

# THE DRUG POLICY REFORM ACT: ANALYZING THE POTENTIAL FUTURE OF UNITED STATES FEDERAL DRUG POLICY

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## INTRODUCTION

In the early 1970s, President Nixon declared the War on Drugs and initiated a movement in the United States that instilled a wrongful sense of animus towards non-violent drug users.<sup>1</sup> Initially, Nixon’s War on Drugs was an attempt to attack drug use and possession with excessively harsh

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<sup>1</sup> *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*, EQUAL JUST. INITIATIVE (Mar. 25, 2016), <https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/>.

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penalties.<sup>2</sup> Since the launch of this initiative, many Americans began to view drug use as a criminal activity rather than as a health issue, hindering effective policy solutions aimed at bringing an end to the War on Drugs.<sup>3</sup> More recently, however, a poll conducted by the American Civil Liberties Union shows that sixty-six percent of Americans “support eliminating all criminal penalties for drug possession and investing the resources saved in treatment and addiction services.”<sup>4</sup>

Since President Nixon declared the War on Drugs, the United States government has been excessively strict in enforcing drug criminalization.<sup>5</sup> Despite being home to less than five percent of the world’s population, the United States accounts for about twenty-five percent of the world’s incarcerated population,<sup>6</sup> and in 2019, there were over 1.5 million drug-related arrests—the vast majority of which were for drug possession.<sup>7</sup> In 2023, approximately one in every five incarcerated people have been charged with a drug-related offense.<sup>8</sup> Furthermore, these high incarceration rates especially impact minority groups, specifically Black communities, more significantly than white communities.<sup>9</sup> The Prison Policy Initiative published a press release stating “It’s no surprise that people of color — who face much greater rates of poverty — are dramatically overrepresented in the nation’s prisons and jails. These racial disparities are particularly stark for Black Americans, who make up 38% of the incarcerated population despite representing only 12% of U.S residents.”<sup>10</sup> After incarceration, many individuals convicted of drug-related offenses have difficulty reintegrating into society.<sup>11</sup> Due to the War on Drugs’ lasting effect on individuals convicted of drug-related offenses, policymakers have begun formulating

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<sup>2</sup> See Ignacio Diaz Pascual, *America’s War on Drugs—50 Years Later*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (June 29, 2021), <https://civilrights.org/blog/americas-war-on-drugs-50-years-later/>.

<sup>3</sup> Jamila Hodge & Nazish Dholakia, *Fifty Years Ago Today, President Nixon Declared the War on Drugs*, VERA INST. JUST. (June 17, 2021), <https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs>.

<sup>4</sup> *Id.*

<sup>5</sup> Hannah Ritchie & Max Roser, *Drug Use*, OUR WORLD IN DATA (Dec. 2019), <https://ourworldindata.org/drug-use>.

<sup>6</sup> Lorna Collier, *Incarceration nation*, AM. PSYCH. ASS’N (Oct. 1, 2014), <https://www.apa.org/monitor/2014/10/incarceration>.

<sup>7</sup> *Drug War Statistics*, DRUG POL’Y ALLIANCE, <https://drugpolicy.org/issues/drug-war-statistics> (last visited Apr. 18, 2023).

<sup>8</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INIT. (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (“Drug arrests continue to give residents of over-policed communities criminal records, hurting their employment prospects and increasing the likelihood of longer sentences for any future offenses.”)

<sup>11</sup> *Id.*

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ideas to remedy past and current inequalities in American society.<sup>12</sup> In June 2021, United States Representatives introduced the Drug Policy Reform Act<sup>13</sup> in hopes of reforming the inequalities brought on by the War on Drugs.

Part I of this Note will first address Nixon's War on Drugs and demonstrate its true intentions and effect, specifically on minority communities. Part II will introduce the Drug Policy Reform Act, and analyze certain provisions contained in the bill. Part III will discuss how and why the War on Drugs failed to decrease drug use throughout the United States. It will highlight Portugal's efforts in drug decriminalization and discuss whether the United States could use this system of policies as a model. Part IV will consider whether allowing states to experiment with drug decriminalization before introducing the Drug Policy Reform Act is a viable option. Part IV will also emphasize the benefits of state experimentation and discuss why it may be wise for the federal government to "wait and see" the results of state decriminalization laws before enacting a federal drug policy like the Drug Policy Reform Act. Finally, Part IV will discuss certain provisions of the Drug Policy Reform Act, or a potentially similar federal drug bill, that raise questions of federalism and how such provisions may be unconstitutional.

## I. BACKGROUND ON THE WAR ON DRUGS

Despite being masked as a calculated, fact-driven policy to end widespread drug use and drug-related crimes, the War on Drugs was a deliberate, targeted attack on Black communities.<sup>14</sup> After announcing an "all out offensive"<sup>15</sup> on drug-related activity, former President Nixon created the Office of Drug Abuse Law Enforcement "to wage a government war on otherwise peaceful and innocent Americans who voluntarily chose to [consume drugs]."<sup>16</sup> As conceded by John Ehrlichman, Nixon's aide, the War on Drugs was a blatant attack on Black communities, used as the pretext for incarcerating an increasing, yet innocent, number of Black people.<sup>17</sup>

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<sup>12</sup> See *Reps. Cori Bush and Bonnie Watson Coleman Introduce Federal Bill to Decriminalize Drug Possession, Replace with Health-Centered Approach*, CORI BUSH (June 15, 2021), <https://bush.house.gov/media/press-releases/reps-cori-bush-and-bonnie-watson-coleman-introduce-federal-bill-decriminalize>.

<sup>13</sup> *Id.*

<sup>14</sup> Mark J. Perry, *The Shocking Story Behind Nixon's Declaration of a 'War on Drugs' on this Day in 1971 that Targeted Blacks and Anti-War Activists*, AM. ENTER. INST. (June 17, 2019), <https://www.aei.org/carpe-diem/the-shocking-story-behind-nixons-declaration-of-a-war-on-drugs-on-this-day-in-1971-that-targeted-blacks-and-anti-war-activists/>.

<sup>15</sup> *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404/>.

<sup>16</sup> Perry, *supra* note 15.

<sup>17</sup> *Id.*

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Stating that the Nixon administration posed Black citizens and the anti-war left as its two enemies,<sup>18</sup> Ehrlichman admitted,

We knew we couldn't make it illegal to be either against the war or [B]lacks, but by getting the public to associate the hippies with marijuana and [B]lacks 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.<sup>19</sup>

Nixon's War on Drugs has been reinforced throughout the years, with succeeding presidents further exacerbating the issue.<sup>20</sup> Notably, in 1986, President Reagan signed the Anti-Drug Abuse Act, which "increased funding for law enforcement and mandated harsher penalties in federal drug cases, including life imprisonment."<sup>21</sup> The Anti-Drug Abuse Act authorized \$65.6 million to build new federal prisons.<sup>22</sup> As a result of Reagan's policies, "[t]he number of people behind bars for nonviolent drug law offenses increased from 50,000 to over 400,000 by 1997."<sup>23</sup> Then, in 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act (the "1994 Crime Bill").<sup>24</sup>

Perhaps the most damaging provision of the 1994 Crime Bill was its incentive for states to increase their prison populations.<sup>25</sup> In providing such an incentive, the 1994 Crime Bill "offered federal grants to states to expand their prison capacity, and it made the grants dependent on states increasing the length of incarceration of those convicted of violent crimes."<sup>26</sup> The Brennan Center for Justice, citing statistics from the Statista Research Department, published that from the high crime rates of 1991, "[b]y the time of the bill's enactment, the violent crime rate had already fallen by 6 percent. By the time it took effect the following year, violent crime was down by ten percent."<sup>27</sup> While the bill was enacted as an attempt to crack down on violent crime, it effected drug-related, non-violent crimes by incentivizing the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Graham Boyd, *The Drug War is the New Jim Crow*, AM. C.L. UNION (2001), <https://www.aclu.org/other/drug-war-new-jim-crow>.

<sup>21</sup> Lauren-Brooke Eisen, *The Federal Funding that Fuels Mass Incarceration*, BRENNAN CTR. FOR JUST. (June 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/federal-funding-fuels-mass-incarceration>.

<sup>22</sup> *Id.*

<sup>23</sup> *A History of the Drug War*, DRUG POL'Y ALLIANCE, <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Apr. 18, 2023).

<sup>24</sup> Eisen, *supra* note 22.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

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expansion of prisons throughout the country.<sup>28</sup> Addressing the National Association for the Advancement of Colored People (“NAACP”) in 2015, President Clinton expressed regret in passing the 1994 Crime Bill, stating, “I signed a bill that made the problem worse, and I want to admit it. In that bill there were longer sentences and most of these people were in prison under state law, but the federal law set a trend, and that was over-done. We were wrong about that.”<sup>29</sup>

This Note argues that, as such an arbitrary federal policy, the War on Drugs was doomed to fail. Since 1971, the United States has spent around \$1 trillion fighting the War on Drugs.<sup>30</sup> In 2015, the federal government spent around \$9.2 million per day on incarcerated individuals for drug-related offenses, costing over \$3.3 billion that year.<sup>31</sup> The Sentencing Project reported that “[i]n 2005, 42.6% of all drug arrests were for marijuana offenses, and marijuana possession arrests accounted for 79% of the growth in drug arrests in the 1990s.”<sup>32</sup> Since most states have either legalized, decriminalized, or loosened prohibitions on marijuana possession,<sup>33</sup> these 2005 arrests<sup>34</sup> shed light on the inequities the War on Drugs caused. Despite marijuana restrictions being eased up nationwide, the individuals incarcerated for marijuana-related offenses in 2005 face the challenges that any individual convicted of a felony would today, including obstructed access to education and employment, as well as obstacles to fundamental rights like voting and possessing a driver’s license.<sup>35</sup> In addition, individuals incarcerated for drug offenses have difficulty receiving child custody and obtaining business loans.<sup>36</sup> Many incarcerated individuals are *victims* themselves—of substance abuse; in 2004, fifty-six percent of state prison inmates had used drugs within the month before they were arrested.<sup>37</sup> It is evident that perhaps a new, health-focused approach is due.<sup>38</sup> Despite a high

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018), <https://www.americanprogress.org/article/ending-war-drugs-numbers/>.

<sup>31</sup> *Id.*

<sup>32</sup> MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY, SENT’G PROJECT (Sept. 2007), <https://www.prisonpolicy.org/scans/sp/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf>.

<sup>33</sup> *Marijuana Legality by State*, DISA (Feb. 2023), <https://disa.com/maps/marijuana-legality-by-state>.

<sup>34</sup> MAUER & KING, *supra* note 33.

<sup>35</sup> DRUG POL’Y ALLIANCE, THE DRUG WAR, MASS INCARCERATION AND RACE (June 2015), [https://www.unode.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Drug\\_War\\_Mass\\_Incarceration\\_and\\_Race\\_June2015.pdf](https://www.unode.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf).

<sup>36</sup> *Id.*

<sup>37</sup> MAUER & KING, *supra* note 33.

<sup>38</sup> *See id.*; *see also* Peter Reuter, *Why Has US Drug Policy Changed So Little Over 30 Years?*, 42 CRIME & JUST. 75 (2013); *see also* Wendy Manwarren Generes, *Rehab Success Rates and Statistics*, AM.

number of incarcerated individuals, the rate of those who participate in drug treatment services are declining: in 1991, one in three incarcerated individuals attended drug treatment services, compared to one in seven in 2004 (in state prisons); federally, in 2004, 15.2% of individuals who had been regular drug users attended treatment, compared to 33.7% in 1991.<sup>38</sup>

*A. Introducing the Drug Policy Reform Act and Laying the Groundwork*

Two years ago, United States Representatives Cori Bush, of Missouri, and Bonnie Watson Coleman, of New Jersey, brought forth the bill H.R. 4020, also referred to as the Drug Policy Reform Act (“DPRA”),<sup>39</sup> which would act as a sweeping overhaul of federal drug policy.<sup>40</sup> The DPRA would “end criminal penalties for drug possession at the federal level” and “shift regulatory authority from the Justice Department to the Department of Health and Human Services.”<sup>41</sup> This bill’s proposal happened to fall around the fiftieth anniversary of Nixon’s official declaration on the War on Drugs.<sup>42</sup> As stated by U.S. Representative Watson Coleman,

Begun in 1972 as a cynical political tactic of the Nixon Administration, the War on Drugs has destroyed the lives of countless Americans and their families. As we work to address the opioid epidemic, it is essential that we change tactics in how we address drug use away from the failed punitive approach to a health-based and evidence-based.<sup>43</sup>

In support of the DPRA, Queen Adesuyi, a manager at the Drug Policy Alliance, has remarked that the DPRA,

[Is] a chance to reimagine what the next 50 years can be. It allows us to offer people support instead of punishment. And it gives people who have been harmed by these Draconian laws a chance to move forward and embrace some semblance of the life they have long been denied.<sup>44</sup>

As noted on U.S. Representative Bush’s website, the belief that the War on Drugs has failed to decrease drug use is shared among political

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ADDICTION CTRS. (Oct. 21, 2022), <https://americanaddictioncenters.org/rehab-guide/success-rates-and-statistics>.

<sup>38</sup> MAUER & KING, *supra* note 33.

<sup>39</sup> *Reps. Cori Bush and Bonnie Watson Coleman Introduce Federal Bill to Decriminalize Drug Possession, Replace with Health-Centered Approach*, *supra* note 13.

<sup>40</sup> See Environmental Justice For All Act, H.R. 2021, 117th Cong. § 2 (2021).

<sup>41</sup> See *Reps. Cori Bush and Bonnie Watson Coleman Introduce Federal Bill to Decriminalize Drug Possession, Replace with Health-Centered Approach*, *supra* note 13.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Lisa Newcomb, *Drug Policy Reform Act Is Introduced in Congress but Faces Long Road Ahead*, LUCID NEWS (June 22, 2021), <https://www.lucid.news/drug-policy-reform-act-is-introduced-in-congress-but-faces-long-road-ahead/>.

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parties.<sup>45</sup> Based on a poll conducted by the Drug Policy Alliance, about eighty three percent of Americans believe the War on Drugs has failed, while only twelve percent believe it has been successful.<sup>46</sup> This poll further shows that “66% [of Americans] support eliminating criminal penalties for drug possession and reinvesting drug enforcement resources into treatment and addiction services.”<sup>47</sup> Additionally, the poll demonstrates that only about thirty-seven percent of people agree that “illegal drugs destroy communities, and we need to continue to prosecute all drug offenders, including both dealers and users.”<sup>48</sup>

These results are encouraging for the prospect of drug policy changes in the future. While many politicians and the American public tend to be more evenly divided on hot button topics,<sup>49</sup> it is promising that a large majority of Americans would support an overhaul of this federal drug policy.<sup>50</sup> Evidently, most people see the War on Drugs as a failed attempt to solve a persistent issue in the United States. Still, however, the DPRA has an arduous journey to traverse before becoming law.

Due to the state of the country following COVID-19, federal drug policy is not a priority for the Biden administration.<sup>51</sup> In April 2021, Vice President Kamala Harris stated that the administration was “too busy” to address federal cannabis decriminalization as a result of COVID policy priorities.<sup>52</sup> While the Biden administration has since pursued some marijuana reform,<sup>53</sup> it is clear that the administration is ill-prepared to take on the massive task of analyzing sweeping federal drug policies, such as the DPRA.<sup>54</sup> Moreover, as noted by Jeffrey A. Singer, a fellow at the Cato Institute, there are glaring questions regarding this bill and federalism.<sup>55</sup> These considerations indicate that the DPRA will have to be put on hold

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<sup>45</sup> Danny Franklin, *Overwhelming Majority Say War on Drugs Has Failed, Support New Approach*, BULLY PULPIT INTERACTIVE (JUNE 2, 2021), [https://drugpolicy.org/sites/default/files/bpi-acu\\_wod\\_public\\_release\\_memo\\_060221\\_updated\\_002\\_002.pdf](https://drugpolicy.org/sites/default/files/bpi-acu_wod_public_release_memo_060221_updated_002_002.pdf).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Amina Dunn, *As the U.S. Copes with Multiple Crises, Partisans Disagree Sharply on Severity of Problems Facing the Nation*, PEW RSCH. CTR. (July 14, 2020), <https://www.pewresearch.org/fact-tank/2020/07/14/as-the-u-s-copes-with-multiple-crises-partisans-disagree-sharply-on-severity-of-problems-facing-the-nation/>.

<sup>50</sup> Franklin, *supra* note 46.

<sup>51</sup> Newcomb, *supra* note 45.

<sup>52</sup> *Id.*

<sup>53</sup> Press Release, Joe Biden, President, United States, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>.

<sup>54</sup> See Newcomb, *supra* note 45.

<sup>55</sup> *Id.*

before even being considered for passage. Still, however, the DPRA appears to be, at the very least, a productive step forward in the search for federal drug policy remedies.<sup>56</sup>

## II. AN ANALYSIS OF THE DRUG POLICY REFORM ACT

The DPRA consists of sections that reframe the issue of drug use and delegate authority to health-related experts.<sup>57</sup> Section 2 of the DPRA highlights congressional findings regarding drug policy among both federal and state governments.<sup>58</sup> Section 2(2) points to state legislatures implementing “increasingly harsh sentencing schemes such as mandatory minimums, established far-reaching and oppressive civil sanctions and collateral consequences . . . .”<sup>59</sup> Section 2(12) draws attention to Portugal’s relatively successful drug decriminalization policy (which will be discussed in greater detail below), stating that Portugal “has successfully decriminalized personal use quantities of drugs and achieved meaningful improvements in treating problematic drug use and reducing the harms of policing drugs.”<sup>60</sup>

Section 3 discusses the DPRA’s general goals and how the U.S. should handle drug possession and use altogether.<sup>61</sup> Section 3(1) suggests that the United States should “refocus its strategies for addressing substance use disorder and dangerous drug use from strategies focused on controlling and punishing unauthorized drug possession to a system that is health focused, evidence-based, and respectful of self-determination.”<sup>62</sup> By shifting the focus to a more health-centered approach, there is hope that individuals who use drugs can gain access to treatment, rather than punishment. Section 3(2) discusses the goals of investing in treatment services, including harm-reduction services, which could “help prevent overdose and other health risks, and strengthen connections to services that provide foundational social and economic support . . . .”<sup>63</sup>

Section 4 of the DPRA sets forth a shift in regulatory authority, amending the Controlled Substances Act.<sup>64</sup> Section 4 proposes amending Section 201 of the Controlled Substances Act, “striking ‘Attorney General’

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<sup>56</sup> See Environmental Justice For All Act, H.R. 2021, 117th Cong. § 2 (2021).

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; 21 U.S.C. §812.



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and inserting ‘Secretary of Health and Human Services’ each place it appears.”<sup>65</sup> This draws similarities to Portugal’s policy, in that Portugal shifted regulatory authority from the justice system to its newly created Commissions. This section corresponds with the view of a majority of Americans, who support shifting the authority from law enforcement to health-related services.<sup>66</sup>

Section 5 of the DPRA is where the bill begins explaining the comprehensive plan step-by-step.<sup>67</sup> Specifically, Section 5 is titled “Eliminate criminal penalties for personal use possession”<sup>68</sup> and proposes further amendments to the Controlled Substances Act.<sup>69</sup> Section 5 proposes that a subsection is added to Section 404 of the Controlled Substances Act.<sup>70</sup> Included in Section 5 of the DPRA, it reads: “A person possessing or using a controlled substance in an amount no greater than the benchmark amount (determined by the Commission on Substance Use, Health, and Safety established by the Drug Policy Reform Act of 2021) shall not be subject to a criminal or civil penalty under this section.”<sup>71</sup> The amendment would further detail that the possession or use of a drug less than the “benchmark amount . . . shall not constitute a basis for detaining, searching, arresting, questioning or surveilling any person, or seizing property including, controlled substances and any items used for ingestion, consumption, preparation, packaging, or storage of a controlled substance.”<sup>72</sup> This section highlights the ultimate shift of authority from law enforcement to trained professionals; the provision seems to comprehend the negative effects that criminal punishment has on drug users. However, it should be noted that Portugal still relies on the police to serve essential roles in the implementation of its policy.<sup>73</sup> Section 3 of the amendment to this section further states that possession or use of a controlled substance in an amount less than the maximum permitted “shall not constitute a basis for any referral to any immigration enforcement agency, U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection.”<sup>74</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Hodge & Dholakia, *supra* note 3.

<sup>67</sup> H.R. 2021, 117th Cong. § 2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 U. D.C. L. REV. 1 (Sept. 30, 2011).

<sup>74</sup> Environmental Justice For All Act, H.R. 2021, 117th Cong. § 2 (2021).

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Similar to how Portugal created several Commissions for the Dissuasion of Drug Addiction, Section 6 of the DPRA would have the Secretary of Health and Human Services establish a “Commission on Substance Use, Health, and Safety.”<sup>75</sup> Just as Portugal appointed individuals involved in the health field to its Commissions,<sup>76</sup> the DPRA would “consist of people with current or past substance use needs and qualified persons in the fields of general and behavioral healthcare, harm reduction, and substance use disorder treatment.”<sup>77</sup> The drafters of the DPRA seemed to understand the importance of utilizing experts in the field of addiction rather than law enforcement; this bill seems to contemplate the adverse effects of relying on the prison system to rehabilitate drug users. Section 6(b)(1)(B) lays out the duties that the Commission is responsible for, including determining the “benchmark amount for controlled substances,”<sup>78</sup> “common patterns of use by typical consumers of the drug,”<sup>79</sup> and “differences in commonly possessed quantities resulting from factors relating to geography, income, employment, and other related demographic considerations . . . .”<sup>80</sup> This section further states that the Commission will consist of at least eighteen members, including voting members and non-voting members. These voting members would include “[f]our individuals who have either used controlled substances or are using controlled substances . . . two members of communities that have been disproportionately impacted by arrests, prosecution or sentencing for drug offenses . . . one peer support specialist . . . a harm reduction service provider,”<sup>81</sup> and more, including physicians and social workers.<sup>82</sup> In sum, the DPRA draws many similarities to the Portugal drug policy, whose drafters clearly had a deep understanding of the issues caused by the War on Drugs.

### III. THE PROBLEM

#### *A. Addressing the Issue with the United States’ Drug Policy*

A major critique of American drug policy is that it has been highly ineffective in decreasing drug use and drug-related offenses.<sup>83</sup> Despite this wholly flawed federal drug policy, politicians have not prioritized finding

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<sup>75</sup> *Id.*

<sup>76</sup> SONIA FÉLIX, PEDRO PORTUGAL, & ANA TAVARES, GOING AFTER THE ADDICTION, NOT THE ADDICTED: THE IMPACT OF DRUG DECRIMINALIZATION IN PORTUGAL, IZA INST. LAB. ECON. (July 31, 2017), <https://docs.iza.org/dp10895.pdf>.

<sup>77</sup> H.R. 2021, 117th Cong. § 2.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Reuter, *supra* note 39.

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ways to improve it.<sup>84</sup> While some politicians advocate for sweeping changes, most do not consider overhauling the federal drug policy a pressing issue.<sup>85</sup> Criminologist and economist Peter Reuter explained that “[o]ne odd feature of the drug policy debate is the reluctance to acknowledge that the US drug problem, by some of the most significant measures, is declining.”<sup>86</sup>

Although incarceration was the War on Drugs’ proposed solution to combatting the drug epidemic in the United States,<sup>87</sup> several studies have shown that many individuals return to drug use after being released from prison or jail.<sup>88</sup> Alternatively, those who have undergone treatment from professional drug treatment centers show decreased rates of returning to drug use after incarceration.<sup>89</sup> Many drug treatment services take pride in their success rates, but it is difficult to truly understand the success of drug treatment services.<sup>90</sup> One reason for this challenge is the lack of a uniform rehabilitation system; drug treatment services use different methods to help drug users, so there are no uniform and reliable studies to consider.<sup>91</sup> Therefore, this Note concludes that it is challenging to understand success rates in treating drug users due to the current federal drug policy as a whole. While certain courts mandate drug treatment for some individuals, compulsory drug treatment is not a widespread practice in the U.S.<sup>92</sup> Since federal drug policy focuses more on incarceration, many drug users do not receive mandates to obtain drug treatment from federal courts.<sup>93</sup>

Mandated drug treatment is an effective tool in combatting drug abuse.<sup>94</sup> Research has shown that individuals who undergo mandated drug

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<sup>84</sup> *Economic Issues Decline Among Public’s Policy Priorities*, PEW RSCH. CTR. (Jan. 25, 2018), <https://www.pewresearch.org/politics/2018/01/25/economic-issues-decline-among-publics-policy-priorities/>.

<sup>85</sup> *Id.*

<sup>86</sup> Reuter, *supra* note 39 (alteration in original).

<sup>87</sup> MAUER & KING, *supra* note 33.

<sup>88</sup> Adam Chamberlain, Sylviah Nyamu, Jenerius Aminawung, Emily A. Wang, Shira Shavit, & Aaron D. Fox, *Illicit Substance Use After Release From Prison Among Formerly Incarcerated Primary Care Patients: A Cross-Sectional Study*, ADDICTION SCI. & CLINICAL PRAC. (Feb. 19, 2019), <https://ascpjournals.biomedcentral.com/articles/10.1186/s13722-019-0136-6>.

<sup>89</sup> *Id.*

<sup>90</sup> Generes, *supra* note 39.

<sup>91</sup> See Batya Swift Yasgur, *Court-Mandated Substance Abuse Treatment: Exploring the Ethics and Efficacy*, PSYCHIATRY ADVISOR (May 29, 2018), <https://www.psychiatryadvisor.com/home/topics/addiction/court-mandated-substance-abuse-treatment-exploring-the-ethics-and-efficacy/>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Donna M. Coviello, Dave A. Zanis, Susan A. Wesnoski, Nicole Palman, Arona Gur, Kevin G. Lynch, & James R. McKay, *Does Mandating Offenders to Treatment Improve Completion Rates?*, 44 J. SUBSTANCE ABUSE & ADDICTION TREATMENT 417 (Nov. 26, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3578041/>.

treatment experience a higher rate of success than those who voluntarily undergo such treatment.<sup>95</sup> A study of veterans in residential treatment reported that “mandated patients had better treatment outcomes after one year and similar outcomes after five years compared to voluntary patients.”<sup>96</sup> Another study showed that “patients who entered residential treatment with moderate to high legal pressure were significantly more likely to stay in treatment 90 days or more compared to those with low legal pressure.”<sup>97</sup>

### *B. The War on Drugs Masked as the War on Minority Communities*

The War on Drugs has continued to have disparate effects on minority groups, specifically Black people, as the War on Drugs is widely recognized as a ploy to infiltrate and disrupt Black communities.<sup>98</sup> Despite no evidence showing that Black citizens use illicit substances more than white people, Black people in the United States are about six times more likely to be incarcerated for drug-related offenses.<sup>99</sup> Additionally, “[f]ederal sentences for Black men are approximately 20% longer than those of whites convicted of similar crimes.”<sup>100</sup> One potential explanation for this significant disparity is crack-cocaine sentencing laws.<sup>101</sup> While the House of Representatives passed a bill in September 2021 eliminating disparate crack and powder cocaine sentencing,<sup>102</sup> the historical difference in sentencing has devastatingly impacted Black and other minority communities.<sup>103</sup> In the mid-1980s, crack-cocaine became a popular drug and received media attention as “a violence inducing, highly addictive plague on inner cities . . . .”<sup>104</sup> After receiving intense media attention, two federal laws were passed in 1986 and 1988, creating “a 100:1 quantity ratio between the amount of crack and powder cocaine needed to trigger certain mandatory minimum sentences for trafficking, as well as creating a mandatory minimum penalty for simple

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<sup>95</sup> *Id.*

<sup>96</sup> John F. Kelly, John W. Finney, & Rudolf Moos, *Substance use disorder patients who are mandated to treatment: characteristics, treatment process, and 1- and 5-year outcomes*, 28 J. SUBSTANCE ABUSE & ADDICTION TREATMENT 213 (Nov. 10, 2016), <https://pubmed.ncbi.nlm.nih.gov/15857721/>.

<sup>97</sup> *Id.*

<sup>98</sup> Kate Orlin, *The War on Drugs & Racial Health Disparities in Incarceration*, HPHR (2021), <https://hphr.org/30-article-orlin/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See Cristina Marcos, *House passes bill to end crack and powder cocaine sentencing disparity*, THE HILL (Sept. 28, 2021, 3:06 PM), <https://thehill.com/homenews/house/574334-house-passes-bill-to-end-crack-and-powder-cocaine-sentencing-disparity>.

<sup>102</sup> *Id.*

<sup>103</sup> See Orlin, *supra* note 99.

<sup>104</sup> SENT’G PROJECT, CRACK COCAINE SENTENCING POLICY: UNJUSTIFIED AND UNREASONABLE, <https://www.prisonpolicy.org/scans/sp/1003.pdf> (last visited April 18, 2023).

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possession of crack cocaine.”<sup>105</sup> In other words, despite causing similar physical reactions, “[f]or powder cocaine, a conviction of possession with intent to distribute carries a five year sentence for quantities of 500 grams or more. But for crack, a conviction of possession with intent to distribute carries a five year sentence for only 5 grams.”<sup>106</sup> Despite a lower rate of Black crack cocaine users compared to white crack cocaine users, “[d]efendants convicted of crack possession in 1994 were 84.5% black, 10.3% white, and 5.2% Hispanic.”<sup>107</sup>

Black people have been further hindered by the War on Drugs’ disparate treatment of racial minorities.<sup>108</sup> Individuals with felony convictions face difficulties reintegrating back into society due to some state laws that disenfranchise convicted felons.<sup>109</sup> The American Civil Liberties Union (ACLU) has noted that “[i]n both Florida and Kentucky, approximately one in five African-American citizens is disenfranchised due to a prior conviction.”<sup>110</sup> Further, convicted drug offenders face challenges finding adequate employment or education, which ultimately results in the inability to reintegrate back into society.<sup>111</sup> The latent, alienating effects of a felony conviction can contribute to people relapsing and returning to drug use, or even starting to use drugs for the first time as a coping mechanism.<sup>112</sup> This disproportionate treatment has further resulted in inequitable outcomes that, combined with pre-existing obstacles of racial inequalities, have had a lasting effect on Black people.<sup>113</sup>

This Note argues that change is necessary to correct past and current wrongs in the criminal justice system, specifically how federal policy treats drug offenders. The Drug Policy Reform Act, if passed, would have a significant positive impact on past and current drug offenders, and it would be a step in the right direction toward justice and equality for those with drug abuse issues. Other countries, such as Portugal, have successfully implemented drug policies emphasizing drug use as a health issue rather than

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Julie Ebenstein, *For Some Convicted of Drug Offenses, the Punishment Never Ends*, AM C.L. UNION (Nov. 17, 2014), <https://www.aclu.org/blog/speakeasy/some-convicted-drug-offenses-punishment-never-ends>.

<sup>110</sup> *Id.*

<sup>111</sup> Leah Wang & Wanda Bertram, *New data on formerly incarcerated people’s employment reveal labor market injustices*, PRISON POL’Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/>.

<sup>112</sup> Allyson Sam Sung, *Drug Use and Punishment: A Public Health Crisis America Can No Longer Ignore*, 17 SEATTLE J. SOC. JUST. 129 (2018).

<sup>113</sup> See Orlin, *supra* note 99.

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a criminal issue.<sup>114</sup> This Note proposes that the United States consider examining Portugal's drug policy as a potential model for crafting its own federal drug policies.

### *C. Portugal as a Model*

In 2001, Portugal's parliament implemented Law Number 30/2000, which states that the "use, purchase, and possession for use of any illicit drugs (hard or soft), in public or private, not exceeding the average quantity required for 10 days of individual consumption is no longer to be considered a criminal offense, but rather an administrative one."<sup>115</sup> Before analyzing Portugal's decriminalization model, it is crucial to distinguish decriminalization and depenalization.<sup>116</sup> As explained in a report from the Institute of Labor Economics, "depenalization comprises a criminal offense but no penal sanctions (imprisonment cannot be imposed), whereas decriminalization means a certain conduct is prohibited but sanctions do not fall within criminal law."<sup>117</sup> However, this mere policy change was not what led to the program's ultimate success.<sup>118</sup> Contrary to how the United States once declared drugs "public enemy number one,"<sup>119</sup> Portugal began treating drug use as a health issue, shifting "from that of a punitive approach to a comprehensive public health-oriented approach, in which prevention and treatment are core concerns."<sup>120</sup> Thus, Portugal invested heavily in bolstering its drug treatment and harm reduction services.<sup>121</sup>

Portugal's law requires that, after being found with possession of fewer than ten doses of any illicit substance, individuals are sent to a Commission for the Dissuasion of Drug Addiction (the "Commission"), consisting of a legal expert, a social worker, and a doctor.<sup>122</sup> Each participant is interviewed by the Commission, during which the participant is asked questions to help the Commission understand their background, so that the Commission is able identify the best way to help them.<sup>123</sup> Typically, if an individual comes before the Commission for the first time, the members of

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<sup>114</sup> See FÉLIX, PORTUGAL, & TAVARES, *supra* note 77.

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Perry, *supra* note 15.

<sup>120</sup> FÉLIX, PORTUGAL, & TAVARES, *supra* note 77.

<sup>121</sup> Marie Nougier, *Gender and Drug Policy: Exploring Innovative Approaches to Drug Policy and Incarceration – The Portuguese Model for Decriminalizing Drug Use*, WOLA (2017), [https://www.wola.org/wp-content/uploads/2017/05/DONE-12-Portuguese-decriminalisation\\_ENGFINAL.pdf](https://www.wola.org/wp-content/uploads/2017/05/DONE-12-Portuguese-decriminalisation_ENGFINAL.pdf).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

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the Commission will inform the individual of the dangers of drug use and suggest treatment methods.<sup>124</sup> On the other hand, if an individual before the Commission is abusing and/or addicted to drugs, the Commission will “encourage him/her to enter treatment or to resume a treatment program that has been interrupted—and as such regain control over their drug use, access opioid substitution therapy (“OST”), or stop using drugs altogether.”<sup>125</sup> Portugal’s laws do not coerce individuals into undergoing treatment, nor are they punished for refusing to enter or remain in treatment.<sup>126</sup> However, despite the low four to six percent rate of individuals who attend a Commission session more than once,<sup>127</sup> individuals who appear before a Commission more than once may face an “administrative sanction,”<sup>128</sup> requiring periodic attendance to treatment services or hospitals.<sup>129</sup> “More rarely, the Commissions can also impose bans on leaving the country without authorization, on undertaking certain jobs where health and safety would be at risk, from frequenting certain locations, and revocation of licenses.”<sup>130</sup>

In 2001, when Portugal passed this drug decriminalization law, drug use, drug overdoses, and drug-related HIV/AIDS transmissions were prevalent throughout the country.<sup>131</sup> Nevertheless, while the results of this policy can be viewed in several ways, many signs indicate that this policy achieved its goals of decreasing drug use, treating those who use drugs, and characterizing drug use as a health issue rather than a criminal act. Studies have shown that “[f]ollowing decriminalization, the number of people who use drugs diagnosed with HIV significantly decreased from 907 new cases in 2000 to only 79 in 2012.”<sup>132</sup> Since Portugal did not begin collecting nationwide data on drug use until 2001,<sup>133</sup> it is difficult to compare those results to the drug use data within the United States and even more challenging to determine which statistics indicate the program’s success. However, some statistics suggest that Portugal is achieving its goal of decreasing drug use and drug-related death or illness.<sup>134</sup> The Drug Policy Alliance reported: “In 2000, people who used drugs accounted for 52 percent

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> DRUG DECRIMINALIZATION IN PORTUGAL: LEARNING FROM A HEALTH AND HUMAN-CENTERED APPROACH, DRUG POL’Y ALLIANCE (2019), [https://drugpolicy.org/sites/default/files/dpa-drug-decriminalization-portugal-health-human-centered-approach\\_0.pdf](https://drugpolicy.org/sites/default/files/dpa-drug-decriminalization-portugal-health-human-centered-approach_0.pdf).

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of new HIV/AIDS diagnoses. In 2015, it decreased to a low of 6 percent.<sup>135</sup> Drug overdose deaths dropped over eighty percent after Portugal passed its law, falling from 369 drug overdoses in 1999 to just fifty-four drug overdoses in 2015.<sup>136</sup> The Drug Policy Alliance elaborated: “In 2017, there were more than 72,000 overdose deaths in the U.S. If the U.S. overdose death rate were on par with Portugal’s, there would have been fewer than 800 overdose deaths that year.”<sup>137</sup>

Critics of Portugal’s model may point to the slight increase in lifetime drug use, which corresponds with increases in neighboring countries.<sup>138</sup> However, the United Nations Office on Drugs and Crime has shared that “[l]ifetime use is widely considered to be the least accurate measure of a country’s current drug use situation.”<sup>139</sup> A more accurate measure of Portugal’s drug use situation is overall drug use among ages fifteen to twenty-four, which has declined since the implementation of the policy.<sup>140</sup> According to the the United Nations Office on Drugs and Crime, “[r]ates of past-year and past-month drug use among the general population—which are seen as the best indicators of evolving drug use trends—have decreased.”<sup>141</sup> Critics of Portugal’s decriminalization model are misguided in their opinion that removing criminal penalties will increase drug use.<sup>142</sup> Such critics note that there is no proven relationship between the strictness of a nation’s laws regarding drug use and possession and its rates of drug use; rather, drug use correlates more with cultural, social, or economic trends.<sup>143</sup> This Note posits that merely funding treatment services and decriminalizing drug use and possession does not causally relate to increased drug use.

Furthermore, while critics may claim that drug decriminalization leads to an increase in violence and crime,<sup>144</sup> this assertion is incorrect.<sup>145</sup> Due to the rhetoric initiated by Nixon’s declaration of the War on Drugs and advanced by decades of criminalization and incarceration, Americans tend to

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Nougier, *supra* note 122.

<sup>139</sup> George Murkin, *Drug decriminalization in Portugal: setting the record straight*, UNITED NATIONS OFF. ON DRUGS & CRIME (June 2014), <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/Drug-decriminalisation-in-Portugal.pdf>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Neal Conan, *Mixed Results for Portugal’s Great Drug Experiment*, NAT’L PUB. RADIO (Jan. 20, 2011, 1:00 PM), <https://www.npr.org/2011/01/20/133086356/Mixed-Results-For-Portugals-Great-Drug-Experiment>.

<sup>145</sup> Murkin, *supra* note 140.



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stigmatize individuals who use drugs.<sup>146</sup> Realistically, though, in Portugal, decriminalization has not led to an increase in crime.<sup>147</sup> The United Nations Office on Drugs and Crime observed that,

With its re-categorization of low-level drug possession as an administrative rather than criminal offence, decriminalization inevitably produced a reduction in the number of people arrested and sent to criminal court for drug offences—from over 14,000 in the year 2000, to around 5,500-6,000 per year once the policy had come into effect.<sup>148</sup>

While drug possession cannot be punished with incarceration, several other drug-related offenses are, in fact, punishable with incarceration.<sup>149</sup>

While the general idea Portugal has implemented seems replicable, it should be noted that the vast differences between Portugal and the United States may make it difficult for the United States to completely model Portugal's drug policy.<sup>150</sup> Portugal's population is substantially smaller than the United States' population<sup>151</sup>, which naturally implies that there is a smaller subset of people in Portugal who would use illicit substances. Furthermore, the United States' governmental structure between federal and state governments is quite different from Portugal's.<sup>152</sup> However, the United States can certainly utilize some ideas from Portugal's policy to build its own. For example, the Portuguese law mandates that "each of the eighteen administrative districts in Portugal create and maintain at least one Commission for the Dissuasion of Drug Addiction to manage the administrative sanctions for drug use in the district."<sup>153</sup> Similar to how Portugal assigns duties to administrative districts, the United States could perhaps delegate duties to municipalities. Delegating responsibilities to municipalities would undoubtedly take significant organization and research, but localizing drug treatment appears to be an effective way to treat individuals on a person-by-person basis.

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<sup>146</sup> Matthew Perrone, *Poll: Most Americans wary of those suffering from addiction, despite recognition of medical condition*, STAT (Apr. 5, 2018), <https://www.statnews.com/2018/04/05/opioids-prescription-drugs-poll/#:~:text=Although%2053%20percent%20of%20Americans,co%2Dworker%2C%20or%20neighbor>.

<sup>147</sup> Murkin, *supra* note 140.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.*

<sup>151</sup> *Countries in the World by Population (2023)*, WORLDOMETER, <https://www.worldometers.info/world-population/population-by-country/> (last visited Mar. 22, 2023).

<sup>152</sup> *Government Stats: compare key data on Portugal & United States*, NATIONMASTER, <https://www.nationmaster.com/country-info/compare/Portugal/United-States/Government> (last visited Mar. 22, 2023).

<sup>153</sup> Woods, *supra* note 74.

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Furthermore, despite Portugal's decriminalization of drug possession, police officers in Portugal are still vital to the federal system.<sup>154</sup> Portuguese police officers are instructed to confiscate any drugs they encounter when dealing with a person either using or possessing drugs, and the officers will then issue the person an administrative citation.<sup>155</sup> Delegating administrative work to police could be useful to involve the police in non-violent situations, which may strengthen relationships between low-income communities and the police.<sup>156</sup> For example, mandating police to administer citations rather than physically arresting individuals could lead to more openness and honesty from drug users about their drug use.<sup>157</sup> The prospect of arrest and incarceration in the United States, in addition to the wrongful assumptions made about drug users as a result of decades of unjust policies, likely discourages those who are addicted to drugs from admitting that they have a problem.<sup>158</sup> This ultimately leads to individuals hiding their drug problems, thus leading to lower rates of individuals voluntarily undergoing treatment.<sup>159</sup> Additionally, this new role for police in Portugal has allowed the government and law enforcement to focus more time and resources on drug trafficking crimes,<sup>160</sup> which, as opposed to mere drug use, actually does lead to violence and crime.<sup>161</sup>

Portugal may be a helpful model for the United States due to its approach to drug policy. Evidently, politicians in the U.S. often struggle to find common ground when devising new, sweeping policies.<sup>162</sup> Decriminalization has been deemed by some experts as a "sensible middle ground between criminalization and legalization."<sup>163</sup> This Note argues that decriminalization, as opposed to legalization and criminalization, may be an effective way to change federal drug policy while also succeeding in bringing politicians on both sides of the aisle together.

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<sup>154</sup> *Id.* at 17.

<sup>155</sup> *Id.*

<sup>156</sup> See Redonna K. Chandler, Benny W. Fletcher, & Nora D. Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MED. ASS'N 1024 (Jan. 14, 2009)

(suggesting that professionals must understand drug addiction before undertaking the facilitation of recovery).

<sup>157</sup> *Id.*

<sup>158</sup> See S.M. Rogers, M. Pinedo, A.P. Villatoro, & S.E. Zemore, "I Don't Feel Like I Have A Problem Because I Can Still Go to Work and Function": *Problem Recognition Among Persons with Substance Use Disorders*, 54 SUBSTANCE USE MISUSE 2108 (2019) (suggesting that adverse social consequences, such as employment and legal issues, deter drug users from recognizing that they have a problem).

<sup>159</sup> *See id.*

<sup>160</sup> Woods, *supra* note 74, at 23.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 25.

<sup>163</sup> *Id.* at 14.

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## IV. A PROPOSAL

A. *Finding Common Ground*

The Portuguese approach to law enforcement interventions regarding drug use and possession was an inspiration for the DPRA, which several Congresspeople are now diligently pushing in Congress. If the federal government plans on crafting an effective drug policy that can ease criminal penalties and attempt to reverse the effects of decades of the war on drugs, the DPRA must have bipartisan support. Due to other pressing issues, such as the widespread impacts on society associated with COVID-19, the federal government has deprioritized conversations surrounding drug policy reform.<sup>164</sup> However, in February 2022, several media outlets falsely reported on an alleged Biden administration policy,<sup>165</sup> alleging that the Biden administration planned on distributing “safe” drug kits, including crack pipes, to Americans addicted to drugs.<sup>166</sup> Before President Biden eventually denied these reports, the alleged policy was met with sharp criticism.<sup>167</sup> Critics’ objections were largely based on the ongoing opioid epidemic.<sup>168</sup> Most of the criticism was brought forth by members of the Republican Party,<sup>169</sup> indicating that Democrats and Republicans are unlikely to reconcile on sweeping federal drug policies like the DPRA. However, it is important to note that Republicans in Congress have indicated a general interest in revising the current state of the United States’ criminal justice system.<sup>170</sup> In 2016, a resolution adopted and unanimously passed by the Republican National Committee supported a plan to decrease investments in the prison system.<sup>171</sup> The resolution acknowledged the prison system’s inability to rehabilitate criminals, with large numbers of recidivist offenders.<sup>172</sup> This resolution serves as an example of the Republican Party’s willingness to critically examine the criminal justice system.<sup>173</sup>

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<sup>164</sup> PEW RSCH. CTR., *ECONOMY REMAINS THE PUBLIC’S TOP POLICY PRIORITY; COVID-19 CONCERNS DECLINE AGAIN* (Feb. 6, 2023), [https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/02/PP\\_2023.02.06\\_political-priorities\\_REPORT.pdf](https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/02/PP_2023.02.06_political-priorities_REPORT.pdf).

<sup>165</sup> Morgan Phillips, *Biden Administration Denies Programs That Hand Out Crack Pipes to Prevent Infection and Promote ‘Racial Equity’*, DAILY MAIL (Feb. 7, 2022), <https://www.dailymail.co.uk/news/article-10487091/amp/Biden-administration-fund-handing-crack-pipes-addicts-improve-racial-equity.html>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See id.*

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As this Note previously mentioned, it would be surprising if both Democrats and Republicans supported the current version of the DPRA. Since the falsely reported “safe” drug kit policy was met with such profound uproar, it is unlikely that Republicans would support such a drastic, extreme change to federal drug policy as the DPRA.<sup>174</sup> While a bipartisan federal drug policy would likely require a greater compromise than supporters of the DPRA would prefer, the efficacy of implementing this bill depends on support from both sides of the aisle.<sup>175</sup> The DPRA, as it stands, would likely see an immense number of legal challenges, potentially disbanding the policy partially, thus leading to implementation problems.<sup>176</sup> Opponents of drug policies like the DPRA remain uneducated on the benefits of drug decriminalization because they are likely unaware of its demonstrated success overseas.<sup>177</sup> This lack of knowledge on the benefits of drug decriminalization and the devastating impact of the War on Drugs makes it nearly impossible for lawmakers to find common ground.<sup>178</sup> While discourse regarding drug decriminalization is important, perhaps the most effective way to communicate drug decriminalization’s benefits is through data and statistics.<sup>179</sup>

### *B. Taking a “Wait and See” Approach*

While the DPRA would be a productive step in the right direction, the federal government must allow the states to develop their own drug policies before passing any federal legislation. States’ abilities to experiment with new laws and policies stand out as a defining benefit of a government based on federalism.<sup>180</sup> Since states are free to adopt policing laws—as long as they are not in contravention of federal laws<sup>181</sup>—the state governments that do so can serve as testing sites for the federal government and other state governments. For example, Colorado has served as an experimental state in

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<sup>174</sup> Phillips, *supra* note 166.

<sup>175</sup> See Chammah, *supra* note 171.

<sup>176</sup> See Jeffrey A. Singer, *On the Eve of The 50<sup>th</sup> Anniversary of President Nixon Declaring War on Drugs, Two Members of Congress Propose an Armistice*, CATO INST. (June 17, 2021), <https://www.cato.org/blog/eve-50th-anniversary-president-nixons-declaration-war-drugs-two-members-congress-propose>.

<sup>177</sup> Woods, *supra* note 74, at 19.

<sup>178</sup> See Chammah, *supra* note 171.

<sup>179</sup> Woods, *supra* note 74, at 26.

<sup>180</sup> See Andrew Cohen, *Fair-Weather Federalism: Strategic Uses of the 10<sup>th</sup> Amendment*, Brennan Ctr. for Just. (July 5, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/fair-weather-federalism-strategic-uses-10th-amendment>.

<sup>181</sup> *Id.*

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its legalization of marijuana.<sup>182</sup> The results of Colorado's marijuana legalization have led to an increase in public support of marijuana legalization.<sup>183</sup> The Marijuana Policy Project noted that "\$1.3 billion in marijuana sales took place in legitimate, taxpaying businesses instead of in the underground market in 2016."<sup>184</sup> Furthermore, in 2016, regulated marijuana sales created \$200 million in state tax revenue; this figure does not include the millions of dollars generated in local taxes and fees.<sup>185</sup>

The benefits of state experimentation do not merely show the success of certain laws; such experimentation shows *which parts* of new laws work well and which do not.<sup>186</sup> For example, while Colorado's marijuana legalization has been successful in some respects, there have also been unwelcome consequences.<sup>187</sup> Colorado's experience has resulted in increased youth usage of marijuana,<sup>188</sup> and it has highlighted a potential issue in the increasing THC potency of marijuana, which may lead to mental health issues in users.<sup>189</sup> Colorado has also served as an example of the potential ineffectiveness of a regulated market, especially when it comes to decreasing black market sales because Colorado's marijuana black market has thrived since legalization.<sup>190</sup>

While there have certainly been unwelcome consequences of Colorado's legalization, these negative takeaways highlight the need for reform. This Note takes the position that the benefits of legalization may have outweighed the drawbacks because Colorado has generated an abundance of tax revenue and has created an exponentially increasing number of jobs.<sup>191</sup> However, the rise in THC potency and the failure to drive out black market sales show that there is still work to be done.<sup>192</sup> Colorado's law is not perfect, but it remains an example for other states to reference when

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<sup>182</sup> David W. Murray, *The "Colorado Experiment": Legalized Marijuana's Impact in Colorado*, HUD. INST. 1 (June 28, 2021), [http://s3.amazonaws.com/media.hudson.org/Murray\\_The%20Colorado%20Experiment.pdf](http://s3.amazonaws.com/media.hudson.org/Murray_The%20Colorado%20Experiment.pdf).

<sup>183</sup> *The Impact of Legalization in Colorado*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legalization/regulationworks/> (LAST VISITED FEB. 23, 2022).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See Bradley A. Blakeman, *States are the laboratories of democracy*, HILL (May 7, 2020) <https://thehill.com/opinion/judiciary/496524-states-are-the-laboratories-of-democracy/>.

<sup>187</sup> See Murray, *supra* note 183, at 4.

<sup>188</sup> *Id.* at 2.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See *The Impact of Legalization in Colorado*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legalization/regulationworks/> (LAST VISITED FEB. 23, 2022).

<sup>192</sup> *Id.*; see also *The Impact of Legalization in Colorado*, *SUPRA* NOTE 179.

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crafting their own legalization bills. This experimentation is necessary for achieving progress in the reform of criminal drug laws.<sup>193</sup>

As follows, when it comes to federal drug decriminalization, it would be wise to allow the states to experiment before bringing this bill to a vote. Members of Congress on both sides of the aisle will be hesitant to support such a dramatic overhaul of federal policy. Therefore, allowing states to experiment would provide empirical data determining which aspects of drug decriminalization are effective and which are not. Luckily, Washington and Oregon have already passed laws decriminalizing possession of most illicit substances up to a certain amount, with Oregon standing as a pioneer in the decriminalization approach.<sup>194</sup> Oregon's Measure 110 "makes possession of small amounts of cocaine, heroin, LSD and methamphetamine, among other drugs, punishable by a civil citation—akin to a parking ticket—and a \$100 fine."<sup>195</sup> NPR correspondent Eric Westervelt commented that this law "expands funding and access to addiction treatment services using tax revenue from the state's pot industry as well as from expected savings from a reduction in arrests and incarceration."<sup>196</sup> This aspect of Oregon's decriminalization bill should be monitored as a potential alternative to the DPRA's tax-based form of expanded funding. Many experts are concerned with the state's ability to implement such sweeping changes and are "deeply concerned the state basically jumped off the decriminalization cliff toward a fractured, dysfunctional and underfunded treatment system that's not at all ready to handle an influx of more people seeking treatment."<sup>197</sup> Thus, while it is imperative to make changes to federal drug policy as soon as possible, it would be helpful to allow Oregon to work on implementation before pushing a vote on the DPRA.

Akin to the DPRA, a new federal drug policy would likely offer states an incentive to adopt the new policy. For example, the DPRA "incentiviz[es] states to align their own drug policy with the federal governments"<sup>198</sup> by withholding federal prison funds "unless that [state] has in effect a program under which each individual incarcerated in that person's jurisdiction who is a citizen of the United States is notified . . . of that individual's rights under

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<sup>193</sup> See Blakeman, *supra* note 187.

<sup>194</sup> Eric Westervelt, *Oregon's Pioneering Drug Decriminalization Experiment Is Now Facing The Hard Test*, NPR (June 18, 2021, 5:00 AM), <https://www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> David Straughan, *The Drug Policy Reform Act Would Fundamentally Change US Drug Policy*, INTERROGATING JUST. (June 17, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/drug-policy-reform-act/>.

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section 1403.”<sup>199</sup> While federal prison funds are significant,<sup>200</sup> states may hesitate to adopt a policy without seeing it functionally implemented. Thus, to convince states to adopt a new federal drug policy, the federal government may want to wait for states like Oregon to experiment with new drug decriminalization laws. Then, using the data from the experimenting states, the federal government can craft a bill with convincing statistics. If hesitant states see tangible, beneficial results from states like Oregon, perhaps they may be more inclined to adopt the federal government’s drug decriminalization policy.

### C. *Constitutional Concerns*

As previously stated, if the DPRA were passed today, it would likely be met with significant challenges in the court system,<sup>201</sup> which supports the consideration of waiting for state experimentation before implementing any sweeping federal drug policies. While the DPRA leaves much of the policy implementation to the states, some provisions raise constitutional questions.

Jeffrey A. Singer of the CATO Institute wrote that “[a] few features of the bill, such as the ones restoring voting rights to those who served time for drug crimes and the insurance that ex-cons can gain access to drivers’ licenses raise federalism concerns as they intrude on state sovereignty.”<sup>202</sup> Section 10(d)(1)(A) of the DPRA reads,

[E]ach State shall notify in writing any individual who has been convicted of a criminal offense under the law of that State that such individual has the right to vote in an election for Federal office pursuant to the Democracy Restoration Act of 2021 and may register to vote in any such election . . . .<sup>203</sup>

In 2021, many Republican-led states changed their voting laws, ultimately making it more difficult for their citizens to vote in a state or federal election.<sup>204</sup> Due to the nature of the 2020 election, many politicians, specifically Republicans, have prioritized changing voting laws in such a manner.<sup>205</sup> This indicates that the provision of the DPRA restoring voting rights to individuals convicted of a criminal offense would be met with stark

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<sup>199</sup> Environmental Justice For All Act, H.R. 2021, 117th Cong. § 2 (2021).

<sup>200</sup> Eisen, *supra* note 22.

<sup>201</sup> See Singer, *supra* note 177.

<sup>202</sup> *Id.*

<sup>203</sup> H.R. 2021, 117th Cong. § 2 (2021).

<sup>204</sup> *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

<sup>205</sup> Mac Brower, *How States Used the Pandemic to Restrict (Or Expand) Voting*, DEMOCRACY DOCKET (May 9, 2022), <https://www.democracymocket.com/analysis/how-states-used-the-pandemic-to-restrict-or-expand-voting/>.

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opposition, and as Singer stated, this provision certainly raises federalism questions.

An underlying principle of federalism is the federal government's inability to coerce the states to adopt its policies.<sup>206</sup> The federal government also cannot dictate how local officials operate; this notion was established by the Anti-Commandeering Doctrine of the Tenth Amendment of the U.S. Constitution.<sup>207</sup> Over time, the Supreme Court has further limited the power of the federal government to intrude on state government actions.<sup>208</sup> In *New York v. United States*, the Supreme Court held that a federal statute requiring states to either regulate radioactive waste following federal regulations or take ownership of the waste was an unconstitutional assertion of congressional power.<sup>209</sup> The Anti-Commandeering Doctrine was further strengthened in *Printz v. United States*, in which the Supreme Court held that a federal statute requiring local authorities to perform background checks on handgun owners was unconstitutional.<sup>210</sup> The Court noted that the Anti-Commandeering Doctrine prohibits the federal government from imposing affirmative and coercive duties upon state and local officials.<sup>211</sup> However, in *United States v. Comstock*, the Supreme Court noted that it would allow a federal statute to *encourage* certain state action, as long as the statute is relatively narrow in scope.<sup>212</sup> In *Comstock*, the Court upheld a federal statute partially because of this narrow scope; in other words, the statute reserved decision-making and police powers for the states.<sup>213</sup>

Opponents of the DPRA would likely rely on the holding in *Printz* to attack the restoration of voting rights provision. One could argue that, in Section 10(d)(1)(A) of the DRPA, by essentially mandating states to take action, the federal government is intruding on state sovereignty. Despite being a somewhat limited power, the responsibility for regulating elections and deciding who can maintain the right to vote generally falls to the states.<sup>214</sup> While the Constitution allows Congress to regulate how states administer elections to an extent,<sup>215</sup> it is generally understood that states have the right

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<sup>206</sup> See *Printz v. United States*, 521 U.S. 898, 919, 932 (1997).

<sup>207</sup> See *New York v. United States*, 505 U.S. 144, 149 (1992).

<sup>208</sup> See *id.*; see *Printz*, 521 U.S. at 932; see *United States v. Comstock*, 560 U.S. 126 (2010).

<sup>209</sup> *New York*, 505 U.S. at 149.

<sup>210</sup> *Printz*, 521 U.S. at 935.

<sup>211</sup> *Id.* at 957.

<sup>212</sup> *Comstock*, 560 U.S. at 128.

<sup>213</sup> *Id.*

<sup>214</sup> U.S. CONST. art. I, § 4, cl.1.

<sup>215</sup> CONG. RSCH. SERV., CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS (Dec. 4, 2014), [https://www.everycrsreport.com/files/20141204\\_RL30747\\_ffc309dc278cd2558c38f0b8b1596c47c6046ea0.pdf](https://www.everycrsreport.com/files/20141204_RL30747_ffc309dc278cd2558c38f0b8b1596c47c6046ea0.pdf).



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to handle the details of the election process.<sup>216</sup> However, it must be noted that Congress has some leeway.<sup>217</sup> Congress may attempt to defend a law, like the DPRA, by arguing that it is exercising its spending powers and that state cooperation is merely a consequence.<sup>218</sup> Still, opponents may argue that this provision of the DPRA does not invoke any form of spending powers on behalf of Congress.

In *National Federation of Independent Business v. Sebelius*, the Supreme Court analyzed aspects of the Affordable Care Act.<sup>219</sup> In particular, the Court held that a provision of the Affordable Care Act requiring states to adopt a significant expansion of Medicaid or lose its Medicaid funding was unconstitutional.<sup>220</sup> The Court noted that, since Medicaid funding was such a significant part of a state's funding, Congress was essentially making it impossible for the states to reject implementing the expansion of Medicaid.<sup>221</sup> In *South Dakota v. Dole*, the Supreme Court held that a federal law withholding state highway funds as an incentive for adopting the federal government's minimum drinking age requirements was constitutional.<sup>222</sup> In *Dole*, the Court noted that federal highway funds make up only about five percent of the state's budget and suggested that this incentive is "relatively mild encouragement" and thus constitutional.<sup>223</sup> Therefore, while in *Sebelius*, the Court held that Congress was impermissibly coercing states to adopt its policies, the Court in *Dole* established that some degree of encouragement is acceptable as long as it is somewhat reasonable.<sup>224</sup> What constitutes what is "reasonable" is up for debate; however, opponents of the DPRA would likely argue that Congress is forcing states to adopt its policies or risk losing substantial prison funding. Federal prison funding has decreased recently,<sup>225</sup> but opponents of the DPRA would potentially have a valid argument that withholding these funds to adopt a federal policy seriously intrudes on state sovereignty.

While there have been many significant Supreme Court cases on federalism and state sovereignty, numerous questions remain regarding how much coerciveness the federal government can employ. It is possible that a court would find the DPRA to be entirely constitutional as a reasonable

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<sup>216</sup> U.S. CONST. art. I, § 4, cl.1.

<sup>217</sup> See *Comstock*, 560 U.S. at 126.

<sup>218</sup> CONG. RSCH. SERV., *supra* note 216.

<sup>219</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530 (2012).

<sup>220</sup> *Id.* at 586.

<sup>221</sup> *Id.* at 582.

<sup>222</sup> *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

<sup>223</sup> *Id.* at 211.

<sup>224</sup> *Id.* at 214.

<sup>225</sup> U.S. DEP'T JUST., FEDERAL PRISON SYSTEM (BOP) (2021), <https://www.justice.gov/doj/page/file/1246666/download>.

exercise of congressional powers. However, it is also possible that a court would find the aforementioned provisions to be an unconstitutional exercise of federal power, leading to the disbandment of the DPRA either partially or in full. As most bills do, the DPRA will likely be adapted into a more agreeable piece of legislation before it is even considered for a vote. If politicians want the DPRA to survive, they will need to debate the constitutionality of these provisions and make it difficult for opponents to shoot down the legislation in court.

### CONCLUSION

For decades, the United States has waged a war upon its citizens, incarcerating individuals (and most specifically, minorities) for arbitrary reasons through unreasonable policies that criminalize drug addiction.<sup>226</sup> Statistics demonstrate how the United States' approach to drug policy has dramatically failed,<sup>227</sup> and the federal government must readdress how to decrease drug use. While countries overseas experiment with decriminalization and depenalization policies, the United States has continued to employ a federal drug policy that has proven unsuccessful and irreversibly damaging to the individuals it targets.<sup>228</sup> Though a policy like the DPRA is a step in the right direction, the federal government could benefit by taking a wait and see approach, analyzing how the individual states fare in their experimentation efforts with drug policy. Additionally, due to the divisive state of the current federal government, it is unlikely that such a progressive bill, like the DPRA, would garner enough bipartisan support to pass and be properly implemented.<sup>229</sup> Such a bill, making substantive shifts in federal drug policy, would surely be met with a flurry of legal challenges attempting to expose the bill for its potentially-unconstitutional infringement on state sovereignty.<sup>230</sup> For these reasons, the federal government should allow individual states to experiment with drug decriminalization before crafting a new federal drug policy. There remains a need for an overhaul of the federal drug policy that takes a health-centered approach.

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<sup>226</sup> Perry, *supra* note 15.

<sup>227</sup> *Id.*

<sup>228</sup> See Ebenstein, *supra* note 110; see also Orlin, *supra* note 99.

<sup>229</sup> See Singer, *supra* note 177.

<sup>230</sup> *Id.*