

# U.S. DRUG REFORM: A CULTURAL SHIFT

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*Addicts are just like everyone else—only more so.*

- *Anonymous*

## ABSTRACT

When a human body ingests a lethal<sup>1</sup> dose of heroin, the body goes through an enormous physiological transformation.<sup>2</sup> The functions of the central nervous system begin to depress, breathing is shallowed, the pulse is weakened, and the skin turns blue or gray with dark lips and fingernails.<sup>3</sup> An alert person must quickly administer naloxone, an opioid antagonist, to reverse the effects of a heroin overdose, as symptoms typically begin after ten minutes.<sup>4</sup> For many, however, their lives end with an overdose, despite this outcome being preventable.<sup>5</sup> This paper will establish that drug overdose deaths are preventable for an entirely different set of reasons.

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\* Juris Doctor Candidate, May 2023, St. Thomas University College of Law. I wish to express my deepest gratitude to the *St. Thomas Law Review* for their time and dedication. I would also like to thank my professors for providing me a gratifying law school experience I will carry with me for the rest of my life. I want to thank Professor Siegfried Wiessner for introducing me to the New Haven School of Jurisprudence, and for his commitment to all his students. I also want to thank my friends and family for their kindnesses and support and a special thank you to Aleksey Romanikhin for being my constant source of love and for always believing in my journey.

<sup>1</sup> *Compare How Much Heroin Does it Take to Overdose?*, SAN ANTONIO RECOVERY CTR., <https://www.sanantoniorecoverycenter.com/rehab-blog/how-much-heroin-does-it-take-to-overdose/> (last visited Nov. 17, 2022) (explaining that various factors contribute to whether a heroin dose will be lethal, but estimates 200mg), with Allison Bond, *Why Fentanyl is Deadlier than Heroin, in a Single Photo*, STAT (Sept. 29, 2016), <https://www.statnews.com/2016/09/29/why-fentanyl-is-deadlier-than-heroin/> (estimating lethal heroin dose at 30mg).

<sup>2</sup> See *Recognizing and Responding to Opioid Overdose*, AM. PSYCH. ASS'N (2018), <https://www.apa.org/topics/substance-use-abuse-addiction/recognizing-overdose.pdf> [hereinafter *Recognizing Overdose*].

<sup>3</sup> See Sarah Hardey et al., *Heroin Overdose: Signs, Symptoms, & Treatment*, AM. ADDICTION CTRS. (Jan. 31, 2022), <https://americanaddictioncenters.org/heroin-treatment/overdose>; see also Leah Miller, *Overdose Symptoms, Risks & Treatment*, AM. ADDICTION CTRS. (Aug. 24, 2022), <https://americanaddictioncenters.org/overdose> (describing overdose symptoms of various drugs).

<sup>4</sup> See Hardey et al., *supra* note 3; see also *Recognizing Overdose*, *supra* note 2, at 2 (“Naloxone is an opioid antagonist”).

<sup>5</sup> See *Recognizing Overdose*, *supra* note 2, at 2 (implying that opioid overdose death is preventable with the timely administration of naloxone by others nearby).

As the nation's drug overdose epidemic worsens, the American Medical Association ("AMA") issued a brief in which it stated that a handful of illicit drugs, often in combination or in adulterated forms, are becoming the driving force behind the epidemic.<sup>6</sup> The AMA thus urges policymakers to take action to increase access to evidence-based care for substance use disorders, as well as for pain and harm reduction measures.<sup>7</sup>

Although the Department of Health and Human Services ("HHS") publicly favors clean needle exchange programs since they slow the spread of diseases such as HIV/AIDS and hepatitis among drug users, it has yet to take a stance on supervised consumption sites and other such controversial matters of ongoing litigation that are still federally banned.<sup>8</sup> Taboo or not, two safe consumption sites have since opened in Manhattan through grassroots means and are operating successfully.<sup>9</sup>

Drug policies in the United States appear to focus more on immediate measures, such as needle exchanges, drug testing kits, and reduced access to prescription opioids.<sup>10</sup> These are effortful steps toward change, but the New Haven School of Jurisprudence approach to social problem solving reveals a deeper and more critical issue to be resolved if the United States is ever to break its pattern of drug policy failures. Drug overdose deaths appear to be the *tip of the iceberg*, wreaking societal havoc, while the underlying and disregarded cultural factors continue to push this devastating problem to the surface, where buzzworthy news coverage fuels quarrelsome politics over who is to blame and who should step up and fix it. Part I delineates the nation's drug overdose crisis. Part II depicts the conflicting claimants and their different perspectives. Part III explores the past legal decisions in light of their conditioning factors to provide historical and environmental context. Part IV objectively predicts future decisions and what will happen. Part V provides appraisals for the above sections. Parts VI and VII illustrate alternatives and a proposal for what ought to happen.

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<sup>6</sup> See *Issue Brief: Nation's Drug-Related Overdose and Death Epidemic Continues to Worsen*, AM. MED. ASS'N (Feb. 15, 2022), <https://www.ama-assn.org/system/files/issue-brief-increases-in-opioid-related-overdose.pdf> [hereinafter *Issue Brief*] (explaining how the AMA, on behalf of physicians and patients, issued a brief in February 2022 compiled of news and reports from all fifty states and the District of Columbia).

<sup>7</sup> See *id.*

<sup>8</sup> See Brian Mann, *Overdose Deaths Are so High that the Biden Team is Embracing Ideas Once Seen as Taboo*, NPR (Oct. 27, 2021, 5:56 PM), <https://www.npr.org/2021/10/27/1049245787/biden-hhs-tackle-drug-overdose-deaths>. This article, cited in the AMA's brief, expresses how overdose deaths are so high that the Biden Administration is open to controversial strategies, including federally supported harm reduction measures, clean needle exchange programs, and fentanyl test strips available to the public. As Secretary of Health and Human Services Xavier Becerra states, the aim is simple: "We are literally trying to give users a lifeline." *Id.*

<sup>9</sup> See Jeffery C. Mays & Andy Newman, *Nation's First Supervised Drug-Injection Sites Open in New York*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html>.

<sup>10</sup> See generally Mann, *supra* note 8 (discussing modern U.S. tactics for dealing with the overdose crisis).

## I. DELIMITATION OF THE PROBLEM

The American culture is consumed by conversations about drugs.<sup>11</sup> Nearly half of Americans report having been affected, directly or indirectly, by substance use or addiction.<sup>12</sup> In 2020 alone, 1,155,610 arrests in the U.S. were drug law violations.<sup>13</sup> Of that total, 1,001,913 were for personal drug possession, while 150,229 were for intent to sell.<sup>14</sup> Notably, the U.S. houses 2,300,000 incarcerated people, and one-fifth are incarcerated for drug offenses.<sup>15</sup> 100,000 people are held for drug offenses at the federal level, while 2,100 are in youth facilities.<sup>16</sup> Since the passing of the Controlled Substances Act of 1970, the U.S. has spent over a trillion dollars enforcing its drug policies.<sup>17</sup> Since 1999, over 1,000,000 people have died in the U.S. from a drug overdose.<sup>18</sup> Currently, the number of deaths is nearly 100,000 each year, and the rate is rising with every passing year.<sup>19</sup>

Importantly, Americans are now more likely to die from an accidental opioid overdose than from a motor vehicle crash.<sup>20</sup> Additionally, 945,523 people in the U.S. have died from COVID-19 between January 2020 and March 2022.<sup>21</sup> While the number of confirmed cases of COVID-19 is decreasing globally,<sup>22</sup>

<sup>11</sup> See Matt Sutton, *On 50th Anniversary of "War on Drugs," New Poll Shows Majority of Voters Support Ending Criminal Penalties for Drug Possession, Think Drug War is a Failure*, DRUG POL'Y ALL. (June 9, 2021), <https://drugpolicy.org/press-release/2021/06/50th-anniversary-war-drugs-new-poll-shows-majority-voters-support-ending>.

<sup>12</sup> See Lydia Saad, *Substance Abuse Hits Home for Close to Half of Americans*, GALLUP (Oct. 14, 2019), <https://news.gallup.com/poll/267416/substance-abuse-hits-home-close-half-americans.aspx> (reporting that 46% of Americans have had substance abuse issues in their families); see also Katharina Buchholz, *Substance Abuse Touches Around Half of All U.S. Families*, STATISTA (Nov. 8, 2019), <https://www.statista.com/chart/19899/us-familiesaffected-by-substance-abuse/> (portraying substance abuse as affecting all genders and educational backgrounds).

<sup>13</sup> *Drug War Statistics*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/drug-war-statistics> (last visited Nov. 17, 2022).

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

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

<sup>16</sup> *Id.*

<sup>17</sup> See Nathaniel Lee, *America has Spent Over a Trillion Dollars Fighting the War on Drugs. 50 Years Later, Drug Use in the U.S. is Climbing Again.*, CNBC (June 17, 2021, 1:15 PM), <https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html>.

<sup>18</sup> See Brian Mann, *More than a Million Americans have Died from Overdoses During the Opioid Epidemic*, NPR (Dec. 30, 2021, 10:26 AM), <https://www.npr.org/2021/12/30/1069062738/more-than-a-million-americans-have-died-from-overdoses-during-the-opioid-epidemi>.

<sup>19</sup> See *Drug War Statistics*, *supra* note 13.

<sup>20</sup> See *For the First Time, We're More Likely to Die From Accidental Opioid Overdose than Motor Vehicle Crash*, NSC (Jan. 14, 2019), <https://www.nsc.org/in-the-newsroom/for-the-first-time-were-more-likely-to-die-from-accidental-opioid-overdose-than-motor-vehicle-crash> (comparing the ratios between the likelihood of opioid fatalities at 1:96 and car crash fatalities at 1:103).

<sup>21</sup> *United States of America: WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/region/amro/country/us> (last visited Apr. 27, 2022).

<sup>22</sup> *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Nov. 17, 2022).

the number of drug overdose deaths in the U.S. is increasing yearly.<sup>23</sup> This decrease is because the COVID-19 pandemic is viewed and treated as a public health crisis,<sup>24</sup> whereas U.S. drug laws are not motivated by public health and science.<sup>25</sup>

## II. CONFLICTING CLAIMS, CLAIMANTS, BASE OF POWER

Mood-altering substances have long been used by many species, even before the existence of humans and other primates.<sup>26</sup> Evidence shows that animals will repeatedly search for and ingest rotting fruit for the alcohol produced in them and other psychoactive plants.<sup>27</sup> The establishment of civilization may have been motivated by a desire to expand the early human palate when tribes began settling and cultivating wheat and barley, not for food but to produce beer.<sup>28</sup> Although the evolutionary precursors of drug use have yet to be fully understood, what can be inferred is that a permanently abstinent human culture does not appear to exist.<sup>29</sup> “[S]tatistically, it is non-users who are abnormal.”<sup>30</sup> Given the seemingly illimitable grasp of drug abuse currently in the U.S., one might come to believe that addiction has always been the soft underbelly of civilizations worldwide;<sup>31</sup> historically speaking, however, the concept of

<sup>23</sup> *Drug War Statistics*, *supra* note 13.

<sup>24</sup> See *COVID-19*, AM. PUB. HEALTH ASS’N, <https://www.apha.org/Topics-and-Issues/Communicable-Disease/Coronavirus> (last visited Apr. 27, 2022) (“The COVID-19 outbreak is a public health emergency and on March 11, 2020 [it] was declared a pandemic by the World Health Organization.”).

<sup>25</sup> See Bill Piper, *There’s Something Missing from Our Drug Laws: Science*, WASH. POST (Apr. 28, 2016, 12:09 PM), <https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/theres-something-missing-from-our-drug-laws-science/>.

<sup>26</sup> See MAIA SZALAVITZ, *UNBROKEN BRAIN: A REVOLUTIONARY WAY OF UNDERSTANDING ADDICTION* 22 (Picador ed., Macmillan Publishing 2017) (2016).

<sup>27</sup> See *id.* at 22; see also Lee Dembart, *Even Monkeys in the Trees Do It: INTOXICATION Life in Pursuit of Artificial Paradise* by Ronald K. Siegel, LA TIMES (July 23, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-07-23-bk-166-story.html> (reviewing the book *Intoxication*, in which Siegel asserts that the need to alter our perceptions of reality is a natural and healthy “fourth drive” experienced by all people and is as much a part of the human condition as sex, hunger, and thirst).

<sup>28</sup> See SZALAVITZ, *supra* note 26, at 22; see S. H. Katz & M. M. Voigt, *Bread and Beer: The Early Use of Cereals in the Human Diet*, 28 EXPEDITION 23, 23, 27 (1986), <http://www.penn.museum/documents/publications/expedition/PDFs/28-2/Bread.pdf> (concluding that early beer drinkers enjoyed low levels of intoxication without serious side effects, but also had the unintended “selective advantage” of improved health for themselves and their offspring because of the substantially richer nutritional value of fermented wild wheat and barley over unprocessed cereal grains).

<sup>29</sup> See SZALAVITZ, *supra* note 26, at 22.

<sup>30</sup> *Id.*; see generally Chris McGreal, *It’s beyond pain’: How Mormons are Left Vulnerable in Utah’s Opiate Crisis*, THE GUARDIAN (May 26, 2016, 6:30 AM), <https://www.theguardian.com/us-news/2016/may/26/utah-mormons-prescription-painkiller-addiction> (explaining that Mormons, who traditionally abstain from alcohol and other drugs, were particularly vulnerable to addiction due to the pressures to live a devout life, especially in Utah, where one-third of adults were prescribed an opioid pain medication in 2014).

<sup>31</sup> See generally Saad, *supra* note 12 (explaining that drug abuse touches nearly half of the U.S. population).

addiction is relatively new.<sup>32</sup> Thus, the best way to understand modern drug policies intended to reduce rates of addiction and overdose is to adopt and analyze the various perspectives of those involved in the creation of these laws.<sup>33</sup>

The call to war on drugs, or rather the war on people,<sup>34</sup> summons three major parties: the prohibitionists, the private sector, and the reformists.<sup>35</sup>

#### A. Prohibitionists

Benjamin Rush, a Declaration of Independence signer and physician, was one of the first to term alcoholism as a “disease of the will.”<sup>36</sup> Although viewing addiction as a disease is what ultimately continued throughout the Prohibition movement and beyond, early usage of the term addiction can be traced back to a religious belief that addiction was a voluntary choice.<sup>37</sup> The Bible, for example, describes a drunkard as a lover of wine.<sup>38</sup> Puritan minister Samuel Danforth preached that “God sends many sore judgments on a people that addict themselves to intemperance in drinking,” ingraining the idea that drunkenness was not only a deliberate choice, but one that would banish people from the gracious presence of God.<sup>39</sup>

The word addiction originally denoted a “social relationship of bondage, with its Latin roots meaning ‘enslaved by’ or ‘bound to,’” but the idea that addiction was a form of chemical slavery did not catch on until about the mid-

<sup>32</sup> See SZALAVITZ, *supra* note 26, at 23.

<sup>33</sup> See *Perspectives on the Drug Policy Research Landscape*, DRUG POL’Y ALL., <https://drugpolicy.org/sites/default/files/documents/Drug%20Policy%20Research%20Landscape%20Jan%202020%202016.pdf> (last visited Nov. 17, 2022) [hereinafter *Perspectives*] (“[O]ne area of great need is for research and analysis that can synthesize work across disciplines, focus on the big picture, and provide guidance on the directions in which drug policy should move . . . [W]e need more research that compares different approaches to policy change.”)

<sup>34</sup> Michael K. Williams, *The War on Drugs is a War on People*, CNN (Sept. 22, 2016, 8:25 AM), <https://www.cnn.com/2016/09/22/opinions/war-on-drugs-michael-k-williams/index.html> (referring to the U.S.’s longest running and most expensive policy initiative as a war on people, not a war on drugs).

<sup>35</sup> See Lee Fang, *The Top Five Special Interest Groups Lobbying to Keep Marijuana Illegal*, REPUBLIC REP. (Apr. 20, 2012, 9:04 AM), <https://www.republicreport.org/2012/marijuana-lobby-illegal/> (listing the top five special interest groups lobbying to keep marijuana illegal, including law enforcement unions, privatized prisons, the alcohol industry, and the pharmaceutical industry); see also *Narcotics and Dangerous Drug Section (NDDS)*, THE U.S. DEP’T OF JUST., <https://www.justice.gov/criminal/ndds> (last visited Apr. 27, 2022) (“Our mission is to reduce the supply of illegal drugs in the United States by investigating and prosecuting priority national and international drug trafficking groups and by providing sound legal, strategic and policy guidance in support of that end.”); see generally *Drug Policy in the United States*, RECOVERY RSCH. INST., <https://www.recoveryanswers.org/resource/an-introduction-to-drug-policy-positions/> (last visited Nov. 17, 2022) [hereinafter *Drug Policy*] (outlining the different drug policy perspectives from the most to the least restrictive, including prohibition, decriminalization, legalization, and commercialization).

<sup>36</sup> SZALAVITZ, *supra* note 26, at 24.

<sup>37</sup> See *id.* at 23–24.

<sup>38</sup> See *Matthew 11:19* (King James) (referring to a drunkard as a winebibber).

<sup>39</sup> Samuel Danforth, *The Woful Effects of Drunkenness*, EVANS EARLY AM. IMPRINT COLLECTION, <https://quod.lib.umich.edu/e/evans/N01214.0001.001/1:3?rgn=div1;view=fulltext> (last visited Sept. 9, 2022) (transcribing the sermon given by Danforth in Bristol on October 12, 1709).

nineteenth century.<sup>40</sup> Interestingly, during this same time span, the United States was entrenched in the slave trade, the abolitionist movement, and the Civil War, the era which created debates about race and involuntary servitude that continue today.<sup>41</sup> It is no accident that the poor personality traits used to describe racist stereotypes are the same words used to identify people with addiction, “from criminal propensities, laziness, promiscuity, violence, and childishness to deviousness and an inability to tell the truth.”<sup>42</sup> Unsurprisingly, the American Civil Liberties Union (ACLU) advocates the view that the modern War on Drugs diminishes the Bill of Rights and establishes a new Jim Crow.<sup>43</sup>

The 1830s and 1840s depicted the nation’s first major anti-alcohol movement.<sup>44</sup> Born out of an impassioned fight against slavery, many abolitionists began categorizing alcohol as “an equally great evil to be eradicated if America [was] ever to be fully cleansed of sin” and its role in proliferating slavery.<sup>45</sup> The Protestant-based temperance movement focused on alcohol, which culminated in National Prohibition.<sup>46</sup> Thus, a recounting of drug laws in the United States reveals a deeply rooted notion that drug abuse was primarily a personal weakness or moral shortcoming, and that the ensuing social ills were best avoided by wide-spread abstinence and, in the event of sin, punishment.<sup>47</sup>

### B. *The Private Sector*

“In time of war the loudest patriots are the greatest profiteers.”<sup>48</sup> The second group of fighters in the ongoing war against drugs are those who eagerly present a solution, specifically a commodified solution.<sup>49</sup> Throughout the twentieth century, society witnessed a shift away from the traditional, moral diagnosis of addiction and began using a new method of social problem solving.<sup>50</sup> Ultimately, what materialized was the disease model of addiction,<sup>51</sup> although in

<sup>40</sup> SZALAVITZ, *supra* note 26, at 23–24.

<sup>41</sup> *See id.* at 24; *see also* Eric Foner, *We are Not Done with Abolition*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/opinion/abolition-prison-labor-amendment.html?searchResultPosition=4>.

<sup>42</sup> SZALAVITZ, *supra* note 26, at 25.

<sup>43</sup> *See* Graham Boyd, *The Drug War is the New Jim Crow*, ACLU (2001), <https://www.aclu.org/other/drug-war-new-jim-crow>.

<sup>44</sup> *See Roots of Prohibition*, PBS, <https://www.pbs.org/kenburns/prohibition/roots-of-prohibition/> (last visited Sept. 9, 2022).

<sup>45</sup> *Id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See generally* SZALAVITZ, *supra* note 26, at 23, 27 (describing the historical ties between drug use and religion).

<sup>48</sup> August Bebel, GOODQUOTES, <https://www.goodreads.com/quotes/1273224-in-time-of-war-the-loudest-patriots-are-the-greatest> (last visited Nov. 17, 2022).

<sup>49</sup> *See generally* Fang, *supra* note 35 (identifying drug lobbying groups in commercial industries).

<sup>50</sup> *See* SZALAVITZ, *supra* note 26, at 27.

<sup>51</sup> *See* Brooke A. Lewis, *The History of the Disease Concept of Substance Dependency* (May 2016) (M.S. thesis, Northern Michigan University) (on file with Northern Michigan University) (describing the influence of Benjamin Rush, Thomas Trotter, T.D. Crothers, and E.M. Jellinek in developing the disease model of addiction).

some communities the shift was grudgingly slow and met with harsh criticism and defiance by those holding onto their settled convictions that alcoholics and other addicts were simply gluttonous sinners.<sup>52</sup> Unlike this emerging disease model, historical depictions of drug use from around the world unveil a common story: drug use is a highly moralized behavior and is seen as “an overindulgence in pleasure, [despite the reality of the experience being described as] a joyless compulsion.”<sup>53</sup> In contrast, the new disease model of addiction greatly improved access to crucial medical treatments since addiction could now be recognized and legitimized as a medical condition, rather than a miscellany of “human behaviors or characteristics that we just happen to find disturbing[.]”<sup>54</sup> With a new found mission to treat addicts like patients, rather than sinners or criminals, came an influx of new medications intended to facilitate the detoxification process and help people wean off their addicted substances.<sup>55</sup> Consequently, the United States now spends over \$600 billion on substance abuse costs.<sup>56</sup>

A heartbreaking story of three young women depicts the pitfalls of countless Florida rehabilitation businesses taking advantage of people, and causing deaths.<sup>57</sup> Katie Cruea was the first of three Midwestern girls—Cruea, Alison Flory, and Mikaya Feucht—to move into one of Kenneth Chatman’s sober homes, and she was the first to die.<sup>58</sup> As for the others, Mikaya’s mother

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<sup>52</sup> See generally SZALAVITZ, *supra* note 26, at 23–24 (explaining the difficult shift from moralizing drug use to treating addiction with scientific evidence).

<sup>53</sup> SZALAVITZ, *supra* note 26, at 23.

<sup>54</sup> Jackie Leach Scully, *What is a Disease?*, 5 EMBO REPORTS 650, 650 (2004) (explaining how historical context and labels change how human behaviors are seen publicly).

<sup>55</sup> See generally *Common Medications Used in a Drug and Alcohol Detox*, INNOVO DETOX (Apr. 26, 2021), <https://www.innovodetox.com/2021/04/26/common-medications-used-drug-alcohol-detox/> (listing common detox drugs that include acamprostate, one of three approved medications to treat alcohol use disorder; antiadrenergic agents; anticonvulsants; antidepressants; anti-nausea medications; antipsychotics; benzodiazepines; buprenorphine; disulfiram; methadone; modafinil; naltrexone; Suboxone; subutex; and vivitrol); see also *Overdose Death Rates*, NIDA (Jan. 20, 2022), <https://nida.nih.gov/drug-topics/trends-statistics/overdose-death-rates> (illustrating in figure 8 how benzodiazepines actually contributed to 12,290 overdose deaths in 2020 that involved benzodiazepines).

<sup>56</sup> See *Is Drug Addiction Treatment Worth its Cost?*, NAT’L INST. ON DRUG ABUSE, <https://nida.nih.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/drug-addiction-treatment-worth-its-cost> (last visited Nov. 17 2022). See *Federal Spending: Where Does the Money Go*, NAT’L PRIORITIES PROJECT, <https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending/> (last visited Sept. 9, 2022) for a contextual understanding of U.S. spending, depicting \$752.06 billion on discretionary military expenses.

<sup>57</sup> See Lisa Riordan Seville et al., *Florida’s Billion-Dollar Drug Treatment Industry Is Plagued by Overdoses, Fraud*, NBC NEWS (June 25, 2017, 11:46 PM), <https://www.nbcnews.com/feature/megyn-kelly/florida-s-billion-dollar-drug-treatment-industry-plagued-overdoses-fraud-n773376>. See generally Corey Reynolds, *Top Drug Rehabilitation Centers in the US (2022 List)*, NAT’L TASC (Mar. 24, 2022), <https://www.nationaltasc.org/best-drug-rehab-centers/> (listing seven of the country’s top ten drug rehabilitation centers as either being based in or having locations in Florida).

<sup>58</sup> See Riordan, *supra* note 57.

Michelle Curran's insurance was to be charged more than \$600,000 by the seven treatment centers her daughter attended between January and June of 2016, including Reflections, the facility whose owner, Kenneth Chatman, has pleaded guilty to healthcare fraud and sex trafficking.<sup>59</sup> Similarly, Alison's mother Jennifer Flory's insurance was charged about \$1.2 million during the fifteen months her daughter bounced between nine different facilities in South Florida.<sup>60</sup> All three young women overdosed and died during the time they sought help from these sober homes.<sup>61</sup> At least three of the facilities the girls attended have been raided by law enforcement and subsequently closed.<sup>62</sup>

Another shift toward commodification is emerging in the space of psychedelic drugs.<sup>63</sup> While psychedelic drugs are federally criminalized under Schedule I of the Controlled Substances Act, psilocybin and MDMA are quickly moving toward becoming the healthcare industry's revolutionary treatments for a host of mental health disorders.<sup>64</sup> In March of 2019, the FDA approved a nasal spray (designed to mimic the positive effects of the hallucinogenic ketamine, a Schedule III drug) for treatment-resistant depression ("TRD") as the first new antidepressant in decades.<sup>65</sup> These breakthrough medicines are attracting not only more research and development (R&D) companies, but also more financial investors.<sup>66</sup> Additionally, over two-thirds of the members of Congress cashed a check from pharmaceutical manufacturing Political Action Committees ("PACs") ahead of the 2020 election.<sup>67</sup>

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<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> See Shayla Love, *Investors Are Debating Who Should Own the Future of Psychedelics*, VICE NEWS (Mar. 10, 2021, 10:15 AM), <https://www.vice.com/en/article/3an9eb/investors-are-debating-who-should-own-the-future-of-psychedelics>.

<sup>64</sup> See Catherine I. V. Bird et al., *Psilocybin and MDMA for the Treatment of Trauma-Related Psychopathology*, 33 INT'L REV. OF PSYCHIATRY 229, 230, 237–40 (2021) (discussing findings of MDMA and psilocybin research for psychiatry); *see also* Rachel Feltman, *The FDA is Fast-Tracking a Second Psilocybin Drug to Treat Depression*, POPULAR SCI. (Nov. 26, 2019, 4:07 PM), <https://www.popsci.com/story/health/psilocybin-magic-mushroom-fda-breakthrough-depression/> (explaining how the FDA granted breakthrough therapy status for psilocybin to COMPASS in October 2018 and to Usona Institute); *see also* Sara Chodosh, *The FDA Says Ecstasy is a 'Breakthrough' Drug for PTSD Patients*, POPULAR SCI. (Aug. 29, 2017, 7:23 PM), <https://www.popsci.com/fda-says-mdma-is-breakthrough-drug-for-ptsd-patients/> (explaining how the FDA also granted breakthrough status for MDMA).

<sup>65</sup> See Kat Eschner, *The First New FDA-Approved Antidepressant in Decades Goes Up Your Nose*, POPULAR SCI. (Mar. 7, 2019, 1:35 AM), <https://www.popsci.com/ketamine-depression-fda-spravo/>.

<sup>66</sup> See *Psychedelic Medicine Stocks Garner Serious Investor Interest*, CISION PR NEWSWIRE (June 25, 2020, 10:40 AM), <https://www.prnewswire.com/news-releases/psychedelic-medicine-stocks-garner-serious-investor-interest-301083414.html>.

<sup>67</sup> See Lev Facher, *More than Two-Thirds of Congress Cashed a Pharma Campaign Check in 2020, New STAT Analysis Shows*, STAT (June 9, 2021), <https://www.statnews.com/feature/prescription-politics/federal-full-data-set/>.

### C. Reformists

Decriminalization is at the forefront of the current reform agenda, followed by the establishment of overdose prevention sites in areas of need, like major cities.<sup>68</sup> Groups such as Drug Policy Alliance, the American Civil Liberties Union, Usona Institute, Students for Sensible Drug Policy, and several others advocate for decriminalization and harm reduction strategies.<sup>69</sup> Many reform advocates come to their positions through personal experiences, either with familial or personal exposure to drug use and addiction, the criminal justice system, or both.<sup>70</sup>

## III. PAST TRENDS IN LEGAL DECISIONS & CONDITIONING FACTORS

Drug related crime and deaths do not decrease when laws become more punitive; in fact, tough-on-crime drug policies create the opposite effect, exacerbating lawlessness and corruption of public officials.<sup>71</sup> A prime example of failed policy within our own history is the Prohibition era, when sale and possession of alcohol for consumption was federally prohibited, and what followed was a litany of unintended consequences.<sup>72</sup>

### A. Prohibition: Leading Factors

In the coming years before Prohibition, the women-led Temperance Movement gained legal traction due to the aggressive efforts of the male-dominated Anti-Saloon League.<sup>73</sup> The movement, however, actually began in the early 1800s as a collective desire for a safer and healthier community.<sup>74</sup> Twenty-four

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<sup>68</sup> See *Perspectives*, *supra* note 33.

<sup>69</sup> See Matt Sutton, *Drug Policy Action's Measure 110 Prevails, Making Oregon the First U.S. State to Decriminalize All Drugs & Expand Access to Addiction and Health Services*, DRUG POL'Y ALL. (Nov. 3, 2020), <https://drugpolicy.org/press-release/2020/11/drug-policy-actions-measure-110-prevails-making-oregon-first-us-state>; see also *Issue Brief*, *supra* note 6.

<sup>70</sup> See *About*, USONA INST., <https://www.usonainstitute.org/about/> (last visited Nov. 17, 2022) (describing how a psilocybin study at Johns Hopkins University inspired the founder of Usona to start the institute).

<sup>71</sup> See *The Senate Overrides the President's Veto of the Volstead Act*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Volstead\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Volstead_Act.htm) (last visited Nov. 17, 2022) [hereinafter *Volstead Act*].

<sup>72</sup> See D. J. Hanson, *The Noble Experiment of Prohibition in the U.S.*, ALCOHOL PROBS. AND SOLUTIONS, <https://www.alcoholproblemsandsolutions.org/noble-experiment-of-prohibition-in-the-u-s/> (last visited Sept. 9, 2022) [hereinafter Hanson, *Noble*] (explaining how Prohibition not only failed but was counterproductive, and that doing nothing would have likely caused fewer harms).

<sup>73</sup> See *Women Led the Temperance Charge*, THE MOB MUSEUM: PROHIBITION, <https://prohibition.themobmuseum.org/the-history/the-road-to-prohibition/the-temperance-movement/> (last visited Sept. 9, 2022) [hereinafter *Temperance*, MOB MUSEUM]; see also UNUM Ken Burns, *Roots of Prohibition: Retribution*, YOUTUBE (July 26, 2012), <https://www.youtube.com/watch?v=yUePMvNsAWw> (explaining how the Anti-Saloon League successfully combined propaganda, religion, and political coercion to make alcohol a wedge issue in elections).

<sup>74</sup> See *Temperance*, MOB MUSEUM, *supra* note 73.

women's organizations emerged by 1831, all working toward this appealing cause.<sup>75</sup> It seemed that community abstinence greatly affected the quality of life for many women.<sup>76</sup> Temperance certainly aligned with other social responsibilities generally associated with women at the time, such as securing "the family, its home, its health and even its salvation . . ."<sup>77</sup> Although Temperance is often reflected upon from the perspective of these traditional Christian values, what is less commonly known were the temporal implications of achieving total abstinence: women's safety.<sup>78</sup> Sharing similarities with the abolitionist and women's suffrage movements, Temperance was "part of a mass mobilization of American women fighting for social change," chiefly against sexual harassment and domestic violence toward women and children.<sup>79</sup> Many advocates were not necessarily offended by drunkenness.<sup>80</sup> Primarily, it was the pro-alcohol sentiment, rather than alcohol use itself, that became inextricably tied to the view that drunken male violence against women was excusable.<sup>81</sup> Not coincidentally, the liquor industry vehemently lobbied against women's right to vote.<sup>82</sup>

Other factors leading to Prohibition included the Abolition Movement, the Anti-Saloon League ("the League"), and the onset of World War I.<sup>83</sup> While the temperance and abolition movements had fit well with the social and political reform sought by the Progressive Era, many "[p]rohibition advocates in the early twentieth century also relied on racist and xenophobic rhetoric."<sup>84</sup> "The [League], under the shrewd and ruthless leadership of Wayne Wheeler, became the most successful single-issue lobbying organization in American history, willing to form alliances with any and all constituencies that shared its sole goal: a constitutional amendment that would ban the manufacture, sale and transportation of alcohol."<sup>85</sup> "The League united with Democrats and Republicans, Progressives, Populists, and suffragists, the Ku Klux Klan and the NAACP, the International Workers of the World, and many of America's most powerful industrialists including Henry Ford, John D. Rockefeller, Jr., and Andrew Carnegie – all of whom lent support to the League's increasingly effective

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

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

<sup>77</sup> *Id.*

<sup>78</sup> *See* Moira Donegan, *The Temperance Movement Linked Booze to Domestic Violence. Did it have a Point?*, THE GUARDIAN (Jan. 3, 2020), <https://www.theguardian.com/commentis-free/2020/jan/03/women-alcohol-drink-culture-prohibition-temperance>.

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

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See* *Roots of Prohibition*, *supra* note 44; *see also* Claire White, *World War I Played Key Role in Passage of Prohibition*, THE MOB MUSEUM (Nov. 10, 2018), <https://themobmuseum.org/blog/world-war-played-key-role-passage-prohibition/>.

<sup>84</sup> White, *supra* note 83.

<sup>85</sup> *Roots of Prohibition*, *supra* note 44.

campaign.”<sup>86</sup> Notably, “support for Prohibition represented the single most important bond between Klansmen throughout the nation.”<sup>87</sup> Racism and prejudice against foreigners and immigrants were thus crucial in guaranteeing the enactment of Prohibition, as membership overlapped between the Klan and the League.<sup>88</sup> Membership in the KKK was limited to males, so women from the Woman’s Christian Temperance Union showed their support by creating and joining the Women of the KKK (WKKK).<sup>89</sup>

Prohibitionists asseverated to the public that the German, Irish, and Jewish Americans were to blame, presenting temperance as an “us v. them’ problem.”<sup>90</sup> Since breweries were largely owned by German Americans, “World War I allowed prohibitionists to manipulate [the] growing anti-German sentiment.”<sup>91</sup> “They argued that every dollar put into the brewers’ pockets, and every bushel of grain diverted to a brewery, aided the German war effort.”<sup>92</sup> This suited the narrative well, as prior to WWI, “brewers were accused of breaking up families.”<sup>93</sup> “Now, they were being portrayed as breaking apart the very fabric of American society.”<sup>94</sup>

Despite the strong racist rhetoric that existed, “a more practical argument for Prohibition [simultaneously] developed out of wartime rationing.”<sup>95</sup> Food production in Europe was down, so many countries established alcohol production regulations meant to ensure soldiers received proper rations.<sup>96</sup> Although “the emergency wartime measures were set to expire at the end of World War I,”<sup>97</sup> many politicians feared the consequences of defying the coercive tactics of the League with all it had already achieved.<sup>98</sup> On October 28, 1919, the Senate

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<sup>86</sup> *Id.*

<sup>87</sup> SZALAVITZ, *supra* note 26, at 27 (citing D. J. Hanson, *KKK (Ku Klux Klan), Alcohol, & Prohibition: The KKK Supported Prohibition*, ALCOHOL PROBS. AND SOL., <https://www.alcoholproblemsandsolutions.org/the-kkk-supported-prohibition/> (last visited Nov. 17, 2022)).

<sup>88</sup> See SZALAVITZ, *supra* note 26, at 27–28.

<sup>89</sup> See D. J. Hanson, *The KKK and the WCTU: Close Partners in Prohibition*, ALCOHOL PROBS. AND SOL., <https://www.alcoholproblemsandsolutions.org/the-kkk-and-the-wctu-close-partners-in-prohibition/> (last visited Apr. 28, 2022).

<sup>90</sup> White, *supra* note 83.

<sup>91</sup> *Id.*

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

<sup>93</sup> *Id.*; see *Temperance*, MOB MUSEUM, *supra* note 73 (illustrating that a man had to leave his family due to alcoholism, eventually breaking the family up).

<sup>94</sup> White, *supra* note 83.

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

<sup>96</sup> See *id.* In August 1917, the Food and Fuel Control Act outlawed the use of any grains or foodstuffs for producing distilled spirits. *Id.* In December 1917, President Woodrow Wilson signed a proclamation forbidding brewers from brewing beverages with more than 2.75% alcohol by volume. *Id.* Dry zones were established around military camps, and the Selective Service Act forbade the sale of liquor to men in uniform. *Id.*

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

<sup>98</sup> See *Roots of Prohibition*, *supra* note 44.

voted to enter National Prohibition, overriding President Woodrow Wilson's veto of the Volstead Act.<sup>99</sup>

### *B. Prohibition & Beyond*

Prohibition was difficult for governments at both federal and state levels to enforce.<sup>100</sup> Rather than creating a nation of law-abiding teetotalers,<sup>101</sup> Prohibition simply drove alcohol consumption underground with the creation of secret bars called speakeasies, illegal sale of liquor known as bootlegging, and home brewed moonshine.<sup>102</sup> The demand for illegal beer, wine, and liquor was so great during the Prohibition that mob kingpins like Al Capone were garnering as much as \$100 million a year in the mid-1920s (\$1.4 billion in 2018), and spending a half million dollars a month in bribes to police, politicians and federal investigators.<sup>103</sup> Stealing from industrial alcohol manufacturers was a primary source of bootlegged alcohol, although this alcohol was not ideal for consumption.<sup>104</sup> Illegality also incentivized bootleggers to sell more potent forms of alcohol because it was “easier to smuggle one bottle of whiskey than multiple bottles of beer,” which led to poorer health consequences for consumers.<sup>105</sup>

Even worse, in an effort to enforce the laws, the Calvin Coolidge administration passed regulation requiring manufacturers of industrial alcohol to add poisons into their alcohol, knowing bootleggers would steal the alcohol and sell it to consumers.<sup>106</sup> This caused 1,200 New York City residents to get sick and

<sup>99</sup> See *Volstead Act*, *supra* note 71.

<sup>100</sup> See *Prohibition*, HISTORY, <https://www.history.com/topics/roaring-twenties/prohibition#:~:text=10%20Images-.Passage%20of%20the%20Prohibition%20Amendment,save%20grain%20for%20producing%20food> (last updated Aug. 12, 2022) [hereinafter *Prohibition*, HISTORY] (“Enforcement was initially assigned to the Internal Revenue Service (IRS) and was later transferred to the Justice Department and the Bureau of Prohibition, or Prohibition Bureau.”). See generally *Volstead Act*, *supra* note 71 (revealing that Prohibition worked well for the presidencies of Warren G. Harding, Calvin Coolidge, and Herbert Hoover, and Congress was reluctant to appropriate sufficient funds for effective enforcement of the Volstead Act).

<sup>101</sup> See Anna Diamond, *Where Does the Word ‘Teetotaler’ Come From? And More Questions From Our Readers*, SMITHSONIAN MAG. (Oct. 2019), <https://www.smithsonianmag.com/smithsonian-institution/where-does-word-teetotaler-come-from-180973091/> (defining the term teetotaler as temperance activists who were totally opposed to alcohol).

<sup>102</sup> See *Prohibition*, HISTORY, *supra* note 100.

<sup>103</sup> See Dave Roos, *How Prohibition Put the ‘Organized’ in Organized Crime*, HISTORY (Mar. 9, 2021), [https://www.history.com/news/prohibition-organized-crime-al-capone?li\\_source=LI&li\\_medium=m2m-rew-history](https://www.history.com/news/prohibition-organized-crime-al-capone?li_source=LI&li_medium=m2m-rew-history).

<sup>104</sup> See Jeffrey Miller, *The Modern Craft Cocktail Movement Got Its Start During Prohibition*, SMITHSONIAN MAG. (Jan. 16, 2020), <https://www.smithsonianmag.com/history/modern-craft-cocktail-movement-got-its-start-during-prohibition-180971265/>.

<sup>105</sup> German Lopez, *Prohibition Worked Better than You Think*, VOX (June 13, 2019, 9:10 AM), <https://www.vox.com/the-highlight/2019/6/5/18518005/prohibition-alcohol-public-health-crime-benefits> (explaining both the positive and negative aspects of Prohibition, despite its legacy that alcohol regulation as a whole will always fail).

<sup>106</sup> See Deborah Blum, *The Chemist’s War*, SLATE (Feb. 19, 2010, 10:00 AM), <https://slate.com/technology/2010/02/the-little-told-story-of-how-the-u-s-government-poisoned-alcohol-during-prohibition.html>.

another 400 to die.<sup>107</sup> In total, as many as 10,000 people were killed by government attempts to keep people from drinking alcohol used in manufacturing processes during Prohibition.<sup>108</sup> Crucially, no one has ever been held accountable for these preventable deaths.<sup>109</sup>

Although drug laws in many U.S. states<sup>110</sup> no longer reflect the Prohibition policies of the 1920s and consider criminalization of drug use outdated and ineffective in reducing abuse, remnants of drug abolition still linger, particularly with religious overtones.<sup>111</sup> The majority of dry counties that still remain in the U.S. are in the South, where religious beliefs harken back to the influence of the Temperance Movement.<sup>112</sup> Today, the religious ties of the Temperance Movement and Prohibition commonly lead the public to blame that era for creating a regressive movement consumed with moralist disdain for alcohol use.<sup>113</sup> The 21st Amendment repealed National Prohibition nearly eighty-nine years ago, but state laws today regulating public access and consumption of alcohol are still tangled with that legacy of religious attitudes toward overall drug use.<sup>114</sup>

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<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See* SZALAVITZ, *supra* note 26, at 28; *see generally* Blum, *supra* note 106 (quoting Charles Norris, the chief medical examiner of New York City during the 1920s, condemning the federal program for its disproportionate effect on the country's poorest residents and calling Prohibition "our national experiment in extermination.").

<sup>110</sup> *See generally* U.S. CONST. amend. XXI, § 2, cl. 2. The 21st Amendment not only repealed the 18th, but it also granted states greater leeway in regulating consumer alcohol within and across its borders, so long as the laws did not violate the Commerce Clause of the Constitution. *See generally* U.S. CONST. art I, § 8, cl. 3 (granting Congress power to control substances through its enumerated power to regulate interstate commerce). Thus, states could now regulate alcohol how they saw fit. *See* *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (holding that the Commerce Clause allows Congress to regulate activity within a state if the activity has a substantial economic effect on interstate commerce).

<sup>111</sup> *See* Evan Comen, *These 9 States Still have Dry Counties*, 24/7 WALL ST. (Mar. 20, 2020, 2:03 PM), <https://247wallst.com/special-report/2019/12/12/states-that-still-have-dry-counties/>; *see, e.g., Dry States 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/dry-states> (last visited Nov. 17 2022) [hereinafter *Dry States*] (stating that Kansas, Mississippi, and Tennessee are dry states by default, which means that the sale of alcohol must be authorized by individual counties within the state).

<sup>112</sup> *See* Comen, *supra* note 111; *see also Dry States*, *supra* note 111 (explaining how many states that allow alcohol prohibition laws, called "moist" counties, are in the South, where religious beliefs are often the motivation).

<sup>113</sup> *See* Donegan, *supra* note 78.

<sup>114</sup> *See generally* D. J. Hanson, *Blue Laws*, ALCOHOL PROBS. AND SOL., <https://www.alcoholproblemsandsolutions.org/Controversies/1095380608.html> (last visited Apr. 28, 2022). Blue laws restrict certain activities or sales of goods on Sundays, the day of the Christian sabbath. *Id.* In 1617, Virginia enacted the nation's first blue law, requiring church attendance to the extent that authorized militia could force colonists to attend church services. *Id.* In the modern era, blue laws requiring church attendance can no longer exist without violating constitutional rights to religious freedoms, *id.*, but the U.S. Supreme Court has held that blue laws are constitutional in that states are allowed to prohibit commercial activity on certain days, Lyman Stone, *Why We Need "Blue Laws," the Religious Tradition that Sanctifies Life Outside of Work*, VOX (Oct. 2, 2018, 8:40 AM), <https://www.vox.com/the-big-idea/2018/10/2/17925828/what-were-blue-laws-labor-unions>. Despite their religious origins, some view blue laws as a gateway to meet other much needed non-economic goals. *Id.* The argument that blue laws are a mere back door for the establishment of

### C. *The Controlled Substances Act of 1970 and Federal Enforcement*

Despite the failures of Prohibition, the United States, like nearly every country, continued to combat drug use with traditional prohibition-based policies, and these efforts ultimately led to the umbrella policy of the Controlled Substances Act (CSA) of 1970.<sup>115</sup> President Nixon signed into effect the CSA and kickstarted the War on Drugs campaign.<sup>116</sup> The prohibitionist perspective is evidenced by these federal laws that ban much of drug use in the United States.<sup>117</sup>

In 1973, the Drug Enforcement Administration (DEA) emerged to enforce the controlled substances laws and regulations of the United States.<sup>118</sup> Since its creation, the DEA has grown from 2,775 total employees with a budget of \$65 million to 9,848 employees with a budget of \$3.28 billion in 2021,<sup>119</sup> with more than \$520 million allocated specifically for its international programs.<sup>120</sup> Congress has done very little to critically evaluate the agency and its budget, “instead deferring to DEA Administrators on how best to deal with drug related issues.”<sup>121</sup> Some of those scandals in the past decade have included “exorbitant payments to confidential informants,”<sup>122</sup> “tapping phone calls and text

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religion, further enmeshing church and state, can be defended on the grounds that historically religious blue laws share much of the same goals as progressive labor unions, in that those taking advantage of these opportunities for rest and togetherness can enrich their lives outside of work, and if preferred, outside of church. *Id.* Supported by the notion that the Supreme Court upholds blue laws based on arbitrary reasoning, states can constitutionally enact laws to achieve non-economic wellbeing. *Id.*

<sup>115</sup> See *The Controlled Substances Act at 50 Years*, ARIZ. STATE UNIV. SANDRA DAY O’CONNOR COLL. OF L., <http://events.asucollegeoflaw.com/csa50/> (last visited Apr. 28, 2022) (“Although the federal drug war has been controversial since its inception, the CSA’s statutory framework defining how the federal government regulates the production, possession, and distribution of controlled substances has endured.”); see also JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, *THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS 1–2* (Feb. 5, 2021) (providing a brief legislative history of U.S. drug policy).

<sup>116</sup> See German Lopez, *Nixon Official: Real Reason for the Drug War Was to Criminalize Black People and Hippies*, VOX (Mar. 23, 2016, 6:05 PM), <https://www.vox.com/2016/3/22/11278760/war-on-drugs-racism-nixon>.

<sup>117</sup> See *Drug Policy*, *supra* note 35; see also 21 U.S.C. § 812 (listing federally banned drugs including, but not limited to, heroin, lysergic acid diethylamide (LSD), marihuana, psilocybin, and peyote, all identified as Schedule I substances in the CSA).

<sup>118</sup> See *Organization, Mission and Functions Manual: Drug Enforcement Administration*, U.S. DEP’T OF JUST. (Oct. 8, 2021), <https://www.justice.gov/jmd/organization-mission-and-functions-manual-drug-enforcement-administration> (illustrating how the DEA was created by merging the Bureau of Narcotics and Dangerous Drugs, the Office for Drug Abuse Law Enforcement, the Office of National Narcotics Intelligence, elements of the U.S. Customs Service that worked in drug trafficking intelligence and investigations, and the Narcotics Advance Research Management Team).

<sup>119</sup> *Staffing and Budget*, DRUG ENF’T AGENCY, <https://www.dea.gov/data-and-statistics/staffing-and-budget> (last visited Apr. 28, 2022).

<sup>120</sup> *It’s Time to Dismantle the DEA*, DRUG POL’Y ALL., <https://drugpolicy.org/DEA> (last visited Apr. 28, 2022) [hereinafter *Dismantle DEA*].

<sup>121</sup> *The Scandal-Ridden DEA: Everything You Need to Know*, DRUG POL’Y ALL. (Apr. 2015), [https://drugpolicy.org/sites/default/files/DEA\\_Scandals\\_Everything\\_You\\_Need\\_to\\_Know\\_Drug\\_Policy\\_Alliance.pdf](https://drugpolicy.org/sites/default/files/DEA_Scandals_Everything_You_Need_to_Know_Drug_Policy_Alliance.pdf).

<sup>122</sup> *Dismantle DEA*, *supra* note 120 (“A 2016 audit revealed the DEA paid 18,000 informants \$237

messages with little scrutiny,”<sup>123</sup> “a lack of supervision and accountability of agents,”<sup>124</sup> and “gross negligence in the handling of an improperly detained person.”<sup>125</sup> “The DEA’s rogue practices have not only undermined the rule of law, they have also failed to deliver their intended result, cutting off the supply of drugs.”<sup>126</sup> Despite the DEA’s budget growth and an increase in people going to prison for drug convictions, drug supplies within our borders has never truly decreased.<sup>127</sup> According to the DEA’s own 2019 National Drug Threat Assessment, the “opioid threat (controlled prescription drugs, synthetic opioids, and heroin) continues at ever-increasing epidemic levels, affecting large portions of the United States” and stimulants (methamphetamine and cocaine) are worsening and becoming more widespread.<sup>128</sup> The U.S. has spent billions of dollars in attempts to curb illegal drug supplies and use, yet “drugs remain cheap, potent, and widely available.”<sup>129</sup>

Drug regulation is undoubtedly a complex system of legal considerations.<sup>130</sup> Unfortunately, over fifty years’ worth of social problems resulting from the CSA were likely foreseeable at the time it was enacted.<sup>131</sup> For instance, in 1994, journalist Dan Baum interviewed John Ehrlichman, Nixon’s domestic-policy adviser, for a book Baum was writing about the politics of drug prohibition.<sup>132</sup> Ehrlichman, who had previously been federally imprisoned for co-conspiring the Watergate scandal, divulged the long-awaited truth behind the War on Drugs campaign, stating that the Nixon administration had two enemies: black people and anyone who opposed the Vietnam war.<sup>133</sup> He stated:

We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with

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million over five years. The informants operated with little oversight or review of the reliability of their information.”).

<sup>123</sup> *Id.* (quoting that “DEA agents routinely circumvented federal courts and prosecutors to instead get wiretap authorization from one local court, which at one point became the source of one-fifth of all U.S. wiretaps.”).

<sup>124</sup> *Id.* (quoting that “DEA agents reportedly received money, gifts, and weapons from Colombian drug trade organizations.”).

<sup>125</sup> *Id.* (recounting the inhumane treatment that student Daniel Chong was subjected to, for which the DEA paid a \$4.1 million settlement).

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

<sup>127</sup> See *Dismantle DEA*, *supra* note 120.

<sup>128</sup> 2019 *National Drug Threat Assessment*, U.S. Dep’t of Just., 1, 4 (Dec. 2019), [https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020\\_Low\\_Web-DIR-007-20\\_2019.pdf](https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf).

<sup>129</sup> *Dismantle DEA*, *supra* note 120.

<sup>130</sup> See *Perspectives*, *supra* note 33 (expressing a need for big-picture thinking and comparative analysis).

<sup>131</sup> See Dan Baum, *Legalize it All*, HARPER’S MAG., <https://harpers.org/archive/2016/04/legalize-it-all/> (last visited Nov. 17, 2022).

<sup>132</sup> See *id.*; see also Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), <https://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/index.html> (stating that this interview occurred just five years before Ehrlichman’s death in 1999).

<sup>133</sup> See *e.g.*, Baum, *supra* note 131.

marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>134</sup>

Used as a political tool, the declaration of a war on drugs was designed to help Nixon win, and keep, the White House, and ever since, Democratic and Republican presidents have all made at least some use of its political leverage.<sup>135</sup> “Baum equated Ehrlichman’s admission with traumatic war stories that often take decades for veterans to talk about and said it clearly took time for Ehrlichman and other Nixon aides he interviewed to candidly explain the war on drugs.”<sup>136</sup> The CSA was not based on scientific evidence or effective drug regulation when it was enacted, nor is it today.<sup>137</sup>

Considerations regarding drug regulation tend to be consistent across administrations, including concerns for public safety, crime prevention, and meeting the needs of victims.<sup>138</sup> Through time, past presidents and media strategists have claimed victory in the war against drugs; however, claiming victory in the war against drugs remains elusive because it is difficult to agree on exactly how to define success, and what strategies ought to be used.<sup>139</sup> Regardless of who has occupied the executive branch, U.S. anti-drug policies can be separated by two general viewpoints: supply-reduction and demand-reduction.<sup>140</sup> Supply-reduction strategies try to address drug use by targeting the physical availability of drugs through cutting off access to drug sources and heightening criminal sanctions for possession and distribution.<sup>141</sup> Alternatively, demand-reduction strategies focus on decreasing underlying demand for illegal drugs through drug use prevention measures, like education and improved quality of life, and

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<sup>134</sup> *Id.*

<sup>135</sup> *See id.*; *see also* Michael F. Walther, *Insanity: Four Decades of U.S. Counterdrug Strategy*, STRATEGIC STUD. INST. (Dec. 2012), <https://ia601302.us.archive.org/3/items/Insanity-Four-Decades-of-US-Counterdrug-Strategy-2012/Insanity%20-%20Four%20Decades%20of%20U.S.%20Counterdrug%20Strategy%20%282012%29.pdf> (stating that early efforts toward treatment, rehabilitation, and other demand-reduction programs were showing positive results, but Nixon’s 1972 reelection campaign and the Watergate scandal marked a turning point in the administration’s drug strategy, prioritizing a “tough-on-crime” image over well-reasoned public policies based on science-driven methodologies).

<sup>136</sup> LoBianco, *supra* note 132.

<sup>137</sup> *See* Piper, *supra* note 25.

<sup>138</sup> *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 388 (2002).

<sup>139</sup> *See* CNBC, *Why U.S. Presidents Can’t Win the War on Drugs*, YOUTUBE (June 17, 2021), <https://www.youtube.com/watch?v=LXmstlYsYjY>.

<sup>140</sup> *See* Nunn, *supra* note 138, at 387; *see also* Walther, *supra* note 135, at 1.

<sup>141</sup> *See* Nunn, *supra* note 138, at 387.

treatment, emphasizing an end-user approach.<sup>142</sup> Proponents of the war on drugs include former presidents Ronald Reagan, George H. W. Bush, and Bill Clinton.<sup>143</sup> Opponents have included former presidents Jimmy Carter and Barack Obama.<sup>144</sup> Both supply- and demand-reduction strategies have been implemented by proponents and opponents of the drug war.<sup>145</sup>

At the time of Reagan's presidency, broad cultural changes were sweeping the country.<sup>146</sup> The United States was shifting away from the liberalism of the Carter administration's emphasis on human rights considerations in foreign policy,<sup>147</sup> and was returning to a "period of relative conservatism that included respect for government and authority with an emphasis on personal responsibility."<sup>148</sup> Primarily, this shift in politics led to Reagan's presidency, as he was the "embodiment of a mainstream reaction to the counterculture of the 60s and 70s."<sup>149</sup> The Silent Majority criticized the permissive perspectives on drugs and obscenity that had grown throughout the 60s.<sup>150</sup> Consequently, Nancy Reagan's campaign to "Just Say No" to drugs became a centerpiece of the Reagan administration's demand-reduction efforts, further expanding on the clean message of abstinence.<sup>151</sup>

Recent efforts embrace more harm reduction programs.<sup>152</sup> On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 into law.<sup>153</sup> This \$1.9 trillion package is intended to combat the COVID-19 pandemic, including public health and economic impacts.<sup>154</sup> Block grants include

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<sup>142</sup> See *id.*

<sup>143</sup> See Walther, *supra* note 135, at 7–11 (discussing the punitive strategies of the Reagan, Bush Sr, and Clinton administrations).

<sup>144</sup> See *id.* at 5–6, 14–16 (discussing the proactive drug strategies of the Carter and Obama administrations).

<sup>145</sup> Compare *id.* at 7 (discussing Reagan's "zero tolerance" and Just Say No campaigns) and *id.* at 6 (discussing Carter's demand-reduction) with *id.* at 14 (stating Obama's publicly expressed support for expanding demand-reduction while spending reflected supply-reduction).

<sup>146</sup> See Nunn, *supra* note 138, at 388 n.47.

<sup>147</sup> See David Buckland, *Jimmy Carter's Liberalism: A Failed Revolution of U.S. Foreign Policy?*, E-INT'L RELATIONS (June 16, 2019), <https://www.e-ir.info/2019/06/16/jimmy-carters-liberal-aspirations-a-failed-revolution-of-u-s-foreign-policy/>.

<sup>148</sup> Nunn, *supra* note 138, at 388.

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

<sup>150</sup> See Brittany Bounds, *The Right Response: The Reaction of the Silent Majority to the Social Movements of the Sixties* (Aug. 11, 2015) (Ph.D. dissertation, Texas A&M University) (on file with the Oak Trust digital repository, Texas A&M University Libraries) (discussing Nixon's coining of the term Silent Majority, the 1970's description of the Silent Majority, and reactions to counterculture and return to "clean" values).

<sup>151</sup> See *id.* at 406 (highlighting the clean message); see also Walther, *supra* note 135, at 7 (discussing demand-reduction).

<sup>152</sup> See Alison Knopf, *Federal Government Announces First-Ever Harm Reduction Grants*, ADDICTION TREATMENT F. (Jan. 4, 2022), <https://atforum.com/2022/01/federal-government-announces-harm-reduction-grants/> (discussing federal grants for harm reduction).

<sup>153</sup> See American Rescue Plan Act, 15 U.S.C. §§ 9001-9013 (2021).

<sup>154</sup> See *American Rescue Plan Act Funding Breakdown*, NAT'L ASS'N OF COUNTIES, <https://www.naco.org/resources/featured/american-rescue-plan-act-funding-breakdown>.

\$1.5 billion for substance abuse prevention and treatment and \$1.5 billion in community mental health services.<sup>155</sup> An additional \$30 million is available for community-based funding for local substance use disorder services, including distribution of naloxone, fentanyl test strips, and syringe services, but not including safe injection sites or other illegal services that allow people to use drugs under medical supervision.<sup>156</sup>

#### D. State Decisions

Since the passing of the CSA, some states have fought against the bright-line federal drug laws by enacting, for example, laws for medical marijuana.<sup>157</sup> Shortly after the CSA came into effect in 1970, Oregon passed legislation in 1973 to decriminalize small amounts of cannabis, making a violation only punishable by fine.<sup>158</sup> In the same year, Texas amended its law to declare cannabis possession of four ounces or less a misdemeanor.<sup>159</sup> Thus, states have balanced the CSA by passing their own state laws effectuating lesser criminal punishments, allowing legal medical use, decriminalization, or legalization of certain drugs.<sup>160</sup>

Currently, thirty-one states and the District of Columbia have decriminalized cannabis.<sup>161</sup> Recreational cannabis is now legal in twenty-one states, D.C., and Guam.<sup>162</sup> Select municipalities across five states (California, Washington, Colorado, Michigan, and Massachusetts) have decriminalized psilocybin (colloquially referred to as “magic mushrooms”), while Oregon and D.C. have decriminalized it throughout its entire territory.<sup>163</sup> Notably, D.C. decriminalized not only psilocybin, but also other psychoactive substances including ibogaine, dimethyltryptamine, mescaline, and psilocyn.<sup>164</sup> Oregon has become the first state to begin developing a legal framework for regulating psilocybin in a therapeutic setting.<sup>165</sup>

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

<sup>156</sup> See Knopf, *supra* note 152.

<sup>157</sup> See e.g., Cara E. Alsterberg, *State and Federal Powers Clash Over Medical Marijuana in United States v. McIntosh*, 47 GOLDEN GATE U. L. REV. 89, 95–96 (2017).

<sup>158</sup> See PATRICK ANDERSON, *HIGH IN AMERICA: THE TRUE STORY BEHIND NORML AND THE POLITICS OF MARIJUANA* loc. 100, 1524, 1975 (2015) (ebook) (explaining the enactment of the Marijuana Commission’s decriminalization recommendations into Oregon legislation in 1973).

<sup>159</sup> See Griffin Smith Jr., *How the New Drug Law was Made*, TEX. MONTHLY (Sept. 1973), <https://www.texasmonthly.com/news-politics/how-the-new-drug-law-was-made/>.

<sup>160</sup> See ANDERSON, *supra* note 158, at 63, 202.

<sup>161</sup> See *Map of Marijuana Legality by State*, DISA, <https://disa.com/map-of-marijuana-legality-by-state> (last updated Nov. 17 2022).

<sup>162</sup> See Claire Hansen et al., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Apr. 20, 2022, 3:40 PM), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization>.

<sup>163</sup> See Phil Dubley, *Where Are Magic Mushrooms Legal? State-by-State Guide*, TRIPSETTER (Mar. 20, 2022), <https://tripsitter.com/magic-mushrooms/legal>.

<sup>164</sup> See D.C. CODE § 48-921.53; see also D.C. CODE § 48-921.52.

<sup>165</sup> See Lizzy Acker, *How soon will it be Before Oregonians can Access Legal Therapeutic Psilocybin?*, THE OREGONIAN (Jan. 22, 2022, 9:20 AM), <https://www.oregonlive.com/pacific-northwest->

In 2020, Oregon also became the first state to decriminalize all drugs and invest in substance misuse treatment instead.<sup>166</sup> Impressively, Oregon's Measure 110 aimed to accomplish this goal without raising taxes because the harm reduction services would be funded through excess cannabis tax revenue, amounting to over \$45 million, in addition to funds available from decreased arrests, incarcerations, and prosecutions for drug possession.<sup>167</sup> Based on its projections, the excess revenue alone would provide "over \$100 million in funding for services in the first year and up to \$129 million by 2027."<sup>168</sup> This measure was designed to meet the particular needs of the people in Oregon, borrowing from other successful policies in Portugal, Switzerland, and other U.S. states.<sup>169</sup> Measure 110 gained widespread support from local, state, and national organizations.<sup>170</sup>

In November 2021, New York became the first U.S. state to begin operations of two supervised injection sites in Manhattan.<sup>171</sup> Mayor Bill de Blasio began advocating for safe injection sites back in 2018, citing to successful programs in Europe and Canadian cities.<sup>172</sup> These supervised injection/use sites (SIS/SUS) are one alternative to the heroin-assisted clinics used primarily in Europe.<sup>173</sup>

### E. Federal Exemption & Rights

When individuals in the United States are prosecuted for illegal psychedelic use, the defense generally focuses on legal technicalities rather than attempting to challenge the prohibitive framework as a whole.<sup>174</sup> On the rare occasion,

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news/2022/01/how-soon-will-it-be-before-oregonians-can-access-legal-therapeutic-psilocybin.html (stating that the Oregon Health Authority is on track for the December 31, 2022 deadline).

<sup>166</sup> See Matt Sutton, *Drug Decriminalization in Oregon Officially Begins Today*, DRUG POL'Y ALL. (Feb. 1, 2021), <https://drugpolicy.org/press-release/2021/02/drug-decriminalization-oregon-officially-begins-today>.

<sup>167</sup> See Sutton, *supra* note 69.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* (stating that the initiative was supported by a broad spectrum of advocacy groups like the ACLU, Human Rights Watch, AFSCME of Oregon, NAACP of Portland/Eugene Springfield, Oregon Academy of Family Physicians, The Confederated Tribes of Grand Ronde, Oregon Nurses Association, Harm Reduction Coalition, YWCA of Greater Portland, Oregon Chapter of the American College of Physicians, Law Enforcement Action Partnership, Coalition of Communities of Color, Oregon School Psychologists' Association, SEIU Local 49 & 503, Oregon AFL-CIO, and over 120 others).

<sup>171</sup> See Mays & Newman, *supra* note 9 (stating that on the first day of operation, staff were able to reverse two overdoses).

<sup>172</sup> See *id.*

<sup>173</sup> See Susan Glaser, *Dutch cut Overdose Deaths by Dispensing pure Heroin*, CLEVELAND (July 15, 2018, 10:00 AM), [https://www.cleveland.com/metro/2018/07/in\\_amsterdam\\_the\\_government\\_pr.html](https://www.cleveland.com/metro/2018/07/in_amsterdam_the_government_pr.html); see generally Knopf, *supra* note 152 (noting that "overdose prevention sites," "safe injection sites," or any other similar site where people are allowed to bring illegal drugs and inject them there do not qualify for federal grants for harm reduction).

<sup>174</sup> See Roc Morin, *Do Psychedelic drug laws Violate Human Rights?*, THE ATLANTIC (Mar. 4, 2016), <https://www.theatlantic.com/health/archive/2016/03/psychedelic-drugs/471603/>.

rights-based defenses are employed, but are generally limited to therapeutic or religious arguments.<sup>175</sup> The Religious Freedom Restoration Act of 1993 (RFRA) bans the government from substantially burdening a person's exercise of religion, and only allows such restrictions for compelling governmental interests that are the least restrictive means of furthering that compelling interest.<sup>176</sup> Since the passing of the CSA, there has been a regulatory exemption for use of peyote, a Schedule I substance, by the Native American Church.<sup>177</sup> In 1994, Congress extended that exemption to all members of every recognized Indian Tribe.<sup>178</sup> In 2006, the Supreme Court held that the UDV church had effectively demonstrated that its use of a hallucinogenic tea called hoasca, which contains the controlled substance DMT, was a sincere exercise of religion that was substantially burdened by the enforcement of the Controlled Substances Act.<sup>179</sup>

To put the RFRA into practice, the DEA in 2009 formulated guidance that allows parties to request religious-based exemptions from the CSA.<sup>180</sup> The petition submitted to the DEA must include information showing that the person's exercise of religion under the RFRA is substantially burdened, but it also requires information on the actual religious practice the person wants to pursue, and background information on the religion itself.<sup>181</sup>

In trying to enforce the drug laws, the ACLU maintains that the government violates the fundamental rights of privacy and personal autonomy that are guaranteed by our Constitution.<sup>182</sup> Although the United States Constitution does not explicitly state a right of privacy, this is a reference to a line of Supreme Court cases that began with Justice Douglas's holding in *Griswold v. Connecticut*.<sup>183</sup> Justice Douglas held that specific guarantees in the Bill of Rights have penumbras, creating zones of privacy and the right of association.<sup>184</sup> In *Eisenstadt v.*

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<sup>175</sup> See *id.*; see also NOAH R. FELDMAN AND KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1607 (Saul Levmore et. al. eds., 20th ed. 2019) [hereinafter FELDMAN & SULLIVAN] (describing the Religious Freedom Restoration Act of 1993 as a congressional response to the decision in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)).

<sup>176</sup> See 42 U.S.C. § 2000bb-1; see also *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress does not have the authority to enact RFRA as to state legislation under § 5 of the Fourteenth Amendment, but that RFRA still binds federal actors).

<sup>177</sup> See 21 C.F.R. § 1307.31 (2005).

<sup>178</sup> See 42 U.S.C. § 1996a(b)(1).

<sup>179</sup> See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428, 439 (2006) (opining how the government failed to demonstrate that the application of the burden to the church would, more likely than not, be justified by the asserted compelling interests).

<sup>180</sup> See U.S. DRUG ENF'T AGENCY, EO- DEA007, DEA-DC-5, REVISED GUIDANCE REGARDING PETITIONS FOR RELIGIOUS EXEMPTION FROM THE CSA PURSUANT TO THE RFRA (2020).

<sup>181</sup> See *id.*

<sup>182</sup> See *Against Drug Prohibition*, ACLU, <https://www.aclu.org/other/against-drug-prohibition> (last visited Oct. 17, 2022).

<sup>183</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965). See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193, 193 (1890) (discussing the right to privacy as the right to be let alone, as co-authored by Brandeis prior to becoming a Supreme Court Justice).

<sup>184</sup> See *Griswold*, 381 U.S. 479, 484-85 (1965) (defining zones of privacy as being rooted in the

*Baird*,<sup>185</sup> the Supreme Court avoided extending the fundamental right recognized in *Griswold* to the context of the right to purchase contraceptives by unmarried couples.<sup>186</sup> Instead, the Court held that the issue was a violation of equal protection, finding that the constitutionally protected right of privacy inheres in the individual, not the marital couple.<sup>187</sup> The scope of the fundamental right specifically recognized in *Griswold* was clarified in *Roe v. Wade*,<sup>188</sup> in which Justice Blackmun held that the right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy, but will generally remain within the scope of other related family matters.<sup>189</sup> The woman's right is not absolute, however, as the State may place restrictions, tailored to its compelling interests.<sup>190</sup> These compelling interests can include safeguarding health, maintaining medical standards, and protecting the potentiality of human life.<sup>191</sup> This line of case precedent, however, is either at an extremely high risk of being overturned or is now overturned by the ruling in *Dobbs v. Jackson Women's Health Org.*<sup>192</sup> As to personal autonomy, the Supreme Court is even more hesitant to recognize such a right.<sup>193</sup>

Some who are against abortion restrictions base their views on different reasons, but the most prominent arguments arise from the concept of "bodily autonomy."<sup>194</sup> Rikelman, in defending abortion rights during oral argument, stated that the right to an abortion of a pre-viability pregnancy is grounded in

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First, Third, Fourth, Fifth, and Ninth Amendments).

<sup>185</sup> See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . .").

<sup>188</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>189</sup> See *id.* at 152-53 (specifying that only fundamental rights, which have some extension to marriage, procreation, contraception, family relationships, child rearing, and education, fall under privacy).

<sup>190</sup> See *id.* at 155.

<sup>191</sup> See *id.*

<sup>192</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2284 (2022) (stating that though the ruling overturns *Roe* and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), Justice Thomas's concurring opinion clarifies that the decision only extends to abortion and not other contexts of privacy, but that future cases should "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" because substantive due process decisions are "demonstrably erroneous").

<sup>193</sup> Compare *Casey*, 505 U.S. at 851 (referring to choices on personal dignity and autonomy as central to the liberty protected by the Fourteenth Amendment), and *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*'s "choices central to personal dignity" language), with *Washington v. Glucksberg*, 521 U.S. 702, 726, 735-36 (1997) (rejecting reliance on *Casey*'s "personal dignity" language), and *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (describing that the Partial-Birth Abortion Ban Act "expresses respect for the dignity of human life," which arguably had limited *Casey*'s scope prior to *Dobbs*).

<sup>194</sup> Tish Harrison Warren, *Dobbs, Roe and the Myth of 'Bodily Autonomy'*, N.Y. TIMES (June 26, 2022, 5:38 PM), <https://www.nytimes.com/2022/06/26/opinion/dobbs-ro-autonomy.html> (arguing that bodily autonomy, specifically used in justifying abortion rights, overextends individual autonomy at the cost of harming others, namely "unborn human beings.").

“liberty,” which includes the right “to physical autonomy . . . .”<sup>195</sup> This “liberty” is from the 14<sup>th</sup> Amendment’s Due Process Clause.<sup>196</sup> The Court, however, was clear in holding that rights implicit to this concept of ordered liberty must be one deeply rooting in this Nation’s history and tradition, of which abortion is not.<sup>197</sup>

On at least one occasion, a defendant on drug-related charges challenged the state’s Controlled Substances Act as being a violation of his rights to equal protection and substantive due process under both the U.S. and Wyoming Constitutions by operating in an unequal and disparate manner because tobacco and alcohol are excluded from the application of the state’s CSA.<sup>198</sup> Hardison made two basic arguments: the Wyoming Controlled Substances Act impinges on his fundamental right to freedom of thought and violates equal protection by excluding tobacco and alcohol with no legitimate government interest in treating these substances differently from other illicit drugs regulated in the Act.<sup>199</sup> To support his freedom of thought argument, Hardison cited to *Doe v. City of Lafayette*.<sup>200</sup> There, the court stated that a government entity “runs afoul of the First Amendment when it punishes an individual for pure thought.”<sup>201</sup> He stated that “the consumption of a controlled substance illegal[ly] infringes [on] one’s fundamental right to freedom of thought, [because every] individual has the right to control, alter and effect one’s thoughts, emotions, and sensations in a comprehensive sense.”<sup>202</sup> Regarding equal protection, Hardison argued that those who consume and distribute tobacco and alcohol are “similarly situated” as those who use Schedule I drugs because tobacco and alcohol are dangerous, intoxicating, and can be addictive.<sup>203</sup> Specifically, he argued that “the Act is unconstitutional because its exclusion of alcohol and tobacco as controlled substances is without a rational basis and violates the equal protection provisions of both the United States and Wyoming Constitutions.”<sup>204</sup>

In rejecting both arguments, the Wyoming Supreme Court held that the U.S. Supreme Court “has made it clear that only governmental regulations aimed at mere thought, and not thought plus conduct, trigger this principle.”<sup>205</sup> This means that regulations may impact thought, so long as that effect

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

<sup>196</sup> U.S. CONST. amend. XIV, § 1; *see also* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (describing the implicit rights protected by the Fourteenth Amendment as those which must fit “the very essence of a scheme of ordered liberty”).

<sup>197</sup> *See* *Dobbs*, 142 S. Ct. at 2242.

<sup>198</sup> *See* *Hardison v. State*, 2022 WY 45, 507 P.3d 36, 38 (Wyo. 2022).

<sup>199</sup> *See id.* at 39–40, 41–42.

<sup>200</sup> *See id.* at 40 (citing *Doe v. City of Lafayette*, 377 F.3d 757, 765 (7th Cir. 2004)).

<sup>201</sup> *Doe*, 377 F.3d at 765.

<sup>202</sup> *Hardison*, 507 P.3d at 36.

<sup>203</sup> *Id.* at 41, 44.

<sup>204</sup> *Id.* at 41–42.

<sup>205</sup> *Id.* at 40.

is incidental to the regulation of conduct, which will not be held as a violation of the First Amendment's "freedom of mind mandate."<sup>206</sup> Because the Act does not regulate pure thought, it does not violate the First Amendment since the law criminalizes conduct, not thought.<sup>207</sup> In rejecting the equal protection argument, the court held that the "[f]ailure to address a certain problem in an otherwise comprehensive legislative scheme is not fatal to the legislative plan."<sup>208</sup>

Over the last decade, the UN human rights system has had a growing concern of the human rights impacts of drug policies, especially with arbitrary detention.<sup>209</sup> Flavia Pansieri, UN official and Deputy High Commissioner for Human Rights, stated that the world drug problem impacts five main areas: "the right to health, rights relating to criminal justice, the prohibition of discrimination including, in particular against ethnic minorities and women, the rights of the child and the rights of indigenous peoples."<sup>210</sup>

The 1948 Universal Declaration of Human Rights states that all have "the right to a standard of living adequate for the health and well-being of [self] and [family]."<sup>211</sup> The right to "the highest attainable standard of physical and mental health" was recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural Rights.<sup>212</sup> Other international human rights treaties have also acknowledged a right to health, or at least a right

<sup>206</sup> *Id.* (citing *Doe v. City of Lafayette*, 377 F.3d 757, 765 (7th Cir. 2004)).

<sup>207</sup> *See id.* at 40 (stating that Mr. Hardison does not have a fundamental right to distribute drugs).

<sup>208</sup> *Hardison v. State*, 2022 WY 45, 507 P.3d 36, 45.

<sup>209</sup> *See Strengthening the Role of the UN Human Rights System in Drug Policies: The Case of Arbitrary Detention*, INT'L DRUG POL'Y CONSORTIUM (July 2, 2021), <https://idpc.net/events/2021/07/strengthening-the-role-of-the-un-human-rights-system-in-drug-policies-the-case-of-arbitrary-detention>; *see also* G.A. Res. 217A, art. 9, Universal Declaration of Human Rights (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (describing rights against arbitrary arrest, detention, and exile); *see generally* U.S. CONST. amends. IV, V, XIV (describing analogous rights in the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution, against unreasonable searches and seizures and violations of due process).

<sup>210</sup> *World Drug Problem Violates Human Rights in Five Key Areas, Says UN Official*, UN NEWS (Sept. 28, 2015), <https://news.un.org/en/story/2015/09/510142-world-drug-problem-violates-human-rights-five-key-areas-says-un-official>; *see* 999 U.N.T.S. 173 <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>. (stating that all peoples have the right of self-determination, and by virtue of that status can freely pursue their economic, social, and cultural development); *see also* U.N.T.S. at 177 (determining other rights include the right against arbitrary or unlawful interference with one's privacy; *see also* U.N.T.S. at 178 (stating the right to freedom of thought, conscience, and religion, as well as a right against coercion which would impair this freedom); *see also* U.N.T.S. at 178 (stating that Article 19 gives the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, . . . through any other media of one's choice)).

<sup>211</sup> G.A. Res. 217A, *supra* note 209, at art. 25.

<sup>212</sup> G.A. Res. 2200A (XXI), art. 12, International Covenant on Civil and Political Rights (Dec. 16, 1966) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

to medical care.<sup>213</sup> “It is crucial that every State recognize the right to health within its borders, since all States have ratified at least one international treaty observing the right to health in one form or another.”<sup>214</sup> Conflictingly, rights to healthcare in the United States have been weak because courts have historically rejected the possibility of “positive” rights under the Constitution.<sup>215</sup>

Arbitrariness is particularly relevant to drug policies.<sup>216</sup> In an extensive U.K. government study conducted in 2010, researcher David Nutt and his team measured the relevant harm of various substances, finding that alcohol was by far the most harmful to the individual and society, followed by tobacco.<sup>217</sup> Many other Class A drugs, similar to Schedule I drugs in the U.S., and psychedelic drugs actually carried little risk of harm.<sup>218</sup> The government’s response to the study has been that U.K.’s “drug policy isn’t based solely on science, [but is also] based on cultural and historical precedent.”<sup>219</sup> Considering that alcohol and nicotine users alike can alter their consciousness freely despite the proven risks while psychedelic users face heavy punishment, the argument that cultural and historical precedent permissibly applies to drug policies but admittedly not for justifying racial discrimination provides evidence of arbitrary application of law.<sup>220</sup> This issue also exists in the United States, as echoed in the Controlled Substances Act, which makes exceptions for alcohol, tobacco, and caffeine use,<sup>221</sup> drugs that have long been a part of our culture and history.<sup>222</sup>

#### IV. FUTURE TRENDS

Meanwhile in Congress, Missouri Representative Cori Bush and New Jersey Representative Bonnie Watson Coleman introduced the first-ever bill to federally decriminalize possession of all currently illicit drugs and shift regulatory authority from the Justice Department to the Department of Health and Human

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<sup>213</sup> See U.N. High Comm’r for Hum. Rts. & WHO., The Right to Health, Fact Sheet No. 31 (June 2008), <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>.

<sup>214</sup> *Id.* at 1.

<sup>215</sup> See David Orentlicher, *Rights to Health Care in the United States: Inherently Unstable*, 38 AM. J. OF L. & MED. 326 (2012) (“[T]he Constitution is a charter of negative rather than positive liberties.” (citing *Wideman v. Shallowford Cmty. Hosp.*, 826 F.2d 1030, 1033 (11th Cir. 1987))).

<sup>216</sup> See Morin, *supra* note 174 (explaining how current drug laws are arbitrarily discriminatory).

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

<sup>218</sup> See *id.*

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

<sup>220</sup> See *id.*

<sup>221</sup> See 21 U.S.C. § 802(6) (“The term “controlled substance” . . . does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986”).

<sup>222</sup> See Marc-Antoine Crocq, *Historical and Cultural Aspects of Man's Relationship with Addictive Drugs*, 9 DIALOGUES IN CLINICAL NEUROSCIENCE 355, 356–57 (2007) (showing global history of drug use).

Services.<sup>223</sup> This push for federal decriminalization would incentivize states to follow suit.<sup>224</sup>

On April 22, 2021, the Florida Supreme Court determined in a 5-2 ruling that the Make It Legal Florida initiative, which already collected 556,049 of the required 891,589 signatures to place the initiative before voters, was unconstitutional and “affirmatively misleading” because the ballot summary would make adult-use cannabis lawful in the state without explicitly acknowledging that it would remain federally illegal.<sup>225</sup> On June 17, 2021, the Florida Supreme Court shut down yet another cannabis initiative, the Sensible Florida campaign, for similar reasons, determining that the term “limited use” made the measure “affirmatively misleading.”<sup>226</sup> In a comprehensive effort, Florida representative Dotie Joseph (D) filed the legislation, titled the “Collateral Consequences of Convictions and Decriminalization of Cannabis and All Drugs Act” on November 23, 2021, in the Florida House of Representatives.<sup>227</sup> The bill would decriminalize all currently illicit drugs in Florida for personal usage, providing avenues for harm reduction services instead of criminalization.<sup>228</sup> Further, it would establish mandatory state-run research on identifying “more effective

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<sup>223</sup> See Kyle Jaeger, *First-Ever Congressional Bill To Decriminalize All Drugs Announced Ahead Of Nixon Drug War Anniversary*, MARIJUANA MOMENT (June 15, 2021), <https://www.marijuanamoment.net/first-ever-congressional-bill-to-decriminalize-all-drugs-introduced-ahead-of-nixon-drug-war-anniversary/>; see also Press Release, Bonnie Watson Coleman, Representative, House of Representatives, Statement on Federal Bill to Decriminalize Drug Possession (June 15, 2021), <https://watsoncoleman.house.gov/newsroom/press-releases/rep-watson-coleman-and-bush-introduce-federal-bill-to-decriminalize-drug-possession-replace-with-health-centered-approach>; see also Press Release, Cori Bush, Representative, House of Representatives, Statement on Federal Bill to Decriminalize Drug Possession (June 15, 2021), <https://bush.house.gov/media/press-releases/rep-cori-bush-and-bonnie-watson-coleman-introduce-federal-bill-decriminalize> [hereinafter Press Release, Cori Bush] (stating that the bill, Drug Policy Reform Act, was introduced on June 15, 2021, just two days ahead of the 50th Anniversary of President Nixon’s declaration of the War on Drugs).

<sup>224</sup> See Press Release, Cori Bush, *supra* note 223 (explaining how the bill would withhold federal funds for states enforcing criminalization, likely incentivizing states and municipalities to stop).

<sup>225</sup> Kyle Jaeger, *Florida Supreme Court Kills 2022 Marijuana Legalization Initiative That Hundreds Of Thousands Had Signed*, MARIJUANA MOMENT (Apr. 22, 2021), <https://www.marijuanamoment.net/florida-supreme-court-kills-2022-marijuana-legalization-initiative-that-hundreds-of-thousands-had-signed/> (showing that the Florida Supreme Court put an end to an initiative that received hundreds of thousands of votes in support of legalization of marijuana).

<sup>226</sup> Kyle Jaeger, *Florida Supreme Court Kills Another Marijuana Legalization Ballot Measure For 2022*, MARIJUANA MOMENT (June 17, 2021), <https://www.marijuanamoment.net/florida-supreme-court-kills-another-marijuana-legalization-ballot-measure-for-2022/> (explaining that the Florida Supreme Court shot down a ballot measure for legalizing marijuana).

<sup>227</sup> See Kyle Jaeger, *Florida Lawmaker Files Bill To Decriminalize All Currently Illicit Drugs*, MARIJUANA MOMENT (Nov. 29, 2021), <https://www.marijuanamoment.net/florida-lawmaker-files-bill-to-decriminalize-all-currently-illicit-drugs/>.

<sup>228</sup> See *id.* (stating that the bill aims to decriminalize all currently illicit drugs, and for cannabis specifically, would make possession of up to one ounce a non-criminal violation punishable by a \$50 fine, rather than a misdemeanor offense).

methods of addressing drug addiction in lieu of criminalizing.”<sup>229</sup> On March 14, 2022, the bill died in the Criminal Justice & Public Safety Subcommittee.<sup>230</sup>

In New Hampshire, 19-year-old state representative Tony Labranche (D) plans to push legislation to decriminalize possession of any controlled substance.<sup>231</sup> 20-year-old Kansas lawmaker Aaron Coleman (D), who defeated a seven-term incumbent in a Democratic primary in 2020, introduced a bill on February 9, 2021 to broadly decriminalize drug possession.<sup>232</sup> Labranche and Coleman were inspired by more and more jurisdictions working to end criminalization, especially of cannabis and other psychedelics.<sup>233</sup>

It is clear that since its passing, an increasing number of states<sup>234</sup> have opposed the harsh effects of the CSA, but amendments at the federal level, such as rescheduling of certain drugs that do not appear to fit the schedule criteria, have remained halted.<sup>235</sup> In 2016, the DEA released another decision on whether it will reschedule marijuana, a decision many have called “outrageous.”<sup>236</sup> According to DEA chief Chuck Rosenberg, the decision to deny the petitioners’ request of rescheduling marijuana from Schedule I to any lesser classification was “rooted in science.”<sup>237</sup> Rosenberg cited to the lack of FDA-accepted scientific research to prove the medical uses of cannabis, bolstered by its perceived high risk of abuse.<sup>238</sup> Not much has changed since 2001, when

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<sup>229</sup> Jaeger, *Florida Lawmaker*, *supra* note 227.

<sup>230</sup> See *HB 725 - Collateral Consequences and Penalties for Criminal Offenses*, FLORIDA HOUSE OF REPRESENTATIVES, <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=74936> (last visited Apr. 28, 2022).

<sup>231</sup> See Kyle Jaeger, *19-Year-Old New Hampshire Lawmaker Prepares Bills To Decriminalize Psilocybin And All Drugs*, MARIJUANA MOMENT (Sept. 30, 2021), <https://www.marijuanamoment.net/19-year-old-new-hampshire-lawmaker-prepares-bills-to-decriminalize-psilocybin-and-all-drugs/>.

<sup>232</sup> See Kyle Jaeger, *20-Year-Old Kansas Lawmaker Files Drug Decriminalization Bill*, MARIJUANA MOMENT (Feb. 12, 2021), <https://www.marijuanamoment.net/20-year-old-kansas-lawmaker-files-drug-decriminalization-bill/>.

<sup>233</sup> See Jaeger, *New Hampshire*, *supra* note 231.

<sup>234</sup> See, e.g., Kyle Jaeger, *Marijuana Legalization Has Majority Support In North Carolina, Poll Finds*, Marijuana Moment (Feb. 11, 2021), <https://www.marijuanamoment.net/marijuana-legalization-has-majority-support-in-north-carolina-poll-finds/> (reviewing marijuana decriminalization in North Carolina); see also Kyle Jaeger, *Missouri Lawmakers Discuss GOP-Led Psychedelics Therapy And Decriminalization Bill In Committee*, MARIJUANA MOMENT (Mar. 21, 2021), <https://www.marijuanamoment.net/missouri-lawmakers-discuss-gop-led-psychedelics-therapy-and-decriminalization-bill-in-committee/> (discussing psychedelics therapy and decriminalization in Missouri).

<sup>235</sup> See German Lopez, *The Federal Drug Scheduling System, Explained*, VOX, (Aug. 11, 2016, 9:05 AM), <https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana> [hereinafter Lopez, *Federal*].

<sup>236</sup> *Id.*

<sup>237</sup> Carrie Johnson, *DEA Rejects Attempt to Loosen Federal Restrictions on Marijuana*, NPR (Aug. 10, 2016, 9:30 PM), <https://www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions-on-marijuana>. (explaining how Rhode Island Gov. Gina Raimondo, Washington Gov. Jay Inslee, and New Mexico nurse practitioner Bryan Krumm petitioned the DEA to move marijuana from Schedule I to any other schedule).

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

the DEA denied a petition<sup>239</sup> by Jon Gettman, Associate Professor of Criminal Justice at Shenandoah University,<sup>240</sup> and it is unlikely that changes will increase in the near future.<sup>241</sup>

On April 1, 2021, the National Drug Control Policy (“NDCP”) announced the Biden-Harris Administration’s policy priorities regarding the first year, which included more access to evidence-based treatment by “removing unnecessary barriers to buprenorphine prescribing . . . and modernizing methadone treatment,” in addition to Syringe Services Programs, further promoting the message of harm-reduction.<sup>242</sup> In September 2021, Regina LaBelle, Acting Director of the NDCP, presented to Congress the Administration’s recommendations for a long-term, consensus approach to reduce the supply and availability of illicitly manufactured fentanyl-related substances (FRS),<sup>243</sup> but this key policy priority has attracted much attention and contention.<sup>244</sup> “The Biden proposal would permanently put many drugs chemically related to fentanyl into the most restrictive category . . . .”<sup>245</sup> While it is stated that the proposal will protect civil rights and reduce barriers to scientific research for all Schedule I substances, a coalition of nearly one hundred civil rights and criminal justice reform groups is protesting the proposal, claiming it would potentially stiffen prison sentences for certain synthetic opioids and exacerbate racial disparities already present in the system.<sup>246</sup> Sakira Cook, who closely follows the issues for the Leadership Conference on Civil and Human Rights, says “the prosecute first, ask questions later approach is wrong and doesn't help until it's too late.”<sup>247</sup> Despite the divided Congress, both parties seem to agree there is a national opioid

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<sup>239</sup> See Notice of Denial of Petition, 66 Fed. Reg. 75 (Apr. 18, 2001), <https://www.govinfo.gov/content/pkg/FR-2001-04-18/pdf/01-9306.pdf>.

<sup>240</sup> See Jon Gettman, SHENANDOAH UNIVERSITY, <https://www.su.edu/faculty-staff/faculty/jon-gettman/> (last visited Nov. 17, 2022).

<sup>241</sup> See Travis McDermott, *Congress Keeps Taking Baby Steps on Marijuana Reform*, JDSUPRA (May 27, 2021), <https://www.jdsupra.com/legalnews/congress-keeps-taking-baby-steps-on-8779251/> (explaining that lawmakers are interested in changing cannabis laws, but the DEA is not).

<sup>242</sup> Press Release, White House Briefing Room, Biden-Harris Admin. Announces First-Year Drug Policy Priorities (Apr. 1, 2021), <https://www.whitehouse.gov/ondcp/briefing-room/2021/04/01/biden-harris-administration-announces-first-year-drug-policy-priorities/>.

<sup>243</sup> See Press Release, White House Briefing Room, Biden-Harris Admin. Provides Recommendations to Congress on Reducing Illicit Fentanyl-Related Substances (Sept. 2, 2021), <https://www.whitehouse.gov/ondcp/briefing-room/2021/09/02/biden-harris-administration-provides-recommendations-to-congress-on-reducing-illicit-fentanyl-related-substances/> [hereinafter Press Release, Fentanyl].

<sup>244</sup> See Carrie Johnson, *A Proposed Biden Drug Policy Could Widen Racial Disparities, Civil Rights Groups Warn*, NPR, <https://www.npr.org/2021/10/22/1048462244/a-proposed-biden-drug-policy-could-widen-racial-disparities-civil-rights-groups-> (Oct. 22, 2021, 5:24 PM).

<sup>245</sup> Johnson, *supra* note 244; see also Press Release, Fentanyl, *supra* note 243 (providing background on the temporary placement of fentanyl-related substances (“FRS”) into Schedule I).

<sup>246</sup> See Johnson, *supra* note 244.

<sup>247</sup> Johnson, *supra* note 244 (described the case of Todd Coleman, an Ohio man who got a mandatory 10-year prison term for allegedly distributing a fentanyl-type substance, and a court later reduced his sentence to three years after finding that none of the drugs were highly restricted substances and one wasn't dangerous or illegal at all).

problem, but advocates warn congressional leaders against repeating the same abrasive laws once used to address the crack epidemic during the 1980s and 1990s.<sup>248</sup>

On July 23, 2019, New York Representative Jerrold Nadler introduced the Marijuana Opportunity Reinvestment and Expungement (MORE) Act.<sup>249</sup> If passed, the MORE Act would decriminalize marijuana by removing it from the list of scheduled substances under the Controlled Substances Act and eliminate criminal penalties for an individual who manufactures, distributes, or possesses marijuana.<sup>250</sup> Additionally, it would replace statutory references to *marijuana* and *marihuana* with *cannabis*, among other effects.<sup>251</sup> Although the bill passed the House, most did not expect the Republican-controlled Senate to support it,<sup>252</sup> and this prediction was confirmed when the bill died in the Committee on Finance.<sup>253</sup>

The MORE Act was reintroduced by Representative Nadler on May 28, 2021, with minor changes such as, studying the impacts of recreational cannabis on highway safety, the workplace, and schools.<sup>254</sup> The House passed the bill on April 1, 2022 on a 220-204 vote, but it is unclear whether it will pass the Senate.<sup>255</sup> On February 4, 2022, Senate Majority Leader, Chuck Schumer, stated that the legislation would be introduced in the Senate in April of 2022.<sup>256</sup> Later in February, Schumer requested other senators to join the process of perfecting the discussion draft<sup>257</sup> on cannabis decriminalization that he previously

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<sup>248</sup> See Johnson, *supra* note 244 ("So this is the issue of the day but it's a repeat of our past, and we do not want this administration or any other administration to continue to make the same mistakes that we have made in the past, and we want to chart a new path forward.").

<sup>249</sup> See H.R. 3884, 116th Cong. (2020); see generally S. 2227 116th Cong. (2019) (introducing the Senate companion bill, S.2227, on the same day by then-Senator Kamala Harris).

<sup>250</sup> See H.R. 3884, *supra* note 249.

<sup>251</sup> See *id.*; see also Alex Halperin, *Marijuana: Is it Time to Stop Using a Word with Racist Roots?*, THE GUARDIAN (Jan. 29, 2018, 5:00 AM), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism> (discussing a discourse on the term marijuana, promulgated by Prohibitionists to emphasize the drug's foreignness to white Americans and appeal to the xenophobia of the time).

<sup>252</sup> See Deirdre Walsh, *House Approves Decriminalizing Marijuana; Bill to Stall in Senate*, NPR (Dec. 4, 2020), <https://www.npr.org/2020/12/04/942949288/house-approves-decriminalizing-marijuana-bill-to-stall-in-senate>; see also Sarah Ferris & Natalie Fertig, *House Punts Marijuana Vote*, POLITICO (Sept. 17, 2020, 3:40 PM), <https://www.politico.com/news/2020/09/17/congress-marijuana-vote-delayed-417122> (discussing how moderates have expressed worry that passing the bill before a coronavirus deal had been reached could negatively impact them in the upcoming election).

<sup>253</sup> See generally S. 2227 (showing the bill as it was when it died in committee).

<sup>254</sup> See H.R. 3617, 117th Cong. (2d Sess. 2022).

<sup>255</sup> See Cristina Marcos, *House Approves Bill Legalizing Marijuana*, THE HILL (Apr. 1, 2022, 12:40 PM), <https://thehill.com/news/house/3256370-house-approves-bill-legalizing-marijuana/>.

<sup>256</sup> See *Senate Majority Leader Provides Timeline for Introducing Long-Awaited Marijuana Descheduling Plan*, NORML (Feb. 7, 2022), <https://norml.org/blog/2022/02/07/senate-majority-leaders-provides-timeline-for-introducing-long-awaited-marijuana-descheduling-plan/>.

<sup>257</sup> See generally Cory Booker, Ron Wyden, & Chuck Schumer, *Cannabis Admin. And Opportunity Act: Discussion Draft*, <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> (showing the draft the senators put together).

introduced in July.<sup>258</sup> The bill was then scheduled to be introduced on April 20, 2022, on the unofficial cannabis holiday,<sup>259</sup> but the timeline has been pushed back to just before recess in August.<sup>260</sup> Support for Senator Schumer among his own caucus may be lacking, with Senators Joe Manchin of West Virginia and Jeanne Shaheen of New Hampshire expressing skepticism.<sup>261</sup> Compared to the first iteration of the MORE Act in 2019/2020, the Act of 2021 appears to have less GOP support.<sup>262</sup>

On March 24, 2022, the Senate unanimously approved the Cannabidiol and Marihuana Research Expansion Act, which would streamline the application process for cannabis researchers, encourage the Food and Drug Administration (“FDA”) to develop cannabis-derived medicines, allow physicians to discuss with patients the risks and benefits of cannabis, as well as require the U.S. Department of Health and Human Services (“HHS”) to submit a report on those potential health benefits.<sup>263</sup> The bill now sits with the House.<sup>264</sup>

## V. APPRAISALS

### A. Federal Prohibition

Although states are successfully passing their own reform-based laws, people are still vulnerable to violating federal law and can face various consequences even if prosecutorial discretion limits bringing drug charges. These groups would include businesses and banks that operate, or avoid operating, within state-legalized cannabis industries because of potential federal

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<sup>258</sup> See Jordain Carney, *Schumer Asks for Input as Democrats Finalize Cannabis Bill*, THE HILL (Feb. 10, 2022, 10:03 AM), <https://thehill.com/homenews/senate/593662-schumer-asks-for-input-as-democrats-finalize-cannabis-bill/>.

<sup>259</sup> See Jonathan D. Salant, *Booker Aims for 4/20 to Drop a New Legal Weed Bill*, NEW JERSEY (Apr. 4, 2022, 7:24 AM), <https://www.nj.com/marijuana/2022/04/booker-aims-for-420-to-drop-a-new-legal-weed-bill.html>.

<sup>260</sup> See Aris Folley, *Timeline for Marijuana Legalization Bill Slips in Senate*, MICROSOFT NEWS (Apr. 14, 2022), <https://www.msn.com/en-us/news/politics/timeline-for-marijuana-legalization-bill-slips-in-senate/ar-AAWezeX>.

<sup>261</sup> See Marcos, *supra* note 255.

<sup>262</sup> See Jacob Sullum, *When Will Democrats Get Serious About Repealing Pot Prohibition?*, REASON (Apr. 6, 2022, 12:01 AM), <https://reason.com/2022/04/06/when-will-democrats-get-serious-about-repealing-pot-prohibition/>. Rep. Thomas Massie (R-Ky.) criticizes Congress for banning marijuana, claiming it had no constitutional authority to do so. *Id.* He nevertheless voted against the MORE Act, objecting to the “new marijuana crimes” its tax and regulatory provisions would create, with each violation punishable by up to five years in prison and a \$10,000 fine. *Id.* See generally Jacob Sullum, *Are Democrats Serious About Legalizing Marijuana?*, REASON (Nov. 2021), <https://reason.com/2021/10/19/are-democrats-serious-about-legalizing-marijuana/> (discussing doubts regarding Democratic commitment to decriminalization).

<sup>263</sup> See Kyle Jaeger, *U.S. Senate Unanimously Approves Marijuana Reform Bill on Same Day That House Schedules Legalization Vote*, MARIJUANA MOMENT (Mar. 24, 2022), <https://www.marijuanamoment.net/u-s-senate-unanimously-approves-marijuana-reform-bill-on-same-day-that-house-schedules-legalization-vote/>.

<sup>264</sup> See S. 253, 117th Cong. (2d Sess. 2022).

penalties,<sup>265</sup> federal employees who cannot legally access medical cannabis even if they live in a legalized state,<sup>266</sup> and veterans who access healthcare through VA hospitals.<sup>267</sup> In addition to criminal liability, an analogy can be drawn between the modern-era deaths caused by drugs adulterated with illicit fentanyl and the deaths caused by government-mandated denaturing of alcohol during the 1920s, which are both foreseeable deaths resulting from prohibitive policies. Prohibitive policies are pursued despite the knowledge of their ineffectiveness, disproportionate effects on racial minorities, exorbitant costs, and the deaths that will ensue. We cannot afford to continue, and “the human cost is incalculable.”<sup>268</sup>

B. “Overdose crisis” vs. “Opioid crisis”

The term ‘opioid crisis’ has brought much negative attention to pharmaceutical corporations who have been accused of over-prescribing drugs that carry a high risk of abuse, such as OxyContin, and helping to fuel the opioid overdose deaths.<sup>269</sup> The Sackler family, owners of Purdue Pharma LP, agreed to pay upwards of six billion dollars to resolve claims alleging that they “fueled the U.S. opioid epidemic.”<sup>270</sup> Johnson & Johnson, McKesson Corp, AmerisourceBergen Corp, and Cardinal Health Inc. reached a twenty-six billion dollar settlement agreement resolving claims by states and local governments that they greatly contributed to the U.S. opioid epidemic.<sup>271</sup>

Interestingly, the statistics from the CDC and the National Institute of Drug Abuse that have tracked overdose deaths over the last twenty-three years

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<sup>265</sup> See Kyle Jaeger, *Don't Expect Senate Marijuana Banking Vote Any Time Soon, Key Chairman Says*, MARIJUANA MOMENT (Apr. 22, 2021), <https://www.marijuanamoment.net/dont-expect-senate-marijuana-banking-vote-any-time-soon-key-chairman-says/>.

<sup>266</sup> See Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986); see also *Marijuana and the Workplace*, BLANCHARD & WALKER PLLC, <https://bwlawonline.com/blog/employee-rights/marijuana-workplace> (last visited Nov. 17 2022) (explaining that a federal employee can be fired for testing positive for marijuana on a drug test despite living in a state where marijuana is legal).

<sup>267</sup> See Todd Hunter, *The Cannabis Cure*, DAV (Nov. 6, 2018), <https://www.dav.org/learn-more/news/2018/the-cannabis-cure/> (“While the VA cannot deny veterans benefits due to medical marijuana use, VA providers cannot recommend or prescribe cannabis since the Food and Drug Administration still classifies it as a Schedule I drug. Instead, Watson has to pay out of pocket for an annual physician’s evaluation and a medical cannabis card in Maryland—one of [thirty] states, as well as the District of Columbia, which has legalized medical marijuana.”).

<sup>268</sup> Carl L. Hart, *Viewing Addiction as a Brain Disease Promotes Social Injustice*, NATURE HUMAN BEHAVIOR (Feb. 17, 2017), <https://www.nature.com/articles/s41562-017-0055> (describing the narrative of the disease model of addiction being widely used to justify the detrimental effects of law enforcement as a primary means to deal with drug use, despite the majority of which being non-problematic and recreational).

<sup>269</sup> See Dietrich Knauth et al., *Sacklers to Pay \$6 Billion to Settle Purdue Opioid Lawsuits*, REUTERS (Mar. 4, 2022, 5:48 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/sacklers-will-pay-up-6-bln-resolve-purdue-opioid-lawsuits-mediator-2022-03-03/>.

<sup>270</sup> *Id.*

<sup>271</sup> See Nate Raymond, *Drug Distributors, J&J Agree to Finalize \$26 Billion Opioid Settlement*, REUTERS (Feb. 25, 2022, 3:09 PM), <https://www.reuters.com/legal/litigation/drug-distributors-agree-finalize-opioid-settlement-2022-02-25/>.

enlighten us with a different perspective.<sup>272</sup> Between 2015 and 2016, overdose deaths by illicit fentanyl and fentanyl analogues rose from 9,580 to 19,413, which was higher than any other drug deaths and higher than prescription opioids by nearly 5,000 deaths.<sup>273</sup> The disparity between deaths caused by illicit fentanyl and prescription opioids has grown at an alarming rate since 2016, and in 2022, fentanyl killed 56,865 people compared to 13,505 people killed by prescription opioids.<sup>274</sup>

The 2020 National Survey on Drug Use and Health found that 10.1 million people misused prescription opioids in the past year,<sup>275</sup> but even reducing opioid prescriptions to only the most severe cases of treatment and pain management would directly address a relatively minor portion of overdose deaths, most of which are ultimately caused by illicit drugs, which contain fentanyl, that are manufactured by unknown parties. This is not to say that prescription opioids have not played a noticeable role in overdoses across the country, but the argument that prescription opioids are the sole cause leading people to seek illicit opioids that happen to be tainted with fentanyl may be questioned by evidence that fentanyl is also found in other common illicit drugs, not just opioids.<sup>276</sup> Essentially, anyone taking a street drug that could be mixed with fentanyl is at risk for overdose death, even if it is his/her/their first time taking an illicit drug, whether or not it is an opioid. Although it is an excellent place to start, U.S. drug reform must encompass more than prescription drug reform.

### C. The Controlled Substances Act & U.S. Patent Law as to Psychedelics

The CSA's use of language to describe a drug's particular "high potential of abuse" is a significant one.<sup>277</sup> The DEA has no official definition of "abuse" but instead lists factors such as high prevalence of use, rather than high risk and severity of withdrawal, for example, to evaluate the addictiveness of particular

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<sup>272</sup> *Drug War Statistics*, *supra* note 13 (citing CDC overdose death graph); *Overdose Death Rates*, NIDA (Jan. 20, 2022), <https://nida.nih.gov/drug-topics/trends-statistics/overdose-death-rates> (showing an increase in drug overdose deaths from 2019 to 2020).

<sup>273</sup> *Drug War Statistics*, *supra* note 13 (illustrating the number of overdose deaths by particular drugs).

<sup>274</sup> *Id.*

<sup>275</sup> See *What is the U.S. Opioid Epidemic?*, DEP'T OF HEALTH AND HUMAN SERVICES, <https://www.hhs.gov/opioids/about-the-epidemic/index.html> (last visited Nov. 17, 2022).

<sup>276</sup> See *Fentanyl*, APLA HEALTH <https://aplahealth.org/fentanyl/> (last visited Nov. 17, 2022) (explaining how lethal amounts of fentanyl can be found in a host of illicit drugs); see also Timothy Bella, *West Point Cadets Overdose on Fentanyl While on Spring Break in South Florida*, *Police Say*, WASH. POST (Mar. 12, 2022, 9:59 AM), <https://www.washingtonpost.com/nation/2022/03/12/west-point-cadets-overdose-fentanyl/>. Around 5 p.m. on March 10, 2021, responders from Fort Lauderdale Fire Rescue administered medical aid to six young men, including four who were found in cardiac arrest on the front lawn. *Id.* Four of the people involved took a substance that appeared to be cocaine laced with fentanyl, and when two others in the group tried to administer CPR, they were exposed to the fentanyl by mouth, also going into cardiac arrest. *Id.*

<sup>277</sup> Lopez, *Federal*, *supra* note 235.

drugs.<sup>278</sup> The fact that cannabis is decriminalized and even legalized in some states, meaning it is used recreationally more often, is actually being used by the DEA to support its contention that cannabis carries a high risk of abuse.<sup>279</sup> This is one example of how the term ‘use’ by the public and ‘abuse’ as defined by the DEA are inappropriately interchanged and mean different things. This is one contributing factor as to why cannabis, even though legal in some states, remains a Schedule I drug federally.

Another barrier to decriminalization of cannabis exists in the inherent difficulty in researching Schedule I drugs.<sup>280</sup> The restrictive classification creates regulatory barriers that only allow access by certain researchers authorized by the government; unfortunately, the data produced by the research is also critical in proving the medical and therapeutic benefits of cannabis, which is the key difference between Schedule I and II classifications.<sup>281</sup> The DEA has admitted to this conundrum, and is reportedly working to fix this regulatory mishap to expand necessary drug research.<sup>282</sup>

On the surface, the DEA’s admission of the classification’s inconsistencies may appear that science has made some headway and that someday soon drugs like cannabis and psilocybin will no longer live in the Schedule I classification. In the meantime, however, there is money to be made, and players of private industries conveniently chauffeur incoming customers to their newly discovered and groundbreaking medicines. Some of these miracle drugs will not become publicly accessible without first being ornamented by the U.S. Patent & Trademark Office. Critics of broad psychedelic drug patents argue that these substances have been used around the world for millennia for exactly its patented purpose: medicinal and therapeutic use.<sup>283</sup> One major problem with patenting psychedelic drugs in particular is the criminal classification of these drugs, which not only historically invalidated anecdotal evidence from coming to the forefront due to the risk of criminal punishment, but also greatly reduced the number of research studies allowed to be conducted because of its Schedule I classification. Only the select elites could conduct the necessary research, submit the data, and claim the patented monopolies. Two such companies are COMPASS Pathways PLC and ATAI Life Sciences, which owns approximately 20.8% stock in COMPASS as of November 2021.<sup>284</sup>

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<sup>278</sup> *See id.*

<sup>279</sup> *See id.* (discussing how increased recreational use of marijuana strengthens the DEA’s assertion that marijuana carries a high risk of abuse).

<sup>280</sup> *See id.*

<sup>281</sup> *See* German Lopez, *DEA Decides Not to Loosen Restrictions on Marijuana, Keeping it Schedule I (with Heroin)*, VOX (Aug. 11, 2016, 11:15 AM), <https://www.vox.com/2016/8/11/12434378/marijuana-schedule-1-dea> (stating that cannabis researchers must first be approved by the HHS, the FDA, and the DEA—a costly, time-consuming process—and the University of Mississippi is the only federally legal grower of cannabis for research purposes).

<sup>282</sup> *See* Lopez, *Federal*, *supra* note 235.

<sup>283</sup> *See* Love, *supra* note 63.

<sup>284</sup> *See* Sam Sheard, *Peter Thiel-backed Psychedelic Start-up Increases Stake in Compass Pathways*,

Patents appear to play the largest role in the pharmaceutical industry, and “pharmaceutical executives report that they regularly drop drugs that lack strong patent protection from their development pipelines.”<sup>285</sup> An extensive study looking at the effect of patent protection on research investments evidenced “less private R&D investment in cancer drugs that require longer clinical trials and thus have shorter effective patent terms.”<sup>286</sup> It was inconclusive whether the reduced investment incentive was caused by these shortened patent terms or from “corporate short-termism.”<sup>287</sup> Nevertheless, corporate culture prioritizes pharmaceutical innovation, and innovation is the heart of what patent law protects, so it appears that corporate short-termism, at least in the pharmaceutical industry, is a direct result of current patent law.

#### *D. Rights violations & reliance on religion*

There is an argument to be made that the application process itself for the RFRA exemption for permissible ceremonial drug use could be a substantial burden on the exercise of religion, particularly as the use of any controlled substance prior to the approval by the DEA of the petition would be unlawful, according to the DEA’s guidance.<sup>288</sup>

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CNBC (Nov. 30, 2021, 4:21 AM) <https://www.cnbc.com/2021/11/29/peter-thiel-backed-atai-snaps-up-compass-pathways-shares.html>. US Patent No 11,180,517 (“COMP360”), granted on October 19, 2021 (Londesbrough, et al., US11149044, Oct. 19, 2021), has become COMPASS’s fifth patent in the U.S. and its tenth patent worldwide; see also *COMPASS Pathways granted fifth US patent for crystalline psilocybin*, COMPASS, <https://compasspathways.com/fifth-us-patent-crystalline-psilocybin/#:~:text=The%20new%20patent%2C%20US%20Patent,crystalline%20psilocybin%20with%20an%20excipient>. (last visited Nov. 17, 2022). COMP360 is synthetic psilocybin, and the patent includes methods of treating treatment-resistant depression (“TRD”) as well as oral dosage forms of the crystalline psilocybin with an excipient. *Id.* In addition to psilocybin, industry research has shown that other psychedelics and their derivatives have broad potential applications for other indications: cannabidiol (CBD) for epilepsy, see Strickland et al., *Cross-sectional and longitudinal evaluation of cannabidiol (CBD) product use and health among people with epilepsy*, EPILEPSY & BEHAV. 122, at 1, 8 (July 23, 2021); see also FM Leweke et al., *Cannabidiol enhances anandamide signaling and alleviates psychotic symptoms of schizophrenia*, TRANSLATIONAL PSYCHIATRY at 1, 3, 6 (2012), 4-Methylenedioxymethamphetamine (MDMA) for post-traumatic stress disorder (PTSD), see Mitchell et al., *MDMA-assisted therapy for severe PTSD: a randomized, double-blind, placebo-controlled phase 3 study*, 27 NATURE MED. 1025, 1032 (2021), and autism spectrum disorder; see also Danforth et al., *Reduction in social anxiety after MDMA-assisted psychotherapy with autistic adults: a randomized, double-blind, placebo-controlled pilot study*, PSYCHOPHARMACOLOGY 3137, 3146 (2018), ketamine for chronic pain; see also Orhurhu et al., *Ketamine Infusions for Chronic Pain: A Systematic Review and Meta-analysis of Randomized Controlled Trials*, 129 ANESTHESIA & ANALGESIA 241, 252 (2019), and post-partum depression, see Alipoor et al., *The effect of ketamine on preventing postpartum depression*, 14 J. OF MED. AND LIFE 87, 91 (2021).

<sup>285</sup> JONATHAN S. MASUR AND LISA LARRIMORE OUELLETTE, PATENT LAW: CASES, PROBLEMS & MATERIALS, 35 (1<sup>st</sup> ed. 2021) (citing Benjamin N. Roin, *Unpatentable Drugs and the Standards of Patentability*, 87 TEX. L. REV. 503, 545 (2009)).

<sup>286</sup> *Id.* at 35, 36 (citing Eric Budish, Benjamin N. Roin & Heidi Williams, *Do Firms Underinvest in Long-Term Research? Evidence from Cancer Clinical Trials*, 105 AM. ECON. REV. 2044 (2015)).

<sup>287</sup> *Id.* at 36.

<sup>288</sup> See Brad Bartlett, *The U.S. Drug Enforcement Administration Problematic Process for Religious*

“While Indigenous Peoples’ cases arise in different contexts, they also appear to test the American commitment to religious freedom . . . .”<sup>289</sup> Indigenous groups seek to recover and validate their own religions, following hundreds of years of oppression, and although Congress did afford certain legislative accommodations after *Lyng*<sup>290</sup> and *Smith*,<sup>291</sup> including the use of peyote and eagle feather possession, these were won on a “case-by-case basis and do not undo [the potentially broader impact under *Smith*] on any other Indigenous religious practices, especially because the courts have interpreted RFRA very narrowly in the Indigenous Peoples’ context . . . .”<sup>292</sup> Outside the context of religious exemptions, Congress is free to exercise its commerce power to ban the use of illicit substances, even if the use is in compliance with state law for medical use, which the Supreme Court upheld in *Gonzales v. Raich*.<sup>293</sup>

Many constitutional scholars argue that prohibitive-based drug policies violate human rights, calling them “the drug exception to the Bill of Rights.”<sup>294</sup> A prime example is found in *Olmstead v. U.S.*,<sup>295</sup> a landmark Supreme Court case about wiretapping and the Fourth Amendment right against unreasonable searches that began with Olmstead’s conviction for violating the Volstead Act.<sup>296</sup> Although former President Franklin D. Roosevelt pardoned Olmstead on December 25, 1935,<sup>297</sup> the Supreme Court’s opinion in the case shaped American law forever, illustrated by “the failure of general historians to recognize the significance of prohibition’s impact on American legal thought . . . .”<sup>298</sup>

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*Exemption for Use of Prohibited Psychoactive Substances*, CHACRUNA INST. FOR PSYCHEDELIC PLANT MEDS. (July 16, 2019), <https://chacruna.net/the-u-s-drug-enforcement-agencys-problematic-process-for-religious-exemption-for-use-of-prohibited-psychoactive-substances/>.

<sup>289</sup> Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARVARD L. REV. 2103, 2105 (2021).

<sup>290</sup> See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441–42 (1988) (rejecting Yurok, Karuk, and Tolowa Indians’ claims that building a road through their prayer sites in a national forest would violate the Free Exercise Clause).

<sup>291</sup> See *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) (holding that a state could deny employment benefits to individuals who lost their jobs for violating a state prohibition on peyote possession, which the employee ingested as a sacrament in the Native American Church).

<sup>292</sup> Carpenter, *supra* note 289, at 2106.

<sup>293</sup> See *Gonzales v. Raich*, 545 U.S. 1, *passim* (2005) (holding that Congress may, under its commerce power, forbid the cultivation and use of marijuana, superseding California’s Compassionate Use Act for medical marijuana).

<sup>294</sup> *Against Drug Prohibition*, *supra* note 182 (Violations include “[r]andom drug testing without probable cause, the militarization of drug law enforcement, heightened wiretapping and other surveillance, the enactment of vaguely worded loitering laws and curfews, forfeiture of people’s homes and assets, [and] excessive and mandatory prison terms . . .”).

<sup>295</sup> See *Olmstead v. United States*, 277 U.S. 438, *passim* (1928).

<sup>296</sup> See Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. OF CRIM. L. AND CRIMINOLOGY 471, 486 (1982) (stating Olmstead was convicted for violating the Volstead Act).

<sup>297</sup> See Daryl C. McClary, *Olmstead, Roy (1886-1966)*, HISTORY LINK (Nov. 13, 2002), <https://www.historylink.org/File/4015>.

<sup>298</sup> Murchison, *supra* note 296, at 472 n.8.

Another example can be found in the Wyoming Supreme Court's decision in *Hardison*.<sup>299</sup> In support of its conclusion of the inapplicability of the First Amendment's protections, the court cited to *Paris Adult Theatre I v. Slaton*,<sup>300</sup> in which the U.S. Supreme Court said, "The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution."<sup>301</sup> This was in response to petitioners' argument that the State has no legitimate interest in controlling the moral content of a person's thoughts.<sup>302</sup> The court in *Hardison* made a reference to a case involving a pornographic film theatre in *Paris Adult*; however, when obscenity is at issue, generally the argument for restrictions is based on public safety and, in the words of Chief Justice Warren, the States' "right . . . to maintain a decent society."<sup>303</sup> In contrast, even assuming that much of illicit drug consumption takes place privately in people's homes, albeit due to the drugs' criminality, an argument that decriminalization would open the door to public consumption of dangerous drugs should be viewed in light of the fact that this already occurs with alcohol and tobacco, for which society has created alternative routes of regulation. Additionally, the destructive effects of criminalizing drug consumption seem to reduce public safety and erode an ordered and 'decent society.' Concededly, *Hardison* was convicted of drug distribution, not consumption, the distinction of which could arguably be based on public safety, though the court also cited language stating that "[t]he Controlled Substances Act's 'central objectives are to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."<sup>304</sup> Unfortunately, criminalization does not appear to conquer drug abuse, but rather drives it.

A key weakness in *Hardison*'s argument was in taking the position that the Controlled Substances Act is essentially underinclusive, as if to say tobacco and alcohol *should* join in Schedule I because they are equally dangerous and thus arbitrarily left out of the classification. Arguing that the CSA is instead overinclusive would likely end in the same result because of state power to regulate commerce, but arguing that at least some drugs on Schedule I should not be there (i.e. marijuana) would force courts to implement a different rationale, perhaps one that could be overcome in time by specifically targeting the CSA's misclassification of Schedule I drugs being used on the state level for medical and therapeutic purposes and undermining the rational basis of the CSA. Indeed the court seems to broach the subject by stating "[e]ven if we assume, without deciding, that Mr. *Hardison* has accurately identified a classification through

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<sup>299</sup> See *Hardison v. State*, 507 P.3d 36, 40 (Wyo. 2022).

<sup>300</sup> See generally *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67–68 (1973) (describing a case about obscenity and pornographic films, not drug use).

<sup>301</sup> *Hardison*, 507 P.3d at 40.

<sup>302</sup> See *Paris Adult Theatre I*, 413 U.S. at 67.

<sup>303</sup> *Id.* at 69 (Warren, C.J., dissenting) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)).

<sup>304</sup> *Hardison*, 507 P.3d, at 43–44 (citing 28 C.J.S. *Drugs and Narcotics* § 210, Westlaw (database updated March 2022)).

which similarly situated persons are treated unequally, the remainder of his argument is unpersuasive.”<sup>305</sup> Constitutional scholars Noah R. Feldman and Kathleen M. Sullivan pose the question whether courts fulfill their constitutional duty when they act so deferentially to any rational basis to economic regulations, the standard of which “does not demand anything approaching a perfect fit to an actual governmental purpose . . . .”<sup>306</sup> They ask whether such a minimal standard, or abandonment of, “render[s] . . . equal protection claim[s] a political question, [effectively making] the legislature and executive self-policing[.]”<sup>307</sup>

Other examples of political influence in adjudication exist in abortion laws, of which judicial decisions on privacy rights and free exercise of religion heavily influence drug laws. In *Dobbs*, Justice Alito endorsed the “unborn human being” language from Miss. Code Ann. § 41-41-191, the challenged law in that case, replacing what was previously referred to as “fetal life” in *Roe* and *Casey*.<sup>308</sup> This shift in language may not appear at first to be legally significant; however, this distinct choice of wording mirrors the conflicting religious interpretations of the Hebrew Bible, or Old Testament, by Jews and Christians.<sup>309</sup> As the Court stated in *Dobbs*, there is no doubt the word ‘abortion’ is absent from the Constitution, but so too is the word ‘Christianity.’<sup>310</sup> If Judaism and Christianity differ in the interpretation of the same text regarding the point at which life begins, it would seem that the Court’s own interpretation of the First Amendment in *Gitlow v. New York*<sup>311</sup> asks the Court to treat these religious views and free exercises thereof as equal before the law, rather than have the

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<sup>305</sup> *Id.* at 43. The remainder of Hardison’s argument was that the Act violates equal protection because the legislature did not explain why it severed tobacco and alcohol from its provisions. The court rejected this argument because the state legislature was not required to articulate its reasons for enacting a statute. Legislatures have wide discretion in attacking social ills. A State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so nonetheless since the forbidden act does not differ in kind from those that are allowed. Additionally, Hardison did not argue that the state cannot regulate the delivery of controlled substances. Thus, the court embarked on its analysis for underinclusiveness, focusing on tobacco and alcohol rather than the misplaced bans on some of the safer Schedule I substances.

<sup>306</sup> FELDMAN & SULLIVAN, *supra* note 175, at 646.

<sup>307</sup> *Id.* at 646.

<sup>308</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (displacing what those decisions called “fetal life” and what the law now before us describes as an “unborn human being”).

<sup>309</sup> See Lindsay Schnell, *Jews, outraged by restrictive abortion laws, are invoking the Hebrew Bible in the debate*, USA TODAY (July 24, 2019, 7:54 PM), <https://www.usatoday.com/story/news/nation/2019/07/24/abortion-laws-jewish-faith-teaches-life-does-not-start-conception/1808776001/> (stating that while conservative Christians use the Bible to argue that a fetus represents a human life, which makes abortion murder, Jews do not believe that fetuses have souls and, therefore, terminating a pregnancy is no crime).

<sup>310</sup> See *Dobbs*, 142 S. Ct. at 2245 (stating that the Constitution makes no express reference to a right to obtain an abortion); see also U.S. CONST. amend. I. (making no reference to Christianity but establishing instead the Free Exercise Clause).

<sup>311</sup> See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that First Amendment restrictions as expressly applying to Congress are extended to apply to state governments through the Fourteenth Amendment).

Court rely on Christianity's deeply rooted history and tradition in this Nation to allot more significance and influence in Constitutional interpretation.<sup>312</sup>

Had the *Dobbs* decision instead left *Roe* intact under a right of privacy, it would still be highly unlikely that the Court would extend privacy rights to the realm of drug use.<sup>313</sup> In retrospect, a preferable Constitutional basis for a right to abortion would have likely survived had the right been protected under the Equal Protection Clause, as the late Justice Ruth Bader Ginsburg had promulgated long ago.<sup>314</sup> Even if that legal groundwork had been laid, an argument that much of drug criminalization is based on racial discrimination—not merely in its effects and inconsistent enforcement but in the inception of the Controlled Substances Act—violating equal protection and lacking a compelling governmental interest, would still likely fail given Congress's power to regulate commerce.

## VI. ALTERNATIVES TO THE U.S. SYSTEM

One major point that creates doubt in the accuracy and impartiality of the CSA is the fact that key drugs are missing from the schedules: namely alcohol, tobacco, and caffeine.<sup>315</sup> If alcohol and tobacco were re-evaluated today, they would both qualify as Schedule I drugs, according to drug policy expert Mark Kleiman.<sup>316</sup> Mr. Kleiman suggests that the current CSA should be done away with and replaced with a new scheduling system that only tracks the dangerousness of drugs.<sup>317</sup> Whether drugs have medicinal benefits are a separate set of issues that should be regulated by healthcare concerns, he says.<sup>318</sup> One problem with the current scheduling system is that each schedule attempts to classify

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<sup>312</sup> See *Dobbs*, 142 S. Ct. at 2253 (holding that a right to abortion is not deeply rooted in the Nation's history and traditions).

<sup>313</sup> See *id.* at 2236 (stating that a broader right to autonomy could license fundamental rights to illicit drug use, prostitution, and the like, none of which are deeply rooted in history).

<sup>314</sup> See Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, UNIV. OF CHICAGO L. SCH. (May 15, 2013), <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit> (describing abortion restrictions as sex-based discrimination and a restriction on physicians' right to practice); see also, e.g., Ruth B. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200–1 (1992). Justice Ginsburg persuasively argued that, had the Court first had the opportunity to hear the case *Struck v. Secretary of Defense*, 409 U.S. 947 (1972), the issue of abortion would have been much more factually clear to the Court as one of sex-based discrimination. *Id.* The case involved Captain Susan Struck's personal and faith-based choice not to obtain an abortion but instead to give birth and give her child up for adoption. *Id.* The Air Force regulations at the time, however, still would have required Captain Struck to be terminated from her position because she gave birth to a child while in a commissioned officer status. *Id.* Had she chosen to have an abortion, the regulations required a pregnant woman to be discharged from the service, nonetheless. *Id.* By the time the Court granted her petition for certiorari, the Air Force waived the regulation, allowing her to continue her service, and the case became moot. *Id.*

<sup>315</sup> See 21 U.S.C. § 802(6).

<sup>316</sup> See Lopez, *Federal*, *supra* note 235.

<sup>317</sup> See *id.*

<sup>318</sup> See *id.*

drugs by their dangerousness and benefits simultaneously, but drugs with completely different effects and risks get lumped together into just a few categories, hence why marijuana, heroin, and psilocybin all get the highest Schedule I stamp, despite each drug operating on different neuro-pathways, creating different effects on the user, being used for different purposes, and carrying different toxicity levels.<sup>319</sup>

One alternative to the current U.S. system would be to expand what is already legal to include all drugs. This approach, although enticing to some, would likely turn a health issue into a freedom of choice, one which would be highly influenced by private commercial entities that are more interested in keeping people as paying customers, at the cost of their personal health. Additionally, complete deregulation is likely impossible given the U.S.'s established industry standards for Good Manufacturing Practices and drug labeling. In fact, simply labeling opiate-containing medicines, as required by the 1906 Pure Food and Drug Act, decreased use by 25% to 50% in the years after the law passed, showing clearly that measures short of criminalization can affect the use of even the most addictive drugs and that education is a powerful part of prevention.<sup>320</sup> This directly speaks to the problems many people faced while being prescribed OxyContin and not recognizing exactly what they were taking, as the ingredient oxycodone hydrochloride was a 'medicine' while street opioids were 'dangerous drugs.'

#### A. Switzerland

In 1993, Ruth Dreifuss was elected as Switzerland's Federal Councillor by the Federal Assembly and was re-elected twice.<sup>321</sup> At the head of public health and social insurance, she pushed forth a new policy for drug addiction and HIV/AIDS prevention.<sup>322</sup> Dreifuss explained to the Swiss people "[W]hen you hear the word 'legalization,' what you picture is anarchy and chaos, but what we have now is anarchy and chaos. We have unknown criminals selling unknown chemicals to unknown drug users all in the dark, all filled with violence, disease, and chaos."<sup>323</sup> Her proposal<sup>324</sup> to legalize heroin, Switzerland's major

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<sup>319</sup> *See id.*

<sup>320</sup> *See* SZALAVITZ, *supra* note 26, at 27 ("The 'typical opiate addict' of the time was actually a mother and housewife who had become inadvertently dependent after buying widely marketed remedies that came with no warnings.").

<sup>321</sup> *See* Ruth Dreifuss, GLOB. COMM'N ON DRUG POL'Y, <https://www.globalcommissionon-drugs.org/commissioner/ruth-dreifuss> (last visited Apr. 29, 2022).

<sup>322</sup> *Id.*

<sup>323</sup> Carrie M. King, *Johann Hari's Key to Humanizing Drug Addiction — Transcript*, BLINKIST MAGAZINE (Mar. 21, 2019), <https://www.blinkist.com/magazine/posts/johann-hari-addict-humanizer-transcript>.

<sup>324</sup> *Id.* Unknown to Dreifuss at the time, the proposal to legalize medical heroin was previously introduced in the U.S. by Dr. Henry Smith Williams and his brother Dr. Edward Smith Williams in 1938. *Id.* The proposal was rejected by Harry Anslinger, who headed the Federal Narcotics Bureau (the precursor to the DEA) for more than three decades—a formative period that shaped the U.S.'s

culprit for drug overdose deaths,<sup>325</sup> was her plan to restore order to this chaos.<sup>326</sup> As a result, Switzerland set up its first legal heroin clinic, Zurich's Arud polyclinic on the Stampfenbachstrasse.<sup>327</sup> Under the plan, people were administered medically pure heroin on site.<sup>328</sup> The results were obvious.<sup>329</sup> In the fourteen years of legal heroin administration, no deaths from overdose had occurred.<sup>330</sup> "Not a single person has died on the legal heroin program in Switzerland since it began."<sup>331</sup> With more people transitioning into the legally available program, heroin deaths outside the program dropped dramatically.<sup>332</sup> After several years of success, "70% of Swiss people voted to keep heroin legal" because overall crime had also fallen significantly.<sup>333</sup> Street crime, property crime, and street prostitution had ended.<sup>334</sup> The Swiss people had spoken, and in 1999, Ruth Dreifuss became Switzerland's first female president, as well as Switzerland's first Jewish member of the Federal Government.<sup>335</sup>

### B. Portugal

Eight years later in 2001, Portugal took a radical step to solve its own drug overdose problem: decriminalize possession and consumption for all illegal drugs.<sup>336</sup> Becoming the first country in the world to do so, Portugal stopped arresting for personal drug use and at most issued a small fine or opted to redirect the situation toward available harm reduction measures, support services,

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drug policy for years to come. Laura Smith, *How a Racist Hate-Monger Masterminded America's War on Drugs*, TIMELINE (Feb. 28, 2018), <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189>. For the full text of Dr. Williams' proposal, see HENRY SMITH WILLIAMS, *DRUG ADDICTS ARE HUMAN BEINGS: THE STORY OF OUR BILLION-DOLLAR DRUG RACKET* (Shaw Publishing Company, 1938).

<sup>325</sup> See Andre Seidenberg, *The Incredible Story of Zürich's Journey to Harm Reduction*, FILTER MAGAZINE (Sept. 9, 2020), <https://filtermag.org/zurich-switzerland-harm-reduction/> (describing Switzerland's Platzspitz city park, internationally nicknamed "Needle Park" where people often went to shoot up heroin).

<sup>326</sup> See King, *supra* note 323 ("... Ruth explained to Swiss people, when you hear the word 'legalization,' what you picture is anarchy and chaos, but what we have now is anarchy and chaos. We have unknown criminals selling unknown chemicals to unknown drug users all in the dark, all filled with violence, disease, and chaos. And what she proposed was to legalize heroin, and she explained to Swiss people, this will be the way that we restore order to this chaos.").

<sup>327</sup> See Seidenberg, *supra* note 325.

<sup>328</sup> See King, *supra* note 323 (describing a similar clinic in Geneva).

<sup>329</sup> See *id.*

<sup>330</sup> See *id.*

<sup>331</sup> *Id.*

<sup>332</sup> See King, *supra* note 323.

<sup>333</sup> *Id.*

<sup>334</sup> See *id.*

<sup>335</sup> See Jennifer Breger, *Ruth Dreifuss*, JEWISH WOMEN'S ARCHIVE, (June 23, 2021) <https://jwa.org/encyclopedia/article/dreifuss-ruth>.

<sup>336</sup> See Susana Ferreira, *Portugal's Radical Drugs Policy is Working. Why Hasn't the World Copied it?*, THE GUARDIAN (Dec. 5, 2017, 1:00 AM), <https://www.theguardian.com/news/2017/dec/05/portugals-radical-drugs-policy-is-working-why-hasnt-the-world-copied-it>.

and potential treatment options.<sup>337</sup> These changes not only stabilized Portugal's opioid crisis, they greatly reduced overdose deaths and abuses of other drugs, HIV and hepatitis infection rates, drug-related crime, and incarceration rates.<sup>338</sup> HIV infection rates dropped dramatically, "from an all-time high in 2000 of 104.2 new cases per million to 4.2 cases per million in 2015."<sup>339</sup>

Although this incredible story of a nation's recovery from the depths of drug addiction is often credited to the change in laws allowing for harm-reduction programs, Portugal's near impossible rehabilitation could not have been accomplished absent "an enormous cultural shift, and a change in how the country viewed drugs, addiction – and itself."<sup>340</sup> Even its language around drugs evolved.<sup>341</sup> "Those who had been referred to sneeringly as drogados (junkies) became known more broadly, more sympathetically, and more accurately, as 'people who use drugs' or 'people with addiction disorders.'"<sup>342</sup> These were the critical shifts Portugal needed for a unified, and more importantly, permanent solution.<sup>343</sup> "In many ways, the law was merely a reflection of transformations that were already happening in clinics, in pharmacies and around kitchen tables across the country."<sup>344</sup> Essentially, what Portugal's nationwide policy of decriminalization accomplished was the streamlining and pooling of services such as health, psychiatry, employment, and housing that had previously been compartmented and left too many communities underserved.<sup>345</sup>

### C. Amsterdam

In east Amsterdam, a government-funded heroin clinic sees an average of seventy-five men and women who visit the clinic twice a day for free distribution of untainted heroin.<sup>346</sup> In 1998, the Netherlands started its own program, similar to Switzerland's successful model.<sup>347</sup> Other European countries followed suit, including Germany and the United Kingdom.<sup>348</sup> To qualify for the program, individuals "must be at least thirty-five years old, regular users for at least five years, and [have a record of] repeatedly unsuccessful . . . treatment efforts, including methadone-maintenance therapy," which means the program

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<sup>337</sup> *See id.*

<sup>338</sup> *See id.*

<sup>339</sup> *Id.*

<sup>340</sup> Ferreira, *supra* note 336.

<sup>341</sup> *See id.*

<sup>342</sup> *Id.*

<sup>343</sup> *See id.* (explaining that despite establishing a solution for drug overdose deaths, the health consequences of long-term drug abuses were still present and adding stress to the country's health system).

<sup>344</sup> *Id.*

<sup>345</sup> *See* Ferreira, *supra* note 336.

<sup>346</sup> Glaser, *supra* note 173.

<sup>347</sup> *See id.*

<sup>348</sup> *See id.*

offered in the Netherlands is a “last-resort” treatment.<sup>349</sup> The federally funded distribution of heroin is rooted in three key concepts:

1. For some individuals, outcomes are better if addiction is treated as a chronic disorder needing supervised drug use in a clinical setting, rather than gearing treatment for a curable condition.
2. Successful treatment may be measured in the reduction of criminal activity and the improvement of physical and mental health, and does not necessarily require complete sobriety from the individual.
3. “Pragmatism, not morality” should drive public health policies.<sup>350</sup>

The core idea behind the Dutch policy is that “every human being may decide about the matters of [his/her/their] own health.”<sup>351</sup> Additionally, the Dutch believe that covering up unfavorable or difficult social phenomena does not mean they no longer exist.<sup>352</sup> In reality, the concealed problems are the ones most likely to worsen since they become much harder to control and ultimately resolve.<sup>353</sup>

Ellen van den Hoogen, who heads the clinic, acknowledged that the heroin-assisted program is not primarily concerned with getting users to stop.<sup>354</sup> John P. Walters, chief operating officer of the Hudson Institute and previous Director of the White House Office of National Drug Control Policy (“ONDCP”) during the George W. Bush administration,<sup>355</sup> was offended by this concept.<sup>356</sup> “Keeping people addicted for the purposes of controlling them? Is that a policy that is consistent with the moral foundations of a moral society?” he asked.<sup>357</sup> Meanwhile, the Netherlands reported just 235 fatal opioid overdoses in 2016, compared to 4,050 in Ohio, alone, for the same year.<sup>358</sup> Although Walters agrees that the current U.S. system is not working to address opioid overdose, he believes that government-funded heroin is not the answer, calling instead for “real treatment” and “real outreach,” though these solutions continuously appear to be vague and unusable in light of successful programs across Europe and other nations.<sup>359</sup> In response, “Peter Blanken, a senior researcher with the Parnassia Addiction Research Centre in Rotterdam, [stated] that heroin-assisted treatment is ‘real treatment.’”<sup>360</sup> Roughly twenty-five percent of his research participants

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<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Amsterdam Drug Laws*, AMSTERDAM, <https://www.amsterdam.info/drugs/> (last visited Nov. 17, 2022).

<sup>352</sup> *See id.*

<sup>353</sup> *See id.*

<sup>354</sup> *See* Glaser, *supra* note 173.

<sup>355</sup> *See* John P. Walters, HUDSON INSTITUTE, <https://www.hudson.org/experts/559-john-p-walters> (last visited Oct. 17, 2022).

<sup>356</sup> *See* Glaser, *supra* note 173.

<sup>357</sup> *Id.*

<sup>358</sup> *See id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

made a "complete recovery," a term defined by the program's emphasis on factors like improved health, discontinuation of illegal drug use, and reduction in alcohol consumption.<sup>361</sup> Blanken clarified that some individuals, however, do completely stop using heroin.<sup>362</sup> Katharine Neill Harris, a drug policy expert at Rice University's Baker Institute, supports heroin-assisted treatment and calls supervised injection sites—like the two in Manhattan, New York—"a step in the right direction," but ultimately, she would like to see the European model implemented in the United States.<sup>363</sup>

#### D. *The Learning Model of Addiction*

Professionals of all fields and the public have long debated the origins of addiction: "is it a defect of the will or of the body[—]a moral or a medical problem?"<sup>364</sup> Many advocates argue for an alternative to the Disease Model of addiction, calling it outdated and ineffective, and favoring instead a narrowed definition of addiction from the broad terminology of disease to a more specific type of health condition.<sup>365</sup> These advocates do not dispute the health aspects of addiction.<sup>366</sup> Instead, they propose that the model should include, not ignore, the role that learning has in the development of a person and his/her/their subsequent development of addiction, in addition to the biological and environmental factors.<sup>367</sup> Emphasizing the role of learning does not mean that addiction is developed by a person's ignorance (i.e., lack of learning), as if to say addicts should be blamed for their poorly-made but ultimately deliberate choices.<sup>368</sup>

In this new model, the learning that is at issue is much more subconscious and less articulable, much like the way people development (and *learn*) how to socialize as toddlers.<sup>369</sup> We often do not explicitly teach ourselves how to bond with others—though this is primarily how persons with Autism Spectrum Disorder acquire many of their social skills—and we seem to inherently know, or pick up, these social skills as we age.<sup>370</sup> But social skills are not inherited; they are not driven by instinct.<sup>371</sup> They are learned.<sup>372</sup> Much in the same way, how

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<sup>361</sup> Glaser, *supra* note 173.

<sup>362</sup> *See id.*

<sup>363</sup> *Id.*

<sup>364</sup> Sally Satel & Scott O. Lilienfeld, *Addiction and the Brain-Disease Fallacy*, 4 FRONTIERS IN PSYCHIATRY 1, 2 (2014).

<sup>365</sup> *See* SZALAVITZ, *supra* note 26, at 32-40, 56-71.

<sup>366</sup> *See id.* at 37.

<sup>367</sup> *See id.* at 37.

<sup>368</sup> *See id.* at 37, 38.

<sup>369</sup> *See* SZALAVITZ, *supra* note 26, at 32-40, 56-71.

<sup>370</sup> *See id.* at 45.

<sup>371</sup> *See* Rory Carroll, *Starved, Tortured, Forgotten: Genie, the Feral Child Who Left a Mark on Researchers*, THE GUARDIAN (July 14, 2016, 7:00 AM), <https://www.theguardian.com/society/2016/jul/14/genie-feral-child-los-angeles-researchers> (depicting one of the U.S.'s worst known cases of child abuse, in which a girl never learned to speak fluently, despite being long removed from the devastating and abusive conditions).

<sup>372</sup> *See id.*

we learn to process and regulate our emotions, how we cope, how we bond with others, how we think of ourselves, how others think of us, as well as at what ages we learn these skills, all play critical roles in the development of addiction.<sup>373</sup>

## VII. PROPOSAL

Alternatives to the Disease Model, such as a learning model, have long been met with resistance and are viewed as controversial because they do not easily fit into either the old Morally Corrupt narrative or the newer Addiction as Disease narrative. This is not to suggest that addiction is not a health condition. It absolutely is and should be treated as such, with the use of medicines and other types of therapies and programs.

Many addiction recovery and therapy programs already understand and implement these concepts of learned behaviors, yet keeping these concepts separate or outside the Disease Model is inefficient and undermines healing. The Disease Model focuses on what happens when a person is an addict, but it poorly explains how a person got there and does not appreciate upfront the complexities of a person's social relationships.

Another weakness of the Disease Model's influence on public policy is its over-reliance on the physiological effects of drugs as being the foundation of addiction. This is not to say that drugs are not dangerous, deadly, or something to carelessly try. It is simply to say that the entirety of addiction is not hidden within the chemical structures of addictive drugs. Most of addiction is not inherent in the drug at all,<sup>374</sup> and even those who try the same drugs do not have the same subjective reactions and feelings about those drugs.<sup>375</sup> When addiction is depicted as being *within* a drug, policies that prohibit drugs become much easier to justify, regardless of their scientific inaccuracies or social costs.

If society can have a more accurate, cohesive understanding of addiction, we can have better policies than prohibition for all drugs. Additionally, a better appreciation of the roles learning and socialization play means that we are all responsible—addicts or not; chronic user or occasional—for the type of culture we create and whether or not we embrace with love and care or ostracize with judgment and hate the people who need others the most. To quote a clinician

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<sup>373</sup> See Gene Heyman, *Addiction and Choice: Theory and New Data*, 4 FRONTIERS IN PSYCHIATRY 1 (2013) (explaining that addiction is far less common in people who use drugs for the first time after age 25); see also SZALAVITZ, *supra* note 26, at 43-47 (stating that most changes in neural tissue as we develop are representations of our memories, and that “[t]hey make each brain—and each addiction—unique.”).

<sup>374</sup> See Maia Szalavitz, *Genetics: No More Addictive Personality*, 522 NATURE 48, 49 (June 25, 2015) (describing that only 10-20% of those who try even the most stigmatized drugs developed addiction).

<sup>375</sup> See Emily Shire, *Five Journalists Who Did Drugs for Work*, THE DAILY BEAST, (July 12, 2017, 4:41 PM), <https://www.thedailybeast.com/five-journalists-who-did-drugs-for-work> (telling the stories of five journalists who did drugs for work, two of whom took heroin with opposite responses).

from Vancouver's heroin clinic and hotel, "In order to treat addiction, you have to keep addicts alive long enough." Harm reduction sites, such as supervised use sites and heroin-assisted treatment clinics, give everyone who walks in, not just addicts, the opportunity to build the connections with those who are there to help at the most critical times, not just after the person has already suffered years of addiction, essentially on his/her/their own and in the dark.

The overturning of *Roe* and *Casey* in the *Dobbs* decision has re-ignited long-held contentions between pro-choice and pro-life advocates in the U.S. and throughout the world.<sup>376</sup> As the scope of the elusive rights to privacy and personal autonomy continue to narrow in the Court, the power to make lasting changes in drug regulation lies with Congress.

Federal decriminalization of all drug use is a start. Rather than relying on prohibitive measures, harm reduction efforts should be implemented. Drugs with a high potential for therapeutic and medicinal use with little to no risks of harm should eventually be recreationally legal, giving time for social understandings to change as well. These drugs would include cannabis, psilocybin, LSD, ibogaine, ayahuasca, ketamine, and other psychedelics.

A final thought for comprehensive drug reform ought to lie in the concept of cognitive liberty, or mental self-determination. Although this right is conceptualized in a variety of legal practices—healthcare, wills and trusts, family, constitutional—it is a difficult one to apply in the context of domestic drug laws. The United States Supreme Court is more likely to recognize a right to free exercise of religious or ceremonial substance use than a right to consumption under privacy or self-determination. In international treaties, the right to self-determination is generally seen as one of political expression, not a basis for making plenary demands.

The current landscape of drug laws and enforcement, however, is based on arbitrary discrimination. Many of the harms associated with drug laws are inherent in the laws themselves. Just as one is free to choose one's religion, one ought to be free to choose one's thoughts and mental experiences, especially considering how life-altering and therapeutic some of those experiences can be.<sup>377</sup> Fine food and wine is in our cultural history and is often held as a gold standard for sophisticated and enriching socialization. It is then a mystery why

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<sup>376</sup> See *The Dobbs v. Jackson Decision, Annotated*, NY TIMES (June 24, 2022), <https://www.nytimes.com/interactive/2022/06/24/us/politics/supreme-court-dobbs-jackson-analysis-roe-wade.html> (stating that Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly); see also *Bachelet on US ruling on Dobbs v Jackson Women's Health Organization*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (June 24, 2022), <https://www.ohchr.org/en/statements/2022/06/bachelet-us-ruling-dobbs-v-jackson-womens-health-organization> (claiming that the U.S. is regressing in women's rights and gender equality while other countries continue to expand them).

<sup>377</sup> See USONA INSTITUTE, *supra* note 70 at 1:08 (video) (recounting the experiences of clinical research participants, grappling with anxiety from terminal cancer, who micro-dosed on psilocybin and reflected on their lives with a sense of validation, existential connection, and peace).

these same social rules of engagement could not extend and apply to drugs currently deemed illicit.

To say, however, that this cognitive liberty is defined by one's experience of being under the influence of any drug one desires to take is to fail in noticing a greater opportunity for societal growth. This 'liberty to choose' exists within the individual, but it does not begin and end when one takes a drug in the privacy of one's home. The liberty of choice ought to endure throughout the individual's life to include the opportunity to choose recovery, but current drug policy gravely burdens the second choice and stigmatizes the first. Thus, the benefits of recognizing the role of cognitive liberty in drug use would be reaped within our relationships with others and ourselves. The failure to engage, through law, with one another on matters of such global importance as the War on Drugs is the failure to cultivate this greater level of societal cognition, personal agency, and human dignity.

Today, the world fights against famine, tyrannical rulers, modern slavery, and a score of other atrocities that most developed and Westernized nations legally recognize as human rights violations. Harder to identify, however, are the internal wars we often wage against people who use drugs who are largely perceived as societal outcasts, ones to be forgotten or, politically worse, memorialized as unfortunate but inevitable casualties in our Noble Experiment<sup>378</sup> and its everlasting political impact against the bizarre and imponderable effects of drugs. These are the unjustified biases that ultimately guide our laws into a political delirium. Although the devastating results of the war against people who use drugs may not easily be felt if you abstain from illicit drugs, it is worth questioning these legal issues the next time you reach for a nightly glass of wine.

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<sup>378</sup> See Hanson, *Noble*, *supra* note 72 (calling Prohibition our nation's Noble Experiment).