incarceration data generalizes drug charges as a whole so there is not a comparative percentage for drug possession.¹⁹⁵ However, as of March 22, 2022, 45.3% of those incarcerated at the federal level are for drug offenses.¹⁹⁶ This gives the United States a huge incentive to decriminalize simple possession in order to decrease expenditures related to incarceration. This is in contrast to Portugal's incentive, which was more focused on their rising HIV rates and a desire to help decrease the social stigma of addiction and widen access to treatment.¹⁹⁷

Another difference is Portugal's social attitude before the law was instituted. Before the Portuguese government even decriminalized simple possession of drugs, the public embraced the idea of treating those with a drug problem instead of criminalizing them.¹⁹⁸ The public was also becoming increasingly skeptical of the criminalization of drug use and its ability to reduce the problems associated with drugs.¹⁹⁹ As Portugal demonstrated, changing social attitudes are often reflected in legislation; gay marriage and marijuana legislation in the United States are prime examples. Conversely, laws that are counter to social attitudes often are not enforced.²⁰⁰ As previously mentioned, the

193. INSTITUTO PORTUGUES DA DROGA E DA TOXICODPENDENCIA, PORTUGAL DRUG SITUATION 2000: ANNUAL REPORT ON THE DRUG PHENOMENA 2000 34 (2000), https://www.emcdda.europa.eu/system/files/publications/148/NR2000Portugal_65264.PDF.

194. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>. Of 1.29 million people imprisoned at the state level, 45,000 of these were for drug possession alone. *Id.*

195. See, e.g., *Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Mar. 27, 2021).

196. *Id.*

197. Laqueur, *supra* note 111, at 751.

198. Gallagher, *supra* note 115, at 228.

199. Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 UDC/DCSL 1, 27 (2011).

200. Clifton B. Parker, *Laws May Be Ineffective If They Don't Reflect Social Norms*, *Stanford Scholar Says*, STAN. REP. (Nov. 24, 2014), <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html>.

DPRA only addresses federal laws so it will be important for states to pass their own drug legislation. States are more likely to do this if their citizens recognize the benefits of decriminalization and the harms of criminalization. In order for the DPRA to be effectively implemented in the United States, the public would have to be accepting of the benefits that come with decriminalizing simple possession of drugs.²⁰¹

Additionally, an accepting social attitude, as seen in Portugal, is important because it contributes to the social stigma around drug addiction, which can hinder treatment-seeking.²⁰² Decreasing this social stigma would be crucial as the 2009 National Survey on Drug Use and Health reported 8.5% of drug users, who admitted they needed treatment, did not receive treatment due to feeling it would lead the community to have a negative opinion of them.²⁰³ An accepting social attitude may make it easier for some individuals to seek treatment.

The social attitude in the United States is becoming more accepting, as shown by the evolution of marijuana legislation, which indicates a federal decriminalization bill may be widely accepted in the United States. On November 3, 2020, American drug policy reform took a huge leap forward as Oregon became the first state to decriminalize simple possession of all drugs.²⁰⁴ The law was written by the Drug Policy Alliance and modeled on Portugal's law.²⁰⁵ Oregon approached the bill with a health-based focus and acknowledged that drug addiction and overdoses had become a serious problem in Oregon.²⁰⁶ The Oregon law makes possession of a small amount of hard drugs (i.e., cocaine, heroin, methamphetamines, LSD) a violation, similar to a traffic ticket.²⁰⁷ However, the individual can complete a health assessment through the Addiction Recovery Center and have this fine waived.²⁰⁸ Importantly, if a person fails to pay his fine, he cannot be

201. Gallagher, *supra* note 115, at 228.

202. Woods, *supra* note 199, at 27.

203. *Id.*

204. Roshan Abraham, *How Oregon's Radical Decriminalization of Drugs Was Inspired by Portugal*, NEXT CITY (Jan. 5, 2021), <https://nextcity.org/daily/entry/how-oregons-radical-decriminalization-of-drugs-was-inspired-by-portugal>.

205. *Id.*

206. OR. REV. STAT. § 430.383(1) (2021). The bill states, "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." *Id.*

207. Fuller, *supra* note 61.

208. OR. REV. STAT. § 430.391(2). The law requires Oregon to set up a temporary telephone Addiction Recovery Center to be in place until such time as a physical Addiction Recovery Center is built. *Id.*

subjected to further penalties or incarceration.²⁰⁹ The law also funds substance use treatment using marijuana sales, and these Addiction Recovery Centers are free to anyone who wants treatment.²¹⁰

Americans have shown a willingness to rethink our system of drug criminalization and incarceration.²¹¹ Including Oregon, eighteen states have legalized marijuana,²¹² and twenty-six states have decriminalized marijuana possession.²¹³ Studies suggest that more Americans than not may support decriminalizing simple possession of all illegal drugs. For example, in the South Carolina Primary, 59% of voters said they would support decriminalizing simple possession of illegal substances, and 65% believe drug use should be treated as a health problem.²¹⁴ In addition, an increasing number of prominent health and civil rights organizations support decriminalizing drugs, including: the ACLU, the World Health Organization, the American Public Health Association, Human Rights Watch, and the National Association for the Advancement of Colored People (NAACP).²¹⁵ The United States' social attitude might not be that far off from Portugal's, making this drug decriminalization legislation more of a reality than a pipe dream.

Another difference between Portugal and the United States is their systems of government. Portugal is a sovereign republic that has one legislature that represents all citizens.²¹⁶ To decriminalize drugs, Portugal implemented one law which applied to the whole country.²¹⁷ However, the United States operates on a system of dual sovereignty, meaning that the federal government has powers enumerated by the Constitution and everything else is delegated to the states to regulate.²¹⁸ The United States has separate federal and state drug laws,²¹⁹ which would make it very difficult for the United States to pass one piece of federal legislation. The division of federal and state drug laws

209. *Id.*

210. *Id.* § 430.389(7).

211. Whitelaw, *supra* note 75, at 89.

212. Avery, *supra* note 60.

213. *Decriminalization*, NORML, <https://norml.org/laws/decriminalization/> (last visited Apr. 29, 2022).

214. *Poll: South Carolina Primary Voters Support Ending Mass Incarceration, Decriminalizing Drug Possession, Treating Drugs as a Health Issue*, DRUG POL'Y ALLIANCE (Feb. 17, 2016), <https://drugpolicy.org/press-release/2016/02/poll-south-carolina-primary-voters-support-ending-mass-incarceration>.

215. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 27–30.

216. LIB. OF CONG., NATIONAL PARLIAMENTS: PORTUGAL 27 (2018), <https://www.loc.gov/law/help/national-parliaments/portugal.php>. “Portugal has a unicameral legislature, the Assembly of the Republic, that represents all Portuguese citizens.” *Id.* at 28.

217. Woods, *supra* note 199, at 25.

218. *See generally* U.S. CONST. amend X.

219. Woods, *supra* note 199, at 25.

has been most apparent in marijuana legislation. While marijuana is illegal at the federal level,²²⁰ it has become legal in several states. States that have already legalized marijuana may be more likely to enact drug decriminalization bills of their own. In order for decriminalization of simple possession to be truly effective, states would need to pass legislation in addition to the federal decriminalization bill.

C. *Applying Federal Legislation to the State Level*

The DPRA is a proposed federal bill that calls for a repeal of the penalties set for possession under the Controlled Substances Act.²²¹ While federal policy impacts state legislation, states are free to regulate drugs however they see fit. So, while the DPRA would decriminalize simple possession of substances at the federal level, without further state legislation, states would be free to criminalize substances.

Decriminalizing simple possession of drugs could be a reality in the United States since a majority of Americans approve of reclassifying drug offenses as a civil offense.²²² States that are predominantly composed of Republican voters may take longer to pass this legislation, as only 40% of Republicans favor decriminalization.²²³ Additionally, the states that have already decriminalized marijuana may be more likely to decriminalize simple possession of all drugs.

In order to encourage states to pass decriminalization bills, Congress could condition federal funding on repealing criminal penalties for simple possession.²²⁴ The DPRA does have a conditional funding provision written into it.²²⁵ The provision calls for the reinvestment of federal funds from the drug war into health-related services.²²⁶ This provision requires states to decriminalize simple possession in order to be eligible for these grants.²²⁷ This provision is constitutional since the Court in *New York v. United States* held Congress could attach condi-

220. Marijuana is considered a Schedule I controlled substance. 21 U.S.C. § 812(c)(10) (2018). 21 U.S.C. § 844 makes it illegal to possess a controlled substance. 21 U.S.C. § 844(a).

221. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 2.

222. 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>.

223. *Id.*

224. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1640 (2006).

225. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 3.

226. *Id.*

227. *Id.* at 4.

tions on the receipt of federal funds.²²⁸ This kind of conditional funding can actually be quite influential on state legislation. *South Dakota v. Dole* is a great example for just how influential conditional spending can be.²²⁹ The Court in *Dole* upheld legislation that withheld a percentage of federal highway funds from states whose legal drinking age was below twenty-one.²³⁰ Consequently, all states now have their legal drinking age as twenty-one years of age.

The *Dole* court found conditional spending would be valid as long as it met four conditions: the spending must advance general welfare, the condition must be expressed unambiguously, it must relate to federal interests in the spending program, and it cannot violate any other constitutional provision.²³¹ Using the *Dole* Court's conditions, legislators should be able to tie federal funding to a decriminalization bill. DPRA's conditional funding provision meets the *Dole* Court's conditions with its grant program for reinvesting federal funding. First, the provision clearly lays out what the grant money could be reinvested in and what the states need to do in order to receive this money.²³² Second, the grant program itself is specifically tied to health and helping the communities most harmed by substance use.²³³ Third, nothing in the grant program violates any articles of the Constitution.

Legislators would need to be careful as to not make the conditional funding coercive to the states.²³⁴ The case of *NFIB v. Sebelius* is one of the most well-known instances of the Supreme Court striking down a bill for being unconstitutionally coercive in its conditional spending provision.²³⁵ In *NFIB*, the Court found Congress unconstitutionally exercised its spending power through the Affordable Care Act's Medicaid expansion conditional funding scheme.²³⁶ The Justices found

228. Siegel, *supra* note 244, at 1640. In *New York v. United States*, the Court evaluated the constitutionality of a federal law, the Low-Level Radioactive Waste Policy Amendments Act of 1985. *New York v. United States*, 505 U.S. 144, 149 (1992). In order to encourage states to comply with this law (and enforce it) Congress offered a monetary incentive. *Id.* at 152. The Court found that Congress was not allowed to compel the actions of state officials to enact a federal program but using monetary incentives to encourage states to adopt legislation was permitted. *Id.* at 188.

229. Patrick Haney, *Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending*, 64 CASE W. RES. L. REV. 577, 581 (2013).

230. *Id.* at 581–82.

231. *Id.* at 582.

232. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 3–4.

233. *Id.*

234. Haney, *supra* note 229, at 583. “Dole asserted that in certain circumstances federal conditional spending may turn from permissible encouragement into unconstitutional coercion.” *Id.*

235. *Id.* at 585.

236. *Id.*

the conditional funding to be coercive.²³⁷ They felt the size of the federal funding program, in relation to state expenditures, made it very difficult to replace lost federal wages.²³⁸ The Court did not lay out a clear framework for when something switches from persuasive to coercive.²³⁹ However, the Court in *NFIB* emphasized the funding at stake compared to a state's expenditures.²⁴⁰ In *NFIB*, over 10% of the state's Medicaid funding was at stake, and this was considered coercive.²⁴¹ Comparatively, in *Dole*, South Dakota would have lost 5% of funds available under the highway program which accounted for 0.19% of the state's total expenditures.²⁴² So, it is safe to say, as long as a relatively small percentage of a state's expenditure is at stake, there is a good chance a federal decriminalization bill could be tied to a conditional spending program and not be unconstitutionally coercive.

Separate legislation would be needed on the state level to combat the various state laws that criminalize simple possession. As noted above, the DPRA repeals criminal penalties laid out by the CSA; it does not explicitly decriminalize simple possession of drug use. So why does the DPRA not decriminalize simple possession itself? The DPRA most likely avoids decriminalizing simple possession to prevent issues involving the Tenth Amendment and preemption. The Supremacy Clause states that when state and federal laws conflict, federal law reigns supreme.²⁴³ Preemption occurs when federal law overrides state law because the state law contradicts, impedes, or conflicts with the federal law.²⁴⁴ Preemption can be explicitly written into a bill or it can be implicit.²⁴⁵ This Comment will not go into preemption since the DPRA does not explicitly decriminalize substances, and, therefore, there is no need to consider applying it to the states. It is just important to know that the federal government does not appear to often exercise its preemption power against the states when it comes to drug regulation.²⁴⁶ This suggests it is unlikely Congress

237. *Id.* at 585–86.

238. *Id.* at 587.

239. *Id.* at 604.

240. *Id.* at 605.

241. *Id.*

242. *Id.* at 606.

243. U.S. CONST. art. VI, cl. 2.

244. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1445 (2009).

245. Brian M. Blumenfeld, *State Legalization of Marijuana and Our American System of Federalism: A Historio-Constitutional Primer*, 24 VA. J. SOC. POL'Y & L. 77, 91 (2017).

246. For a look at one of the first instances of federal drug legislation preempting state legislation, see *Gonzales v. Raich*. The Court states “[o]ur case law firmly establishes Congress’ power

would create a law that decriminalizes drugs and explicitly preempts state law.

D. Remaining Challenges After Drug Decriminalization

While drug decriminalization will reduce the burden on the justice system for drug possession cases, drug decriminalization would not change the toll drug trafficking has on the justice system. If 85.4% of drug use violations were for possession, this still means the 14.6% of arrests for sale/manufacturing will continue.²⁴⁷ This amounts to approximately 238,406 arrests per year.²⁴⁸ As seen in Portugal, arrests for drug trafficking could decrease as well, making this number lower. Portugal found several reasons drug trafficking decreased as a result of drug decriminalization, including increased thresholds for personal use amounts making it more difficult to distinguish consumers from traffickers, traffickers only carrying personal use amounts on them and skirting drug laws, and prosecutors or judges possibly being more lenient with trafficking offenses.²⁴⁹ However, drug decriminalization will effectively address the more prevalent issue of drug charges for simple possession and the consequences that come with this offense.

Substance use disorders will still be prevalent despite decriminalization of simple possession. Substance use disorder is not dependent on the legal status of a drug. Therefore, decriminalization may not change overall substance use disorder rates. However, since part of the DPRA involves redistributing funds to programs including substance use treatment, individuals addicted to substances might more readily seek treatment.²⁵⁰ Hopefully, this access to treatment will reduce the overall substance use disorder rate and help decrease the number of overdose deaths annually.²⁵¹

Critics of drug decriminalization often argue decriminalization will increase drug use; however, evidence suggests this would not be the case. The effect of Portugal's decriminalization law on drug use has

to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). "The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market" *Id.* at 19.

247. *2017 Crime in the United States: Persons Arrested*, *supra* note 74.

248. *Id.* With 14.6% of arrests being for sales/manufacturing and 1,632,921 drug abuse violations in 2017, this means 238,406 of those arrests were for sales/manufacturing.

249. Laqueur, *supra* note 111, at 758.

250. *DISMANTLING THE FEDERAL DRUG WAR*, *supra* note 11, at 3.

251. In 2016, 63,600 people died in the United States from opiate overdoses alone. Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis? End the War on Drugs*, 42 *HARV. J.L. & PUB. POL'Y* 547, 550 (2019).

been a contested topic.²⁵² This is largely because there is not one clear cut answer. While drug use has declined among those aged fifteen to twenty-four, lifetime drug use has increased slightly.²⁵³ However, many researchers explain this increase away by pointing out that it is in line with the trends in nearby countries.²⁵⁴ There is other evidence that decriminalization will not increase overall drug use. A 2013 study of European Union member-states showed countries with less punitive drug policies did not have higher rates of drug use.²⁵⁵ In the 1970s, several states in the United States reduced or eliminated criminal penalties for simple possession of marijuana, and there was no significant increase in drug use in these states.²⁵⁶ In the worst case scenario, decriminalization would slightly increase drug use, but hundreds of thousands of people would be freed from a criminal record, the burden on the criminal justice system would lessen, and there would be greater access to treatment for those who want it.

E. Law Enforcement as a Barrier to Implementation

Opposition by law enforcement will be a significant barrier to decriminalization of simple possession. As previously mentioned, the United States puts a significant amount of money into the war on drugs. This has led to job creation, as well as an entire agency to fight the war on drugs: the DEA. Since simple possession accounts for such a significant portion of drug arrests, decriminalization could lead to a collapse of law enforcement agencies, a loss of jobs altogether, or a reallocation of resources. This will most likely be met with resistance from law enforcement agencies.

In 2010, the DEA issued a report against legalizing drugs.²⁵⁷ The report laid out “myths” and “facts” about drug legalization.²⁵⁸ However, many of these “myths” and “facts” were erroneous. For example, myth # 2 stated “[I]egalizing and taxing marijuana will help local economies by reducing crime and increasing tax revenue.”²⁵⁹ This is not a myth at all, as proved by several states. In 2019, California generated \$629.2 million in tax revenue, while Washington generated

252. DRUG DECRIMINALISATION IN PORTUGAL, *supra* note 154, at 3.

253. *Id.*

254. *Id.*

255. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 14.

256. *Id.*

257. See generally DRUG ENFORCEMENT ADMIN., SPEAKING OUT AGAINST DRUG LEGALIZATION (2010), <https://northstarbehavioral.com/wp-content/uploads/2015/06/DEASpeakingOutAgainstDrugLegalization2010.pdf>

258. *Id.* at ii.

259. *Id.* at 4.

\$512.5 million.²⁶⁰ In fact, taxes on marijuana sales raised more than \$1.9 billion in the United States in 2019.²⁶¹ Fact # 4 states “[s]moked marijuana has never been, and will never be scientifically approved for medical use.”²⁶² Medical marijuana is currently legal in thirty-seven states.²⁶³ Even when the DEA published this report, thirteen states had already legalized medical marijuana.²⁶⁴ Given that in 2019, the DEA’s budget was \$2.86 million²⁶⁵ the DEA has a significant stake in the war on drugs. As this report shows, they could be a big opponent of decriminalizing simple possession of drug use.

Many local law enforcement officers may oppose decriminalizing simple possession as well. The DPRA calls for a prohibition on funding to states for drug enforcement.²⁶⁶ This may lead local law enforcement officers to feel their jobs will be at stake. However, law enforcement may still have a role to play. Law enforcement could be part of the effort to help individuals get treatment instead of criminalizing drug use.²⁶⁷ Realistically, some law enforcement personnel may lose their jobs if simple possession of drugs is decriminalized. However, this might be a necessary consequence of dismantling the war on drugs and its harmful effects.

IV. IMPACT

As Portugal has shown, there can be many benefits to decriminalizing drug use, including relieving the burden on the criminal justice system, decreasing the amount of people incarcerated, decreasing overdose deaths, and increasing access to treatment.²⁶⁸ This Part will lay out the effects of decriminalizing simple possession of all drugs in the United States. There is good reason to believe the United States

260. Carl Davis, *State and Local Cannabis Tax Revenue Jumps 33%, Surpassing \$1.9 Billion in 2019*, INST. ON TAX’N & ECON. POL’Y (Mar. 10, 2020), <https://itep.org/state-and-local-cannabis-tax-revenue-jumps-33-surpassing-1-9-billion-in-2019/>.

261. *Id.*

262. DRUG ENFORCEMENT ADMIN., *supra* note 257, at 31.

263. *State Medical Cannabis Laws*, NAT’L CONF. OF ST. LEGISLATURES, (Apr. 19, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. While each state will have their own medical marijuana law, generally these laws do not discriminate between the forms of medical marijuana that is allowed. *Id.* Therefore, “smoked marijuana” is, in fact, approved for medical use.

264. Sarah Trumble & Nathan Kasai, *America’s Marijuana Evolution*, THIRD WAY (Aug. 24, 2017), <https://www.thirdway.org/report/americas-marijuana-evolution>.

265. *FY 2019 Budget Request at a Glance*, DRUG ENFORCEMENT ADMIN., <https://www.justice.gov/jmd/page/file/1033151/download> (last visited Mar. 27, 2021).

266. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 2.

267. ILL. CRIM. JUST. INFO. AUTH., *RETHINKING LAW ENFORCEMENT’S ROLE ON DRUGS 4* (2017), http://www.icjia.state.il.us/assets/articles/Police_drug_diversion_012517.pdf.

268. *See supra* Part II.C.2.

could receive similar, if not more, benefits from decriminalizing simple possession of all drugs. The Drug Policy Alliance cites several benefits to implementing their DPRA including:

- Reducing the number of people arrested, incarcerated, or otherwise swept into the justice system, thereby allowing persons, their families and communities to avoid the many harms that flow from drug arrests, incarceration, and the lifelong burden of having a criminal record;
- Alleviating income-based disparities in the criminal justice system;
- Improving the cost-effectiveness of limited public health resources;
- Revising the current law enforcement incentive structure and re-directing resources to prevent serious and violent crime;
- Reducing racial discrimination and disparities in drug law enforcement;
- Creating a climate in which people who are using drugs problematically have an incentive to seek treatment;
- Improving treatment outcomes where treatment is called for;
- Removing barriers to the implementation of evidence-based practices to reduce the potential harms of drug use, such as drug checking;
- Improving relationships between law enforcement agencies and the communities they have sworn to protect and serve; and
- Making communities safer by reducing prohibition-related violence.²⁶⁹

One of the most substantial benefits from decriminalizing simple possession of drugs would be the decrease in the number of arrests and therefore, the decrease in individuals with a criminal record. In 2016, 80% of the 1.5 million drug arrests were for drug possession-related crimes alone.²⁷⁰ Often simple possession and possession with intent to distribute are included together in possession statistics. However, even factoring for possession with intent to distribute charges, this means potentially over a million people could avoid receiving a criminal record for a simple possession charge. A decrease in arrests would mean a drop in those incarcerated, leading to a diminished

269. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 13.

270. Aila Hoss, *Decriminalization as Substance Use Disorder Prevention*, 51 U. TOL. L. REV. 477, 489 (2020).

prison population. The DPRA also calls for the decarceration of those currently imprisoned for simple possession, which would further diminish the prison population.²⁷¹ After Portugal decriminalized drugs, there was a 43% drop in people incarcerated for drug offenses.²⁷² The Prison Policy Initiative, an advocacy non-profit focused on research related to mass incarceration, estimates there are 371,000 people incarcerated for a drug offense.²⁷³ If the United States saw a 43% drop as Portugal did, this would mean 159,530²⁷⁴ people might be able to avoid incarceration.

Clearly, drug arrests and incarceration have not served as an effective deterrent, and incarceration and criminal records certainly are not treatment for drug addicts. Drug-related overdose deaths doubled between 1999 and 2017,²⁷⁵ Opioid-related overdoses quadrupled between 1999 and 2013,²⁷⁶ and 63,600 Americans died from opiate overdoses in 2016.²⁷⁷ To put this in perspective, more Americans die annually from opioids than are killed in car accidents.²⁷⁸ Decriminalizing simple possession of drug use may be able to decrease overdose deaths if the reform bill includes grant money for treatment programs.²⁷⁹ The Drug Policy Alliance reports that if the United States decriminalized drugs like Portugal, the 2017 number of overdose deaths would have been around 800 instead of the 72,000 that were actually reported.²⁸⁰ Hopefully, decriminalizing drugs will not only decrease the overdose death rate, but it would also reduce the stigma around drug use, as in Portugal, and open the door for users to seek treatment.

Another impact of decriminalizing simple possession of drugs would be reduced state and local expenditures on drug prohibition. The war on drugs has not been cheap. For example, in 2015, North Carolina spent \$70 million incarcerating individuals for drug posses-

271. DISMANTLING THE FEDERAL DRUG WAR, *supra* note 11, at 3.

272. DRUG POL'Y ALLIANCE, DRUG DECRIMINALIZATION IN PORTUGAL: LEARNING FROM A HEALTH AND HUMAN-CENTERED APPROACH 7, https://drugpolicy.org/sites/default/files/dpa-drug-decriminalization-portugal-health-human-centered-approach_0.pdf (last visited Mar. 21, 2021) [hereinafter DRUG DECRIMINALIZATION IN PORTUGAL: LEARNING].

273. Sawyer & Wagner, *supra* note 194. 1 in 5 people incarcerated is there for a drug offense. *Id.*

274. With 371,000 people incarcerated for drug offenses, 43% of 371,000 is 159,530.

275. Hoss, *supra* note 270, at 481.

276. *Id.*

277. Minhee & Calandrillo, *supra* note 251, at 550.

278. *Id.*

279. Portugal saw an 80% decrease in overdose deaths after drug decriminalization so it stands to reason the United States would also see a decrease in overdose deaths. DRUG DECRIMINALIZATION IN PORTUGAL: LEARNING, *supra* note 272, at 6.

280. *Id.*

sion.²⁸¹ In this same year, across the United States, the average cost of incarceration per inmate was \$33,274.²⁸² Studies estimate that 5 to 15% of those in prison for drug offenses are there for simple possession, not possession with intent to distribute.²⁸³ This could result in significant savings around incarceration alone. Going beyond incarceration, a Harvard economist estimated state and local expenditures on drug prohibition are around \$30 billion a year, while federal expenditure is around \$15 billion per year.²⁸⁴ Drug trafficking would still be illegal, so the United States would still need to spend some amount of funding on drug enforcement; however, not having to worry about simple possession charges should bring the figure down considerably.

Drug treatment and prevention programs would help eliminate the burden on the healthcare system caused by drug addiction. Criminalizing drug use creates a fear of arrest that prevents drug users from seeking preventative care, which leads to more emergency room visits.²⁸⁵ Plus, lack of access to treatment and fear of arrest encourages more risky behavior, such as not calling 9-1-1 when witnessing an overdose.²⁸⁶ In fact, hospitals contribute a third of their inpatient costs to treating substance use and addiction.²⁸⁷ The Department of Justice estimates that treatment for addiction- and drug-related illnesses costs the healthcare system over \$9 billion per year.²⁸⁸ Recent data estimates prevention programs create a \$10 return for every \$1 spent.²⁸⁹ This is a significant return on investment, and this investment should decrease the burden on hospitals having to step in as treatment facilities. The United States would be able to reinvest this money in supportive social services programs or other public health initiatives. The United States could see a significant increase in individuals attending treatment if simple possession is decriminalized, just as Portugal did.²⁹⁰

To be clear, decriminalizing simple possession of all drugs is not a total fix for the war on drugs. As mentioned above, opioid use has

281. 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/>.

282. *Id.* at n.20

283. Laqueur, *supra* note 111, at 776.

284. Whitelaw, *supra* note 75, at 85.

285. *Id.* at 87.

286. *Id.*

287. *Id.* at 88.

288. *Id.*

289. *Id.*

290. DOMOSŁAWSKI, *supra* note 110, at 30. In 2008, 5,124 people sought treatment, in 2008, 7,019, in 2009, 7,643, and in 2010, that number jumped exponentially to 40,000. *Id.*

risen substantially, and a large portion of this is due to legal prescription opiates, which will not be impacted by decriminalizing drug use.²⁹¹ However, hopefully the decrease in social stigma around addiction will lead more of these addicted individuals to seek treatment. And with grant programs reinvesting funding into treatment programs, individuals will have wider access to treatment programs.

Additionally, decriminalizing drugs will not end mass incarceration,²⁹² but it should significantly decrease the burden on the criminal justice system by reducing incarceration costs and law enforcement expenditures for simple possession arrests. Decriminalizing all drugs would be a step in the right direction of ending the war on drugs and making drug treatment more accessible.

V. CONCLUSION

Criminalizing simple possession of drugs has militarized police, left many Americans with a criminal record, and overburdened our criminal justice system. The effects of such criminalization have been disproportionality felt by communities of color. Decriminalizing simple possession of drugs will prevent the undue burden of being strapped with a criminal record. This means avoiding endless consequences, including difficulty finding housing, employment discrimination, and prohibition from federal benefits programs. The DPRA provides a model path for how the United States can begin to decriminalize simple possession.

Decriminalization could be a reality in the United States, as a majority of Americans favor reclassifying drug offenses as civil, rather than criminal, offenses.²⁹³ While this Comment focused specifically on Portugal's decriminalization efforts, Portugal is not the only country to decriminalize simple possession of drugs. Spain, Costa Rica, and the Czech Republic also do not criminalize the possession of drugs at a personal use amount.²⁹⁴ Further, an increasing number of public health organizations support decriminalization, including the World Health Organization and the American Public Health Association.²⁹⁵ Marijuana legalization in many states, as well as Oregon's recent

291. *Prescription Opioid Overdose Death Maps*, CDC, <https://www.cdc.gov/drugoverdose/deaths/prescription/maps.html> (last visited Apr. 27, 2022). "In 2019, an average of 38 people died each day from overdoses involving prescription opioids, totaling more than 14,000 deaths." *Id.*

292. ALEXANDER, *supra* note 23, at 217–18. To return to the rate of incarceration in the 1970s, before the war on drugs, four out of five people currently imprisoned would need to be released. *Id.*

293. Ekins, *supra* note 222.

294. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 181.

295. DECRIMINALIZE DRUG USE AND POSSESSION, *supra* note 4, at 27.

decriminalization efforts, suggest the American public would be supportive of decriminalizing simple possession of drugs.

Outside of protecting human rights, legislators' largest motivator for decriminalizing simple possession should be to relieve the burden on the criminal justice system. One in every nine arrests by a state law enforcement officer is for drug possession; this comes at a significant cost.²⁹⁶ The war on drugs requires a significant amount of money and public resources to cover incarceration costs, judicial costs, and the expenses of law enforcement agencies. Despite all this, drug use rates remain relatively unchanged. Clearly, arrest and incarceration are not effective deterrents.²⁹⁷ What the war on drugs *is* successfully doing is further marginalizing people of color and limiting their access to employment, housing, and federal benefits. The United States should decriminalize simple possession to begin to undo the harmful effects of the war on drugs.

Ashley Mastro

296. BORDEN, HUMAN RIGHTS WATCH, *supra* note 1, at 4.

297. Studies show there is no relationship between imprisonment rates and rates of drug use. Brian Elderbroom & Julia Durnan, RECLASSIFIED: STATE DRUG LAW REFORMS TO REDUCE FELONY CONVICTIONS AND INCREASE SECOND CHANCES 2 (2018), https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf.