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Should the United States Move Towards Portugal's Decriminalization of Drugs?

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SHOULD THE UNITED STATES MOVE TOWARDS PORTUGAL'S DECRIMINALIZATION OF DRUGS?

Lauren Gallagher

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I. INTRODUCTION

"We can use the power of the law not as a blunt instrument, but as a way to nudge people toward an outcome that is better for them, better for the community."

- Daniel T. Satterberg, King County Prosecuting Attorney¹

¹ Brave New Films, *Drug War Alternatives that Work: Overcriminalized #2: Substance Abuse*, YOUTUBE (Oct. 9, 2014), https://www.youtube.com/watch?v=_66uT64YzbY.

Jeremy Bradford, a former corporal in the Marines, has been arrested for drugs more than twenty times in the last ten years.² He completed the Seattle Drug Court Program before.... but the day he graduated he got high.³ As a program requirement, Jeremy obtained a job – not because he needed or wanted to, but because he had no other choice if he wanted to stay out of jail.⁴ Jeremy was eventually fired from that job due to his crack dependency.⁵ He was without housing, or employment, living in the only world he could survive in the illegal world. The vicious cycle continued.

In the fall of 2011 Jeremy again found himself sleeping under the freeway abusing drugs.⁶ He did not feel like he belonged there, but there he was.⁷ However, when Seattle's West Precinct approached Jeremy's "housing area," he was not faced with another trip to county jail. Instead, Jeremy was invited to participate in a radical experiment.⁸ This time was different; this time he was given another chance.

Jeremy became one of the Law Enforcement Assisted Diversion (LEAD) Program's first "clients."⁹ Instead of leaving in handcuffs, Jeremy opted to meet with a counselor at a social-service agency and avoid the court system altogether.¹⁰ At the time, he had no intention of giving up drugs, but he could not resist the appeal of free housing and clean clothes.¹¹ Over the next few months Jeremy met with his counselor who assisted him in reinstating his driver's license and obtaining housing.¹² It was not long before Jeremy also wanted help with his addiction. Now, he spends his mornings in support meetings, afternoons cooking for his housemates, and nights

² Saki Knafo, *Change of Habit: How Seattle Cops Fought an Addiction to Locking Up Drug Users*, THE HUFFINGTON POST, Aug. 29, 2014, http://www.huffingtonpost.com/2014/08/28/seattle-lead-program_n_5697660.html.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Knafo, *supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

at his part-time job.¹³ It is the longest Jeremy has been sober in over a decade.¹⁴ Not because he has to, but because he wants to.

To say that drugs are a heavily debated topic would be an understatement. Amid the highly polarized argument about what to do with our drug policy, it is often forgotten that prohibition or legalization are not the only two policy options. Decriminalizing the possession and use of drugs and replacing criminal sanctions with administrative ones is now a viable option. Portugal provides a feasible example. In 2001, Portugal removed criminal penalties for drug use, possession, and acquisition of quantities up to a ten-day supply.¹⁵ The country now deals with these offenders through an administrative system based on the notion that drug abuse should be treated as a public health issue.¹⁶

This paper will begin by situating the reader by providing background to the United States' war on drugs. Specifically, this was the moment that the United States took a punitive turn and began sentencing individuals to increasingly long prison sentences. This section will also introduce an alternative approach, drug courts, which began to be championed in the U.S. during the 1990s. The next section will discuss Portugal's radical alternative and demonstrate that the Portuguese model could work in the United States. Finally, this paper will explain how drug use and abuse can and should be treated as a public health issue through an administrative system.

II. THE UNITED STATES "WAR ON DRUGS"

A. Punitive Policy

Prior to the "war on drugs," the United States did not take a punitive approach when handling its illegal drug usage. In the 1960s, the government began researching the medical safety and efficacy of

¹³ *Id.*

¹⁴ Knafo, *supra* note 2.

¹⁵ LAURENCE ALLEN ET AL., THE BECKLEY FOUND. DRUG POLICY PROGRAMME, DECriminalIZATION OF DRUGS IN PORTUGAL: A CURRENT OVERVIEW 3 (DrugScope 2004), available at http://reformdrugpolicy.com/wp-content/uploads/2011/10/paper_06.pdf.

¹⁶ *Id.*

illicit drugs.¹⁷ However, that research was halted when drugs became symbols of rebellion, social upheaval, and political dissent.¹⁸ Then in 1971, former President Richard Nixon named drug abuse “public enemy number one.”¹⁹ The former president dramatically increased the size and presence of federal drug control agencies and pushed for mandatory sentencing measures.²⁰ Despite the push towards punishment, it was still the case that the majority of government funding went towards treatment, rather than law enforcement.²¹

For a moment in time it seemed as though the country was heading towards decriminalization. States began decriminalizing marijuana possession, and in 1976, former President Jimmy Carter was elected on a campaign platform that included marijuana decriminalization.²² Within a few years, however, proposals to decriminalize marijuana would be abandoned.

In 1982, former President Ronald Reagan declared a “war on drugs.”²³ This policy harkened back to that of the Nixon Administration, but was even tougher on drugs. The program set forth the “zero tolerance” initiative, in which punitive measures against users were emphasized.²⁴ This change in policy was evident in the fact that individuals began to be sentenced to increasingly longer prison sentences. The number of individuals incarcerated for drug offenses increased sevenfold – from approximately 24,000 in

¹⁷ *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Nov. 14, 2014).

¹⁸ *Id.*

¹⁹ *The United States War on Drugs*, STANFORD UNIVERSITY, https://web.stanford.edu/class/e297c/poverty_prejudice/paradox/hte.html (last visited Nov. 14, 2014).

²⁰ *A Brief History of the Drug War*, *supra* note 17.

²¹ *Thirty Years of America's Drug War*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Nov. 14, 2014).

²² *A Brief History of the Drug War*, *supra* note 17.

²³ J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 313-314 (1994) (“This publicly supported crusade against drug abuse and narcotics trafficking was supposed to succeed where the supply reduction-oriented policies of the 1970s has failed.”).

²⁴ *The United States War on Drugs*, *supra* note 19.

1980 to over 179,000 by 1990.²⁵ Even after the Reagan Administration ended, its anti-drug policies continued to result in escalating levels of incarceration. From 1995-2003 the number of individuals incarcerated for drug offenses in federal prisons increased by 49%.²⁶

A recent report by a Harvard economist found that in 2008 the United States spent approximately 49 billion dollars on drug prohibition costs.²⁷ Since then, the percentage of federal prisoners convicted of drug offenses has decreased each year.²⁸ State facilities have also seen reduced incarceration rates of drug offenses.²⁹ Nevertheless, as of 2012, 210,000 inmates (16% of the state prison population) were incarcerated for drug offenses in state facilities.³⁰ In federal facilities, 98,200 inmates (51% of the federal prison population) were imprisoned for drug offenses as of September 30, 2013.³¹ Although the incarceration *rate* may be decreasing, over 308,000 individuals are currently imprisoned for drug offenses. They comprise 25% of all individuals incarcerated in U.S. prisons or jails.³²

²⁵ *People Sentenced for Drug Offenses in the U.S. Correctional System*, COMMON SENSE FOR DRUG POLICY, http://www.drugwarfacts.org/cms/Prisons_and_Drugs#Drugs (last visited Nov. 14, 2014).

²⁶ PAIGE M. HARRISON ET AL., THE BUREAU OF JUSTICE STATISTICS OF THE U.S. DEP'T OF JUSTICE, Prisoners in 2005 10 (2007), *available at* <http://www.bjs.gov/content/pub/pdf/p05.pdf#sthash.ZIPMB0iO.dpuf>.

²⁷ ARI ROSMARIN & NIAMH EASTWOOD, RELEASE LEGAL EMERGENCY & DRUGS SERV. LTD., A QUIET REVOLUTION: DRUG DECRIMINALISATION POLICIES IN PRACTICE ACROSS THE GLOBE 11 (2012), *available at* http://www.release.org.uk/sites/default/files/pdf/publications/Release_Quiet_Revolution_2013.pdf.

²⁸ ANN CARSON, PH. D. ET AL., THE BUREAU OF JUSTICE STATISTICS OF THE U.S. DEP'T OF JUSTICE, Prisoners in 2013 16 (2014), *available at* <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

²⁹ *People Sentenced for Drug Offenses in the U.S. Correctional System*, *supra* note 25.

³⁰ CARSON, *supra* note 28, at 15.

³¹ *Id.* at 16.

³² *People Sentenced for Drug Offenses in the U.S. Correctional System*, *supra* note 25.

B. Change

For many years now, the United States has been criticized for its punitive policy. In 2008, the World Health Organization (WHO) released a statement commenting on the U.S. drug policy: "The US, which has been driving much of the world's drug research and drug policy agenda, stands out with higher levels of use of alcohol, cocaine, and cannabis, despite [more] punitive illegal drug policies...than many comparable developed countries. Clearly, by itself, a punitive policy towards possession and use accounts for limited variation in nation-level rates of drug use."³³ The overwhelming consensus that the "war on drugs" has failed³⁴ has created the need for an alternative approach for handling illicit drug usage. Yet, European Union drug policy officials have criticized the United States for showing little interest in decriminalization and other alternative approaches to handling illicit drug usage. Indeed, as recently as March of 2012, U.S. Vice President Joe Biden made it clear that the United States has no intention of changing its policy on drugs.³⁵ However, he acknowledged that it is a subject "worth discussing."³⁶

In 2014 the White House published its National Drug Control Strategy, which marked a dramatic change from previous approaches. For the first time during the "war on drugs" era, the country acknowledged that drug use is a "major public health threat," and that drug addiction can be prevented and treated.³⁷ The Obama Administration stated its commitment to what it calls a

³³ DRUG POLICY ALLIANCE, APPROACHES TO DECRIMINALIZING DRUG USE & POSSESSION 1 (2013), available at http://www.abwfct.org/wp-content/uploads/2013/03/DPA_Fact-Sheet_Approaches-to-Decriminalizing-Drug-Use-and-Possession.pdf.

³⁴ ARTUR DOMOSTAWSKI, OPEN SOC'Y FOUNDS., DRUG POLICY IN PORTUGAL: THE BENEFITS OF DECRIMINALIZING DRUG USE 5 (Hanna Siemaszko trans., Createch Ltd. 2011), available at <http://www.opensocietyfoundations.org/sites/default/files/drug-policy-in-portugal-english-20120814.pdf>.

³⁵ Darcy Crowe, *Latin American Leaders to Question U.S. Drug Policy at Summit*, WALL ST. J., Apr. 13, 2012, available at <http://www.wsj.com/articles/SB10001424052702303624004577340212625723878>.

³⁶ *Id.*

³⁷ *Policy and Research*, OFFICE OF NAT'L DRUG CONTROL POLICY, <http://www.whitehouse.gov/ondcp/policy-and-research> (last visited Nov. 14, 2014).

“‘third way’ toward a healthier, safer, and more prosperous America.”³⁸ The focus is on treating addiction as a disease, and both the public health and public safety aspects affected by drug use and abuse.³⁹ The new strategy includes the development of infrastructure to promote alternatives to incarceration when appropriate.⁴⁰ It also discusses means of treatment and support for those recovering from addiction.⁴¹ Further it mentions the implementation of needle exchange programs. Although, federal funding for such programs remains banned.⁴²

C. Drug Courts

Even before the Obama Administration’s new policy reforms, however, states were experimenting with alternatives for drug offenders. In 1989, in Miami-Dade County, Florida, the first Drug Court emerged.⁴³ Judges, prosecutors, and public defenders wanted to provide an alternative to the revolving door many drug users continued to use in and out of the criminal justice system.⁴⁴ Miami’s experiment has spread, as of June 2012, 2,734 Drug Courts operate across the U.S. and its territories.⁴⁵ The programs combine treatment, sanctions, drug testing, and aftercare in order to help addicted offenders have charges dismissed, reduced, or receive a lesser penalty.⁴⁶ The National Association of Drug Court Professionals (NADCP) defines the goal of Drug Courts as “striking the proper

³⁸ THE EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL DRUG CONTROL STRATEGY 79 (2014), *available at* http://www.whitehouse.gov/sites/default/files/ndcs_2014.pdf.

³⁹ *Id.*

⁴⁰ *Id.* at 27.

⁴¹ *Id.* at 79.

⁴² *Id.* at 21.

⁴³ *See* History: Justice Professionals Pursue a Vision, NAT’L ASS’N OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Nov. 14, 2014).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ OFFICE OF NAT’L DRUG CONTROL POLICY, DRUG COURTS: A SMART APPROACH TO CRIMINAL JUSTICE 1 (2011), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/drug_courts_fact_sheet_5-31-11.pdf.

balance between the need to protect community safety *and* the need to improve public health and well-being; between the need for treatment *and* the need to hold people accountable for their actions; between hope and redemption on the one hand *and* good citizenship on the other."⁴⁷

Drug Courts are judicially-supervised court dockets that provide treatment and structure to individuals in order to assist them with avoiding a recurrence of crime and drug abuse.⁴⁸ Each program supervises nonviolent drug-addicted individuals in treatment.⁴⁹ Individuals not only receive the treatment and services they need to stay clean, but they are held accountable by a judge for meeting their obligations.⁵⁰ Participants must appear in court for a judge to review their progress, are regularly tested for drug use, and receive rewards for doing well and sanctions for not meeting their obligations.⁵¹

Although U.S. Drug Courts are an alternative for drug offenders, they are still situated within the criminal justice system. First, individuals must plead guilty to be admitted into the Drug Court system.⁵² Judges then use the possibility of future criminal penalty to keep participants in line. Furthermore, if users do not meet the conditions of Drug Courts they regularly receive harsher sentences than if they had accepted a plea bargain at the outset.⁵³ The use of Drug Courts illustrates to some extent that the U.S. acknowledges the need for restorative justice processes by combining treatment with regular testing as opposed to prison. However, the system is still essentially criminal.

⁴⁷ NAT'L. ASS'N OF DRUG COURT PROFESSIONALS, THE FACTS ON DRUGS AND CRIME IN AMERICA I (2008), *available at* <http://www.nadcp.org/sites/default/files/nadcp/Facts%20on%20Drug%20Courts%20.pdf>.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 299 U. CHI. LEGAL F. 1, 4 (2010).

⁵³ *Id.* at 29-30.

III. PORTUGAL'S PATH TO DECRIMINALIZATION

Before analyzing the results of Portugal's drug policy reform, it is important to examine the rationale behind its passage. This will assist in understanding what the legislative framework aims to achieve and precisely what it entails.

A. Background

The concept of decriminalization first stepped into the national spotlight in 1976.⁵⁴ Portugal's location made it an ideal gateway into Europe for drug traffickers; as a result, the Portuguese had a serious problem with heroin addiction and HIV transmission.⁵⁵ Two decades of drug policy debate ensued, and despite hard-fought efforts in the 1990s the country saw no reduction. Desperate for a solution, in 1998, the Portuguese government invited a panel of academic and medical experts to analyze the country's drug problem and propose a new strategy for its drug policy.⁵⁶ The expert commission criticized the country's previous policy for being based on false, preconceived notions about the use of drugs.⁵⁷ The commission found that in order to assist individuals suffering from addiction, the government needed to remove the stigma associated with treatment.⁵⁸ The government counsel and the commission agreed that a harm-reduction rather than a zero-tolerance approach was necessary.⁵⁹ Central to this harm-reduction approach was the understanding that the idealistic goal of a completely drug free

⁵⁴ MARIA MOREIRA ET AL., EUROPEAN MONITORING CTR. FOR DRUGS AND DRUG ADDICTION, DRUG POLICY PROFILES: PORTUGAL 11 (2011), available at http://www.emcdda.europa.eu/attachements.cfm/att_137215_EN_PolicyProfile_Portugal_WEB_Final.pdf.

⁵⁵ *Id.* at 15.

⁵⁶ *Id.* at 20.

⁵⁷ LAURENCE ALLEN ET AL., *supra* note 15, at 2.

⁵⁸ *Id.*

⁵⁹ GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 7 (2009), available at http://www.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf.

society is unattainable.⁶⁰ With little to lose, Portugal did something radical.

B. Administrative Policy

On July 1, 2001, Portugal implemented Law 30/2000, which effectively decriminalized drug use.⁶¹ Although it is still illegal to use or possess drugs, an offense (for drug use, possession, and acquisition of quantities up to a ten-day supply) is no longer dealt with through the criminal justice system, but instead through an administrative procedure.⁶² Portugal devised an implementation structure with five elements: Prevention; Dissuasion Commissions; Risk and Harm Reduction; Treatment; and Reintegration.⁶³

i. Prevention

Since Portugal continues to outlaw the use and possession of drugs, its first goal is prevention. The core of Portugal's prevention element is targeted campaigns regarding drug use.⁶⁴ Interestingly enough, in an attempt to reach young citizens and identify areas where it is easy for individuals to start using drugs, the Portuguese government made a conscious decision not to aggressively condemn or discourage drug use.⁶⁵ Outreach programs have succeeded in preventing first-time drug usage without the word "drug" appearing in its message.⁶⁶

ii. Dissuasion Commissions

The most notable element of Portugal's implementation structure is its use of dissuasion commissions. When an individual is

⁶⁰ DOMOSTAWSKI, *supra* note 34, at 22 ("Nuno Portugal Capaz, a member of a Dissuasion Commission, noted that those who developed the policy assumed that trying to create a "drug free" society was an illusion that would never become reality – like creating a society where drivers will not exceed the speed limit.").

⁶¹ MOREIRA ET AL., *supra* note 54, at 16.

⁶² *Id.* at 16-17.

⁶³ DOMOSTAWSKI, *supra* note 34, at 27.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 28.

⁶⁶ *Id.* at 28-29.

caught with fewer than ten daily doses of any narcotic drug, the drugs are seized and the individual is given a citation requiring them to appear before the Commission for the Dissuasion of Drug Abuse (CDT).⁶⁷ As long as there is no evidence that the individual is trafficking drugs, it does not matter where he is or what he is doing.

The CDT is comprised of three practitioners whom the Ministry of Justice and Health appoints.⁶⁸ Of the three, one member must be a legal expert and the other two will have medical or social services backgrounds.⁶⁹ In a proceeding that is designed to be non-adversarial, members of the CDT evaluate the offender and his or her situation and rule on the offense.⁷⁰ The commission is given sole discretion to determine what sanction should be imposed.⁷¹ The law sets forth a variety of factors the commission should consider in this process; these include: the seriousness of the act, the type of drug consumed, whether consumption was public or private, and whether usage is occasional or habitual.⁷²

For an individual who does not appear to have an addiction or repeated violations, the CDT suspends the proceeding and issues the individual a warning.⁷³ Even in the case of an addict with repeat offenses, the commission can suspend sanctions contingent on completion of drug treatment.⁷⁴ Once treatment is completed, the proceeding will be closed and the individual will exit the system without a record.⁷⁵ This humanistic approach allows the commission to advise individuals on how to develop a healthier relationship with drug usage if they decide to continue using.⁷⁶

iii. *Risk and Harm Reduction*

Risk and harm reduction reforms play a crucial role in the attempt to create healthier relationships with drug usage. For

⁶⁷ MOREIRA ET AL., *supra* note 54, at 17.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ GREENWALD, *supra* note 59, at 4.

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ DOMOSTAWSKI, *supra* note 34, at 31.

example, projects that provide methadone for heroin-dependent individuals and night shelters for the homeless support a vital public health function by preventing the spread of HIV and other diseases through injection drug use.⁷⁷ Teams of social workers tour locations where drug users gather and give out kits that contain clean syringes and hygiene products.⁷⁸ In an effort to promote risk and harm reduction, drug users must give back used syringes in order to receive a new kit.⁷⁹ Major health institutions, such as the National Institutes of Health and the World Health Organization (WHO), support needle exchange as a well-documented intervention.⁸⁰ These policies are grounded in an underlying conviction that the government should assist in-need drug users instead of marginalizing them.⁸¹

iv. Treatment

Portugal's ultimate goal for those who abuse drugs is treatment. Prior to the country's drug reform, Portuguese drug officials found that the greatest barrier to treatment was the addict's fear of government officials.⁸² To overcome this, the new policy provides drug users the opportunity to access treatment in the least stigmatizing way by treating them with continued respect.⁸³ In order to preserve privacy and dignity officials do the following: notice is not sent to the offender's residence; commissioners dress informally and sit across from the offender during proceedings; and finally, all commission members are legally bound to maintain the confidentiality of the proceedings.⁸⁴ This new philosophy was ratified in the Portuguese Drug Strategy, 1999, which provides: "The guarantee of access to treatment for all drug addicts who seek treatment is an absolute priority of this national drug strategy. The humanistic principle on which the national strategy is based, the

⁷⁷ *Id.* at 33.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 34.

⁸² GREENWALD, *supra* note 59, at 7-8.

⁸³ ALLEN ET AL., *supra* note 15, at 6.

⁸⁴ GREENWALD, *supra* note 59, at 6.

awareness that drug addiction is an illness and respect for the State's responsibility to satisfy all citizen's constitutional right to health, justify this fundamental strategic option and the consequent mobilization of resources to comply with this right."⁸⁵

In 2009, 68% of CDT rulings were for suspension of the proceedings.⁸⁶ In those situations, the offender was not considered an addict and did not receive treatment. In 2011, that number increased to 81%.⁸⁷ Between those years more individuals were diverted out of the system and received no penalty or treatment. Still, the number of individuals entering treatment programs has increased.⁸⁸ Critics argue that the increase is a result of more drug dependent citizens. However, the increase could also be a result of more open-minded individuals seeking the process of treatment on their own because the country has destigmatized drug addiction.

v. *Return to Life*

The final step for individuals affected by Portugal's drug implementation structure is reintegration. Support teams pair with treatment centers in order to find educational opportunities, housing, jobs, and emotional support for patients.⁸⁹ This assisted plan of action embodies the humanistic philosophy on which the national drug policy is based. This step is not only essential to the success of the recovering offender, but aids in the success of the policy reform overall.

C. The Results

More than a decade after Portugal's policy reform, a meaningful body of research exists regarding the policy's successes. It is fair to say that policy advocates and opponents alike have been

⁸⁵ DOMOSTAWSKI, *supra* note 34, at 27.

⁸⁶ MOREIRA ET AL., *supra* note 54, at 17.

⁸⁷ GEORGE MURKIN, TRANSFORM DRUG POLICY FOUND., DRUG DECriminalISATION IN PORTUGAL: SETTING THE RECORD STRAIGHT 4 n.1 (2014), *available at* <http://www.tdpf.org.uk/resources/publications/drug-decriminalisation-portugal-setting-record-straight>.

⁸⁸ DOMOSTAWSKI, *supra* note 34, at 34.

⁸⁹ *Id.* at 35.

guilty of misrepresenting the data – either overstating or incorrectly disputing the policy benefits. Individuals have drawn on the results that most suit their interests.⁹⁰ Many have taken extreme positions on Portugal's success. For example, a respected research organization said, "The data show that, judged by virtually every metric, the Portuguese decriminalization framework has been a resounding success."⁹¹ Conversely, others report the impact of the Portuguese model as a "disastrous failure."⁹² An important limitation on the results is the absence of a control comparison.⁹³ As with any evaluation of a country's drug policy, there is no "counter-factual" Portugal that did not decriminalize drugs.⁹⁴ Thus, it will always be a question as to whether the results were attributable to the reform or if the same results would have been achieved regardless.

Proponents argue that there was a reduction in the number of people arrested and sent to criminal court for drug offenses – the number dropped from 14,000 in 2000 to an average of 5,500-6,000 per year after the law came into effect.⁹⁵ Another argued success of the reform is that the number of those newly infected with HIV decreased.⁹⁶ On the other hand, opponents point out that since 2001, the demand for heroin has stabilized across Western Europe⁹⁷ – insinuating that any decrease in deaths from heroin overdose is independent from the policy's reform. In addition, opponents argue that the percentage of drug addicts with AIDS has not decreased significantly (from 57% to 43% in six years).⁹⁸ However, these

⁹⁰ Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. CRIM. 999, 1111 (2010) ("An American journalist, Keith O'Brien, concluded that the Portuguese decriminalisation has become 'something of a Rorschach test where people...can look at these numbers and make almost whatever argument they'd like to make.'").

⁹¹ GREENWALD, *supra* note 59, at 1.

⁹² ROSMARIN & EASTWOOD, *supra* note 27, at 31.

⁹³ Hughes & Stevens, *supra* note 90, at 1003.

⁹⁴ *Id.*

⁹⁵ MURKIN, *supra* note 87, at 3.

⁹⁶ DOMOSTAWSKI, *supra* note 34, at 40. In 2000 of the 2,758 newly diagnosed cases of HIV-infected individuals, 52% were drug users. In 2008, the total number of newly infected cases were 1,774, of which 20% were drug users.

⁹⁷ *Id.* at 44.

⁹⁸ DRUG POLICY ALLIANCE, DRUG DECRIMINALIZATION IN PORTUGAL: A HEALTH-CENTERED APPROACH I (2014), available at

numbers have drastically different meanings depending on what one considers a significant decrease. Certainly it is unlikely that a drug statistic will make a radical change from one year to the next.⁹⁹

One of the most significant differences between the way proponents and opponents view the data results is in the reporting of the number of deaths that are a direct or indirect result of drug use. What seems to be the core difference is the source each group uses to support its view. The Mortality Registry of the National Institute (Morality Registry) and the Special Registry of the National Institute of Forensic Medicine (Special Registry) use different formulas in their post-mortem reporting.¹⁰⁰ For example, the Special Registry would report a death as a drug-related death if an individual dies from a gunshot, but also tests positive for drugs; the Mortality Registry would not.¹⁰¹ This leads to a higher reporting of deaths that are drug-related by the Special Registry, while the Mortality Registry would simply view these deaths as encompassing those individuals who had previously used drugs.¹⁰²

The results of Portugal's policy reform show that the number of drug users has not increased dramatically, and in some categories even decreased.¹⁰³ However, Portugal's new policy has not cured all of the country's problems; it still has high levels of problem drug use and HIV infection.¹⁰⁴ Unfortunately, it may never be clear whether the results are a coincidence or a direct consequence of the policy change. Nevertheless, the policy reform accomplished a major change in legislation, policy, and practice by uniting the public health and law enforcement systems.¹⁰⁵

Before Portugal enacted its decriminalization law, the Portuguese Minister of Justice stated, "the option to criminalize drug use does not stem from a clear strategy which considers this as the only possible solution, but mainly from the conviction that

http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2014.pdf [hereinafter A HEALTH-CENTERED APPROACH].

⁹⁹ GREENWALD, *supra* note 59, at 21.

¹⁰⁰ DOMOSTAWSKI, *supra* note 34, at 40.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 13.

¹⁰⁴ MOREIRA ET AL., *supra* note 54, at 24.

¹⁰⁵ DOMOSTAWSKI, *supra* note 34, at 45.

introducing changes in such complex areas, as this one, is only justifiable if the available data are reliable enough to demonstrate that the new system is clearly better than the one traditionally adopted."¹⁰⁶ Accordingly, regardless of the results, the reform was an evolutionary and intelligent improvement to Portugal's drug policy. It was implemented after decades of research and analysis, and is praised around the globe as a viable reform option.

D. The Global Response

Panic first set in after Portugal passed its innovative law. Due to the country's geographic location, several other European countries became fearful of "drug tourism" and the materialization of a "flood of heroin addicts."¹⁰⁷ Inside Portugal, conservative party leaders, such as Paulo Portas, also raised concerns: "There will be planeloads of students heading for [Portugal] to smoke marijuana and take a lot worse, knowing we won't put them in jail. We promise sun, beaches, and any drug you like."¹⁰⁸

However, none of these "doomsday predictions"¹⁰⁹ came true. In fact, today, there is growing consensus among Portuguese political leaders that drug use is a health issue. Debate regarding a possible revisit to a criminalization framework is now almost nonexistent.¹¹⁰ "Portugal did not become a 'drug paradise'."¹¹¹ In addition, the United Nations Office on Drugs and Crime reported that: "Portugal's policy has reportedly not led to an increase in drug tourism. It also appears that a number of drug-related problems have decreased."¹¹² Indeed, WHO concluded that decriminalization had little or no effect on rates of consumption.¹¹³

Those who play a crucial role in the policy's success are those individuals who were less ready to accept the philosophical change at first – police officers troubled with the daily confrontations of drug

¹⁰⁶ MOREIRA ET AL., *supra* note 54, at 12.

¹⁰⁷ ALLEN ET AL., *supra* note 15, at 2.

¹⁰⁸ GREENWALD, *supra* note 59, at 6.

¹⁰⁹ ROSMARIN & EASTWOOD, *supra* note 27, at 14.

¹¹⁰ MOREIRA ET AL., *supra* note 54, at 23.

¹¹¹ DOMOSTAWSKI, *supra* note 34, at 5.

¹¹² A HEALTH-CENTERED APPROACH, *supra* note 98, at 3.

¹¹³ DRUG POLICY ALLIANCE, *supra* note 33.

abuse.¹¹⁴ However, it seems after an adjustment, law enforcement officials are also benefiting from the policy changes. The new approach has allowed officers to refocus on more demanding and significant tasks. Police officers are now free to focus on larger trafficking and smuggling issues in order to increase public safety.¹¹⁵

Thus far, many countries, and U.S. cities and states have followed Portugal's success by taking steps toward decriminalization. The shift has been conducted by various societies – not only those in a particular geographic location or level of wealth.¹¹⁶ This proves that there is an increasing awareness that in regards to drugs, prohibitionist policies are counterproductive. Many countries ground their new policy in a health-based approach by viewing drug usage as a health problem rather than a criminal one.¹¹⁷ For example, in 2009, Argentina's Supreme Court held that it is an unconstitutional violation of the right to privacy and personal autonomy to pass legislation criminalizing possession of drugs for personal use.¹¹⁸ In addition, Australia estimated that it avoided 32,050 HIV infections between 2000 and 2009 with its needle exchange program.¹¹⁹ Such programs are now found in almost all EU Member States.¹²⁰ The Czech Republic,¹²¹ Argentina,¹²² and Mexico,¹²³ however, are among the only countries that have systematically changed policies the way Portugal did; other countries merely amended their current policies.

The United Nations (UN), who at first questioned whether or not Portugal was in breach of international drug conventions, has since expressed support for the country's innovative policy – holding that it is in fact in compliance.¹²⁴ In the World Drug Report for 2009, the UN stated: "The International Narcotics Control Board was initially apprehensive when Portugal changed its law in 2001, but

¹¹⁴ See DOMOSTAWSKI, *supra* note 34.

¹¹⁵ *Id.* at 8.

¹¹⁶ ROSMARIN & EASTWOOD, *supra* note 27.

¹¹⁷ GREENWALD, *supra* note 59, at 10.

¹¹⁸ DRUG POLICY ALLIANCE, *supra* note 33, at 3.

¹¹⁹ DOMOSTAWSKI, *supra* note 34, at 33.

¹²⁰ *Id.* at 45.

¹²¹ *Id.*

¹²² DRUG POLICY ALLIANCE, *supra* note 33, at 3.

¹²³ *Id.* at 2.

¹²⁴ DOMOSTAWSKI, *supra* note 34.

after a mission to Portugal in 2004, it 'noted that the acquisition, possession and abuse of drugs has remained prohibited,' and said 'the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties.'"¹²⁵

In 2011, the Portuguese policy was endorsed by the Red Cross/Red Crescent,¹²⁶ International AIDS Society,¹²⁷ and the Global Commission on Drug Policy.¹²⁸ Possibly the most publicized and prestigious seal of approval came from the Vienna Declaration which states, "'The criminalisation of illicit drug users is fuelling the HIV epidemic and has resulted in overwhelming negative health and social consequences. A full policy reorientation is needed' and includes a call on 'governments and international organisations, including the United Nations,' to 'decriminalise drug users.'"¹²⁹

Portugal enacted its new drug policy in an effort to prioritize public health for problem drug users, mainly heroin users.¹³⁰ Not surprisingly, the United States official stance on drug decriminalization in Portugal has not been supportive. According to the Office of National Drug Control Policy (ONDCP), reports regarding the impact of Portugal's drug policy changes are "difficult, to draw any clear, reliable conclusion from."¹³¹ Likewise, in regards to the claimed benefits, the ONDCP holds that any conclusions drawn may be unique to Portugal's circumstances and firmly believes current claims exceed supporting science.¹³²

¹²⁵ *Id.*

¹²⁶ STEVE ROLLES & NIAMH EASTWOOD, RELEASE LEGAL EMERGENCY & DRUGS SERV. LTD., DRUG DECRIMINALISATION POLICIES IN PRACTICE: A GLOBAL SUMMARY 160 (2012), available at http://www.ihra.net/files/2012/09/04/Chapter_3.4_drug-decriminalisation_.pdf.

¹²⁷ *Id.*

¹²⁸ ROSMARIN & EASTWOOD, *supra* note 27, at 11-12 (The Global Commission on Drug Policy published its report War on Drugs, which discussed the failure of the global war on drug and recommended that countries adopt decriminalization policies and invest in harm reduction services.).

¹²⁹ ROLLES & EASTWOOD, *supra* note 126.

¹³⁰ MOREIRA ET AL., *supra* note 54, at 23.

¹³¹ Office of Nat'l Drug Control Policy, *Drug Decriminalization in Portugal: Challenges and Limitations*, WHITEHOUSEDRUGPOLICY.GOV 1 (Aug. 2010), http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/portugal_fact_sheet_8-25-10.pdf.

¹³² *Id.* at 2.

IV. THE FUTURE OF U.S. DRUG POLICY

Over the years, the U.S. has become infamous for its zero-tolerance drug laws, mandatory sentencing, and high rates of incarceration.¹³³ Instead of trying to address the underlying reasons why people use drugs, the U.S. has attempted to solve the drug problem through the threat of incarceration. This approach ignores the role that addiction plays, and it also downplays the very real consequences criminal convictions have on an individual's life chances. Having a drug conviction impairs an individual's chance at obtaining an education, obtaining gainful employment, and finding a place to live.¹³⁴ All of this makes it more difficult for an individual to remain law abiding and stay away from drugs. If the measure of a drug policy's success is the number of people who are locked away then the U.S. has won; the number of individuals incarcerated for drug offenses in the U.S. nearly equals the number of all incarcerated offenders in the European Union.¹³⁵ But if the measure of a program's success is how many people are still using drugs, then we have clearly lost. According to a Central Intelligence Agency report, the U.S. is still the world's largest consumer of cocaine, Colombian heroin, and both Mexican heroin and marijuana; and in addition, is a "major consumer of ecstasy and Mexican methamphetamine."¹³⁶

A. The Making of a Better Policy

A more effective policy would be based on a public health model, like the one described above in Portugal. Drugs should be illegal; but offenses of drug use, possession, and acquisition of small quantities should be handled through an administrative system.

¹³³ See ROSMARIN & EASTWOOD, *supra* note 27, at 36.

¹³⁴ See Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, 272 NIJ J. 24 (2013).

¹³⁵ Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 UDC/DCSL L. REV. 1, 3 (2011).

¹³⁶ *Illicit Drugs*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2086.html> (last visited Nov. 14, 2014).

Although the Portuguese experiment has not been perfect, it does offer tremendous insight into fighting the drug problem – provide treatment to those who need it, allow the first time users to get out of the system with just a warning, and incarcerate only those who truly deserve it.

Some contend that decriminalizing drugs will send the wrong message. It will signal that doing drugs is no longer bad, and so it will encourage drug use. However, a change in framework does not necessarily mean society has given up and in turn supports drug usage. Individuals continue to use drugs regardless of the threat of incarceration. This is highlighted by the fact that so many Americans use and sell small quantities of drugs. Indeed, research shows that criminal drug laws only have a marginal impact in deterring people from using drugs.¹³⁷ A 2008 study found that there was not a lower level of drug use in countries with stringent policies toward illegal drug use in comparison to countries with more liberal policies.¹³⁸

Incarcerating individuals who have an addiction may seem to fix their problem at first; however, upon release these individuals are left with little opportunity for success and often revert back to their addiction. Making drug use less dangerous for these individuals, instead of incarcerating them, does not mean a society condones drugs, or makes them more acceptable. Providing treatment to those who need it is more effective long term for the individual and society; it is cost-effective for society, and practical and humane for the individual.

It is also argued that by eliminating criminal sanctions, it will signal that drug use does not carry consequences. However, allowing first time users to get out of the system with just a warning is a proportionate response and does not necessarily insinuate that there are not consequences for breaking the law. Decriminalization does not have to be viewed as a less punitive approach – in many cases administrative penalties can be harsher than criminal sanctions.¹³⁹ This response would recognize that many individuals who use drugs may only be experimenting, or their use may not be interfering with their life. These individuals should not be subjected to the consequences criminal convictions have on an individual's life

¹³⁷ MURKIN, *supra* note 87, at 2.

¹³⁸ GREENWALD, *supra* note 59, at 25.

¹³⁹ ALLEN ET AL, *supra* note 15.

chances. The goal for a better policy should not be to legalize all drug use, but to instead formulate more effective and proportionate sanctions.

B. Would Portugal's Policy Work in the U.S.?

At first glance, the ideas of legalization and decriminalization seem to blend together. However, this could not be further from the truth. The terms legalization and decriminalization are often used interchangeably; thus, the public's understanding of what decriminalization is has been confused with liberalization or legalization. As a result, Portugal's position on drugs and what the country's policy reform accomplished is misinterpreted. Although the Portuguese model can be looked at as the first step towards legalization, it is truly a groundbreaking step towards harm reduction, and a new public health policy movement.¹⁴⁰ The country's policy is a far cry from legalization – the production, commercial distribution, and retail sale of drugs. Drugs are still illegal; however, small offenses are now dealt with through an administrative system, instead of the criminal justice system.

Portugal's policy was based on the belief that drug users would enroll in treatment programs if there was not a social stigma of guilt, and that addicts avoided treatment out of fear of criminal charges.¹⁴¹ Regardless of Portugal's initial goals, importance should be placed on the policy's initiatives for drug users who are already dependent. The policy is successful in reducing an already present harm in users who need empowerment and help in order to treat their addictions, not punishment and prevention philosophies.

A major argument against the Portuguese model working in the U.S. is that Portugal reevaluated a strategy in order to attack two specific problems – heroin addiction and HIV transmission. These issues are not at the center of the drug debate in the United States, so would such a system work here? However, it would be senseless to think the United States does not have a drug problem. A 2008 study

¹⁴⁰ MOREIRA ET AL., *supra* note 54, at 24.

¹⁴¹ MANUEL PINTO COELHO, DRUGS: THE PORTUGUESE FALLACY AND THE ABSURD MEDICALIZATION OF EUROPE 6 (2013), available at http://www.drugfree.org.au/fileadmin/library/Policies_Legislation_and_law/ThePortugueseDrugFallacyReport.pdf.

of seventeen countries concluded that the United States had the highest levels of illegal cocaine and cannabis use.¹⁴²

Social attitudes in Portugal also played a role in the policy's success. The government did not force a change in public opinion. Prior to decriminalization, the Portuguese public became accepting of the idea that those suffering from drug addiction should not be marginalized, but instead treated to reduce the problems associated with drug use.¹⁴³ Thus, in the U.S. there would need to be an understanding of the benefits a change in the legal approach could have on the problems associated with drug use.

Practical obstacles also hinder the possibility of reform. Unlike in Portugal, the U.S. cannot pass one piece of legislation to implement a new policy for the entire country.¹⁴⁴ The federal government and each of the states maintain individual drug laws.¹⁴⁵ Each state would have to support and implement a decriminalization regime on its own.¹⁴⁶ Regardless, the federal government could still maintain the current prohibitionist policy.¹⁴⁷ The federal government has always maintained its stance on prohibition and although marijuana laws have recently changed in some states, citizens in other states have voted against a change to the drug's prohibition. However, Portugal can be an example to the more liberal states. If these states implemented a decriminalization policy for all drugs, the U.S. would truly have a realistic option in its eyes. Still, this would require cooperation from the federal government. It may seem as though the federal government has "overlooked" many of the changes taking place with marijuana; decriminalization of other drugs, such as heroin, could immediately trigger the federal government to step in and take action – as it did a few years ago by ordering medical marijuana dispensaries in California to shut down.¹⁴⁸

Portugal's model would also allow for a solution to a major issue impeding Drug Courts – many who are put through the Drug

¹⁴² GREENWALD, *supra* note 59, at 22-23.

¹⁴³ Woods, *supra* note 135, at 27.

¹⁴⁴ *Id.* at 25.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 26.

¹⁴⁸ *Id.*

Court system are those that do not actually have a drug issue. Instead, they are willing to submit to a fine and treatment in order to circumvent “real” punishment – not because they will benefit from treatment for problematic drug use. The Portuguese model allows an exception for those caught in possession of drugs for personal use by allowing officials to take no action on the first occasion. Not only does this protect the future opportunities of citizens, but it also arguably avoids wasting government resources.¹⁴⁹

C. Law Enforcement Assisted Diversion (LEAD)

Fortunately, certain reform projects in the United States are mirroring Portugal’s restorative justice approach with the use of diversion programs. In October 2011,¹⁵⁰ Seattle, Washington took a progressive approach when it instituted a program that circumvents the criminal justice system entirely, known as Law Enforcement Assisted Diversion (LEAD) – the program Jeremy Bradford participates in. It is a promising step in the direction of decriminalization, which achieves a health-centered approach to drug addiction and empowers individuals to seek help.¹⁵¹

LEAD is a diversion program that has exact similarities to Portugal’s reform – starting with an underlying philosophy of harm reduction¹⁵² – precisely the mission Portugal promotes. The Seattle program diverts low-level drug and prostitution offenders into treatment and support services, instead of processing individuals through the traditional criminal justice system.¹⁵³ Once individuals choose this avenue, they are no longer offenders, but instead considered “clients.”¹⁵⁴

A Policy Coordinating Group, similar to the Portuguese CDT, governs the program and is a coalition of law enforcement agencies,

¹⁴⁹ ROSMARIN & EASTWOOD, *supra* note 27, at 39.

¹⁵⁰ *About LEAD*, LAW ENFORCEMENT ASSISTED DIVERSION, <http://leadwa.squarespace.com/about/> (last visited Nov. 14, 2014).

¹⁵¹ DRUG POLICY ALLIANCE, *supra* note 33, at 3.

¹⁵² LFA GROUP, LEAD PROGRAM AND EVALUATION PLAN NARRATIVE 2 (2011), available at <http://leadwa.squarespace.com/storage/LFA%20Evaluation%20Narrative%20-%20February%202012.pdf>.

¹⁵³ *About LEAD*, *supra* note 150.

¹⁵⁴ Knafo, *supra* note 2.

public officials, and community groups.¹⁵⁵ These counselors aim to improve public safety and order while reducing the criminal behavior of their “clients.”¹⁵⁶ Counselors assist with housing, education, and health needs.¹⁵⁷ Since the program’s goal is harm reduction, it focuses on the secondary effects of drug addiction – poverty, homelessness, and disease – regardless of whether the clients are unwilling or unable to stop using drugs.¹⁵⁸ This is similar to the CDT’s response to individuals who decide to continue using drugs after appearing before the commission – advise a healthier relationship with drug usage if individuals decide to continue using them.

Although a full evaluation has not taken place regarding the success of LEAD, the program has attracted interest from other areas across the country.¹⁵⁹ Police departments and prosecutors from San Francisco and Atlanta have sent representatives to speak with LEAD administrators for implementation guidelines.¹⁶⁰ Albany, New York and Santa Fe, New Mexico have already adopted the model for individuals arrested for heroin and prescription opiates.¹⁶¹

V. CONCLUSION

Over the last fifty years while the United States has been losing its extremely costly war on drugs, the international community has taken a radically different approach to tackling illicit drug use. Although it has held to its commitment to prohibition in numerous treaties and agreements, countries around the world have experimented with policies that fall somewhere on the spectrum between prohibition, decriminalization, and legalization. Although these countries have had problems along the way, they have not attempted to return to American style prohibitionist regimes.

Portugal has adopted a more effective approach to managing its citizens’ drug abuse by freeing them from the stigma associated

¹⁵⁵ *About LEAD, supra* note 150.

¹⁵⁶ *Id.*

¹⁵⁷ *Knafo, supra* note 2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

with the criminal justice system and dramatically improving the accompanying social ills with harm-reduction elements. It is a policy that provides treatment to those who need it, allows first time users to get out of the system with just a warning, and incarcerates only those who truly deserve it. As stated in *The British Journal of Criminology* in 2010: “The Portuguese evidence suggests that combining the removal of criminal penalties with...alternative therapeutic responses to dependent drug users offers several advantages. It can reduce the burden of drug law enforcement on the criminal justice system, while also reducing problematic drug use.”¹⁶²

The time has come for the United States to try something new. The change to an administrative policy is a more humanistic approach to solve the serious issues of drug abuse and focus on the treatment of individuals who need it. The focus should be on helping the individual not stigmatizing them. It is clear that the United States, as well as, numerous other countries are taking a page from Portugal’s book and revamping how they view drug abuse and offenders by implementing rational and humanitarian policy changes, which seemed unfathomable only a few years before. Drawing on evidence from Portugal’s experience, and the success found in U.S. Drug Courts and diversion programs, similar programs should be brought to scale and be the priority in policy change. The most humane and financially shrewd policy is a decriminalization framework, which maintains the legal and social disapproval of drug use, but deals with abuse under an administrative framework rather than a punitive system.

¹⁶² A HEALTH-CENTERED APPROACH, *supra* note 98, at 2-3.