

# PANDEMIC, PROTESTS, AND PRISON REFORM? WHY 2020 IS A CATALYST TO RETHINK DRUG POLICY

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## INTRODUCTION

The unprecedented events of 2020 have demonstrated the need for major reforms to the criminal justice system in the United States.<sup>1</sup> Protests against police brutality, a symptom of decades of racism, have exposed the systemic failure of policing, which has targeted impoverished minority communities through drug policy under the guise of “safety.”<sup>2</sup> In calling for the defunding of police departments, people are expressing their dissatisfaction with the criminal justice system that funnels money into the prisons and disproportionately targets minorities.<sup>3</sup> These protests, in the midst of a global pandemic revealing the weaknesses in the healthcare system by leaving millions uninsured with skyrocketing hospital costs, have become a catalyst for the dismantling of the present structures that have failed to provide for the safety and health of people.<sup>4</sup> The country is grappling with crumbling support for the current structures handling the pandemic and race relations, leaving us with an immense need for change.<sup>5</sup>

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<sup>1</sup> See Politico Magazine, *Coronavirus Will Change the World Permanently. Here’s How*, POLITICO (Mar. 19, 2020, 7:30 PM), <https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579>; Chandelis Duster & Allison Gordon, *Obama condemns violence and calls for change in wake of George Floyd protests*, CNN (June 1, 2020, 8:28 PM), <https://www.cnn.com/2020/06/01/politics/barack-obama-george-floyd/index.html>.

<sup>2</sup> “Kettling” Protesters in the Bronx, *Systematic Police Brutality and Its Costs in the United States*, HUM. RIGHTS WATCH (Sep. 30, 2020), <https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states#; infra Part II>.

<sup>3</sup> Scottie Andrew, *There’s a growing call to defund the police. Here’s what it means*, CNN (June 17, 2020, 10:32 AM), <https://www.cnn.com/2020/06/06/us/what-is-defund-police-trnd/index.html>.

<sup>4</sup> See *Hospitals and Health Systems Face Unprecedented Financial Pressures Due to COVID-19*, AM. HOSP. ASS’N, <https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due> (last visited Dec. 28, 2020).

<sup>5</sup> Quint Forgey, *Poll shows Trump’s coronavirus approval at all-time low*, POLITICO (July 10, 2020, 7:41 AM), <https://www.politico.com/news/2020/07/10/trump-coronavirus-approval-rating-low-355894>.

Race relations in the United States are strongly influenced by the drug policies that have primarily targeted Black Americans.<sup>6</sup> Dissatisfaction with the way in which the criminal justice system handles drug offenses is not the result of the recent world events that have shaken the political arena.<sup>7</sup> The call to end the War on Drugs and Tough on Crime policies has been around for decades, as research continued to show how ineffectual harsher sentences were in combatting drug use and sale and how racial minorities, especially impoverished Black individuals, were disproportionately targeted and punished.<sup>8</sup> Even with many strong voices calling for prison reform, change over the past few decades has been slow, encumbered by political processes and disagreeing viewpoints.<sup>9</sup> Furthermore, drug users and addicts rarely arouse a sense of sympathy from many Americans who believe drug use and violent crime go hand-in-hand.<sup>10</sup> However, despite these limitations, the current political climate is the perfect environment to create the changes that activists have been pushing for.<sup>11</sup>

This Article will argue for the abandonment of the current criminal justice system as it relates to drug offenses and for its replacement with a medical model to address the healthcare problem of addiction. The medical model approach calls for complete decriminalization of all controlled substances coupled with better rehabilitation and reintegration policies.<sup>12</sup> This Article argues the criminalization of drugs has targeted minorities under the guise of keeping communities safe. It will look at the differences between the United States and Portugal, a country that has implemented the medical model, while also analyzing recent legislation in the United States addressing drug policy. The Article will then defend the medical model by concentrating on the benefits of the system and the strong incentives stemming from recent events behind moving away from the criminal justice system.

Part I will describe the opposing models for approaching crime, comparing the prevailing punitive system that the United States has adopted with a non-punitive approach known as the “medical model.” The punitive system, using law enforcement to control drug addiction requiring a goal of near “zero

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<sup>6</sup> Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 257 (2009).

<sup>7</sup> John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 173–74 (2015).

<sup>8</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT, (April 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; *infra* Part I.

<sup>9</sup> Joe Davidson, *Federal prison reform has bipartisan support. But it’s moving slowly*, WASH. POST (Jan. 9, 2020, 6:30 AM), [https://www.washingtonpost.com/politics/federal-prison-reform-has-bipartisan-support-but-its-moving-slowly/2020/01/08/81edfbd6-3268-11ea-898f-eb846b7e9feb\\_story.html](https://www.washingtonpost.com/politics/federal-prison-reform-has-bipartisan-support-but-its-moving-slowly/2020/01/08/81edfbd6-3268-11ea-898f-eb846b7e9feb_story.html).

<sup>10</sup> *Racial Double Standard in Drug Laws Persists Today*, EQUAL JUST. INITIATIVE (Dec. 9, 2019), <https://eji.org/news/racial-double-standard-in-drug-laws-persists-today/>.

<sup>11</sup> *Infra* Part III.

<sup>12</sup> *Infra* Section I.C.

tolerance” of drugs will be referred to as the “punishment model.”<sup>13</sup> Section I.A will focus on the history behind the criminalization of drugs, concentrating on the war on drugs and the popular Tough on Crime policies. This section will highlight the racial undertones behind these laws, focusing on the political and societal pressures driving the enactment of stricter laws with harsher punishments. Section I.B will discuss the resulting systemic issues that have stemmed from the criminalization of drugs, particularly how it disproportionately affects minority communities. This section will emphasize the failure of using the prevailing penal system to address addiction. Section I.C will describe the use of the medical model to address drug offenses, using Portugal as a leading example of the success of the system.

Part II will address the recent shift away from Tough on Crime policies towards Smart on Crime initiatives. Section II.A will highlight the rise of Smart on Crime initiatives, describing the motivations behind the movement. Section II.B will reject prevalent Smart on Crime initiatives that focus on the reformation of the criminal justice system, such as the First Step Act of 2018, providing an overview and analysis of the Act and explaining the limitations of acts similar to it.

Part III will propose the total reformation of drug law in the United States by adopting a medical model like Portugal, arguing that the benefits to adopting the medical model far outweigh the incremental benefits associated with gradual reformation of the criminal justice system. Section III.A will provide an overview of the incentives driving the switch to a medical model, including a discussion on recent global events. This section will touch on how the global pandemic has pushed forward the need for a better healthcare system and how protests have brought to light the fundamental need to change the policing system. Section III.B will discuss the limitations to this approach. This proposal will argue for the decriminalization of all controlled substances and for the substitution of the criminal justice system with a medical model system that can better address broader healthcare needs.

## I. THE RISE OF INCARCERATION

Despite cultural similarities, the United States and European countries incarcerate individuals at far different rates.<sup>14</sup> The United States has the highest number of incarcerated persons per capita in the world.<sup>15</sup> The United States now houses about one third of the world’s prison population despite only accounting for 4% of the world’s population, while Portugal houses only about

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<sup>13</sup> Gabriel G. Nahas, *Drugs, the Brain and the Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 729, 742 (1991).

<sup>14</sup> Ava Shahani, *The Time Does Not Fit the Crime: Eliminating Mandatory Minimums for Nonviolent Drug Offenders in Favor of Judicial Discretion*, 23 SW. J. INT’L L. 445, 446 (2017).

<sup>15</sup> *Id.*

13,000 people.<sup>16</sup> The American criminal justice system, developed to punish individuals for committing crimes, treats drug offenses very differently from Portugal, which, following its decriminalization of drugs in 2001, focuses on leniency to promote reintegration of people into society.<sup>17</sup> The vastly different ways drugs and addiction are treated in the respective countries have made otherwise culturally similar countries completely different in incarceration rates.<sup>18</sup> A reason for this difference is racism pushing harsher sentencing laws for drug offenses in the United States.<sup>19</sup>

#### A. THE RACIAL UNDERTONES IN ANTI-DRUG LAWS

The punishment model, often referred to as the rational basis model, is a philosophical school of thought used to justify the use of punishments.<sup>20</sup> Under the rational basis model, humans have free will to make decisions based upon their perception of potential pain and pleasure: when the potential pleasure outweighs the potential pain, the individual is more likely to engage in a behavior.<sup>21</sup> Ultimately, the belief is that people have the ability to control their behavior and thereby punishment is an effective way to control crime; by making the criminalized behavior less attractive, people are less likely to engage in such behavior.<sup>22</sup> This model of thought was very popular in the 70s and 80s, manifesting itself in public policy through sentencing guidelines, tougher penalties, and the abolishment of parole.<sup>23</sup> The belief that punishments could deter criminal activity birthed the Tough on Crime movement, dramatically expanding criminal

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<sup>16</sup> See Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html>; see also *World Prison Brief: Portugal*, INST. FOR CRIME & JUST. POL'Y RSCH. (Jan. 9, 2020), <https://www.prisonstudies.org/country/Portugal>. *Portugal Population*, WORLDOMETER, <https://www.worldometers.info/world-population/portugal-population/> (last visited Dec. 28, 2020). Portugal, who accounts for only 0.13 % of the world's population, houses only about 13,000 people.

<sup>17</sup> See *Drug decriminalisation in Portugal: setting the record straight*, TRANSFORM DRUG POL'Y FOUND. (Nov. 14, 2018), <https://transformdrugs.org/drug-decriminalisation-in-portugal-setting-the-record-straight/>.

<sup>18</sup> See Peter Wagner & Wanda Bertram, "What percent of the U.S. is incarcerated?" (*And other ways to measure mass incarceration*), PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> (showing that the incarceration rate in Portugal is 126 per 100,000 whereas it is 698 per 100,000 in the United States.); see also Daniel Clark, *Incarceration Rate in Portugal from 2008 to 2019*, STATISTA (May 7, 2020), <https://www.statista.com/statistics/1023249/incarceration-rate-in-portugal/>.

<sup>19</sup> See *infra* Section I.A.

<sup>20</sup> *Section 2.5: Theories of Punishment*, LUMEN CRIM. JUST., <https://courses.lumenlearning.com/atd-bmcc-criminaljustice/chapter/section-2-5-theories-of-punishment/> (last visited Dec. 28, 2020).

<sup>21</sup> See Sam Torres, *Should Corrections Treat or Punish Substance-Abusing Criminals*, 60 FED. PROBATION 18, 18 (1996).

<sup>22</sup> Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, THE SENTENCING PROJECT (2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

<sup>23</sup> Torres, *supra* note 21, at 18.

liability and the role of the criminal justice system.<sup>24</sup> At the same time, the War on Drugs expanded criminal punishment for drug offenses under the same reasoning that increased arrests and punishments for drug offenses would reduce illegal drug activity.<sup>25</sup> However effective the punishment model was for crime deterrence, a silent justification for harsher punishments remained: racism.<sup>26</sup>

The justice system is strongly influenced by a shift in sentencing policies pushed by the Tough on Crime movement.<sup>27</sup> This movement, emphasizing the prevention of crime through the incapacitation of criminals, was brought by an upsurge of serious crime in the 1960s, and marked a dramatic departure from the previous rehabilitative ideal that was popular in the postwar era.<sup>28</sup> The rehabilitative ideal, at its core, is greatly different from the punitive model: rather than being an agent of free choice, a criminal is suffering from some condition which requires treatment, not punishment.<sup>29</sup> The shift away from this school of thought is due, in part, by the anxiety most Americans experienced over crime and by the perception that harsher sentences keep crime rates low; these ideas drove politicians, Democratic and Republican alike, to implement harsher punitive policies.<sup>30</sup> Thus, the penal theory that once supported rehabilitation and indeterminate sentencing was replaced by one that emphasized rigidity and severity.<sup>31</sup> It would be these increasingly draconian anticrime initiatives that would eventually create the criminal justice system that we know today.<sup>32</sup>

The Tough on Crime movement claimed that implementing mandatory minimum penalties results in greater public safety.<sup>33</sup> The movement resulted in

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<sup>24</sup> See William R. Kelly, *Why Punishment Doesn't Reduce Crime*, PSYCH. TODAY (Apr. 25, 2018), <https://www.psychologytoday.com/us/blog/crime-and-punishment/201804/why-punishment-doesnt-reduce-crime>.

<sup>25</sup> See Doris Layton Mackenzie, *Sentencing and Corrections in the 21st Century: Setting the Stage for the Future*, NAT'L CRIM. JUST. REFERENCE SERV. 11 (2001), <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>.

<sup>26</sup> See Dan Baum, *Legalize It All*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/> (showing the author's discussion with John Ehrlichman, who was the domestic policy advisor for the Nixon Administration, that the anti-crack and-marijuana rhetoric was used to disrupt the Black and antiwar left people, the greatest opponents to the campaign in 1968); see also Robb London, *Is the war on drugs succeeding?*, HARV. L. TODAY (July 1, 2005), <https://today.law.harvard.edu/feature/war-drugs-succeeding/> (highlighting that the success of the War on Drugs remains questioned).

<sup>27</sup> See Ed Chung et al., *The 1994 Crime Bill Continues to Undercut Justice Reform – Here's How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019, 8:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/> (showing how legislators today are still trying to undo the effect of Tough on Crime policies).

<sup>28</sup> See Sara S. Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 414 (2003).

<sup>29</sup> Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 389–90 (2015), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1023&context=faculty>.

<sup>30</sup> Beale, *supra* note 28, at 417–18, 424.

<sup>31</sup> *Id.* at 414.

<sup>32</sup> *Id.*

<sup>33</sup> Mark Mauer, *Why Are Tough on Crime Policies So Popular? Despite the promises of political*

a wave of mandatory sentencing laws including “Three Strikes” laws, requiring mandatory sentencing of up to life imprisonment for a criminal’s third offense.<sup>34</sup> These policies draw from a history of mandatory penalties that have existed in the United States since the 1790s, with mandatory penalties for drug offenses appearing as early as 1956 under the Narcotic Control Act.<sup>35</sup> As Americans called for stricter punishments, drug policies began to change. Already popular, the surge of anti-drug policies in the 1970s, popularly referred to as the War on Drugs, resulted in the height of the Tough on Crime policies in the 1980s.<sup>36</sup>

President Nixon declared the War on Drugs in 1971, pushing for mandatory sentencing for drug offenses and increasing federal funding for antidrug agencies.<sup>37</sup> President Reagan, in signing the Anti-Drug Abuse Act of 1986, reinforced President Nixon’s antidrug policies by focusing on passing severe punishments for drug offenses and creating mandatory minimum sentences targeting crack cocaine possession.<sup>38</sup> An unsurprising result of the institution of mandatory prison sentences and other harsh penalties is the increase in the number of prisoners.<sup>39</sup> The War on Drugs, heavily influenced by the movement to “get tough” on crime tripled the number of drug arrests between 1980 to 1995, shifting the federal prison population of drug offenders from 25.2 percent to 59.9 percent.<sup>40</sup> “[T]he annual number of drug-related arrests increased from 200,000 to over 1.2 million” between 1968 and 1992.<sup>41</sup>

Though officially the War on Drugs was meant to target drug abuse, the implementation of the War on Drugs was rooted deeply in racism.<sup>42</sup> Under the Anti-Drug Abuse Act of 1986, the distribution of 500 grams of powder cocaine and the distribution of five grams of crack cocaine carried the same minimum five-year federal prison sentence, largely due to the conception that Black people used crack cocaine and White people used powder cocaine.<sup>43</sup> This arbitrary ratio was calculated by Congress under the impression that crack cocaine was more affordable and popular than powder cocaine.<sup>44</sup> The disparate policing of minority communities through the War on Drugs is rationalized by a narrative that drug users are poor people of color, justifying criminalizing people rather

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*leaders and others who have promoted them as effective tools for fighting crime, “tough on crime” policies have proved to be costly and unjust, 11 STAN. L. & POL’Y REV. 9, 10 (1999).*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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

<sup>37</sup> *War on Drugs*, HISTORY, <https://www.history.com/topics/crime/the-war-on-drugs> (last updated Dec. 17, 2019).

<sup>38</sup> See Allyson Sam Sung, *Drug Use and Punishment: A Public Health Crisis America Can No Longer Ignore*, 17 SEATTLE J. SOC. JUST. 129, 132–33 (2018); see also *War on Drugs*, *supra* note 37.

<sup>39</sup> Shahani, *supra* note 14, at 446.

<sup>40</sup> Mauer, *supra* note 33, at 10–11.

<sup>41</sup> Sung, *supra* note 38, at 134.

<sup>42</sup> *War on Drugs*, *supra* note 37.

<sup>43</sup> Sung, *supra* note 38, at 133.

<sup>44</sup> Shahani, *supra* note 14, at 451.

than providing resources.<sup>45</sup> Reliance on stereotypes has resulted in the skewed makeup of the prison system, with Black people over twenty-one times more likely than White people to go to federal prison on a crack cocaine charge.<sup>46</sup>

The War on Drugs also facilitated a dramatic increase in police forces and funding at the federal, state, and local levels, resulting in many more officers on patrol.<sup>47</sup> As the number of officers grew, the threshold governing when officers could stop and frisk civilians was lowered.<sup>48</sup> The protections guaranteed by the Fourth Amendment (limiting unreasonable searches and seizures and requiring probable cause warrants) were limited by what Thurgood Marshall coined as “the drug exception to the Constitution.”<sup>49</sup> In a monumental Fourth Amendment case, *Terry v. Ohio*, the Supreme Court interpreted the Fourth Amendment to include an exception to the protection requiring probable cause for warrants.<sup>50</sup> Law enforcement could stop a civilian if they reasonably suspected the individual of committing a crime, reasonable suspicion being a much lower threshold than probable cause.<sup>51</sup> The Court in *Whren v. United States* upheld a drug arrest at a traffic stop as lawful because the officers had probable cause for the traffic stop.<sup>52</sup> Traffic stops like in the *Whren* case were geographically concentrated in many impoverished communities during the War on Drugs, impacting Black and Latino people the most.<sup>53</sup> Of the 5 million people stopped and frisked in New York between 2002 and 2014, only about 9 to 12 % frisked were non-Latino white, despite the demographic representing 33% of the New York population.<sup>54</sup> Law enforcement was further empowered with the dismantling of The Posse Comitatus Act of 1878.<sup>55</sup> The Posse Comitatus Act of 1878 drew a distinction between the Armed Forces and domestic law enforcement: civilian police are designed to protect civilians using as little force as possible and the Armed Forces could not perform the duties of civilian law enforcement.<sup>56</sup> This Act was dismantled to advance the War on Drugs as the military became empowered to train civilian police officers and give their departments access to military research and equipment.<sup>57</sup> The culmination of these changes resulted

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<sup>45</sup> Sung, *supra* note 38, at 135.

<sup>46</sup> *Id.* at 134–35.

<sup>47</sup> Hannah L.F. Cooper, *War on Drugs Policing and Police Brutality*, DEP’T HEALTH & HUM. SERVS – HHS PUB. ACCESS 3 (Mar. 21, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4800748/>.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> U.S. CONST. amend. IV; Cooper, *supra* note 47, at 4.

<sup>50</sup> Cooper, *supra* note 47, at 4; *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968); Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 73 OKL. L. REV. (forthcoming 2021).

<sup>51</sup> Cooper, *supra* note 47, at 4.

<sup>52</sup> *Whren v. United States*, 517 U.S. 806, 819 (1996). *See generally* Cooper, *supra* note 47, at 4 (describing pretext stops as stops for one violation when the officer’s true suspicions lie elsewhere).

<sup>53</sup> Cooper, *supra* note 47, at 6.

<sup>54</sup> *Id.* at 5.

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

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

in the increasing use of violence and aggressive tactics to police minority communities.<sup>58</sup>

Aside from President Nixon's overtly racist justification for waging the War on Drugs, the argument that anti-drug legislation was (and remains) influenced by racism is strengthened through comparison of the legislative responses to the crack cocaine epidemic, popular with lower-income minorities, with the responses to the opioid crisis, which largely affects White communities.<sup>59</sup> Rather than moving towards stricter sentencing through the criminal justice system to punish opioid users and providers, as popularized during the War on Drugs, access to treatment and mental health services is encouraged.<sup>60</sup> For some, the shift is the result of changing attitudes towards drugs, yet this argument is weakened by the near-universal support for more robust governmental responses to the opioid epidemic like emphasizing funding research on the public-health crisis, while those attempting to overhaul laws from the War on Drugs face far greater political hurdles.<sup>61</sup>

The opioid epidemic has ravaged the country: 11.8 million Americans misused opioids in 2016, overdose death rates increased by 48% between 2014 and 2016, the majority of those fatalities being White people.<sup>62</sup> Yet this opioid crisis is being treated as what it is, a public health crisis.<sup>63</sup> Thus, the contrast is stark: despite both addictions stemming from the same substance abuse problems, opioid addicts are treated from the public-health-problem perspective while crack cocaine users were not, and still aren't, given the same empathy.<sup>64</sup> While some states are treating the opioid epidemic from the Tough on Crime perspective by lengthening sentences and creating stricter sentencing laws, the general consensus is that opioid epidemic is a public health issue, and Congress is treating it as such.<sup>65</sup> The Substance Abuse and Mental Health Services Agency, following

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<sup>58</sup> *Id.* at 7; Jeffrey Miron & Erin Partin, *Police Violence and the Racist Drug War*, CATO INST. (June 3, 2020, 12:18 PM), <https://www.cato.org/blog/police-violence-racist-drug-war>.

<sup>59</sup> See Kristina Peterson & Stephanie Armour, *Opioid vs. Crack: Congress Reconsiders Its Approach to Drug Epidemic*, WALL ST. J. (May 5, 2018, 7:00 AM), <https://www.wsj.com/articles/opioid-vs-crack-congress-reconsiders-its-approach-to-drug-epidemic-1525518000>; Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse*, DEP'T HEALTH & HUM. SERVS – HHS PUB. ACCESS (Dec. 1, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121004/>.

<sup>60</sup> See Nazgol Ghandnoosh & Casey Anderson, *Opioids: Treating an Illness, Ending a War*, SENT'G PROJECT 5–6, 11, 22–23 (Dec. 13, 2017), <https://www.sentencingproject.org/publications/opioids-treating-illness-ending-war/>.

<sup>61</sup> See Peterson & Armour, *supra* note 59.

<sup>62</sup> Betsey Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

<sup>63</sup> See generally *Opioid Crisis*, HEALTH RES. & SERVS. ADMIN., <https://www.hrsa.gov/opioids> (last updated July 2020) (highlighting resources offered by the Health Sources & Services administration to address the opioid epidemic).

<sup>64</sup> See Peterson & Armour, *supra* note 59.

<sup>65</sup> See generally *id.* (explaining how bipartisan proposals are passing in Congress and lawmakers are setting aside money to combat opioid and mental health problems).

Opioid Strategy of the Department of Health and Human Services, is funded with over \$3.6 billion, over half of which is annually used to combat substance addiction by providing access to treatment and recovery services, distributing overdose-reversing drugs, and funding research.<sup>66</sup> This response to an addiction crisis plaguing the country is a far cry from the increasingly long and harsh sentences used to treat drug addiction in communities of color.<sup>67</sup>

## B. THE CONSEQUENCES OF CRIMINALIZATION

The prevailing penal system used to address drugs and addiction in the United States has its faults: it is rooted in racism, promotes inequality, and despite efforts at reforms, does not achieve the goal of safety. The Tough on Crime initiatives promoting mandatory minimum sentences were built, in part, by legislators' beliefs that greater certainty in sentencing will deter potential offenders.<sup>68</sup> Over the decades, this belief was eroded by evidence that certainty, not severity, of punishment deters potential offenders.<sup>69</sup> Thus, the intended effects of Tough on Crime policies were not achieved. While mandatory minimum sentences have failed in reducing crime, they have succeeded in creating a system with high fiscal costs, instability, and insecurity through mass incarceration and racial disparities.<sup>70</sup>

Proponents of Tough on Crime policies believed that mandatory minimum sentences reduced crime.<sup>71</sup> This belief carried over to how legislators addressed drug offenses: drug-related statutes accounted for about 94% of the mandatory minimum offenses regularly prosecuted.<sup>72</sup> Despite these beliefs, mandatory minimum sentences for drug offenses have done little to enhance public

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<sup>66</sup> Francis Collins et al., *The Federal Response to the Opioid Crisis*, NAT'L INST. ON DRUG ABUSE (Oct. 5, 2017), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2017/the-federal-response-to-the-opioid-crisis> (highlighting testimony from Dr. Francis Collins in front of Senate Committee on Health, Education, Labor, and Pensions); see also *The Federal Response to the Opioid Crisis: Hearing Before Senate Comm. On Health, Education, Labor, and Pensions*, 115th Cong. (2017), <https://www.govinfo.gov/content/pkg/CHRG-115shrg27121/html/CHRG-115shrg27121.htm>; see also *SAMHSA – At a Glance*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/sites/default/files/samhsa-at-a-glance.pdf> (last visited Dec. 28, 2020) (detailing allocation of SAMHSA's annual budget).

<sup>67</sup> See *supra* Section I.A.

<sup>68</sup> See Mauer, *supra* note 33, at 9–10.

<sup>69</sup> See *Five Things About Deterrence*, NAT'L INST. JUST. (June 5, 2016), <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>.

<sup>70</sup> See generally Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1096, 1134 (2017) (explaining the motivations for the switch away from Tough on Crime policies).

<sup>71</sup> See Marc Mauer, *Viewpoint: The Impact of mandatory minimum federal sentencing*, 94 AM. JUDICATURE SOC'Y 6, 6 (2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Judicature-Impact-of-Mandatory-Minimum-Penalties-in-Federal-Sentencing.pdf> (explaining how federal mandatory penalties apply to drug offenses more than other offenses).

<sup>72</sup> See *Mandatory Minimum Sentencing of Federal Drug Offenses*, CONG. RSCH. SERV. (Jan. 11, 2018), [https://www.everycrsreport.com/files/20180111\\_R45074\\_32258e3b09188ca2d21dcaf115051e2c9ff0d020.pdf](https://www.everycrsreport.com/files/20180111_R45074_32258e3b09188ca2d21dcaf115051e2c9ff0d020.pdf).

safety.<sup>73</sup> This is due, in part, to the fact that a substantial number of those sentenced under these statutes were nonviolent, first-time, lower and mid-level ranking drug traders.<sup>74</sup> As long as there remains a demand for drugs, another person can easily step in and take the place of the low-level drug offender when they are arrested.<sup>75</sup> Further weakening the argument that public safety is enhanced through harsher punishments is the fact that increasing the severity of punishments does not provide any additional deterrent effects, leading to the conclusion that mandatory penalties fail to disincentivize people from joining the drug trade.<sup>76</sup>

One immediate negative result from using mass incarceration to combat drug offenses is the high financial cost.<sup>77</sup> A study found that in 2008, the United States spent approximately \$49 billion on drug prohibition.<sup>78</sup> In 2015, the total expenditure on incarcerated people in 45 states was approximately \$43 billion; among these states, the total cost per inmate averages around \$33,274.<sup>79</sup> According to the Bureau of Justice Statistics, in the United States, the annual cost of incarceration is \$81 billion.<sup>80</sup> Taxpayers bear the cost of the War on Drugs.<sup>81</sup>

The consequences of having a criminal justice system focused on incarcerating greater numbers of people for longer periods of time go beyond the monetary costs from supporting the high prison population. Criminalization has resulted in the United States having the largest incarcerated population in the world, disproportionately affecting racial minorities.<sup>82</sup> This disparity was propelled by the Reagan Administration's War on Drugs, which connected the rise in crime to the use of crack cocaine, popular in minority communities.<sup>83</sup> Someone could possess 100 grams of powdered cocaine before receiving the same sentence as someone possessing just one gram of crack cocaine, and as sentences grew longer, the racial makeup of the prison population driven by these policies continued to be more skewed.<sup>84</sup> The racial disparity in prisoners is stark

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<sup>73</sup> See Mauer, *supra* note 71, at 7.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *infra* text accompanying notes 78–80.

<sup>78</sup> Lauren Gallagher, *Should the United States Move towards Portugal's Decriminalization of Drugs*, 22 U. MIAMI INT'L & COMP. L. REV. 207, 211 (2015).

<sup>79</sup> See *Prison Spending in 2015*, VERA INST. JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> (last visited Dec. 28, 2020).

<sup>80</sup> See *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), <https://eji.org/news/mass-incarceration-costs-182-billion-annually>.

<sup>81</sup> See generally Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST. JUST. 2 (Jan. 2012), <https://shnny.org/uploads/Price-of-Prisons.pdf> (giving statistics on expenditure at correctional facilities funded states).

<sup>82</sup> See Robertson *supra* note 16.

<sup>83</sup> See *supra* notes 37–38, 43–45 and accompanying text.

<sup>84</sup> See Colleen Walsh, *The costs of inequality: A goal of justice, a reality of unfairness*, HARV. GAZETTE (Feb. 29, 2016), <https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality->

when looking at the statistics of inmates. African Americans and White Americans use drugs at similar rates, but the imprisonment of African Americans is almost six times more than the imprisonment of White people.<sup>85</sup> African Americans represent 29% of those arrested for drug offenses and 33% of those incarcerated for drug offenses in state facilities, despite representing 5% of drug users.<sup>86</sup>

Most inmates are already economically disadvantaged minority men, and to make reintegration into society even more impossible post-release, it is harder for people with a criminal record to get jobs.<sup>87</sup> Employers are hesitant to hire individuals with a criminal background, and those who have been incarcerated are more likely to have little formal education and limited marketable skills.<sup>88</sup> Those trying to return to society post-incarceration, find themselves facing social problems of poverty: they struggle to find stable housing, jobs, and healthcare. People without jobs, housing, and an education are more likely to commit crime, contrary to the goals of these Tough on Crime initiatives to create safer environments through incarceration, which culminates in high rates of recidivism.<sup>89</sup> This also creates a burden on the children of individuals with criminal backgrounds as they are more likely to live in poverty; these children are more likely to be expelled and to enter the juvenile justice system.<sup>90</sup> Thus, the penal system that was designed in a way that disfavors minorities also affects future generations, creating a system that consistently fails minority communities.

The increased presence of police forces in these minority communities also has a human cost; oftentimes human lives are the collateral damage for waging the War on Drugs.<sup>91</sup> The military tactics as described in Section II.B used to fight this “war” are used mostly for nonviolent drug crimes: according to the ACLU, 62% of the more than 800 SWAT deployments conducted by law enforcement were solely to search for drugs, and Latino people account for 12% and Black people account for more than 42% of the people affected by SWAT deployment.<sup>92</sup> This issue is exacerbated by the way in which funding is allocated: drug task forces get funding based on the number of arrests made and

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a-goal-of-justice-a-reality-of-unfairness.

<sup>85</sup> See *Criminal Justice Fact Sheet*, NAT’L. ASS. ADVANCEMENT COLORED PEOPLE (2020), <https://www.naacp.org/criminal-justice-fact-sheet>.

<sup>86</sup> See *id.*

<sup>87</sup> See Bruce Western & Becky Pettit, *Incarceration & social inequality*, DAEDALUS 8, 12 (2010).

<sup>88</sup> See Vazquez, *supra* note 70, at 1110.

<sup>89</sup> See Walsh, *supra* note 84; Lacey McLaughlin, *The Poverty-Crime Connection*, JACKSON FREE PRESS (Oct. 19, 2011) <https://www.jacksonfreepress.com/news/2011/oct/19/the-poverty-crime-connection/> (explaining the correlation between lack of housing, and employment which leads those who were recently released from jail to return to the life of crime).

<sup>90</sup> See Vazquez, *supra* note 70, at 1113.

<sup>91</sup> See Jeff Adachi, *Police Militarization and the War on Citizens*, 42 HUM. RIGHTS MAG. (2016), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2016-17-vol-42/vol-42-no-1/police-militarization-and-the-war-on-citizens](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-1/police-militarization-and-the-war-on-citizens).

<sup>92</sup> See *id.*

property seized during their busts, incentivizing increased policing.<sup>93</sup> The fight for funding has resulted in undercover officers conducting sting operations in which they go to some of the poorest areas and pretend to buy drugs on the streets to raise the number of arrests without incurring much risk.<sup>94</sup> These tactics tend to disproportionately focus on minority communities and do little to track down high-level dealers.<sup>95</sup> They may even lead to more violence, as addicts are rarely rehabilitated in prison and disruptions in the drug market lead to territory disputes.<sup>96</sup>

The War on Drugs has also fueled sanction killings, driven by the narrative that police aggression and violence was justified because the offender was “high on drugs.”<sup>97</sup> This excuse has been used time and time again, as drugs remain a pretext by which police can target citizens.<sup>98</sup> As the death of Breonna Taylor has shown, even those in their home are at the mercy of police officers: Breonna was in bed at her apartment when Louisville police officers forcibly entered her home and fired their guns, killing her.<sup>99</sup> A no-knock warrant to enter her home was issued because the police were investigating two potential drug dealers, one of whom was believed to have used her apartment to receive packages; no drugs were found in the Taylor residence.<sup>100</sup> In 1991, Rodney King was chased by police and charged with driving under the influence; after the police stopped him, the officers beat him with batons for fifteen minutes leading to extensive injuries.<sup>101</sup> The police were then acquitted of police brutality; one of their defenses was that they feared King had “superhuman strength” from a drug that King did not test positive for, PCP.<sup>102</sup> The acquittal resulted in riots: the area was already ravaged by drug addiction, unemployment, and violent crimes, and the policing culture was described as “paramilitary,” with police officers targeting poor communities of color and openly suppressing Black communities.<sup>103</sup> Anti-drug laws increase the odds of encounters with police turning violent, and minorities are more likely to lose their life than anyone else.<sup>104</sup> The somber

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<sup>93</sup> See Jeff Adachi & Tal Klement, *The War on Crumbs*, 91 OR. L. REV. 1319, 1323 (2013).

<sup>94</sup> See *id.* at 1320.

<sup>95</sup> See *id.* at 1322; see also Adachi, *supra* note 91 (stating “when paramilitary tactics are used in drug searches, people of color are the most frequent targets.”)

<sup>96</sup> See Adachi & Klement, *supra* note 93, at 1322.

<sup>97</sup> See Max Daily, *How the War on Drugs Enables Police Brutality Against Black People*, VICE (June 8, 2020, 6:18 AM), [https://www.vice.com/en\\_us/article/3azbek/how-war-on-drugs-enables-police-brutality](https://www.vice.com/en_us/article/3azbek/how-war-on-drugs-enables-police-brutality).

<sup>98</sup> See *id.*

<sup>99</sup> See Richard A. Oppel Jr. & Derrick B. Taylor, *Here’s What You Need to Know About Breonna Taylor’s Death*, N.Y. TIMES (Jul. 31, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

<sup>100</sup> See *id.*

<sup>101</sup> See Anjali Sastry & Karen G. Bates, *When LA Erupted In Anger: A Look Back At The Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

<sup>102</sup> See Daily, *supra* note 97.

<sup>103</sup> *Id.*

<sup>104</sup> See generally German Lopez, *There are huge racial disparities in how US police use force*, VOX

reality of the War on Drugs is that rather than making neighborhoods safer, it has bred violence and death.<sup>105</sup>

### C. A DIFFERENT SYSTEM

Portugal provides an alternative to the criminalization scheme followed by the United States. The Portuguese policy, resting upon the principles that there is no such thing as a soft or hard drug, that the unhealthy use of drugs is rooted in strained relationships between the user and their community, and that the eradication of all drugs is impossible, came after the acknowledgement of the counterproductivity in the practice of jailing people for taking drugs.<sup>106</sup> Prior to 2001, Portugal was party to criminalization regimes under the Convention of Psychotropic Substances of 1971, which required that each party treat mood-altering substances as offenses punishable by imprisonment, and Article III of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which required that all parties criminally punish the manufacture and distribution of drugs.<sup>107</sup> These criminal punishments, however, did little to curb the use of drugs.<sup>108</sup> In the 1990s, Portugal experienced an influx of heroin users, substantially increasing the rate of drug-related AIDS and the number of arrests for drug offenses.<sup>109</sup> It was this public health crisis that eventually pushed the Portugal legislature to adopt a different system.<sup>110</sup>

The punishment model is not the only model that can be used to address crime; the medical model exists as an alternative mode to address drug use and addiction issues.<sup>111</sup> The medical model addresses these problems by treating people's behaviors as illnesses.<sup>112</sup> The medical model, like the rehabilitative ideal, operates under the belief that the subject's behavior is the result of an

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(Nov. 14, 2018, 4:12 PM), <https://www.vox.com/identities/2016/8/13/17938186/police-shootings-killings-racism-racial-disparities> (explaining how racial minorities make up 62.7% of unarmed people killed by police despite accounting for 37.4% of the general population). See Sophie Quinton, *Policing Protests Propel Marijuana Decriminalization Efforts*, PEW CHARITABLE TR. (July 2, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/02/policing-protests-propel-marijuana-decriminalization-efforts>.

<sup>105</sup> Miron, *supra* note 58.

<sup>106</sup> See Susana Ferreira, *Portugal's radical drugs policy is working. Why hasn't the world copied it?*, GUARDIAN (Dec. 5, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it>.

<sup>107</sup> Kellen Russoniello, *The Devil (and Drugs) in the Details: Portugal's Focus on Public Health as a Model for Decriminalization of Drugs in Mexico*, 12 YALE J. HEALTH POL'Y L. & ETHICS 371, 378–79 (2012).

<sup>108</sup> *Id.* at 380.

<sup>109</sup> *Id.* at 381–82.

<sup>110</sup> Ferreira, *supra* note 106.

<sup>111</sup> See Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 377 (1987).

<sup>112</sup> *Id.* at 380–81.

underlying malfunction of some bodily function, rather than free will.<sup>113</sup> The root cause is then “diagnosed” through looking at which form of intervention is necessary.<sup>114</sup> Similarly to how doctors treat illnesses, a prognosis is made and a treatment prescribed.<sup>115</sup> This medical model is a stark contrast from the Tough on Crime policies focusing on crime prevention through incarceration.<sup>116</sup>

Portugal is one of a number of jurisdictions that have tried using the medical model to address the issue of drug use and crimes.<sup>117</sup> In response to high numbers of addicts and HIV infections, Portugal became the first country to decriminalize possession and consumption of all regulated substances.<sup>118</sup> This decriminalization scheme, which took effect in 2001, is known as Decree Law 30/2000.<sup>119</sup> Under this law, possession of a ten-day supply of drugs is an administrative rather than criminal offense, and offenders are referred to special commissions known as the Commissions for the Dissuasion of Drug Addictions (CDTs).<sup>120</sup> These CDTs hold proceedings to determine whether the user is an addict, and are then suspended when the user undergoes voluntary treatment.<sup>121</sup> Penalties for non-addicted users can include fines of up to the national minimum wage, which was under \$1000 per month in 2012, travel restrictions, ineligibility for firearm licenses, and termination of public benefits. Addicted users are subject to the same penalties, minus fines.<sup>122</sup> This decriminalization scheme, added with harm reduction programs, in Portugal is generally regarded as a success: the number of people needing drug treatment has fallen, drug-induced death rate has dropped to five times lower than the E.U. average, and drug use has declined in the 15- to 24-year-old population.<sup>123</sup>

## II. MOVING AWAY FROM INCARCERATION

### A. SMART ON CRIME INITIATIVES

The issues with the penal system have not gone unnoticed and in recent decades, criminal justice reform movements have sought to make the criminal justice system more effective and fair.<sup>124</sup> While there are many reasons for

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<sup>113</sup> *Id.* at 381.

<sup>114</sup> *Id.* at 382.

<sup>115</sup> *Id.*; cf. Douglas N. Husak, *Addiction and Criminal Liability*, 18 L. & PHIL. 655, 663–64 (1999) (describing how addiction can be used to excuse criminal liability).

<sup>116</sup> *Supra* Section I.A.

<sup>117</sup> *Decriminalization works, but too few countries are taking the bold step*, UNITED NATIONS AIDS (Mar. 3, 2020), [https://www.unaids.org/en/resources/presscentre/featurestories/2020/march/20200303\\_drugs](https://www.unaids.org/en/resources/presscentre/featurestories/2020/march/20200303_drugs).

<sup>118</sup> Ferreira, *supra* note 106.

<sup>119</sup> Russoniello, *supra* note 107, at 385.

<sup>120</sup> *Id.* at 385–86.

<sup>121</sup> *Id.* at 386–87.

<sup>122</sup> *Id.* at 387–88.

<sup>123</sup> Naina Bajekal, *Want to Win the War on Drugs? Portugal Might Have the Answer*, TIME (Aug. 1, 2018, 6:09 AM), <https://time.com/longform/portugal-drug-use-decriminalization>.

<sup>124</sup> See Pfaff, *supra* note 7, at 173–74; see also *supra* Section I.C.

departure from existing Tough on Crime policies, the financial struggles of governments across the nation have been influential in pushing legislators to find more cost-effective and efficient ways to keep the community safe.<sup>125</sup> One of the latest approaches to reform, referred to as the Smart on Crime movement, emphasizes the effects of overcriminalization, calling for alternatives to incarceration and reintegration of former inmates to society.<sup>126</sup>

Examples of such alternatives may be found in the use of restorative justice and alternative dispute resolutions rather than incarceration in the criminal process.<sup>127</sup> Under these processes, parties would be able to discuss the root causes of the underlying criminal conduct and create a plan to avoid these issues.<sup>128</sup> Another alternative to incarceration would be to sanction users using drug courts.<sup>129</sup> Other policies brought forth under Smart on Crime initiatives are efforts to combat racial disparities, a well-known example being the Fair Sentencing Act of 2010.<sup>130</sup> This Act is aimed at reducing the racial disparities created under the Anti-Drug Abuse Act of 1986 through the system of punishing crack cocaine possession much harsher than powder cocaine possession by reducing the sentencing disparities.<sup>131</sup> Overall, Smart on Crime initiatives focus on saving money by reducing incarceration rates and lessening the impact the criminal justice system has on poor minority communities.

#### B. THE ISSUE WITH SMART ON CRIME POLICIES

As opposed to the Tough on Crime initiatives, the prevailing political stance is now focused on rehabilitation and sentencing reforms.<sup>132</sup> One of the most recent Smart on Crime policies is known as the First Step Act of 2018, which is a bipartisan initiative taken by Congress in an effort to reform the criminal justice system.<sup>133</sup> This act reduces minimum sentences for drug related convictions and allows the Fair Sentencing Act of 2010 to be applied retroactively, reducing the disparity between sentences for crack and powder cocaine for offenders who

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<sup>125</sup> See Roger A. Fairfax Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 610 (2011).

<sup>126</sup> *Id.* at 597–98.

<sup>127</sup> *Id.* at 614.

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

<sup>129</sup> *Id.* at 615.

<sup>130</sup> See Nathan James, *The First Step Act of 2018: An Overview*, CONG. RSCH. SERV. (Mar. 4, 2019), <https://crsreports.congress.gov/product/pdf/R/R45558> (providing an overview and summary of the First Step Act of 2018).

<sup>131</sup> See Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841 (2006); see also Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, AM. C.L. UNION, i–ii (2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law>.

<sup>132</sup> See Barbara McQuade & Sally Q. Yates, *Prosecutors and Voters Are Becoming Smart on Crime*, A.B.A. (Oct. 17, 2019), [https://www.americanbar.org/groups/litigation/publications/litigation\\_journal/2019-20/fall/prosecutors-and-voters-are-becoming-smart-crime](https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/fall/prosecutors-and-voters-are-becoming-smart-crime).

<sup>133</sup> See James, *supra* note 130, at 1.

have been sentenced for crack cocaine offenses before the passage of the bill.<sup>134</sup> The First Step Act is seen as a positive step towards mending the consequences of the War on Drugs and the Tough on Crime era and may lead to additional criminal justice system reforms.<sup>135</sup> Despite the positive possibilities, these Smart on Crime policies, such as the First Step Act, should be regarded as just that – the first step to, and not the solution for – equity.

The First Step Act carries with it critiques that can be broadly applied to many other Smart on Crime policies.<sup>136</sup> These Smart on Crime initiatives rectify mistakes made in the past without drastically changing the sentencing structure of the carceral system.<sup>137</sup> Simply put, the First Step Act and other Smart on Crime initiatives are not sweeping reforms of federal sentencing laws, especially considering the fact that the mandatory nature of so many sentences give prosecutors bargaining power to coerce pleas, resulting in a trial rate of 2.5%.<sup>138</sup> Mandatory penalties are most often applied to drug penalties and provide increasingly harsh punishments for offenders with criminal records, exacerbating racial inequalities.<sup>139</sup> Without reforming sentencing, the problems that started with the Tough on Crime policies continue to carry into the incarceration system.<sup>140</sup>

For example, the opioid crisis has resulted in some federal prosecutors increasing charges of distribution of heroin resulting in death rather than viewing addiction as a public health issue.<sup>141</sup> Furthermore, the ongoing opioid epidemic is pushing Congress to return to the War on Drugs by creating mandatory minimum sentences for fentanyl offenses.<sup>142</sup> Another limitation to the First Step Act is a monetary concern. In 2020, the First Step Act was allocated \$14 million, more than \$60 million less than the required funding to implement the act.<sup>143</sup> Based on these findings, the success of this program is ultimately at the discrepancy of Congress and prosecutors.

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<sup>134</sup> See *id.* at 8–9.

<sup>135</sup> Jonathan Feniak, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENV. L. REV. 166, 166 (2019).

<sup>136</sup> See Jesselyn McCurdy, *The First Step is Actually the “Next Step” After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189, 241 (2019) (providing an overview of the last few decades of Smart on Crime initiatives leading up to the First Step Act of 2018).

<sup>137</sup> See *id.* at 223–26, 229, 233, 236, 239 (describing the FSA and clemency initiatives).

<sup>138</sup> Avern Cohn, *Prosecutors and Voters Are Becoming Smart on Crime*, 46 LITIG. 27, 28 (2019).

<sup>139</sup> See Mauer, *supra* note 71, at 8, 40.

<sup>140</sup> See *id.* at 40.

<sup>141</sup> See Cohn, *supra* note 138, at 29.

<sup>142</sup> See *id.*; see also Nancy Gertner, *Washington Post: William Barr’s New War on Drugs*, SENT’G PROJECT (Jan. 26, 2020), <http://www.sentencingproject.org/news/william-barrs-new-war-drugs/> (highlighting the support by federal prosecutors for minimum mandatory sentences for federal drug charges, such as those involving the drug fentanyl).

<sup>143</sup> See Cohn, *supra* note 138, at 28.

A year after implementation of the First Step Act, The Sentencing Project found that while there were many achievements, more reforms are needed.<sup>144</sup> The Act, which allowed for retroactive application of the Fair Sentencing Act resulted in the resentencing of almost 2,000 people, 91% of those were Black and 4% of those were Hispanic.<sup>145</sup> The sentences were reduced, on average, from over 20 years to around 15 years.<sup>146</sup> Despite these achievements, there were some reservations about the First Step Act: it does not provide systemic change necessary to undo the harms of mass incarceration.<sup>147</sup> Without taking the next steps towards eradication of mandatory minimums, the benefits from the First Step Act are limited.<sup>148</sup> The First Step Act, like many other “smart on crime” initiatives, is just the first step towards equity.<sup>149</sup>

### III. THE PERFECT POLITICAL CLIMATE FOR DRUG POLICY REFORM

The United States is reeling under the global pandemic of COVID-19, which has claimed over 262,020 lives and upended fourteen million jobs.<sup>150</sup> One major impact of the staggering numbers of lost lives and unemployment is their effect on the healthcare system.<sup>151</sup> The healthcare system, which includes insurance policies, doctors, and nursing homes, is rapidly changing in response to the economic and environmental changes.<sup>152</sup> A reason for the shift in healthcare may be due to the attention brought to the racial disparities in healthcare; disproportionately to their population, Black people die at alarming rates.<sup>153</sup> At the same time, the Black Lives Matter movement, rooted in combatting police brutality, has been reinvigorated following the death of George Floyd at the hands of policeman.<sup>154</sup> Between 15 million to 26 million people

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<sup>144</sup> See Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENT’G PROJECT (Dec. 17, 2019), <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See Kanya Bennett, *The First Step Act Was Exactly That, a First Step. What Comes Next?*, AM. C.L. UNION (Oct. 25, 2019), <https://www.aclu.org/news/smart-justice/the-first-step-act-was-exactly-that-a-first-step-what-comes-next/>.

<sup>150</sup> See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last updated Nov. 25, 2020 8:14 PM); see also Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> (describing the rise in unemployment due to COVID-19).

<sup>151</sup> See Lev Facher, *9 Ways Covid-19 May Forever Upend the U.S. Health Care Industry*, STAT (May 19, 2020), <https://www.statnews.com/2020/05/19/9-ways-covid-19-forever-upend-health-care/>.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd->

have participated in demonstrations for this cause, making it the largest movement in United States history.<sup>155</sup> A call for racial justice in the healthcare system and in the judicial system has awoken.<sup>156</sup>

#### A. INCENTIVES FOR CHANGE

As COVID-19 leaves millions unemployed and therefore ineligible for traditional employer-based insurance, ravages minority communities at rates disproportionate to their populations, and the Black Lives Matter movement continues to unearth decades of inequality in the criminal justice system, the motivation to change the criminal process and healthcare structure has never been stronger.<sup>157</sup> Adoption of the medical model, and thereby decriminalizing drug possession, takes into account the current political pressures, histories, and public health concerns that are being brought to the foreground of attention now.<sup>158</sup> The medical model approach to addressing drug addiction does two important things: it makes treatment of criminal offenders a major goal of corrections and it recognizes that criminalization of drug use and possession exacerbates the problem of drug abuse.<sup>159</sup> Portugal adopted the medical model and decriminalized all drugs as a means to reduce drug abuse and increase treatment and experienced positive consequences such as reduction of their prison population, more effective constraints on drug trafficking, and fiscal savings post-implementation.<sup>160</sup> These benefits are not the only positive results that can come from decriminalization. Decriminalizing drug possession reduces racial disparities in incarceration and arrest rates by removing a significant factor in the disproportionate policing of minority communities.<sup>161</sup> It removes barriers to reintegration to society in areas including voting, employment, and public assistance.<sup>162</sup> Decriminalization can even be used for new areas of medical

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protests-crowd-size.html.

<sup>155</sup> *See id.*

<sup>156</sup> *See* Lindsey Tanner, *Virus, Floyd Death Merge in Brutal Blow to Black Well-Being*, ASSOCIATED PRESS (July 5, 2020), <https://apnews.com/8bff847aeb6acc4a5894dee96791d9e>.

<sup>157</sup> *See id.*; *see also* Facher, *supra* note 151 (describing the hope that COVID-19 will lead to changes in healthcare disparities); *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last updated July 24, 2020) (noting there is discrimination in healthcare and criminal justice); Jenna Wortham, *A 'Glorious Poetic Rage'*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/sunday-review/black-lives-matter-protests-floyd.html> (describing how the civil rights movement is "more powerful than ever.").

<sup>158</sup> *See generally* Russoniello, *supra* note 107, at 430 (arguing that developing an effective drug strategy requires a holistic look at a country's needs and history).

<sup>159</sup> *See id.* at 384; *see also* Torres, *supra* note 21, at 20 (arguing that the medical model does not set firm limits to effectively help addicts). *But see* Nahas, *supra* note 13, at 742 (arguing that the adoption of the medical model aggravated criminality problems in Sweden).

<sup>160</sup> *See* Russoniello, *supra* note 107, at 393–94, 413.

<sup>161</sup> *See Race and the Drug War*, DRUG POL'Y ALL., <https://www.drugpolicy.org/issues/race-and-drug-war> (last visited Dec. 28, 2020).

<sup>162</sup> *See id.*

research and treatment.<sup>163</sup> Pushed by world events, a dramatic shift away from the punishment model towards adoption of the medical model may provide the shift towards better funding for healthcare.

As statistics regarding the COVID-19 outbreak continue to pour in, one thing is apparent: the risk of members of minority communities contracting and dying from the disease is much higher than the risk White persons face.<sup>164</sup> The health differences between ethnic and racial groups result from pervasive social inequities.<sup>165</sup> For example, minorities earn less and have higher unemployment rates, are more likely to be uninsured, and are over-represented in jails and prisons, all of which impact the spread and treatment of Covid-19.<sup>166</sup> Statistics like these are some of the factors influencing the call for healthcare changes as healthcare providers are pushed to make difficult decisions.<sup>167</sup> Congress has already passed legislation in response to the emergency, the Families First Coronavirus Response Act, which requires all private insurers to eliminate all cost sharing associated with testing services and appropriated \$1 billion for funding testing for uninsured people, and the Coronavirus Aid, Relief and Economic Security (CARES) Act, which requires all private insurers to cover COVID-19 testing and future vaccines.<sup>168</sup> Still, there remains the argument that healthcare should be funded for all, for more than just one disease.<sup>169</sup> As one commentator noted, “we are only as healthy as the least healthy member of our community.”<sup>170</sup>

One way the switch to the medical model can help revamp the medical system in the United States is through the reallocation of funding.<sup>171</sup> Portugal’s success in implementing their decriminalization scheme provides significant support for this argument.<sup>172</sup> Portugal has reduced expenditures from decreasing the amount of low-level drug users going through the court and incarceration

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<sup>163</sup> See Laurel Brauns, *Oregon Voters to Consider Psilocybin Therapy, Drug Decriminalization This Fall*, SOURCE WKLY. (July 9, 2020), <https://www.bendsource.com/bend/oregon-voters-to-consider-psilocybin-therapy-drug-decriminalization-this-fall/Content?oid=12798252>.

<sup>164</sup> See *Health Equity Considerations and Racial and Ethnic Minority Groups*, *supra* note 157.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See Suzy Khimm, *Who Gets a Ventilator? Hospitals Facing Coronavirus Surge Are Preparing for Life-or-Death Decisions*, NBC NEWS, <https://www.nbcnews.com/health/health-care/who-gets-ventilator-hospitals-facing-coronavirus-surge-are-preparing-life-n1162721> (last updated Mar. 19, 2020, 11:26 AM) (discussing the ventilator shortages and the decisions healthcare providers are making to determine who can get care).

<sup>168</sup> Jaime S. King, *Covid-19 and the Need for Health Care Reform*, N. ENG. J. MED. (June 25, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMp2000821>.

<sup>169</sup> See Mical Raz, *Yes, Covid-19 Treatment Must Be Free for All. But That’s Not Enough*, WASH. POST (Apr. 1, 2020), <https://www.washingtonpost.com/outlook/2020/04/01/yes-covid-19-treatment-must-be-free-all-thats-not-enough/?arc404=true>.

<sup>170</sup> *Id.*

<sup>171</sup> See Jeffrey Miron, *The Budgetary Effects of Ending Drug Prohibition*, CATO INST. (July 23, 2018), <https://www.cato.org/publications/tax-budget-bulletin/budgetary-effects-ending-drug-prohibition>.

<sup>172</sup> *Infra* Section III.B.

system.<sup>173</sup> Furthermore, the prevalence of costly diseases, such as HIV and hepatitis, within the country are predicted to decrease as more users come in contact with the public health system as a result of the increased emphasis on public health and treatment.<sup>174</sup> Because the United States spends more than \$80 billion annually on funding the prison system, decreasing the number of prisoners would likely free up a substantial amount of money annually.<sup>175</sup> Estimates for budgetary gains in the United States for drug legalization reach over \$106.7 billion annually, coming from a “decrease[] in drug enforcement spending and increases in tax revenue.”<sup>176</sup> A shift to the medical model has the potential to reallocate the funds used for drug prohibition for other uses, like public health spending.<sup>177</sup>

George Floyd’s murder, reigniting the fight against police brutality, draws a clear connection to the interaction of policing and the War on Drugs.<sup>178</sup> As Floyd was slowly suffocated by officer Derek Chauvin, another officer addressed the crowd of people around them saying, “[d]on’t do drugs, guys.”<sup>179</sup> This “warning” exemplifies how the War on Drugs is a war that continues to hurt minority communities, exposing Black people more than any other group because this war has centered around heightened policing in poor communities.<sup>180</sup> Strict drug laws that encourage police officers to search for drugs in routine interactions increase the chance of these interactions turning violent.<sup>181</sup> Drugs often spark the initial deadly confrontation between armed police and Black people, and Black people make up 24% of those killed by police, an average of three people per day, despite accounting for only 13% of the population.<sup>182</sup> Decriminalization is only part of the answer to combat the racial inequities: the criminal justice system must change as well.<sup>183</sup>

Adoption of the medical model would bring the justice and equality demanded by the Black Lives Matter movement. The movement bringing

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<sup>173</sup> See Russoniello, *supra* note 107, at 429.

<sup>174</sup> *Id.* at 392–93, 429.

<sup>175</sup> *Id.* at 429; see also Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM) <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> (highlighting the amount of money the United States spends per year “to keep roughly 2.3 million people behind bars.”).

<sup>176</sup> Miron, *supra* note 171.

<sup>177</sup> *Id.*; see also Tom Angell, *Oregon Drug Decriminalization and Treatment Measure Qualifies for November Ballot*, MARIJUANA MOMENT (July 1, 2020), <https://www.marijuanamoment.net/oregon-drug-decriminalization-and-treatment-measure-qualifies-for-november-ballot/> (illustrating how legislatures can use drug tax for funding substance treatment services).

<sup>178</sup> See Max Daly, *How the War on Drugs Enables Police Brutality Against Black People*, VICE (June 8, 2020, 8:41 AM), [https://www.vice.com/en\\_us/article/3azbek/how-war-on-drugs-enables-police-brutality](https://www.vice.com/en_us/article/3azbek/how-war-on-drugs-enables-police-brutality).

<sup>179</sup> *Id.*

<sup>180</sup> See *id.*

<sup>181</sup> Quinton, *supra* note 104.

<sup>182</sup> See Daly, *supra* note 178.

<sup>183</sup> See Quinton, *supra* note 104.

attention to police brutality, racial injustice, and systemic inequities has picked up a significant amount of media attention, and legislators are taking note.<sup>184</sup> Many of the demands for change center on criminal justice reform, and one of the most prominent demands call for defunding the police.<sup>185</sup> Activists claim that police departments are overfunded, while social programs, like mental health services and housing, are left struggling.<sup>186</sup> The co-founder of Black Lives Matter, Patrisse Cullors, spoke against police control over mental health crises, homelessness, and treating drug dependency and addiction, stating that, “[t]hose are three line items which we can cut out of the police budget and then put that back into health care.”<sup>187</sup> This demand is not new, but has picked up momentum as protestors across the nation share their dissatisfaction with policing: the time for ending police involvement is now.<sup>188</sup> The medical model would reduce the likelihood of lethal encounters between police officers and drug users, reallocate the funding from the police force to social services and healthcare, and address the racial inequalities so prevalently found within the criminal justice system.<sup>189</sup>

Moving away from the punishment model would not be as drastic of a shift as one may think: pro-decriminalization and anti-incarceration for drug offenses rhetoric is gaining traction in the political arena.<sup>190</sup> Preparing for the 2020 Presidential election, Democrats met to discuss a draft Democratic party platform, drawing upon the Biden-Sanders Unity Task Force policy recommendations to discuss, among other topics, criminal justice and healthcare reforms.<sup>191</sup> Notably, this draft recognizes police brutality, and also the challenges police officers face as the front-line workers addressing social issues, such as mental health crises, and addiction.<sup>192</sup> The platform also discusses expanding access to substance abuse treatment, and ensuring no one is incarcerated solely for drug

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<sup>184</sup> See *America’s Reckoning on Racism Spreads Beyond Policing*, N.Y. TIMES, <https://www.nytimes.com/2020/06/10/us/protests-black-lives-matter-george-floyd.html#link-7ec68a76> (last updated June 15, 2020).

<sup>185</sup> See Martin Austerhuhle, *Here’s What Black Lives Matter D.C. Is Calling For, And Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands>.

<sup>186</sup> *Id.*

<sup>187</sup> Lissandra Villa, *Why Protesters Want to Defund Police Departments*, TIME (June 7, 2020, 11:17 AM), <https://time.com/5849495/black-lives-matter-defund-police-departments/>.

<sup>188</sup> *See id.*

<sup>189</sup> *See supra* notes 183–88 and accompanying text.

<sup>190</sup> *See supra* Part II.

<sup>191</sup> See Scott Detrow, *Democrats Meet Virtually to Approve Platform That Builds Off Biden-Sanders Effort*, NPR (July 27, 2020, 7:25 PM), <https://www.npr.org/2020/07/27/895800425/democrats-meet-virtually-to-approve-platform-that-builds-off-of-biden-sanders-ef>; Scott Detrow, *Democratic Task Forces Deliver Biden a Blueprint for a Progressive Presidency*, NPR (July 8, 2020, 7:03 PM), <https://www.npr.org/2020/07/08/889189235/democratic-task-forces-deliver-biden-a-blueprint-for-a-progressive-presidency>.

<sup>192</sup> See *2020 Democratic Party Platform*, DEMOCRATIC NAT’L CONVENTION (July 7, 2020), <https://www.demconvention.com/wp-content/uploads/2020/07/2020-07-21-DRAFT-Democratic-Party-Platform.pdf>.

use.<sup>193</sup> Much of the relevant criminal justice, and substance use language, mirrors the medical model framework, pointing to the greater tolerance and even acceptance of these ideals.<sup>194</sup> This points to the potential for overhauling the criminal justice system.

## B. LIMITATIONS TO THE MEDICAL MODEL

### i. Political Obstacles

The success of the medical model may be impeded by political obstacles, imposing limitations on its implementation. Legislation surrounding drugs are politically charged.<sup>195</sup> Take, for example, the First Step Act discussed above.<sup>196</sup> It took over four years from the introduction of a criminal justice reform bill to the passage of the First Step Act, even with overwhelming bipartisan support.<sup>197</sup> Even if political obstacles were overcome, as seen in state legislative action moving towards a healthcare-centered drug decriminalization policy, there are significantly powerful actors upholding the current criminal justice system.<sup>198</sup> Law enforcement departments are some of the most well unionized groups, not to mention the lobbying effect for-profit prisons have.<sup>199</sup> Yet, there remains hope that the status quo will change, as legislators continue to face growing pressures amid the world events. If the changes that happened mid-pandemic show anything, it is the collective power the people have in creating change.<sup>200</sup>

Sentencing reform has been a long and slow process, with only modest changes.<sup>201</sup> Even for legislation with bipartisan support, like the First Step Act,

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<sup>193</sup> See *id.* at 28.

<sup>194</sup> See *supra* Part II.

<sup>195</sup> See Eric E. Sterling, *U.S. Drug Policy*, INST. POL'Y STUD. (Nov. 1, 1999), [https://ips-dc.org/us\\_drug\\_policy/](https://ips-dc.org/us_drug_policy/).

<sup>196</sup> See *supra* Part II.

<sup>197</sup> See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

<sup>198</sup> See Miron, *supra* note 171; Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One is Talking About*, WASH. POST (Apr. 28, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/>.

<sup>199</sup> See Dylan Matthews, *How Police Unions Became So Powerful—and How They Can Be Tamed*, VOX (June 24, 2020, 9:00 AM), <https://www.vox.com/policy-and-politics/21290981/police-union-contracts-minneapolis-reform>; Cohen, *supra* note 198.

<sup>200</sup> See Sophia Ankel, *30 Days That Shook America: Since the Death of George Floyd, the Black Lives Matter Movement Has Already Changed the Country*, BUS. INSIDER (June 24, 2020, 8:58 AM), <https://www.businessinsider.com/13-concrete-changes-sparked-by-george-floyd-protests-so-far-2020-6>; *In America Protests Have Already Brought Policy Changes*, ECONOMIST (June 11, 2020), <https://www.economist.com/united-states/2020/06/11/in-america-protests-have-already-brought-policy-changes>.

<sup>201</sup> See Aliyah Frumin, *The Long, Slow Push to Prison Sentencing Reform*, MSNBC, <http://www.msnbc.com/msnbc/the-long-push-prison-sentencing-reform> (last updated Apr. 28, 2014, 7:33 AM).

steps to reform the criminal justice system is slow.<sup>202</sup> The complete shift from the punishment model to the medical model, then, would seem unlikely to happen soon, or at least not in the near future. Yet, the protests have brought hope to the movement for progress in the criminal justice system.<sup>203</sup> The push for change encouraged by global events comes alongside evidence that the medical model works.<sup>204</sup> Even for those who claim that the model is ineffectual, the downsides of the punishment model provide evidence for the desperate need for a different way of thinking about drug policy.<sup>205</sup> This new mindset is reflected in changing attitudes towards drugs and punishment.<sup>206</sup>

As recent legislative initiatives show, the move away from using the criminal justice system to address drug offenses would not be an entirely novel idea. Take, for example, two initiatives, in Oregon and Washington, that embody the medical model. The Oregon Drug Addiction Treatment and Recovery Act, IP 44, treats drug possession penalties as infractions, and expands access to treatment by establishing addiction recovery centers, and increasing the availability of social services like housing.<sup>207</sup> Initiative 1715 in Washington, also known as the Substance Use Disorder Treatment, Recovery, and Education Act, moves to decriminalize drug possession, treating possession as an infraction without the threat of jail time, and directs taxes from legalized marijuana to fund treatment and recovery services.<sup>208</sup> This viewpoint is also reflected in older cases. In a 1965 California Supreme Court case, *Robinson v. California*, the Court held that because addiction is a disease, and making a disease a criminal offense would be cruel and unusual punishment, addiction should not be criminalized.<sup>209</sup> This holding reflects a different attitude on drugs, present over four decades ago, in line with the medical view that addiction is a disease. Concerns about the broader acceptance of the medical model within the United States, based upon

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<sup>202</sup> See Davidson, *supra* note 9.

<sup>203</sup> See Jeffrey Toobin, *The Halted Progress of Criminal-Justice Reform*, *ECONOMIST* (July 12, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-halted-progress-of-criminal-justice-reform>.

<sup>204</sup> See George Murkin, *Drug Decriminalization in Portugal: Setting the Record Straight*, U.N. OFF. ON DRUGS & CRIME 1–2 (June 2014), <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/Drug-decriminalisation-in-Portugal.pdf>.

<sup>205</sup> See *supra* Part II.

<sup>206</sup> See Frumin, *supra* note 201.

<sup>207</sup> See generally *Get the Facts*, YES ON 110, <https://yesonip44.org/get-the-facts/> (describing the aims of the ballot measure). See *Campaign Begins for Drug Treatment Ballot Measure*, KTVZ (Mar. 1, 2020, 9:36 AM), <https://ktvz.com/news/election/2020/03/01/campaign-begins-for-drug-treatment-ballot-measure/>; see also *Initiative 44 full text*, OR. SEC'Y OF STATE 1, 7 <http://oregonvotes.org/irr/2020/044text.pdf> (breaking down the entire Drug Addiction and Recovery Act).

<sup>208</sup> See 2020 Bill Request WA Initiative Measure No. 1715, (March 2020), [https://www.sos.wa.gov/assets/elections/initiatives/finaltext\\_1802.pdf](https://www.sos.wa.gov/assets/elections/initiatives/finaltext_1802.pdf); see also Kyle Jaeger, *Washington Voters Could See Drug Decriminalization and Treatment Initiative on November Ballot*, MARIJUANA MOMENT (Apr. 21, 2020), <https://www.marijuanamoment.net/washington-voters-could-see-drug-decriminalization-and-treatment-initiative-on-november-ballot/> (explaining some details of Initiative 1715).

<sup>209</sup> See *Robinson v. California*, 82 S. Ct. 1417, 1420–21 (1962).

the perseverance of tough sentencing initiatives, are therefore unfounded, given the increasing popularity of these policies. If anything, current pressures will help move along the shift away from treating drug possession as a criminal offense.<sup>210</sup>

Another political obstacle, potentially preventing the implementation of the medical model, is the impact of lobbying. For-profit private prisons have built influence over candidates in office over the decades; the two largest prison companies in the United States have spent more than \$10 million on the candidates, and nearly \$25 million on lobbying efforts since 1989.<sup>211</sup> These companies also have a huge market share; contracts with these prisons require keeping the facilities full, and these quotas extend into the federal level.<sup>212</sup> Police unions are another stronghold against change. Historically, these unions have been some of the most vocal interest groups against criminal justice reform and remain a loud opponent to the activists today.<sup>213</sup>

In spite of the strong lobbying power of prisons and police forces, the collective call for change has resulted in impressive reforms. In the months following the death of George Floyd, the ongoing demonstrations have resulted in concrete changes in police reform, and policies.<sup>214</sup> Lawmakers, facing increasing pressure from activists, have vowed to disband their police departments, and pledge comprehensive police reform.<sup>215</sup> Chokeholds have been banned in a number of states. New York City, Minneapolis, Minnesota, Washington, DC, California, Nevada, and Texas are some of the jurisdictions pledging to change.<sup>216</sup> On a federal level, new legislation is being introduced; the Justice in Policing Act of 2020 eliminates unannounced police raids and makes it easier to prosecute police. Politicians are listening, making this an opportune time for change.<sup>217</sup>

## ii. Social Obstacles

Drug use has (accurately) been believed to be linked with violence, contributing to the rise in Tough on Crime rhetoric by politicians; people want to feel safe.<sup>218</sup> The Journal of Substance Abuse Treatment found that more than 75% of people who enrolled in treatment for substance abuse had performed acts of violence, including mugging, and attacking another person using a weapon.<sup>219</sup>

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<sup>210</sup> See Ankel, *supra* note 200.

<sup>211</sup> See Cohen, *supra* note 198.

<sup>212</sup> See *id.*

<sup>213</sup> See Matthews, *supra* note 199.

<sup>214</sup> See Ankel, *supra* note 200.

<sup>215</sup> See *id.*

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

<sup>218</sup> See *Understanding the Connection Between Drug Addiction, Alcoholism, and Violence*, AM. ADDICTION CTRS, <https://americanaddictioncenters.org/rehab-guide/addiction-and-violence>.

<sup>219</sup> *Id.*

This fear remains an obstacle against widespread acceptance of decriminalization. However, the pervasiveness of violent crime caused by drugs may be lessened by increasing access to treatment programs.<sup>220</sup> Seattle's Law Enforcement Assisted Diversion (LEAD) initiative connects people with minor drug offenses with service providers, rather than incarcerating them.<sup>221</sup> One review found that almost 60% of participants were less likely to be rearrested, and 46% were more likely to have a job or job training.<sup>222</sup> Post-incarceration challenges to access to housing, drug treatment, and employment are risk factors for recidivism, while treatment programs helping reintegrate offenders greatly reduce the risk of recidivism.<sup>223</sup> Given the evidence that recidivism is influenced by the cycle of incarceration and poverty, decriminalization may reduce violent crime by removing the stigma faced by ex-offenders, easing their access to employment, housing, and community.<sup>224</sup> Furthermore, policing for minor situations, involving recreational use of low-level drugs, can result in fatal interactions between the police and civilians.<sup>225</sup> Using the medical model, which calls for the decriminalization of drugs, to address situations in which social work is necessary may even help in reducing violence.

To further assuage the fears that accompany decriminalization, evidence of the medical model's success in both the international and local arena exists. Nearly two decades after implementation of their decriminalization scheme, Portugal reports levels of drug use below the average rate in Europe, decreased drug use rates in multiple populations, and decreased rates of continued drug use.<sup>226</sup> These statistics suggest that decriminalization did not cause an increase in drug use.<sup>227</sup> Even evidence that points to a rise in crime following decriminalization, such as an increase in homicide in Portugal post-implementation, may be refuted by evidence that crimes associated with drug use, such as muggings, have not increased.<sup>228</sup> Despite potential arguments that Portugal's success with the medical model would not lead to the same results in the United States, an analysis conducted by the Oregon Criminal Sentencing Commission looking at IP 44, discussed above, found that the measure would likely result in

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<sup>220</sup> See *How Non-Policing Programs Can Be Successful*, NPR (June 27, 2020), <https://www.npr.org/2020/06/27/884213520/how-non-policing-programs-can-be-successful>.

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

<sup>222</sup> *Id.*

<sup>223</sup> See Paul Heroux, *Reducing Recidivism: The Challenge of Successful Prisoner Re-Entry*, HUFFPOST, [https://www.huffpost.com/entry/reducing-recidivism-the-c\\_b\\_929510](https://www.huffpost.com/entry/reducing-recidivism-the-c_b_929510).

<sup>224</sup> See *supra* notes 87–90 and accompanying text.

<sup>225</sup> See Roge Karma, *We Train Police to be Warriors—and Then Send Them Out to be Social Workers*, VOX (July 31, 2020, 7:30 AM), <https://www.vox.com/2020/7/31/21334190/what-police-do-defund-abolish-police-reform-training>.

<sup>226</sup> See Murkin, *supra* note 204, at 2.

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

<sup>228</sup> *Id.* at 3; see also Daniel R. Yablon, *The Effect of Drug Decriminalization in Portugal on Homicide and Drug Mortality Rates (2011)* (B.S. thesis, University of California, Berkeley) (on file with author) (explaining that data indicating an increase in other crimes such as homicide does not reflect the failure of decriminalization in Portugal).

fewer Oregonians convicted of felonies, and reductions in the racial disparities in arrests and convictions.<sup>229</sup> Fewer convictions, an effect of alternatives to incarceration, would allow for easier reintegration into society, reducing the risk of additional offenses.<sup>230</sup> Thus, the fears associated with decriminalization, as refuted by a country that has adopted a medical model approach, and a study looking at the benefits of such a model in Oregon, are misplaced.

#### IV. CONCLUSION

As argued above, using the criminal justice system, which relies on policing and incarceration to punish and deter offenders, to fight the War on Drugs, is harmful.<sup>231</sup> In recent decades, tough drug laws have decreased in popularity, and a more tolerant view on drug use has emerged.<sup>232</sup> In addition to that political shift, more people than ever are calling for the reform of the healthcare and criminal justice system's response to the culmination of major world events.<sup>233</sup> While reforms to address racial disparity in the prison population have been made, these changes are not enough.<sup>234</sup> However, in light of the growing influence of current world events, activists may successfully advance the movement to completely alter the system of incarceration.<sup>235</sup>

Taking a page out of Portugal's book, many governments are now considering combatting the problem of drug use and addiction through other means.<sup>236</sup> Years of growing rejection of War on Drugs policies have pushed politicians towards more equitable means of ensuring justice, and treating criminals.<sup>237</sup> The added attention, from current global events given to the systemic problems faced by impoverished minority communities, has amplified the voices calling for abandoning the very systems that upheld the War on Drugs.<sup>238</sup> Given the newfound attention to the desperate need for reform of some of the systems used to promote the welfare of the American people, the time to reinvent the way in which we treat drug offenses is now.<sup>239</sup>

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<sup>229</sup> See *IP 44 Racial and Ethnic Impact Statement Supplemental Document*, OR. CRIM. JUST. COMM'N (Aug. 5, 2020), <https://www.theskanner.com/images/stories/2020/August/IP44-REI-Statement-Supplement.pdf>.

<sup>230</sup> See Heroux, *supra* note 223.

<sup>231</sup> See discussion *supra* Section I.B.

<sup>232</sup> See *War on Drugs*, *supra* note 37.

<sup>233</sup> See Ben Kessler, *Calls to Reform, Defund, Dismantle and Abolish the Police, Explained.*, NBC NEWS, <https://www.nbcnews.com/news/us-news/calls-reform-defund-dismantle-abolish-police-explained-n1227676> (last updated June 9, 2020, 8:12 PM).

<sup>234</sup> See discussion *supra* Section II.B.

<sup>235</sup> See discussion *supra* Part III.

<sup>236</sup> See discussion *supra* Section III.B.

<sup>237</sup> See Kessler, *supra* note 233.

<sup>238</sup> See *id.*

<sup>239</sup> See Janet Weiner & Melissa Ostroff, *What Does COVID-19 Mean for Health Care Reform?*, PENN. LDI (Apr. 30, 2020), <https://ldi.upenn.edu/healthpolicysense/what-does-covid-19-mean-health-care-reform>.