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Tom Lininger

After the War on Drugs: Challenges Following Decriminalization

20 U.N.H. L. REV. 375 (2022)

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INTRODUCTION

I appreciate the opportunity to take part in this symposium at the Franklin Pierce School of Law on October 29, 2021. Thanks to Symposium Editor Cory Greenleaf and the rest of *The University of New Hampshire Law Review* staff for inviting me to make a presentation on your beautiful campus.

I am aware that your region has suffered a great deal of tragedy due to the drug epidemic.¹ In fact, it was only two months ago that I passed through Concord on my way to attend the memorial service for a young man who had died of a drug overdose. I know that advocates in New Hampshire have played a role in the national conversation about the efficacy and the fairness of the so-called War on Drugs.²

I am here today to discuss the experience of my home state, Oregon, which recently became the first state in the nation to decriminalize possession of “hard drugs” in certain circumstances.³ Some commentators have opined that Oregon has ended its War on Drugs.⁴ While that characterization is perhaps unduly facile,

¹ Casey Leins, *New Hampshire: Ground Zero for Opioids*, U.S. NEWS & WORLD REP. (June 28, 2017, 4:57 PM), <https://www.usnews.com/news/best-states/articles/2017-06-28/why-new-hampshire-has-one-of-the-highest-rates-of-opioid-related-deaths> (“Though other New England states such as Vermont and Maine have seen spikes in opioid-related deaths, the granite state ranks No. 2 in the nation, behind West Virginia, for the number of opioid-related deaths relative to its population.”).

² See, e.g., Ryan Fowler, *Ryan Fowler: New Hampshire Casualties of the War on Drugs*, CONCORD MONITOR (Apr. 14, 2018, 12:20 AM), <https://www.concordmonitor.com/The-human-cost-of-the-war-on-drugs-16841617> (urging an end to drug prohibition); Behzad Mirashem, *N.H. Takes Stock of “The War on Drugs”*, NHPR.COM (May 24, 2017, 7:26 AM), <https://www.nhpr.org/the-exchange/2017-05-24/n-h-takes-stock-of-the-war-on-drugs> [<https://perma.cc/7SJZ-WHEQ>] (discussing both human cost and due process cost of War on Drugs). The New Hampshire authors taking part in this symposium are presenting cogent critiques of the drug war.

³ Andrew Selsky, *Oregon First State to Decriminalize Possession of Drugs*, L.A. TIMES (Feb. 1, 2021, 3:04 PM), <https://www.latimes.com/world-nation/story/2021-02-01/oregon-1st-state-to-decriminalize-possession-of-drugs> [<https://perma.cc/G49N-G7VG>]. For the specific provisions of Ballot Measure 110, approved by Oregon voters in November 2020, see *infra* Section I.

⁴ E.g., German Lopez, *America’s War on Drugs Has Failed. Oregon Is Showing a Way Out*, VOX (Nov. 11, 2020, 8:00 AM), <https://www.vox.com/future-perfect/21552710/oregon-drug-decriminalization-marijuana-legalization> [<https://perma.cc/LEA2-YNSF>] (“Oregon’s voters have forced significant reforms to end the war on drugs”); The Times Editorial Board, *Editorial: Oregon Voted to End the War on Drugs. California Should Watch and Learn*, L.A. TIMES (Nov. 25, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-11-25/oregon-decriminalize-drugs> [<https://perma.cc/RNH4-LCBE>] (describing Oregon as “the first state to exit the nation’s long war on drugs”); Kristian Foden-Vencil, *Oregon Takes a Sharp Turn Away from the War on Drugs as Measure*

it would be accurate to say that Oregon has repudiated its reliance on the traditional criminal justice system as the primary means of addressing low-level violations of drug laws. Other jurisdictions are considering whether, and to what extent, they should emulate Oregon's approach.⁵

My focus today is on challenges following decriminalization in Oregon. Four categories of challenges are particularly noteworthy: 1) the logistical difficulty of transitioning from a punitive model to a health model; 2) the harms that drug users continue to experience after decriminalization; 3) the complications for enforcement of remaining criminal laws following decriminalization of some offenses; and 4) the need to codify protections against police misconduct when the lack of criminal prosecution reduces officers' incentives to comply with the Fourth Amendment (because the sanction of excluding evidence no longer seems consequential).⁶

I need to be clear that I am not taking a position on the merits of decriminalization. I respect advocates on both sides of this debate. Given the page limits for a symposium piece, the most I can hope to accomplish here is to flag certain issues that deserve attention when states or localities consider the possibility of adopting decriminalization measures.⁷

110 Kicks In, OPB (Feb. 1, 2021, 9:01 AM), <https://www.opb.org/article/2021/02/02/oregon-takes-turn-away-from-war-on-drugs-as-measure-110-kicks-in/> [<https://perma.cc/FNM3-43NR>].

⁵ Sophie Quinton, *Oregon's Drug Decriminalization May Spread, Despite Unclear Results*, PEWTRUSTS (Nov. 3, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/03/oregons-drug-decriminalization-may-spread-despite-unclear-results> [<https://perma.cc/CEG8-G6LX>] ("Democratic lawmakers in Maine, Massachusetts, Rhode Island and Vermont all proposed decriminalization bills this year"); The Times Editorial Board, *supra* note 4 ("California and other states would be wise to watch and learn what goes right, or wrong, in Oregon"); Tatiana Parafiniuk-Talesnick, *Starting Monday, Oregon Spearheading Drug Decriminalization: Here's What You Need to Know*, EUGENE REGISTER-GUARD (Jan. 31, 2021, 5:00 AM), <https://www.registerguard.com/story/news/2021/01/31/faq-measure-110-goes-into-effect-feb-1-need-know-drug-decriminalization/4235674001/> [<https://perma.cc/Y8DA-4AUQ>] ("Ballot Measure 110 goes into effect Feb. 1, and all eyes are turned to Oregon as it embarks on being the first state in the nation to decriminalize the personal possession of hard drugs.").

⁶ For a more thorough discussion of these four challenges, see *infra* Section II.

⁷ Cities and counties, as political subdivisions of states, generally cannot redefine offenses and thereby decriminalize conduct that constitutes a crime under state law, but cities and counties can change enforcement priorities in a manner that amounts to de facto decriminalization. See, e.g., Justin Jouvenal, *No Charges for Personal Drug Possession: Seattle's Bold Gamble to Bring 'Peace' After The War on Drugs*, WASH. POST (June 11, 2019), https://www.washingtonpost.com/local/public-safety/no-charges-for-personal-drug-possession-seattles-bold-gamble-to-bring-peace-after-the-war-on-drugs/2019/06/11/69a7bb46-7285-11e9-9f06-5fc2ee80027a_story.html [<https://perma.cc/7M27-YVNV>] (noting that, late last year, prosecutors in King County, which

One other point needs emphasis at the outset. There is no place for perfectionism in the evaluation of drug policy. Most of us would agree that the War on Drugs has failed in several important respects. With this troubled history as a baseline, it is unreasonable to expect that the next iteration of drug policy will be flawless. A more reasonable expectation is that states will experiment with different approaches that depart from the War on Drugs, and over time the incremental adjustment of these approaches will hopefully come closer to an optimal drug policy.

I. OREGON'S DECRIMINALIZATION OF DRUG OFFENSES

Liberals and conservatives in Oregon do not agree on much, but substantial constituencies on both sides agree that they do not want the government to dictate what substances they must or must not put in their bodies. Whether the substances at issue are fluoride,⁸ vaccines,⁹ or even suicide drugs,¹⁰ a large segment of Oregon's

encompasses Seattle prosecutors, “became the first in the nation to stop charging people for possessing small amounts of drugs — heroin, meth and crack included — in virtually all cases.”)

⁸ A significant number of Oregon communities have decided against fluoridating their public water supplies. Saerom Yoo, *Oregon Ranks in Bottom Three in Fluoridated Water*, STATESMAN J. (Apr. 29, 2015, 8:39 PM), <https://www.statesmanjournal.com/story/news/health/2015/04/29/oregon-ranks-bottom-three-fluoridated-water/26618785/> [<https://perma.cc/YK7K-22J4>] (noting that while 75% of all Americans have access to fluoridated water, in Oregon “the figure is about 23 percent – among the worst in the country.”).

⁹ Oregon parents may exempt their children from school vaccination requirements simply by citing philosophical objections and watching a brief video. The exemption rate in Oregon is very high. JoNel Aleccia, *95% of Oregon Parents Who Exempt Kids from Vaccinations Use Do-It-Yourself Option, New Data Shows*, OREGONLIVE (Apr. 5, 2019, 3:52 AM), <https://www.oregonlive.com/news/2019/04/95-of-oregon-parents-who-exempt-kids-from-vaccinations-use-do-it-yourself-option-new-data-shows.html> [<https://perma.cc/7FU4-VSZN>] (indicating that Oregon “has the highest kindergarten vaccine exemptions rate in the U.S.”). So great is Oregon's aversion to mandatory vaccinations that the state has the nation's only statute forbidding mandatory vaccinations for health care workers, firefighters and law enforcement personnel. OR. REV. STAT. § 433.416 (1989); Fedor Zarkhin, *“Why The Hell Did We Do That?”: How Unique Oregon Law Prevents COVID-19 Vaccine Mandates for Health Care Workers*, OREGONLIVE (Jul. 17, 2021, 6:00 AM), <https://www.oregonlive.com/coronavirus/2021/07/why-the-hell-did-we-do-that-how-unique-oregon-law-prevents-covid-19-vaccine-mandates-for-health-care-workers.html> [<https://perma.cc/Y47P-ZF2G>] (“Oregon appears to be the only state in the country that explicitly prohibits health care organizations from mandating vaccinations for workers.”).

¹⁰ In 1996, Oregon voters approved a ballot measure allowing the use of suicide drugs by certain categories of people suffering from terminal illnesses. OR. REV. STAT. § 127.800 (2018). This law was the first of its kind in the United States. *Id.* (codifying Death with Dignity Act).

population prefers individual autonomy over government mandates.¹¹ In addition, citizens of this state tend to share a distrust of law enforcement, a faith in parents to set appropriate boundaries for children, and a belief that many lawbreakers who have not victimized any third party deserve rehabilitation rather than retribution.¹² Oregon's distinctive political ideology makes it an attractive testing ground for national advocacy groups seeking to decriminalize recreational drugs.¹³ Some of these groups have spent significant resources on decriminalization campaigns in Oregon, with the hope that Oregon's approval of such initiatives might lead other states to follow suit.¹⁴

Decriminalization in Oregon dates back to the inception of Richard Nixon's War on Drugs. In the early 1970s, shortly after Nixon began using his bellicose metaphor, Oregon became the first state to decriminalize the possession of marijuana in small quantities.¹⁵ The new law transformed marijuana possession from a crime to a violation akin to a low-level traffic offense.¹⁶ In 1998, Oregon became the second state in the United States to approve marijuana for medicinal

¹¹ See, e.g., Taylor Purvis, *Debating Death: Religion, Politics, and the Oregon Death with Dignity Act*, 85 YALE J. BIOL. MED. 271, 272–84 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3375669/> [<https://perma.cc/2RRH-5YQY>] (discussing distinctive political culture of Oregon that enabled passage of a ballot measure authorizing physician-assisted suicide; noting Oregonians' strong preference for self-determination and distrust of authority).

¹² By contrast, Oregonians have approved a ballot measure establishing significant mandatory minimum sentences for offenders who commit certain "person crimes" (i.e., crimes with victims). For a list of such offenses and the accompanying penalties, see OR. REV. STAT. § 137.700 (2019), codifying Ballot Measure 11, approved in 1994.

¹³ According to Judge Eric Bergstrom, the American Bar Association's Oregon State Judicial Outreach Liaison, "Oregon was the obvious test state for a decriminalization initiative." Eric J. Bergstrom, *Oregon's Drug Decriminalization Law*, ABA HIGHWAY TO JUSTICE, 4 (2021), https://www.americanbar.org/content/dam/aba/publications/judicial_division_record/2021-sum-hwtj.pdf [<https://perma.cc/HU67-4JPH>].

¹⁴ The executive director of the Drug Policy Alliance ("DPA") characterized the anti-drug campaign in Oregon as a "domino" in the organization's national strategy. Selsky, *supra* note 3 (reporting that DPA hoped its campaign in Oregon would set off a "cascade of other efforts" across the nation).

¹⁵ In 1973, Oregon's legislature approved House Bill 2936, known as the Oregon Decriminalization Bill, which decriminalized possession of up to an ounce of marijuana. Noelle Crombie, *Legal Marijuana in Oregon: A Look at the State's Pot History*, OREGONLIVE (Jan. 10, 2019, 12:43 AM), https://www.oregonlive.com/marijuana/2014/11/legal_marijuana_in_oregon_a_lo.html [<https://perma.cc/8XUK-5SGG>].

¹⁶ *Id.* (stating that violators received a ticket and paid a small fine).

use.¹⁷ In 2014, Oregon became the third state in the United States to legalize recreational use of marijuana and to permit widespread manufacture and sale of the drug,¹⁸ notwithstanding the continuing prohibition of these activities under federal law.¹⁹

While Oregon's lenient approach to marijuana may no longer seem so unusual in the United States today,²⁰ Oregon reclaimed the national spotlight last fall when a statewide initiative, Ballot Measure 110, proposed decriminalizing "hard drugs."²¹ The primary architect and backer of Oregon's campaign was the Drug Policy Alliance (DPA), based in New York and funded by billionaire George Soros.²² Oregon's unique politics seemed to present the best possible opportunity for the DPA to win approval of a decriminalization statute.²³ Virtually all of the

¹⁷ *Id.* (Oregon voters took this step by approving Ballot Measure 67).

¹⁸ *Id.* Again, Oregon resorted to the initiative process, as had Colorado and Washington in 2012. Oregon's Ballot Measure 91 allowed citizens to use, possess, grow and sell marijuana, provided that they paid certain taxes.

¹⁹ *E.g.*, 18 U.S.C. § 841 (2010) (criminalizing distribution, manufacture, and possession of marijuana with intent to distribute); 18 U.S.C. § 844 (2004) (criminalizing possession of marijuana for personal use).

²⁰ See Claire Hansen et al., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REPORT (Jan. 6, 2022, 3:25 PM), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> (listing marijuana laws in different states, and indicating that recreational marijuana is now "legal in 18 states, Washington, D.C., and Guam").

²¹ See generally Oregon Measure 110, Drug Addiction Treatment and Recovery Act (2020), OREGON VOTES, <http://oregonvotes.org/irr/2020/044text.pdf> [<https://perma.cc/3NU6-9WB7>] (including the full text of Oregon's Measure 110 which spans nineteen pages).

²² Kathleen Davis, *Oregon Just Decriminalized Small Amounts of All Drugs. Now What?*, OPB (Mar. 5, 2021, 8:30 AM), <https://www.opb.org/article/2021/03/05/science-friday-oregon-measure-110-drug-decriminalization/> [<https://perma.cc/PC86-JV85>] ("Measure 110 was spearheaded by the Drug Policy Alliance, a New York-based organization focused on reducing criminalization associated with drug use across the country"); Madison Feller, *Oregon Is the First State to Decriminalize All Drugs. These Women Helped Make It Happen*, ELLE (Feb. 19, 2021), <https://www.elle.com/culture/career-politics/a35463141/oregon-decriminalize-drug-policy-alliance-women/> [<https://perma.cc/MMW5-P2WA>] ("The New York-based non-profit wrote the ballot measure, in partnership with Oregonians"); Poppy Noor, *US Drug Laws Set for Sweeping Overhaul as Voters Choose Decriminalization*, THE GUARDIAN (Nov. 4, 2020, 12:49 EST), <https://www.theguardian.com/us-news/2020/nov/04/us-drug-laws-decriminalization-voters-us-elections> [<https://perma.cc/8DU7-NY9S>] (indicating that DPA "drafted and funded" Measure 110 in Oregon).

²³ See Bergstrom, *supra* note 13, at 4 (quoting DPA statement that "Oregonians have always been early adopters" of progressive drug laws).

approximately six million dollars raised in support of Measure 110 came from sources beyond Oregon, including the DPA and Facebook founder Mark Zuckerberg.²⁴ The opponents of the measure only raised \$167,000, mostly from in-state donors.²⁵

Measure 110 proposed to decriminalize the possession of many drugs up to certain specified limits. For cocaine, the limit was two grams; for heroin, one gram; for LSD, forty units; for MDMA (“ecstasy”), one gram or five pills; for oxycodone, forty pills; and for psilocybin, twelve grams.²⁶ Below these limits, a violation would result in a \$100 fine, and at or above these limits, Measure 110 classified noncommercial possession as a misdemeanor offense.²⁷ Perhaps due to an oversight in drafting, Measure 110 classified possession of fentanyl as a noncriminal violation without specifying a maximum quantity, even though this drug ranks among the deadliest in Oregon.²⁸ Certain drug offenses remained felonies under Measure 110, but these were only a fraction of what Oregon law had previously included on the felony list.²⁹

²⁴ Oregon Measure 110, Drug Decriminalization and Addiction Treatment Initiative (2020) BALLOTPEdia, [https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_\(2020\)](https://ballotpedia.org/Oregon_Measure_110,_Drug_Decriminalization_and_Addiction_Treatment_Initiative_(2020)) [<https://perma.cc/F4WG-MNXD>] (summarizing state records setting forth total raised by supporters and identifying largest contributors).

²⁵ *Id.* (indicating total and identifying contributors). Michael Lewis, another author in this symposium, made a sensible comment that while the proponents’ expenditures exceeded those of the opponents in the Measure 110 campaign, the proponents’ spending was “a pittance when compared to the millions, if not billions, of dollars spent in public misinformation about drugs and the efficacy of the criminal law in response to drug usage, spent by government officials, over the past century.” Email from Michael Lewis, Adjunct Professor of L., Univ. of N.H. Franklin Pierce Sch. of L., to author (Nov. 1, 2021) (on file with author).

²⁶ Measure 110, Drug Addiction, *supra* note 21, §§ 11–17. Sections 11–17 are codified at OR. REV. STAT. § 475.752 (2021), *et seq.*

²⁷ *See id.* § 19.

²⁸ *Contra id.* §§ 11–17. Oregon’s legislature later addressed this issue with a series of amendments in the summer of 2021. *See* S.B. 755, 81st Leg., Reg. Sess. (Or. 2021) (setting forth a maximum quantity for fentanyl beyond which possession would not be a mere violation).

²⁹ Measure 110, Drug Addiction, *supra* note 21, §§ 11–17 (removing felony classification for drug possession under many circumstances, but preserving this classification for, *inter alia*, certain drug offenses involving distribution, manufacture, or other commercial activity); *see supra* text accompanying note 26; *see also* Noelle Crombie, *Police Issue Few Tickets under Drug Decriminalization Law; Most People Ignore Court, Hotline*, OREGONLIVE (Oct. 25, 2021, 6:16 AM), <https://www.oregonlive.com/politics/2021/10/police-issue-few-tickets-under-new-drug-decriminalization-law-most-people-ignore-court-hotline.html> [<https://perma.cc/F83C-8X4P>]

Some provisions of Measure 110 focused on treating drug abuse as a public health issue rather than a criminal issue. The measure's title and preambulatory language emphasized this theme.³⁰ One way in which Measure 110 sought to implement a public health approach was by steering violators to drug treatment. The measure authorized courts to waive fines for violators who called a telephone hotline and completed a health assessment that could lead to a recommendation of drug treatment (there was no obligation for the violators actually to seek treatment).³¹ The measure mandated the establishment of centers to provide screenings.³² Other provisions in Measure 110 set up a process to provide grants for treatment centers,³³ but did not necessarily specify a strategy for funding treatment,³⁴ and did not mandate an increase in Oregon's total number of treatment

(noting that Measure 110 “reduced penalties for what were previously felony drug possession cases involving larger quantities . . . most of these crimes are [now] misdemeanors.”).

³⁰ The authors of Measure 110 gave it an appealing title: “Drug Addiction Treatment and Recovery Act.” The seven “whereas” clauses at the start of the measure focused primarily on the benefits of a health-oriented approach to drug addiction, and did not emphasize that the measure would decriminalize possession of hard drugs such as heroin, methamphetamine and cocaine. See generally Measure 110, Drug Addiction, *supra* note 21. To be sure, this marketing tactic heightened the attractiveness of the measure to voters.

³¹ See *id.* §§ 2(2)(b), 22.

³² *Id.* § 2(2) (directing that, grants must go to “Addiction Recovery Centers” that would be open 24 hours a day and would provide screenings and assessments; requiring that such a center exist in each of Oregon’s “coordinated care organization service area[s].”). Patricia Perlow, district attorney for one of Oregon’s most populous counties, and Chris Wig, director of the Focus Treatment Program at Emergency Addition and Behavioral Therapies, strongly criticized Measure 110’s emphasis on screenings rather than treatment: “All the measure requires is the creation of 16 centers that provide *screenings and referrals*, not high-quality, evidence-based addiction treatment. Oregon doesn’t have a shortage of health assessment and referral centers. Oregon does have a shortage of residential treatment beds.” Patricia Perlow & Chris Wig, *Guest View: Measure 110 Full of False Promises*, THE REGISTER-GUARD (Oct. 9, 2020, 5:00 AM), <https://www.registerguard.com/story/opinion/columns/2020/10/09/measure-110-full-false-promises/5910832002/> [<https://perma.cc/B8RW-XAFT>].

³³ Measure 110, Drug Addiction, *supra* note 21, §§ 2, 5 (establishing grant program for various purposes including expansion of treatment, and establishing some requirements for eligibility, while specifying that funding would come from marijuana tax revenue).

³⁴ Eric Westervelt, *Oregon’s Pioneering Drug Decriminalization Experiment Is Now Facing the Hard Test*, NPR (June 18, 2021, 5:00 AM), <https://www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test> [<https://perma.cc/K5P9-DUG4>] (citing concerns raised by critics including Mike Marshall, co-founder and director of the group Oregon Recovers, that Measure 110 “did not require those funds to spent in a strategic way to expand capacity for a system that has too few detox beds.”).

beds.³⁵

Both sides campaigned zealously prior to the vote on Measure 110 in November 2020. Proponents emphasized that a health-oriented approach to drug addiction would be more humane than continuation of the failed War on Drugs.³⁶ In particular, proponents pointed to Oregon's high rate of fatal overdoses, and claimed that Measure 110 would address this problem better than the traditional criminal justice system could.³⁷ Proponents argued that the War on Drugs disproportionately harmed people of color.³⁸ Opponents, for their part, contended that decriminalization would increase drug use, compound the problem of homelessness, exacerbate intoxicated driving, and take away incentives for successful completion of drug treatment.³⁹ Some critics claimed that proponents of Measure 110 were exaggerating its ability to reduce overdoses, because there was no guarantee that more low-level violators would ever elect to seek health assessments and/or drug treatment.⁴⁰

When the dust cleared after the November 2020 election, the proponents of drug decriminalization had won an impressive victory. Voters approved Measure 110 by a margin of 58.46% to 41.54%.⁴¹ A similar initiative also prevailed in Oregon's November 2020 election: Ballot Measure 109 allowed the therapeutic use of

³⁵ *Contra* Measure 110, Drug Addiction, *supra* note 21, § 2 (setting aside funding for treatment without mandating an increase in treatment beds); Perlow & Wig, *supra* note 32 (“Measure 110 would not create a single new treatment bed . . . If Measure 110 were truly about improving access to treatment, it would have set clear targets for real, quality treatment, like more sobering centers and detox facilities, [and] more residential treatment beds.”). Perlow and Wig expressed the further concern that Measure 110 would divert marijuana tax revenue that counties and cities had been using to fund mental health and addiction services. *Id.*

³⁶ Oregon allows advocates to post arguments in the online voters' guide for a small fee, and these arguments are typical of those that appeared in op-eds, letters to the editor, and paid advertisements that appeared in various media. *See* OFFICIAL 2020 GENERAL ELECTION VOTERS' PAMPHLET 131–149 (2020).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 150–157.

⁴⁰ According to Dr. Paul Coehlo, whose practice involves treating patients with pain and addiction, the \$100 fine provided by Measure 110 is not a “financial disincentive of sufficient magnitude to coax ambivalent or pre-contemplative people into a life of abstinence or long-term recovery.” *Id.* at 150. *See also* Perlow & Wig, *supra* note 32 (predicting that passage of Measure 110 would actually cause a “spike in overdoses”).

⁴¹ Measure 110, Drug Decriminalization, *supra* note 24 (reporting election results following official certification).

psilocybin, or “magic mushrooms.”⁴² Oregon’s legislature would later make some adjustments to the new decriminalization regime; these adjustments were possible because the voter-approved reforms had taken the form of a statutory rather than constitutional amendments.⁴³

II. CHALLENGES FOLLOWING DECRIMINALIZATION

My role in this symposium is to focus on pitfalls that states must navigate if they choose to decriminalize drug possession. I realize that other participants in the symposium are advocating for decriminalization, and I will defer to them to lay out that argument.

At the risk of duplicating the points made by my fellow authors, I do want to acknowledge briefly the beneficial results achieved by Measure 110. First and foremost, decriminalization in Oregon has ameliorated the harsh consequences of criminal punishment for low-level drug violations. Once Measure 110 took effect on February 1, 2021, arrests for drug possession dropped by 83%.⁴⁴ Officers even showed a reluctance to issue citations for the new categories of violations created by Measure 110.⁴⁵ Police largely retreated from enforcing drug laws—at least those

⁴² Oregon Measure 109, Psilocybin Mushroom Services Program Initiative (2020), BALLOTOPEDIA, [https://ballotpedia.org/Oregon_Measure_109,_Psilocybin_Mushroom_Services_Program_Initiative_\(2020\)](https://ballotpedia.org/Oregon_Measure_109,_Psilocybin_Mushroom_Services_Program_Initiative_(2020)) [<https://perma.cc/YL26-MAGA>] (summarizing provisions and reporting that measure prevailed by a margin of 55.75% to 44.25%).

⁴³ See S.B. 755, *supra* note 28 (making several changes to provisions in Measure 110). For example, the new law changed the term “Addiction Recovery Center” to “Behavioral Health Resource Network,” revised the procedure for providing state grants, consolidated jurisdiction over Measure 110 violations in circuit courts rather than municipal or justice courts, and set forth quantities distinguishing criminal from noncriminal possession of fentanyl.

⁴⁴ This figure is for the first nine months following the effective date of Measure 110. See Crombie, *supra* note 29 (reporting that arrests after implementation of Measure 110 are generally for possession of “dealer quantities.”). Prior to the passage of Measure 110, the Oregon Criminal Justice Commission (OCJC) estimated that the law would reduce felony convictions for drug possession by 1,800 per year and misdemeanor convictions for drug possession by 1,900 per year. Oregon Criminal Justice Commission, *IP 44 Racial and Ethnic Impact Statement*, OPB (Aug. 5, 2020), https://www.opb.org/pdf/IP44%20-%20REI%20Statement%20Supplement_1602708982790.pdf [<https://perma.cc/AHW6-KXCJ>]. OCJC estimated that the total number of arrests for drug possession would fall from 6,700 to 615 per year. *Id.* Note that the “IP 44” was the identifier for the initiative petition that eventually become Measure 110 upon certification of the signatures collected by the proponents.

⁴⁵ In the first nine months following the effective date when possession of a small drug quantity became a violation rather than a crime, police in Oregon only issued a total of 1,280 citations for drug possession. See Crombie, *supra* note 29. The numbers were particularly low in Oregon’s three

involving possession rather than distribution or manufacture of controlled substances.⁴⁶ The reduction of criminal sanctions for this category of lawbreaking has brought some benefits by reducing both the short-term and long-term hardships⁴⁷ associated with arrest, conviction, and incarceration.⁴⁸ These hardships have been especially burdensome for people of color, who have felt the brunt of the War on Drugs.⁴⁹

The following subsections do not address the successes of Measure 110, but rather the challenges facing Oregon as it implements decriminalization. By listing these challenges, I am not necessarily arguing that Measure 110 was a bad idea. I am just pointing out that work remains to be done in Oregon.⁵⁰ Other states considering Oregon's example might want to choose different language in their decriminalization measures so they can deal with these issues more effectively at the outset.

largest counties. In Multnomah, which includes Portland, police only issued 55 tickets; in Washington County, Oregon' second largest, police only issued 34 tickets; and in Clackamas County, Oregon' third largest, police only issued five tickets. *Id.* (concluding that "police agencies generally haven't embraced [Measure 110's] plan" to use citations as a means of steering drug users to health assessments that might lead to counseling and treatment).

⁴⁶ See Dirk Vanderhart, *Oregon's Pioneering Drug Law Raises More Questions Than Answers in Early Months*, OPB (Oct. 27, 2021, 8:00 AM), <https://www.opb.org/article/2021/10/27/oregon-pioneering-drug-law-raises-more-questions-than-answers-early-months/> [<https://perma.cc/V3Z9-HHJN>] (describing overall decline in enforcement of criminal laws against drug possession since Measure 110 took effect, and indicating that "many officers appear to be turning their attention elsewhere.").

⁴⁷ See *IP 44 Racial and Ethnic Impact Statement*, *supra* note 44 (indicating that Measure 110 would reduce "collateral consequences stemming from criminal justice system involvement" such as "reduced ability to find employment, reduced access to housing, restrictions on the receipt of student loans, inability to obtain professional licensure, and others."). Of course, the consequences of incarceration include physical suffering, mental trauma, and separation from loved ones.

⁴⁸ Even before the passage of Measure 110, conviction for possession of small drug quantities had rarely resulted in incarceration. In 2017, Oregon had reclassified simple possession of hard drugs to be a misdemeanor rather than a felony offense, so "fewer people were spending time in jail for possession." See Bergstrom, *supra* note 13, at 5.

⁴⁹ See *IP 44 Racial and Ethnic Impact Statement*, *supra* note 44 (predicting that passage of Measure 110 "will likely lead to significant reductions in racial/ethnic disparities in both convictions and arrests.").

⁵⁰ On this point, there would likely be wide agreement among both proponents and opponents of Measure 110.

A. *Logistical Difficulty of Transitioning from Punitive Model to Health Model*

As noted previously, the main marketing theme for proponents of Measure 110 was the need to replace criminal penalties with a public health approach.⁵¹ A common refrain was that Oregon “cannot arrest [its] way out of [the drug epidemic.]”⁵² Proponents urged that Oregon should follow the lead of Portugal, which had reduced fatal overdoses by addressing drug use with medical resources rather than punishment.⁵³ This strategy appealed to Oregonians because it seemed to be more humane and fiscally prudent than continuing the War on Drugs. Whereas the punitive approach demanded more resources each year while making little progress toward a long-term solution, a health-oriented approach offered the hope of curing addiction and thereby reducing public expenditures on drug-related problems. The year 2020 had set records for overdose deaths, so a medical response seemed to be more fitting than a police response.⁵⁴ All of these considerations led to predictions that Measure 110 would begin a new era in which health care professionals rather than police would attend to the problem of drug abuse.⁵⁵

⁵¹ See Bergstrom, *supra* note 13, at 4 (“Its backers claim Ballot Measure 110 is a bold experiment that will get illicit drug users out of jail and into treatment. It was framed as an effort to treat substance abuse as a health care issue rather than a criminal justice one.”).

⁵² See, e.g., Peter O’Dowd & Allison Hagan, ‘A Sledgehammer to the War on Drugs’: Oregon Decriminalizes Illegal Drugs, WBUR (Feb. 1, 2021), <https://www.wbur.org/hereandnow/2021/02/01/oregon-decriminalizes-illegal-drugs> [https://perma.cc/U4TK-N3PM] (quoting Kassandra Frederique, DPA’s executive director, who said, “everyone recognizes we cannot arrest our way out of this problem,” so it is necessary to “start investing in community well-being.”).

⁵³ Lauren Frayer, *In Portugal, Drug Use Is Treated As A Medical Issue, Not a Crime*, NPR (Apr. 18, 2017, 4:55 AM), <https://www.npr.org/sections/parallels/2017/04/18/524380027/in-portugal-drug-use-is-treated-as-a-medical-issue-not-a-crime> [https://perma.cc/54XJ-NB98] (describing Portugal’s approach); Westervelt, *supra* note 34 (“Oregon supporters of decriminalization point to Portugal as a reform model.”).

⁵⁴ Katherine Cook, *CDC: Record Number of Americans Suffered Drug Overdose Deaths in 2020*, KGW (July 14, 2021, 11:30 PM), <https://www.kgw.com/article/news/local/cdc-record-number-of-americans-suffered-drug-overdose-deaths-in-2020/283-24d226e6-c2d8-4196-af07-c231789fd410> [https://perma.cc/VXP6-ZAE5] (reporting that overdose fatalities in Oregon rose 40% from 2019 to 2020, and deaths attributable to opioids nationwide rose by 30% during that period); VOTERS’ PAMPHLET, *supra* note 36, at 131–149 (repeatedly stressing that overdoses provided an urgent reason to treat drug abuse as a health issue rather than a crime).

⁵⁵ E.g., Robert A. Lowe & Ray G. Strangeland, *Opinion: A ‘Yes’ on Measure 110 Will Ensure Oregon Treats Addiction as the Health Care Issue It Is*, OREGONLIVE (Sept. 20, 2020, 6:15 AM), <https://www.oregonlive.com/opinion/2020/09/opinion-a-yes-on-measure-110-will-ensure-oregon-treats-addiction-as-the-health-care-issue-it-is.html> [https://perma.cc/BXZ8-PZSC] (“Measure 110 will remove criminal penalties . . . [P]eople caught with small amounts of drugs will

The first nine months of implementation disappointed some observers who had hoped for a quick pivot to the health model. One problem has been a lack of incentives for drug users to seek treatment. Arrests previously landed offenders under the supervision of drug court judges or probation officers who offered leniency if the offenders completed treatment.⁵⁶ Measure 110 reduced arrests by 83%,⁵⁷ but the measure purported to set up an alternate route to treatment: police would issue tickets imposing \$100 fines, and violators could avoid the fines by calling a hotline to undergo a “health screening” that might result in a suggestion to seek treatment.⁵⁸ Police wrote very few such tickets in the nine months after Measure 110 took effect. In fact, in Oregon’s three largest counties containing nearly half of the state’s population, police only issued a total of ninety-four tickets.⁵⁹ Statewide, the total was 1280, with a higher concentration in rural counties.⁶⁰ Among the violators who received tickets, a substantial number ignored them, failing to appear in court or pay the fine.⁶¹ Only a total fifty-one violators who

instead be connected to the drug treatment and recovery services they need to get well.”). The Health Justice Recovery Alliance, a proponent of Measure 110, included this language on its website: “People will no longer be arrested and put in jail simply for possession of small amounts of drugs. Instead, they will receive a health assessment and be connected to the right treatment or recovery services, including housing assistance, to help them get their lives back on track.” HEALTH JUSTICE RECOVERY ALLIANCE, <https://healthjusticerecovery.org/facts/> (last visited on Nov. 5, 2021).

⁵⁶ See Bergstrom, *supra* note 13, at 5 (noting that a criminal conviction is a necessary condition for probation); Crombie, *supra* note 29 (noting that Measure 110 reduced the number of participants in drug court by approximately 33% in one county, but statewide data are not yet available).

⁵⁷ See Crombie, *supra* note 29 (indicating that arrests for drug possession dropped 83%).

⁵⁸ Measure 110, Drug Addiction, *supra* note 21, §§ 2(2)(b), 22.

⁵⁹ Crombie, *supra* note 29 (setting forth total number of citations in Oregon’s three largest counties, Multnomah, Washington, and Clackamas).

⁶⁰ *Id.* (indicating total citations statewide from February to October 2021, based on statistics maintained by Oregon Judicial Department).

⁶¹ *Id.* (stating that approximately 600 violators receiving tickets failed to show up in court at all). According to Captain Todd Moran of the Grants Pass Police Department, violators who receive citations under Measure 110 “generally understand they don’t face a consequence for failing to follow up.” *Id.* Kevin Barton, the district attorney for Washington County, Oregon (one of the state’s largest counties, including portions of the Portland metro area) expressed the concern that it would be “easy for people struggling with addiction to ignore the \$100 fine and not get a voluntary health assessment.” Amelia Templeton, *2020 Election Trend: Voters Liberalize State Drug Laws*, NPR (Nov. 5, 2020, 5:00 AM), <https://www.npr.org/2020/11/05/931643092/2020-election-trend-voters-liberalize-state-drug-laws> [<https://perma.cc/B8RK-6EXR>] (quoting Barton’s comments about Measure 110); see Westervelt, *supra* note 34 (noting criticism, after

received tickets actually phoned the hotline to take the health assessment, and most of those calls were perfunctory, with few resulting in drug treatment.⁶² By October 2021, nine months after Measure 110 took effect, the Oregon Judicial Department reported that circuit court judges had only waived fines for a total of seven violators who completed health assessments—less than 0.1% of all people who received tickets.⁶³ The chief executive for the state’s primary hotline declared at the end of October 2021 that the tickets had not provided a viable means of connecting violators to treatment.⁶⁴

Another problem was the scarcity of resources for treatment. As of October 2021, only 457 treatment beds were available in Oregon, compared to 740 a few years before.⁶⁵ Recovery advocates sent a letter to Governor Kate Brown on September 2,

implementation of Measure 110, that “there’s basically no consequence if anyone now cited for possession simply ignores the ticket”); VOTERS’ PAMPHLET, *supra* note 36, at 150 (arguing that the \$100 fine provided by Measure 110 is not “a financial disincentive of sufficient magnitude”). See also Radio Interview with Noelle Crombie, ‘OPB Politics Now:’ *Measure 110 Isn’t Measuring Up*, OPB (Nov. 5, 2021, 5:49 PM), <https://www.opb.org/article/2021/11/05/opb-politics-now-oregon-measure-110-drug-decriminalization/> [https://perma.cc/FZ5U-TP5L] (concluding that Measure 110 citation system, “pitched as an entry point to possible treatment, is not really working as it was presented to voters”; noting that violators “are ignoring these citations” and “people just put [tickets] in their pockets and move on with their lives.”).

⁶² Crombie, *supra* note 29 (“By far, the callers are going through the motions: Only eight asked for treatment information and 35 declined information about those services, saying they called just to meet the requirements of the new law . . . The remaining eight reported that they were already receiving treatment services.”). See Crombie, *supra* note 61 (“The people who staff that health line, they offer to connect [violators] to a treatment facility on a three-way phone call, but no one has taken them up on that offer.”). See also Vanderhart, *supra* note 46 (“The line has received, on average, fewer than two calls a week from people who’ve received tickets.”).

⁶³ Quinton, *supra* note 5 (“In only seven cases did defendants submit a health assessment to get their fines waived” as of October 2021, according to statistics collected by the Oregon Judicial Department); Vanderhart, *supra* note 46 (calculating that waivers of fines occurred in fewer than 0.1% of cases).

⁶⁴ Vanderhart, *supra* note 46 (quoting Dwight Holton, the CEO of Lines for Life, the nonprofit that operates a hotline offering screenings to people who receive tickets for drug possession, who stated: “Potentially the most important metric here — aside from decriminalization and taking stigma away — is, “Are we getting people help?” . . . The answer so far is no. Not in any great numbers.”).

⁶⁵ According to Monta Knudson, executive director of Bridges to Change, and Tera Hurst, executive director of the Health Justice Recovery Alliance, funding for treatment has not matched the need after Measure 110 took effect. Monta Knudson & Tera Hurst, *Knudson and Hurst: Measure 110 Started Strong, But Oregon Still Has an Addiction Crisis*, PORTLAND TRIB. (Oct. 13, 2021), <https://pamplinmedia.com/pt/10-opinion/524715-419365-knudson-and-hurst-measure-110->

2021, arguing that Oregon’s addiction recovery system was “straining to a breaking point with the increase in demand,” and that the inadequate funding for treatment was “causing system failure.”⁶⁶ While Measure 110 established a process for awarding grants to fund health screening and treatment, some treatment providers believed that the subsidies lagged too far behind the need, at least in the early stages of implementation.⁶⁷ Critics also complained that Measure 110 had not mandated an increase in the total number of treatment beds.⁶⁸ Another point of concern was that the measure diverted funding that cities and counties had previously used for drug treatment.⁶⁹

The above-listed shortcomings led some observers to conclude that Measure 110 was far less successful in implementing a health model than in dismantling the punitive model. Doctor Reginald Richardson, director of Oregon’s Alcohol and Drug Policy Commission, noted that Measure 110 succeeded in decriminalizing drugs, “[b]ut in terms of creating a system where more people can get more treatment, which is what was advertised, that’s absolutely not what’s going to be

started-strong-but-oregon-still-has-an-addiction-crisis [https://perma.cc/2WPK-WA9Q] (discussing decline in total number of treatment beds and urgent need for additional funding).

⁶⁶ The lead author of this letter was Mike Marshall, executive director of Oregon Recovers, who had been an outspoken opponent of Measure 110 prior to its passage. Joining Marshall as co-authors were twenty-one other leaders of recovery organizations in Oregon. Letter from Mike Marshall, Exec. Dir., Oregon Recovers, et al., to Kate Brown, Oregon’s Governor, (Sept. 2, 2021), <https://s3.documentcloud.org/documents/21094600/letter-to-brown-from-addiction-treatment-specialists.pdf> [https://perma.cc/8TVX-A224].

⁶⁷ See *id.*; Westervelt, *supra* note 34 (citing various experts who believe that funding for treatment has been insufficient in early phase of Measure 110 implementation).

⁶⁸ Measure 110, Drug Addiction, *supra* note 21, § 2 (providing funding for treatment without setting minimum benchmarks for total treatment beds); Perlow & Wig, *supra* note 32 (indicating that Measure 110 did not necessarily increase number of treatment beds).

⁶⁹ Paul Coelho, medical director of the Salem Health Pain Clinic, and Tim Murphy, CEO of Salem’s Bridgeway Recovery Services, have noted that Measure 110 diverted funding from marijuana taxes that had formerly supported treatment and prevention services at the local level. Paul Coelho & Tim Murphy, *Measure 110 Would Take Away Addiction Treatment and Cost Lives*, SALEM STATESMAN-J. (Oct. 16, 2020), <https://www.statesmanjournal.com/story/opinion/2020/10/16/measure-110-take-away-56-million-addiction-treatment-prevention-guest-opinion/3654050001/> [https://perma.cc/C3L3-ZB78] (“Measure 110 would take away \$56 million in addiction treatment and prevention . . . over the next three years.”). *Accord* Perlow & Wig, *supra* note 32 (pointing out that Measure 110 diverted funding that cities and counties had been using to fund drug treatment and related services).

happening.”⁷⁰ Mike Marshall, executive director of Oregon Recovers, said that Measure 110 “put the cart before the horse” by decriminalizing hard drugs before setting up an adequate health infrastructure.⁷¹ By contrast, according to Marshall, Portugal had achieved better results because that country had spent two years laying the groundwork for the health model before adopting decriminalization.⁷² District Attorney Joshua Eastman put it simply: Measure 110 brought “decriminalization with none of the promised treatment.”⁷³

The other side of the story, however, requires careful consideration. Backers of Measure 110 responded cogently to criticism of Oregon’s slow transition to the health model.⁷⁴ First, they pointed out that Oregon’s treatment infrastructure had

⁷⁰ Rachel Alexander & Saphara Harrell, *Oregon’s Drug Treatment System Is Not Ready for Measure 110 Aftermath, Salem Reporter Finds*, OREGONLIVE (Feb. 6, 2021), <https://www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test> [<https://perma.cc/PPC7-LDGM>]. Richardson contrasted Oregon’s experience with that of other jurisdictions that set up adequate treatment networks before decriminalizing hard drugs: “Most places that have successfully done decriminalization have already worked on a robust and comprehensive treatment system . . . Unfortunately, here in Oregon, we don’t have that. What we have is decriminalization.” Westervelt, *supra* note 34.

⁷¹ Westervelt, *supra* note 34 (“In fact, Marshall and others worry that the treatment and hard reduction horse isn’t even on its feet in Oregon, which is leaving too many stuck in a dangerous pre-treatment limbo and at potential risk of overdosing”); see Zach Weismuller, *Oregon Decriminalized All Drugs to Stop Overdoses. Will It Work?*, REASON (Aug. 6, 2021), <https://reason.com/video/2021/08/06/oregon-decriminalized-all-drugs-to-stop-overdoses-will-it-work/> [<https://perma.cc/QVY7-X4N9>] (citing Marshall’s concern that “Oregon should have bolstered its treatment infrastructure *before* moving forward with decriminalization”); see also Vanderhart, *supra* note 46 (discussing view among some segments of treatment community that Oregon’s treatment infrastructure was not ready for implementation of Measure 110 in 2021).

⁷² Westervelt, *supra* note 34; see also The Times Editorial Board, *supra* note 4 (pointing out that although Oregon sought to emulate Portugal’s decriminalization experiment, “a critical difference between Portugal and present-day Oregon: Portugal invested a lot of money to develop a comprehensive healthcare approach to drug use.”).

⁷³ Crombie, *supra* note 29. Eastman is the district attorney in Josephine County, Oregon.

⁷⁴ There are many eloquent advocates with this perspective, but some are particularly noteworthy: Anthony Johnson, one of the chief petitioners for Measure 110; Tera Hurst, executive director of the Oregon Health Justice Alliance; and various officials with the New York-based Drug Policy Alliance. *E.g.*, Doug McVay, *Measure 110 Update*, KBOO (Nov. 1, 2021), <https://kboo.fm/media/105849-measure-110-update> [<https://perma.cc/Y57D-U3D8>] (interviewing Anthony Johnson about implementation of Ballot Measure 110); Quinton, *supra* note 5 (quoting Hurst’s assessment of Measure 110’s implementation); see generally DRUG POLICY ALLIANCE, <https://drugpolicy.org> (last visited on Nov. 5, 2021) (recapping DPA’s work in Oregon and other jurisdictions, and setting forth positions of DPA leaders on decriminalization).

ranked among the worst in the nation prior to passage of Measure 110,⁷⁵ so it was unreasonable to expect a quick fix.⁷⁶ Second, the proponents downplayed the inefficacy of the citation system in leading addicts to treatment, saying that there are other routes to treatment,⁷⁷ and that the ultimate goal is “to remove police from the picture.”⁷⁸ Third, proponents contended that drug treatment is more successful when sought voluntarily than when compelled by a judge or probation officer.⁷⁹ Fourth, proponents argued that Oregon’s present insufficiency of treatment resources is due largely to the COVID-19 pandemic—which brought hindrances such as social distancing requirements and a labor shortage⁸⁰—and the state will be augmenting those resources with more funding in the coming months.⁸¹ Fifth, the backers of Measure 110 declared that decriminalization alone was an important

⁷⁵ The Times Editorial Board, *supra* note 4 (indicating that when Oregon passed Measure 110 in 2020, the state’s treatment services were “among the least accessible” in the United States).

⁷⁶ Quinton, *supra* note 5 (quoting Hurst’s explanation that shift “doesn’t happen overnight” from the War on Drugs to “a trauma-informed, patient-centered system.”).

⁷⁷ McVay, *supra* note 74 (indicating that Oregonians experiencing substance use disorder can access treatment whether or not they have received citations).

⁷⁸ Crombie, *supra* note 29 (reporting in November 2021 that proponents of Measure 110 “downplayed the citations and the role of police as the entry point to the system, and said the goal overall was to remove police from the picture, so [proponents] weren’t really too bothered by the low citation numbers and low follow-up from folks who were issued these tickets.”).

⁷⁹ See, e.g., Daniel Werb, et al., *The Effectiveness of Compulsory Drug Treatment: A Systemic Review*, 28 INTL. J. DRUG POL’Y 1, 1 (2016) (reviewing studies and concluding that compulsory drug treatment has limited effectiveness); The Times Editorial Board, *supra* note 4 (stating that Measure 110 created a policy where “drug treatment should be voluntary”).

⁸⁰ Nigel Jaquiss, *Providers Warn Substance Abuse Treatment Is Vanishing in Oregon*, WILLAMETTE WEEK (Sept. 23, 2021), <https://www.wweek.com/news/state/2021/09/23/providers-warn-substance-abuse-treatment-vanishing-in-oregon-amid-slow-measure-110-rollout/> [<https://perma.cc/D7EB-3M6H>] (discussing imminent closure of some treatment facilities in Oregon, and attributing problem in part to “workforce shortages in the treatment field exacerbated by COVID.”).

⁸¹ Measure 110, Drug Addiction, *supra* note 21, §§ 2, 5 (establishing ongoing process for awarding grants); Evan Schreiber, *On Anniversary of Vote, Measure 110 Still a Work in Progress*, KATU (Nov. 2, 2021), <https://katu.com/news/recover-northwest/on-anniversary-of-vote-measure-110-still-work-in-progress#:~:text=%E2%80%94%20It%20is%20the%20vote%20that,overwhelmingly%20by%20voters%20in%20Oregon> [<https://perma.cc/9NXX-9J69>] (reporting that treatment providers are awaiting a “new round of funding” from the state pursuant to Measure 110).

victory, even if Oregon has not yet established a robust treatment system.⁸²

What alterations to Oregon's model might allow another state to transition more effectively from the War on Drugs to a health-oriented approach? To begin with, I believe that advocates for drug policy reform should lobby the legislature rather than resorting to the initiative process. A ballot measure has several limitations: it bypasses vetting by legislators and legislative staff, it rarely fits cohesively with existing statutes, it needs to address a narrower range of subjects than does legislation,⁸³ and it often necessitates campaigning with general themes that blur the nuances of the actual provisions.⁸⁴ I believe that a reform proposal should include very specific language indicating precisely how it would undertake a health approach rather than a traditional law enforcement approach.⁸⁵ Another

⁸² Celebrating the one-year anniversary of Measure 110's passage, Cassandra Frederique, executive director of the Drug Police Alliance, discussed the benefits of decriminalization that are separate from ushering in a new health-oriented approach to drug problems. "Now, because of [Measure 110], there are thousands of people in Oregon that will never have to experience the devastating life-long barriers of having a drug arrest on their record, which disproportionately and unjustly affected Black and Indigenous people due to targeted policing." Matt Sutton, *Drug Decriminalization in Oregon, One Year Later: Thousands of Lives Not Ruined by Possession Arrests, \$300 Million+ in Funding for Services*, DRUG POLICY ALLIANCE (Nov. 3, 2021), <https://drugpolicy.org/press-release/2021/11/drug-decriminalization-oregon-one-year-later-thousands-lives-not-ruined> [<https://perma.cc/V58Y-LWRJ>] (quoting Cassandra Frederique); accord *McVay*, *supra* note 74 (arguing that decriminalization was an important accomplishment notwithstanding controversy about citations issued in first nine months following implementation of Measure 110).

⁸³ Among the 26 states that allow citizens to propose ballot measures, 16 states require that each such measure must address a single subject. *Single-Subject Rule*, BALLOTPEDIA https://ballotpedia.org/Single-subject_rule [<https://perma.cc/17JP-YL3K>]. Oregon follows the single-subject rule. OR. CONST., art. IV, § 1(1)(d), art. XVII, § 1.

⁸⁴ During the campaign preceding the November 2020 election in Oregon, proponents of Measure 110 rarely discussed the technical details of the 19-page measure, but instead emphasized the general theme that Oregon should treat drug abuse as a health problem rather than as a crime. Compare Measure 110, Drug Addiction, *supra* note 21, with VOTERS' PAMPHLET, *supra* note 36, at 131–149 (invoking general themes rather than discussing provisions).

⁸⁵ The November 2021 election indicated an increasing wariness of vague proposals to replace traditional policing with a public health model. For example, in Minneapolis, where voters considered a ballot measure that would replace the police department with a "public health oriented" department of public safety, the lack of specificity was a major campaign theme for the opposition, which defeated the proposal. Martin Kaste, *Minneapolis Voters Reject a Measure to Replace the City's Police Department*, NPR (Nov. 3, 2021), <https://www.npr.org/2021/11/02/1051617581/minneapolis-police-vote> [<https://perma.cc/Z5J9-NMW4>]. This result seemed surprising in a city that had expressed so much outrage over the murder of George Floyd by police in 2020.

suggestion is that the schedule for implementation should ensure that adequate treatment infrastructure is in place by the time decriminalization takes effect, as was the case in Portugal.⁸⁶ A lengthy interim between the effective date of decriminalization and the rollout of new treatment systems could exacerbate the problems that decriminalization seeks to address.⁸⁷ In addition, policy makers must ensure that incentives exist for drug users to seek treatment.⁸⁸ Whether these incentives come from the judicial system or from other inducements created by statute,⁸⁹ there must be a reason for drug-dependent people to make healthy decisions. Finally, legislation must provide for periodic collection of data on both the availability, utilization, and effectiveness of treatment.

B. Problems Experienced by Drug Users Following Decriminalization

Drug users in Oregon continue to suffer significant harm after the passage of Measure 110.⁹⁰ One way to gauge this harm is by comparing overdose rates in 2021

⁸⁶ See sources cited *supra* note 71 and accompanying text.

⁸⁷ Westervelt, *supra* note 34 (citing concerns raised by Mike Marshal, executive director of Oregon Recovers, that lag between decriminalization and sufficient funding of treatment programs could leave drug addicts in “dangerous pretreatment limbo” and at greater risk of overdose).

⁸⁸ Coelho & Murphy, *supra* note 69 (noting that most people experiencing SUD “do not take advantage of treatment options available . . . studies show that more than 80% of opioid and methamphetamine users declined treatment when offered”); Vanderhart, *supra* note 46 (indicating that even after implementation of Measure 110, people with SUD tend to ignore treatment “if it’s easier to do nothing”).

⁸⁹ For example, California is considering the possibility of offering payments for sobriety. Ian Spiegelman, *Staying Clean Could Soon Pay Off for Some California Addicts – Literally*, L.A. MAG. (Aug. 26, 2021), <https://www.lamag.com/citythinkblog/staying-clean-payments/#:-:text=Staying%20Clean%20Could%20Soon%20Pay%20Off%20for%20Some%20California%20Addicts%E2%80%94Literally,-The%20State%20Assembly&text=As%20KRON%204%20reports%2C%20the,a%20similar%20program%20in%20California> [<https://perma.cc/BMD7-CVR8>] (“Governor Gavin Newsom and members on both sides of the aisle in the State Assembly are looking to enact plans that would pay California addicts to get sober.”). Other possible inducements might include the provision of highly desirable housing, job training, or employment opportunities upon completion of treatment programs.

⁹⁰ Some reasonable people, such as my fellow symposium participant Michael Lewis, might question whether the government has any legitimate business preventing citizens from harming themselves. I agree with Mike that the regulation of drug use stands in conspicuous contrast with the government’s refusal to police consumption of fatty foods and other dangerous habits. I second Mike’s suggestion that it would be helpful to develop a principled taxonomy of permissible and impermissible government interventions in individuals’ victimless activities.

to those in prior years. (Proponents of Measure 110 had argued before the November 2020 election that the need to reduce overdoses was a paramount consideration.)⁹¹ Some evidence suggests that since Measure 110 took effect on February 1, 2021, Oregon has seen an increase in overdoses requiring hospitalization,⁹² as well as fatal overdoses.⁹³ Of course, the causal connection between the implementation date and subsequent overdoses is unclear. Proponents could argue persuasively that Oregon already had a high overdose rate when Measure 110 took effect,⁹⁴ and the entire United States experienced a surge of overdoses at around the same time,⁹⁵ so decriminalization cannot be at fault for the recent overdoses in Oregon. By the same token, though, it is hard to review this evidence and conclude that Measure 110 has somehow reduced overdoses. The most accurate characterization would be that overdoses have been a significant problem in Oregon both before and after the passage of Measure 110.

Other categories of drug-related harm persist in Oregon. Some commentators have suggested that the large size of the unhoused population in Oregon may be attributable, at least in part, to the prevalence of potent drugs,⁹⁶ and that

⁹¹ VOTERS' PAMPHLET, *supra* note 36, at 131–149 (stressing high overdose rate in Oregon as a reason to transition from a punitive model to a public health model).

⁹² Oregon Health Authority Public Health Division, *Opioid Overdoses Public Health Surveillance Update October 15, 2021*, https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/SUBSTANCEUSE/OPIOIDS/Documents/monthly_opioid_overdose_related_data_report.pdf [https://perma.cc/2APF-DLJA] (reporting that the number of patients with opioid overdoses who presented at emergency departments and urgent care facilities in Oregon was higher or at least as high in each month from March through September of 2021 as in the corresponding months of 2020 and 2019).

⁹³ *Id.* (indicating that fatal opioid overdoses in Oregon in the three months from February to April 2021 were higher than in the corresponding months in 2020 and 2019); Crombie, *supra* note 29 (reporting that in 2022, Oregon “is on track to reach a record for opiate-related overdose deaths.”).

⁹⁴ Oregon Health Authority Public Health Division, *supra* note 92 (reporting a high rate of fatal overdoses, and also hospitalizations due to overdoses, throughout the year 2020).

⁹⁵ Bill Chappell, *Drug Overdoses Killed a Record Number of Americans in 2020, Jumping by Nearly 30%*, NPR (July 14, 2021, 6:54 PM), <https://www.npr.org/2021/07/14/1016029270/drug-overdoses-killed-a-record-number-of-americans-in-2020-jumping-by-nearly-30> [https://perma.cc/U7V2-8NKX] (“More than 93,000 people died of a drug overdose in the U.S. last year – a record number that reflects a rise of nearly 30% from 2019, according to new data released by the Centers for Disease Control and Prevention.”).

⁹⁶ Megan Johnson, *Cheap, Potent Meth Is Pouring in From Mexico. Is It Making Oregon's Homeless Crisis Worse?*, KGW (Nov. 4, 2021, 8:07 PM), <https://www.kgw.com/article/news/local/the-story/p2p-new-meth-homeless-crisis/283-d37c9aa4-bd5a-4894-af39-d8a7100c4830>

decriminalization makes the problem worse.⁹⁷ Proponents could respond, though, the population was already large before the passage of Measure 110, the problem is attributable to other factors such as the high cost of housing and the COVID-19 pandemic, and drug use may be a symptom rather than a cause of homelessness.⁹⁸ Similarly, there is evidence that child removal by the government occurs more frequently in households where parents are experiencing substance use disorder,⁹⁹ but the evidence does not indicate in particular that child removal increased following passage of Measure 110,¹⁰⁰ and in any event, the War on Drugs had

[perma.cc/U927-LHPP] (“A surge of cheap, potent methamphetamine from Mexico is flooding the U.S. drug market, and the growing problem is exacerbating the mental health and homelessness crises in Portland”); Sam Quinones, “I Don’t Know That I Would Even Call It Meth Anymore”, *THE ATLANTIC* (Oct. 18, 2021), <https://www.theatlantic.com/magazine/archive/2021/11/the-new-meth/620174/> [https://perma.cc/YQB8-ERY] (indicating that potent new variety of meth is “worsening America’s homelessness problem,” and including comments from nonprofit CEO in Portland, Oregon); see Joanne Zuhl, *Unpacking the Complex Relationship of Addiction, Homeless, Housing and Recovery*, *STREET ROOTS* (Nov. 4, 2020), <https://www.streetroots.org/news/2020/11/04/unpacking-complex-relationship-addiction-homelessness-housing-and-recovery> [https://perma.cc/NTC6-PNV2] (“Nearly half of people living unsheltered on Portland’s streets last year reported living with substance abuse issues.”).

⁹⁷ Judge Eric Bergstrom, *Oregon’s Ballot Measure 110, The Nation’s First-of-its Kind Drug Decriminalization Law*, https://www.oregon.gov/odot/Safety/Documents/Ballot_Measure_110.pdf [https://perma.cc/294C-H7N2] (linking Measure 110 to homelessness).

⁹⁸ See National Coalition for the Homeless, *Substance Abuse and Homelessness*, (July 2009), <https://www.nationalhomeless.org/factsheets/addiction.pdf> [https://perma.cc/JNC3-G7TW] (“Substance abuse is both a cause and a result of homelessness, often arising after people lose their housing”); Zuhl, *supra* note 96 (“Even if addiction isn’t what puts people on the streets, it’s often what keeps them there.”).

⁹⁹ Naomi Schafer Riley & John Walters, *Legal Drugs Are Fashionable – And Treacherous for Children*, *WALL ST. J.* (Nov. 18, 2020, 1:08 PM), <https://www.wsj.com/articles/legal-drugs-are-fashionableand-treacherous-for-children-11605722904> [https://perma.cc/LR4A-AT7Y] (noting Oregon’s passage of Measure 110 and commenting that “[d]ecriminalization efforts will likely exacerbate the connection between foster care and substance abuse”); cf. Susan Neilson, *More Kids Are Getting Place in Foster Care Because of Parents’ Drug Use*, *NPR* (July 15, 2019, 11:27 AM), <https://www.npr.org/sections/health-shots/2019/07/15/741790195/more-kids-are-getting-placed-in-foster-care-because-of-parents-drug-use> [https://perma.cc/488C-56CY] (“The number of cases of children entering the foster care system due to parental drug use has more than doubled since 2000.”).

¹⁰⁰ Hillary Borrud, *The Number of Oregon Children in Foster Care Dropped Steeply During the Pandemic*, *OREGONLIVE* (Oct. 31, 2021, 8:00 AM), <https://www.oregonlive.com/politics/2021/10/the-number-of-oregon-children-in-foster-care-dropped-steeply-during-the-pandemic-state-official-says-its-part-of-a-long-term-shift.html> [https://perma.cc/L8AF-Z3BL] (reporting that

certainly separated many parents from their children. Once again, the most accurate characterization would be that the drug-related problems of homelessness and child removal both predate and postdate the passage of Measure 110 in Oregon. The available evidence does not indicate clearly that Measure 110 exacerbated or ameliorated these problems.

A debate swirls around whether underage drug use increases following the reduction of criminal penalties for drug possession. In the context of marijuana, there is some evidence that underage use by college students has increased in jurisdictions that legalized this drug,¹⁰¹ increasing risks for certain health-related harms.¹⁰² One explanation is that the elimination of penalties signaled the government's de facto endorsement of marijuana as harmless, diminishing the reluctance of underage populations to use marijuana.¹⁰³ It is too early to tell, however, whether decriminalization of hard drugs will increase their use by young people. Proponents of Measure 110 could argue that such an effect would be unlikely for several reasons. First, the decriminalization of hard drugs does not send as strong a signal of approval as does the legalization of marijuana: in the former case, possession of hard drugs is still illegal, and the government is not deeming these drugs to be innocuous, but rather is determining that a public health approach

the “number of Oregon children in foster care has fallen nearly 20% since January 2020,” due in part to a policy shift at the state’s human service agency).

¹⁰¹ States that legalize marijuana set a minimum age of 21 for legal marijuana use. College students, most of whom are under 21, tend to increase use of marijuana following legalization. Molly Rosbach, *College Students Use More Marijuana in States Where It’s Legal, But They Binge Drink Less*, SCIENCE DAILY (Jan. 13, 2020), <https://www.sciencedaily.com/releases/2020/01/202011311637.htm> [<https://perma.cc/9R33-95NL>] (reporting results from study by researchers at Oregon State University who collected data from seven states and 135 colleges where marijuana was legal and from 41 states and 454 colleges where marijuana was not legal).

¹⁰² These harms could potentially include heart disease and impaired brain development. Jeanine Santucci, *Risk of Heart Attack Associated More Highly with Young Adult Cannabis Users, New Study Finds*, USA TODAY (Sept. 7, 2021), <https://www.usatoday.com/story/news/health/2021/09/07/cannabis-heart-attacks-young-customers-study/5763774001/> [<https://perma.cc/MF4H-MUL9>] (citing peer-reviewed study published in Canadian Medical Association Journal); see Kristin Weir, *Marijuana and the Developing Brain*, 46 AM. PSCH. ASSOC. MON. 10 (Nov. 2015) (collecting studies that show risks of using marijuana before brain development is complete in one’s mid-twenties).

¹⁰³ Abigail Mariani & April Williams, *Perceived Risk of Harm from Monthly Cannabis Use Among U.S. Adolescents: National Survey on Drug Use and Health, 2017*, 23 PREVENTATIVE MEDICINE REP. 101436 (Sept. 2021) (“Despite these risks, adolescents’ cannabis use has risen and their overall perception that cannabis use is harmful has declined over the past two decades. These shifts could be attributed to the rapidly changing policies regarding cannabis legalization.”).

offers the best of hope of reducing overdoses. Furthermore, Measure 110 treats adult use of hard drugs no differently from use by people under age twenty-one, so the regulatory regime for hard drugs in Oregon may not seem as hypocritical to underage populations as does the regime for marijuana.¹⁰⁴ In any event, it is noteworthy that police are issuing far fewer Measure 110 citations to juveniles than to the rest of the population in Oregon. Among 1280 citations issued from February to October 2021, only ten citations were for juveniles.¹⁰⁵ The paucity of juvenile citations may reflect a low rate of drug use in that population or a hesitation on the part of police to cite younger users.

Could other states alter the blueprint of Measure 110 to include additional provisions aimed at harm reduction for drug users? To be clear, Measure 110's omission of specific harm reduction strategies does not mean that Oregon undervalues them; to the contrary, the measure provided funding for harm reduction, and the omission of greater specificity was likely due to space limitations or concerns that more granularity might seem to violate the single-subject rule for a ballot measure.¹⁰⁶ In any event, a comprehensive harm reduction package should include some or all of the following elements. State and local governments can improve safety by establishing needle exchange programs and by distributing test strips that help users to check for fentanyl contamination in their drugs.¹⁰⁷ Another important strategy is the wide distribution of naloxone—a substance that can revive an opioid user after an overdose—to first responders and other personnel who are likely to come into contact with drug users.¹⁰⁸ Public service announcements can be an important element of harm reduction, broadcasting warnings such as “Never use alone,” admonishing children against drug use, and alerting the local community

¹⁰⁴ Bergstrom, *supra* note 97 (noting that Measure 110 does not distinguish between adults' and juveniles' possession of hard drugs).

¹⁰⁵ Crombie, *supra* note 29 (indicating that among 1,280 tickets that police issued statewide from February to October 2021, officers only issued ten tickets to juveniles).

¹⁰⁶ Oregon follows the single-subject rule, along with 15 other states among the 26 that allow citizens to propose initiatives. Single-subject rule, *supra* note 83; OR. CONST., art. IV, § 1(1)(d), art. XVII, § 1. This rule requires that a ballot measure cannot address several subjects; such multiplicity would require presentation of different proposals in several measures.

¹⁰⁷ National Harm Reduction Coalition, *Harm Reduction Issues: Fentanyl*, <https://harmreduction.org/issues/fentanyl/> [<https://perma.cc/LC7F-RJEJ>] (“Fentanyl test strips can identify the presence of fentanyl in unregulated drugs. They can be used to test injectable drugs, powders, and pills.”).

¹⁰⁸ National Institute on Drug Abuse, *Naloxone Drug Facts*, www.drugabuse.gov/publications/drugfacts/naloxone [<https://perma.cc/UD6P-4YQ4>] (“Naloxone is a medicine that rapidly reverses an opioid overdose.”).

when law enforcement detects dangerous contaminants in the local drug supply.¹⁰⁹ Ideally, state and local governments would invest in the construction of facilities for detoxification, even if the users of such facilities have not yet consented to treatment. The combination of these measures does not prevent all harm to drug users, but helps to establish a safety net that could reduce overdoses.

C. Complications for Enforcement of Remaining Criminal Laws after Decriminalization of Some Offenses

Critics sometimes raise the concern that decriminalization of low-level offenses could constrain the enforcement of criminal laws remaining on the books. For example, by eliminating criminal penalties for simple possession, Measure 110 could hinder the investigation of higher-level drug crimes such as distribution, manufacturing, and possession with intent to distribute. This effect is difficult to quantify.¹¹⁰ Critics point out that Measure 110 forecloses the use of certain investigative techniques such as “rolling” low-level offenders against their dealers, or relying on the possession of a small drug quantities as probable cause for search warrants.¹¹¹ Measure 110 could allow dealers to evade arrest by carrying quantities below criminal thresholds, such as thirty-nine units of LSD.¹¹² Another criticism is that the inconsistent patchwork of drug laws might cause confusion or frustration

¹⁰⁹ Cf. U.S. Food & Drug Administration, *The Real Cost Campaign*, <https://www.fda.gov/tobacco-products/public-health-education/real-cost-campaign> [<https://perma.cc/LVA-8-4PU7>] (discussing effectiveness of public service announcements warning against tobacco use in certain contexts).

¹¹⁰ To quantify this effect, it would not be sufficient to compare arrests and convictions in the periods before and after February 1, 2021, the date when Measure 110 took effect. It would be necessary to determine the ratio of arrests and convictions to total crimes committed during those periods. Available data presently do not allow such a calculation, although some statistics seem to indicate a declining total number of arrests and convictions for offenses involving drug dealing and possession of large quantities during the period from February to August 2021. Quinton, *supra* note 5 (citing data collected by the Oregon Criminal Justice Commission).

¹¹¹ F. Lee Bailey & Kenneth Fishman, *HANDLING NARCOTIC AND DRUG CASES*, § 73.12 (2021) (discussing Oregon’s Ballot Measure 110, and noting that “decriminalization will have an effect on searches and arrests where the quantity no longer gives rise probable cause”); Eric Howald, *Decriminalization Movement’s Goals Are Lofty; the Effects Are Already Being Felt Locally*, *KEIZER TIMES* (Mar. 30, 2021, 9:00 AM), <https://www.keizertimes.com/posts/2627/decriminalization-movements-goals-are-lofty-the-effects-are-already-being-felt-locally> [<https://perma.cc/MBG7-F6AE>] (listing various ways in which Measure 110 will impact traditional investigative techniques such as stopping and questioning suspects carrying small quantities of hard drugs).

¹¹² Measure 110, *Drug Addiction*, *supra* note 21, §§ 11–17. See *supra* text accompanying note 26.

that would lead police to abandon their enforcement efforts altogether.¹¹³ Backers of Measure 110 could rightly respond that past enforcement strategies have sometimes abused low-level offenders and have exacerbated racial disparities; moreover, there is no requirement that police work must be easy, and alternative investigative tools are available when police pursue higher-level traffickers. One possible irony, however, is that the withdrawal of state and local police from such investigations might increase the involvement of federal authorities, leading to longer sentences and compounding mass incarceration.¹¹⁴

Intoxicated driving, also known as driving under the influence of intoxicants (DUI), is a matter of great concern to critics of decriminalization. They insist that DUI rates will increase as Measure 110 takes away the criminal penalties and stigma formerly associated with drug use. Some evidence suggests that legalization of marijuana led to higher rates of DUI involving that drug.¹¹⁵ One challenge for police is that there is no easy way to determine what blood alcohol level of drugs necessarily proves intoxication: sometimes trace amounts of drugs remain in the bloodstream after intoxication has ended. Whereas proof of drunk driving is relatively straightforward, proving drug-intoxicated driving will be difficult, at least in the near future.¹¹⁶ Proponents of Measure 110 could reply to such concerns by pointing out that the best proof of intoxicated driving is the erratic driving itself, not the inference of danger from evidence of past drug use. Moreover, the shift from alcohol use to marijuana use in certain states has arguably reduced the danger of

¹¹³ This problem seems to have arisen in the context of marijuana laws. A study by researchers at Portland State University found that among police officers surveyed in Oregon, the “overwhelming consensus” was that marijuana laws were so complicated, inconsistent, and confusing as to preclude effective enforcement. Kris Henning & Greg Stewart, *Dazed and Confused: Police Experiences Enforcing Oregon’s New Marijuana Laws*, Portland St. U. Research Brief (Feb. 2021) <https://www.pdx.edu/criminology-criminal-justice/sites/g/files/znlchr3071/files/2021-04/2021-oregon-marijuana-law-enforcement-survey-research-brief.pdf> (“[P]olice officers and deputies in Oregon are struggling to understand and actively enforce the state’s remaining prohibitions involving marijuana. Where once there was a clear distinction between legal and illegal activity, there is now complex, many would say poorly written, policy that is difficult to implement in the field.”).

¹¹⁴ Richard Boylan & Cheryl Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J. L. & ECON. 627, 642 (2005) (indicating that “in states with short state sentences for drug offenders, relatively simple cases may be prosecuted at the federal level to obtain longer prison sentences.”).

¹¹⁵ Henning & Stewart, *supra* note 113 (presenting evidence that driving under the influence of marijuana in Oregon has increased since legalization of the drug).

¹¹⁶ *Id.* (setting forth survey results indicating the difficulty of proving a suspect has driven while under the influence of marijuana).

intoxicated driving, because marijuana does not cause the same degree of impairment as alcohol.¹¹⁷ In any event, say the backers of Measure 110, law enforcement officers should develop new investigative techniques for DUII instead of assuming that a device such as a breathalyzer will always be sufficient to prove this crime.

How can states that adopt decriminalization reduce the risk that this reform will limit enforcement of other criminal laws? One important precaution is to make sure police have access to resources and investigative techniques that remain effective following decriminalization. Once legislators decide what crimes they want to keep on the books, and how aggressively they want to enforce violation of those laws, legislators should consider the extent to which they will permit and/or subsidize alternate investigative techniques such as the following: proactive electronic surveillance, reliance of paid informants, and the use of a statewide investigative team that includes credible undercover officers who can rotate from location to location in order to maintain their cover. Some legislators might conclude that the use of such techniques is an intolerable infringement on suspects' liberties, but at least there will be a careful consideration of the tradeoff with tolerance of higher-level drug crime. With respect to DUII investigations, legislatures can provide funding for the training of drug recognition experts who will be able to assess whether a suspect is driving under the influence.¹¹⁸ In sum, Measure 110 and similar reforms in other states will require an update, not an abandonment, of techniques for the investigation of higher-level crimes outside the scope of the decriminalization measures.

D. Need to Codify Protections Against Police Misconduct as Fewer Cases Go to Court Due to Declining Prosecutions

Decriminalization also necessitates greater protection of suspects' rights against overreaching by police. Historically the remedy for police misconduct during investigations has been the exclusion of evidence from criminal

¹¹⁷ Rishi Iyengar, *Driving While Stoned Is Much Safer Than Driving Drunk, Says a New Study*, TIME (Feb. 12, 2015, 5:32 AM), <https://time.com/3706491/driving-stoned-drunk-study-safety/> [<https://perma.cc/6NVD-VCHS>] (citing data collected by National Highway Traffic Safety Administration).

¹¹⁸ National District Attorneys Association, *SAVING LIVES AND PREVENTING CRASHES: THE DRUG EVALUATION AND CLASSIFICATION (DEC) PROGRAM* (2018) https://ndaa.org/wp-content/uploads/1033558_DREMonograph_FinalWEB.pdf [<https://perma.cc/8HZF-F7PH>] (discussing value of drug recognition experts in investigation and prosecution of intoxicated driving).

prosecutions.¹¹⁹ The authority for this sanction has come primarily from judicial interpretations of constitutional requirements.¹²⁰ Now that Measure 110 has taken away any possibility of a criminal prosecution for a low-level drug violation, this sanction could seem inconsequential to police,¹²¹ especially when they realize that a ticket for a civil violation rarely results in any judicial proceeding.¹²² Thus decriminalization could reduce the disincentive for police misconduct. Of course, it is important not to be too naïve about the disincentive created by Fourth Amendment jurisprudence during the War on Drugs,¹²³ but at least a suppression motion by a criminal defense attorney could bring police misconduct to light and thereby embarrass the officer or provoke a judicial rebuke, if not derail a prosecution. Without the suppression remedy, there really is no recourse for aggrieved suspects: qualified immunity shields police from liability for civil damages, and investigations of local police departments by the U.S. Department of Justice rarely bring meaningful change.¹²⁴

One might reasonably wonder why police would want to mistreat drug users

¹¹⁹ *Weeks v. United States*, 232 U.S. 383, 383, 398 (1914) (applying the exclusionary rule at federal level for the first time); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to state level).

¹²⁰ Orin Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1118 (2017) (observing that the “best-known” regulation of searches and seizures comes from the “massive body of case law” under the Fourth Amendment; statutes occasionally address specific matters of privacy in the interstices).

¹²¹ A similar phenomenon occurred during the “War on Terror” following the attacks on September 11, 2001. Domestic antiterrorism investigations were seeking to avert further attacks, and were not necessarily seeking to collect admissible evidence for criminal prosecutions, so law enforcement agents were less likely to follow constitutional rules governing investigations, because the remedy for violation of those rules was the exclusion of evidence. See generally John Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 792–93 (2007) (noting that because domestic antiterrorism investigations are “not necessarily directed at obtaining admissible evidence, rules that ordinarily limit the available range of tactics may not apply.”).

¹²² Crombie, *supra* note 29 (indicating that small fraction of violators who receive citations actually end up going to court).

¹²³ Michael Vitiello, *The End of the War on Drugs, the Peace Dividend, and the Renewed Fourth Amendment*, 73 OKLA. L. REV. 285, 285 (2021) (“The War on Drugs profoundly eroded the Fourth Amendment.”).

¹²⁴ See Eric Williamson, *Harmon’s New Casebook Is the First to Look at Law of the Police*, U. VA. NEWS (Mar. 18, 2021) <https://www.law.virginia.edu/news/202103/harmons-new-casebook-first-look-law-police> [<http://perma.cc/YFD2-P322>] (discussing scholarship of Virginia Law Professor Rachel Harmon, who notes insufficiency of these two remedies, but who sees potential value in regulation as a means of curbing police misconduct).

when the citation system is so unlikely to result in drug treatment or payment of a fine, and when criminal prosecution is no longer a possibility. To be sure, most police probably would not exploit the new era of diminished accountability as an opportunity to violate the rights of drug users.¹²⁵ But some officers might abuse their authority, either because of enmity toward drug users, a desire to “keep drugs off the streets,” or a strategy of prodding unhoused people to leave certain locations. Such officers could seize evidence using impermissible techniques and could expose the suspects to several categories of detriment, including the loss of parental rights, employment, housing, government benefits, etc.¹²⁶ Officers might conceivably furnish such evidence to federal investigators, who can still arrest for a wide range of drug crimes including simple possession, and who operate under federal Fourth Amendment rules that are generally less strict than the rules in the progressive states where decriminalization is likely to occur.¹²⁷ While it is certainly inaccurate to presume that a large number of state officers would try to circumvent decriminalization by imposing ancillary hardships on low-level drug offenders, it is important to guard against the possibility that some police might refuse to abandon the War on Drugs.

What should states do to address this risk? The time has come to codify rules against police misconduct in a comprehensive statutory scheme, rather than relying on judicial enforcement of constitutional rules by means of excluding evidence in

¹²⁵ It would be inaccurate and unfair to assume that all police desire to harass low-level drug offenders after the implementation of Measure 110. In fact, early evidence indicates that the opposite view is more widespread: many officers seem disinterested in interacting with drug users following decriminalization. Vanderhart, *supra* note 46 (indicating that after passage of Measure 110, many officers “have little appetite” for the enforcement of laws against possessing small quantities of drugs, and these officers “appear to be turning their attention elsewhere”); Crombie, *supra* note 29 (discussing reluctance of police to issue citations pursuant to Measure 110).

¹²⁶ Thanks to UNH Law Professor Melissa Davis for her insightful comments on this topic during my presentation when I visited campus on October 29, 2021.

¹²⁷ Federal constitutional requirements serve as a floor, but not a ceiling, for rights that states can accord to defendants in criminal cases. *E.g.*, *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution”); *California v. Greenwood*, 486 U.S. 33, 43 (1988) (“Individual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.”). Some courts in progressive states now impose stricter requirements on police in drug investigations than do the federal courts. *Vitiello*, *supra* note 123, at 289 (indicating that some “states’ courts have shown a willingness to expand Fourth Amendment protection or to rely on state constitutional provisions to counter the Supreme Court’s Fourth Amendment case law” that has favored the government in the War on Drugs).

criminal prosecutions. A statute should specify precisely what police conduct is out of bounds, and should remove immunity for officers who engage in the forbidden conduct. One advantage of such an approach is that it would provide clearer notice to police than does the existing jurisprudential framework (set forth in hundreds of separate judicial opinions).¹²⁸ Clear notice would not only facilitate lawsuits for redress, but it would also help to prevent the use of abusive investigative techniques in the first instance. State bars should also revise their ethical rules—which apply to both state and federal prosecutors—so that no prosecutor at any level can participate in an investigation that violates the new statutes for police conduct, and no prosecutor can adopt a case that rests in whole or in part on an investigation violating these statutes.¹²⁹

CONCLUSION

Oregon has embarked on a bold experiment. In approving Measure 110, the state's voters signaled that they can no longer abide certain aspects of the War on Drugs. They demanded a transition to a health-oriented approach prioritizing equity, healing, and cost savings.

These goals are commendable, even if the results from the first nine months of implementation are disappointing in some respects. The state has been more successful in tearing down criminal penalties than in erecting a health infrastructure to replace the punitive approach. Drug users continue to suffer significant harms, police face difficulty enforcing certain statutes that remain on the books, and there is less incentive for police to respect the rights of suspects when decriminalization has taken away the sanction of excluding evidence from a criminal prosecution for drug possession.

It is important to bear in mind that the above-listed challenges are not inherent shortcomings of decriminalization. Rather, it is likely that a state could avoid or ameliorate many of these problems by crafting a comprehensive statutory scheme that addresses the challenges simultaneously with the implementation of

¹²⁸ See Kerr, *supra* note 120, at 118 (noting that judicial opinions on constitutional rules governing searches and seizures sometimes lack clarity, leading to uncertainty in interpretation by police and others).

¹²⁹ For an argument that reforms to the ethical rules for prosecutors are an appropriate way to constrain certain categories of misconduct by police, see Tom Lininger, *Sects, Lies and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1271–81 (2004) (advocating such reforms in the context of racial and religious profiling by police); see also Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL'Y REV. 389, 393–405 (2006) (taking similar position in context of federal antiterrorism investigations).

decriminalization.¹³⁰

Once again, the imperfection of Oregon's Measure 110 does not mean it was a step in the wrong direction. The appropriate basis for comparison is not a utopia free of drug abuse, racial disparities and police misconduct; rather, Measure 110 deserves evaluation against the backdrop of the War on Drugs. The last half-century has shown that the United States causes great harm whenever it wages any "war" against its own citizens (e.g., the War on Poverty that began in the 1960s, the War on Drugs that began in the 1970s, and the War on Terror that began in 2001). Now Oregon and the rest of the nation are learning what political scientists have long understood: peacebuilding can be more difficult than warfare. This reality does not mean peace is less desirable than war; it just means that reformers and their critics should temper expectations for a speedy solution to the drug problem, and should be patient as various jurisdictions experiment with, and incrementally improve, policy alternatives to the War on Drugs.

¹³⁰ See *supra*, final paragraphs of Sections II.A., II.B., II.C., and II.D.