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A Response to Modern Criticisms of the War on Drugs

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PREFACE

We are currently living through a massive shift in attitude towards what was at one point deemed “public enemy number one” by President Richard Nixon in 1971.¹ For decades, American policy towards illegal drugs, drug abuse, and the plethora of social and personal problems that accompany these societal cancers has been one of combativeness.² Punitive justice was embraced, and drug offenses were met with the full might of the law in the form of harsh mandatory minimum sentences.³ Even the most brutal, evil drug lords of the past fifty years feared the American justice system for our handling of drug offenders, and their inability to escape justice once caught.⁴ American policy and support were the key deterrents. Yet these policies are now coming under scrutiny like never before.

In the past decade, this opinion, as well as the tactics employed, have seemingly fallen out of favor with many American citizens, policy makers, and academics.⁵ The methodology used is shifting from punishment to rehabilitation; from imprisonment to incarceration alternatives; and from strict drug laws to outright legalization.⁶ The prevailing retrospective of the American drug policy over the past fifty years seems to be that the so-called “War on Drugs” was an absolute and total failure.

America’s vision and handling of the drug crisis in the past five decades was attacked on all fronts, as, among other things, a failure, tragedy, and most commonly, racist.⁷ The criticisms of the War on Drugs were and are presented as undisputed fact, as if there was no one in the

¹ MICHAEL NEWTON, GANGS AND CRIME 29 (2008).

² Alex Kreit, *Drug Truce*, 77 Ohio St. L.J. 1323, 1324-26 (2016).

³ *Id.*

⁴ Jenna Bowley, *Robin Hood or Villain: The Social Constructions of Pablo Escobar* (2013) (Honors thesis, University of Maine) (University of Maine Digital Commons)

⁵ Alex Kreit, *Drug Truce*, 77 Ohio St. L.J. 1323, 1326 (2016).

⁶ *Id.*

⁷ *Id.*

entire country who believed in the war that we as a nation spent fifty years and billions of dollars fighting.

Despite this prevailing narrative, nearly half of Americans actually continue to support the policy of harsh sentencing and punitive justice system that has been employed since the War on Drugs was declared.⁸ The voices of these individuals are often silenced, or brushed off by those who write criticizing the War on Drugs, who portray as fact their opinion that the war was and remains a failure which has brought about countless societal ills.

The seemingly universal criticisms of the War on Drugs often fail to take into account the myriad of complexities that accompanies the War on Drugs. Furthermore, they fail to consider even the possibility of alternative explanations for the societal ills for which they blame America's drug policy. Just as these criticisms call into question the methods used in fighting the War on Drugs, the criticisms themselves must be subjected to their fair share of scrutiny. The seemingly infinite complexities and nuances surrounding the War on Drugs renders it too multifaceted to simply write off as a failed policy, and attribute to it a host of societal problems.

Therefore, the true goal of this paper is not to write in outright support of the War on Drugs, but rather shine a light on the seemingly overlooked (or ignored) intricacies, complexities, and nuances surrounding it. Once taken into account, these overlooked facets of the War on Drugs will reveal that its constant criticism does not offer the full picture, and why the common retrospective of the War on Drugs should be reevaluated in light of these complexities.

PART I: THE HISTORY OF THE WAR ON DRUGS

A. Early Drug Legislation (1900-1960)

⁸ Emily Ekins, *55% of Americans Favor Decriminalizing Drugs*, CATO INSTITUTE, October 2, 2019.

The effort put into the criminalization and eradication of illegal drugs is a relatively new policy in our country. Early on, the drug⁹ market was largely unregulated. In fact, some “medicine” contained ingredients such as cocaine or heroin derivatives.¹⁰ One of the first pieces of legislation aimed at regulating drugs was the Harrison Tax Act of 1914.¹¹ However, this act was not as much of a criminal prohibition as it was “an act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.”¹² In essence, the Harrison Tax Act was an attempt to regulate via crippling taxation rather than prohibition.¹³

Notably missing from the Harrison Tax Act was any mention of marijuana. This was likely due to opposition from the pharmaceutical industry.¹⁴ One of the earliest attempts to regulate marijuana in America was the Marijuana Tax Act of 1937.¹⁵ Once again, the act did not create any criminal prohibitions, and favored exorbitant taxation to curtail the use of marijuana. It was not until The Boggs Act of 1951¹⁶ that the government really began to turn their attention towards prohibition and criminal sanctions for drug related offenses. Motivated by an uptick in drug use among teenagers in the late 40s and early 50s¹⁷, the act imposed mandatory sentencing for drug offenses. For instance, a conviction for possession of marijuana or heroin was met with

9 For purposes of this paper, the term “drug” refers to the common illegal drugs such as heroin, cocaine, crack, methamphetamines, marijuana, and the like. It does not refer to drugs that have traditionally been used for medicinal purposes, such as ibuprofen or acetaminophen.

10 Tom Head, *A Short History of the War on Drugs*, ThoughtCo (Feb. 16, 2021), <https://www.thoughtco.com/history-of-the-war-on-drugs-721152>.

11 Harrison Act of 1914, 38 Stat. 785.

12 *Id.*

13 ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 37 (2009).

14 *Id.* at 38.

15 Marijuana Tax Act of 1937, 50 Stat. 551 (repealed 1956).

16 Pub.L. 82–255

17 See WHITFORD & YATES, *supra* note 13, at 38.

a minimum sentence of two years imprisonment, and a fine up to \$20,000.¹⁸ This was also around the time the “gateway drug” argument came onto the public radar.

Harry J. Anslinger, president of the Federal Bureau of Narcotics (FBN) defended equally categorizing marijuana and heroin by claiming marijuana was a “stepping stone” which would inevitably lead to the use of harder, more dangerous drugs.¹⁹ States also began passing criminal statutes proscribing the use and sale of drugs.²⁰

The perceived success of the Boggs Act encouraged congress to double down on their anti-drug stance, paving the way for the 1956 Narcotics Control Act.²¹ This act is perhaps the first step in creating the system of narcotics enforcement we are familiar with today. The Narcotics Control Act stiffened minimum sentences for second and third offenses to five and ten years imprisonment respectively. However, perhaps the most notable innovation of the act was the power it gave to the Bureau of Narcotics. Upon the passage of the Act, agents were allowed to carry firearms, execute search and arrest warrants, serve subpoenas, and “make arrests without warrant for violations of any law of the United States relating to narcotic drugs...where the violation is committed in the presence of the person making the arrest.”²² Lastly, the act provided for the possible deportation of aliens convicted under federal narcotics laws.²³ This strengthened the federal government’s ability to pursue and prosecute drug offenses to a level never seen before in the United States.

B. The 1960s

The counterculture of the mid to late 1960s will forever be intertwined with drug use. It was during this period that rampant drug use really came into the public eye. As one author put

18 Pub.L. 82–255

19 See WHITFORD & YATES, *supra* note 13, at 38.

20 *Id.*

21 70 Stat. 567.

22 *Id.*

23 *Id.*

it, “The use of marijuana in colleges in 1960 was almost unknown; by 1970, it [was] commonplace.”²⁴ The spike in marijuana use had begun in the early 1960s, and statistics show a gradual increase until it reached its peak in 1973.²⁵ However, the decade did not start out this way. The administration of President Kennedy did not put the issue of drugs at the forefront of his priorities list.²⁶ He did convene the Advisory Commission on Narcotics and Drug Abuse, but the commission’s recommendations did not make it into law during the Kennedy administration.²⁷

Turbulence came during the massive social upheaval stemming from the perfect storm of several major historical events of this time. These include civil rights struggles, the Vietnam War, and anti-poverty initiatives.²⁸ It was also during this time that the crime rate in America more than doubled.²⁹ This inevitably led to public worry over crime. In fact, in one survey, the percentage of people claiming crime-related issues are the most important national problem rose from 5.6 percent in 1957 to 37.9 percent in 1972.³⁰ This growing concern among the general public prompted congress to pass the Drug Abuse Control Amendments³¹ in 1965. These amendments increased the control of the Food and Drug Administration over “hypnotics and stimulants.”³² It also created the Bureau of Drug Abuse Control (BDAC).³³ The BDAC and FBN

24 ERICH GOODE, *THE MARIJUANA SMOKERS* (1970).

25 Joseph Gfroerer & Marc Brodsky, *The Incidence of Illicit Drug Use in the United States, 1962–1989*, 87 *British Journal of Addiction* 1345 (1992).

26 See WHITFORD & YATES, *supra* note 13, at 38.

27 The commission’s recommendations were received by President Kennedy shortly before his assassination on November 22, 1963.

28 See WHITFORD & YATES, *supra* note 13, at 39.

29 JUSTICE RESEARCH AND STATISTICS ASS’N, U.S. DEPT. OF JUSTICE, *CRIME AND JUSTICE ATLAS 2000* (2000).

30 ARTHUR L. STINCHCOMBE ET AL., *CRIME AND PUNISHMENT IN AMERICA: CHANGING ATTITUDES IN AMERICA* (1980).

31 Drug Abuse Control Amendments of 1965, 79 Stat. 226

32 *Id.*

33 *Id.*

were merged, forming the Bureau of Narcotics and Dangerous Drugs (BNDD) in 1968 under President Lyndon Johnson's initiative to consolidate power.³⁴

However, perhaps the most important shift to come out of this decade as it pertains to drug enforcement came not from legislature, but from the judiciary. In the landmark case of *Terry v. Ohio*³⁵, the Supreme Court held that law enforcement may stop, frisk, and/or detain an individual based on "reasonable suspicion."³⁶ While *Terry* involved a pat-down search for weapons, we will see that police have taken the concept much further, applying it to drug related offenses. We will also see that the expansion of *Terry* has been widely met with judicial approval from the courts.

C. Declaration of War

Richard Nixon won the presidential election of 1968 vowing to instill law and order into the growingly more lawless society that was late 1960s America. President Nixon officially ushered in what we know today as the "War on Drugs," referring to illegal drugs as "public enemy number one" in 1971.³⁷ The rhetoric went one step further in 1973 when he declared before congress "This administration has declared all-out, global war on the drug menace."³⁸ That same year, he oversaw the creation of the federal Drug Enforcement Administration ("DEA")³⁹, which would become the preeminent federal law enforcement agency used to wage the War on Drugs.

Important to note is that the early months of the War on Drugs were aimed at treatment rather than criminal punishment.⁴⁰ In fact, President Nixon oversaw the repealing of mandatory

³⁴ Wisotsky, Steven (1986) *Breaking the Impasse in the War on Drugs*. New York: Greenwood Press.

³⁵ *Terry v. Ohio*, 392 U.S. 1 (1968)

³⁶ *Id.*

³⁷ MICHAEL NEWTON, *GANGS AND CRIME* 29 (2008).

³⁸ Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. Ill. U.L.J. 1, 8.

³⁹ Michael M. O'Hear, *Federalism and Drug Control*, 57 Vand. L. Rev. 783, 798

⁴⁰ Alex Kreit, *Drug Truce*, 77 Ohio St. L.J. 1323, 1329 (2016).

minimum sentences for drug offences.⁴¹ It was not the federal government that first instituted tough anti-drug laws; it was the states, with New York being at the forefront. The Rockefeller Drug Laws (named for then New York Governor Nelson Rockefeller) imposed mandatory minimum sentencing for drug possession convictions.⁴² The other states soon followed suit, and passed “harsh” drug laws that imposed minimum sentences for possession offenses.⁴³

In 1973, we saw the Supreme Court give police another tool with which to fight the War on Drugs in the form of *United States v. Robinson*.⁴⁴ The Court here upheld the search of a crumpled-up cigarette packet (in which police found heroin) incident to Robinson’s arrest for driving with a suspended license.⁴⁵ This served to implicitly validate pretextual arrests in order to search for drugs on those who police deemed suspicious.

D. The Reagan Era

Even after President Nixon’s declaration of war, drug use soared, mainly among younger Americans.⁴⁶ This led to many Americans calling on the federal government to enact tougher drug policies.⁴⁷ President Ronald Reagan fully bought into the War on Drugs, and took a more hard-lined approach than his predecessors, framing the War as a “struggle of national values against some unnamed terror.”⁴⁸ He employed both the military, and the intelligence community to help fight the drug war.⁴⁹ It was under his administration that federal funding for drug treatment, which had ballooned under President Nixon, was slashed by over seventy-five

⁴¹ *Id.*

⁴² Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the “War on Drugs”*, 15 UDC-DCSL L. Rev. 59, 66

⁴³ *Id.*

⁴⁴ *United States v. Robinson* 414 U.S. 218 (1973)

⁴⁵ *Id.*

⁴⁶ O’Hear, *supra*, at 799.

⁴⁷ *Id.*

⁴⁸ Stuart, *supra*, at 10.

⁴⁹ Gilmore, *supra*, at 67.

percent, and mandatory minimum sentences for drug offenses were reinstated.⁵⁰ This confirmed the all out shift in federal focus from dealing with the drug problem through rehabilitation, to using the full force of the criminal justice system.

It was also under President Reagan that the Anti-Drug Abuse Acts of 1986 and 1988 were passed, which brought about the much-maligned sentencing disparity between crack and powder cocaine.⁵¹ The two bills also called for the hiring of more DEA agents, and the 1986 bill provided for building more federal prisons.⁵²

Ironically, the lasting legacy of President Reagan's anti-drug efforts is not his hard-lined approach, but a much "softer" tactic. Perhaps the most well-known tactic employed by President Reagan was the deployment of the First Lady. As the story goes, Nancy Reagan was asked by a group of children what they should do if offered drugs. She responded with "Just say no," thus launching the three-word phrase into the American lexicon.⁵³ While it has been parodied ad nauseum, its staying power has proven itself in the proceeding decades since it was first uttered.

The Reagan years also saw the Supreme Court further shrink the protections of the Fourth Amendment. In *California v. Ciraolo*, the Court affirmed a conviction stemming from police flying a private plane over Ciraolo's backyard and observing marijuana.⁵⁴ The Court went one step further in *Florida v. Riley*, where They upheld a conviction in which police flew a helicopter 400 feet over the Defendant's enclosed greenhouse and saw "what [they] thought was marijuana growing in the structure."⁵⁵ A warrantless search incident to an arrest for a minor traffic stop also gained credence in *New York v. Belton*, where the Supreme Court held "when an officer makes a

⁵⁰ Kreit, *supra*, at 1331.

⁵¹ Gilmore, *supra* note 42, at 67.

⁵² Pub. L. No. 99-570, tit. I, XIV (1986); Pub. L. No. 100-690, tit. I, VI.

⁵³ Gilmore, *supra*, at 67.

⁵⁴ *California v. Ciraolo*, 476 U.S. 207, 209 (1986)

⁵⁵ *Florida v. Riley*, 488 U.S. 445, 448 (1989).

lawful arrest of an occupant or recent occupant of a vehicle on the highway, the officer can reasonably search the interior passenger compartment of that vehicle.”⁵⁶

E. 1990s-2000s

The election of Democrat Bill Clinton did little to alter the trajectory of our nation’s drug policy. While the tough rhetoric of the Reagan and Bush years subsided, the tough-on-drugs policies continued. President Clinton employed the same strategies as his predecessors. Two of his most notable policies were to approve funding for 100,000 additional police officers, and commit \$15 billion to “a special anti-drug command force under military supervision.”⁵⁷ As a result, by 1998, the federal anti-drug budget had grown to over two hundred times what it was when President Nixon first began his campaign against drugs.⁵⁸

The judicial expansion of police power also extended into the 1990s. For example, in *Wren v. United States*, the Court explicitly gave approval to pretextual traffic stops.⁵⁹ This validated the practice of police stopping and arresting individuals for minor traffic offenses with the ulterior motive of searching for narcotics.

F. Modern Day

The War on Drugs as we have come to understand it over the past fifty years seems to be coming to an end. In 2003, under the administration of George W. Bush, the National Drug Control Strategy strayed away from the punitive approach to drug regulation, and identified “healing America’s drug users” as a national priority.⁶⁰ Today more than ever we are focusing not on punishing drug users, but helping them. This is a stark shift in attitude after decades of employing punitive justice in an attempt to force drugs out of our society.

⁵⁶ *New York v. Belton*, 453 U.S. 454, 455 (1981)

⁵⁷ Gilmore, *supra*, at 68.

⁵⁸ O’Hear, *supra*, at 800.

⁵⁹ *Wren v. United States*, 517 U.S. 806 (1996)

⁶⁰ O’Hear, *supra*, at 802.

There is also the massive shift in policy regarding marijuana. Since the Nixon administration, it has been categorized as a Schedule 1 substance, along with the likes of heroin and LSD.⁶¹ This categorization means that marijuana is viewed as having no medical purpose, and a high potential for abuse.⁶² In spite of this label, California became the first state to legalize marijuana for medicinal purposes in 1996.⁶³ As of 2021, thirty-five states now allow marijuana to be used for certain medicinal purposes, such as treating cancer, glaucoma, and HIV/AIDS, among other things.

An even larger shift in policy is outright legalization of marijuana. As of 2011, polls have shown that a majority of Americans support the legalization of marijuana.⁶⁴ In 2012, the state of Washington became the first in the union to allow marijuana to be used for recreational purposes, with Colorado following suit four days later. As of 2021, fifteen states have legalized recreational marijuana.⁶⁵ This is in direct conflict with federal law, under which marijuana is still illegal for any use.

While our attitudes have certainly become more lenient than they have been over the past decades, we do still spend billions of dollars enforcing our nation's drug laws, and the curtailment of drug use is still a major national priority.

PART II: THE MODERN NARRATIVE

Today, the general opinion of the War on Drugs among those with a voice⁶⁶ is overwhelmingly negative. Any quick search of the “War on Drugs” will lead you to countless

⁶¹ Scott C. Martin, *Marijuana in the United States: How Attitudes Have Changed*, TIME, Apr. 20, 2016.

⁶² *Id.*

⁶³ Jordan McMahon, *Marijuana History and Legal Aspects in the United States* (2017) (B.A. thesis, Murray State University) (Murray State University Digital Commons)

⁶⁴ *Id.*

⁶⁵ Note that this is in conflict with federal law, under which marijuana is still criminalized.

⁶⁶ I use this phrasing to make the point that the vast majority of Americans do not have the opportunity to have their voices heard through nationally published writings. The narrative is generally driven by a comparatively small amount of intellectuals who do have said opportunity.

articles, editorials, and books about how the war has been a disaster. This section will detail some of the more popular sentiments and arguments used to justify calling the War on Drugs a complete failure.

A. Harm to Certain Minority Communities

Perhaps the most popular narrative surrounding our nation's drug enforcement policy is that it has had disastrous effects on particular minority communities. Critics malign the drug war as a racially motivated system of oppression, and tout crime statistics to support their claims. There are many who go so far as to call the War on Drugs a "Race War," and claim it has been a way for the "white majority" to oppress urban minorities.⁶⁷ The most common means of support for this argument is crime statistics. For example, it is said that "While African Americans only comprise twelve percent of the U.S. population, there are forty-six percent of those incarcerated in state and federal prisons."⁶⁸ It is also claimed that African American males are almost eight times more likely to be incarcerated than white males.⁶⁹

The idea of "mass incarceration" has permeated many a modern discussion about the American criminal justice system. Many people are quick to blame the War on Drugs for the drastic increase in America's prison population. More specifically, they blame the War on Drugs for the increased rate of incarceration among African Americans.⁷⁰

Next, there is the much talked about sentencing disparity between crack and cocaine. At one time the possession of crack cocaine received a sentence one hundred times the sentence for powder cocaine.⁷¹ Critics often point to the fact that African Americans are more likely to use

⁶⁷ Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks"*, 6 J. Gender Race & Just. 381

⁶⁸ *Id.* at 391

⁶⁹ *Id.* at 392

⁷⁰ Dorothy E. Roberts, *Punishment and Its Purposes: The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1273.

⁷¹ 21 USCS § 841

crack, and white Americans are more likely to use powder cocaine as the underlying motives behind the sentencing disparity.⁷²

Armed with these statistics, opponents of the War on Drugs tout how the system of tough drug laws and mandatory minimum sentences have served to devastate particular lower income minority communities, since these are the communities being policed the most. As one critic put it, “Mass imprisonment inflicts harm at the community level "not only because incarceration, experienced at high levels, has the inevitable result of removing valuable assets from the community, but also because the concentration of incarceration affects the community capacity of those who are left behind.”⁷³

To surmise, it is argued that the War on Drugs has been negative for society because it has led to the disparate incarceration of African Americans, promoted a racist ideology, and devastated these communities by imprisoning so many individuals. Laws have also been crafted to target African Americans, and favor other races and ethnicities.⁷⁴ Based on these contentions, the War on Drugs is a failure, and the entire way we criminalize and regulate drugs in this country must be overhauled.⁷⁵

B. We Would Be Better Off Spending Our Resources Differently

Some put the cost of continuing the War on Drugs at \$68 Billion.⁷⁶ “Tax dollars should be used to pay for schools, health care, and transportation, not the 4’ x 6’ cell of a non-violent

⁷² Nunn, *supra*, at 396-397.

⁷³ Roberts, *supra*, at 1281.

⁷⁴ E.g., Crack vs. Powder Cocaine Sentencing

⁷⁵ There is obviously so much more to this argument, and books have been written about the subject, but for brevity's sake I did my best to summarize the gist of the claims put forth.

⁷⁶ Newt Gingrich & Pat Nolan, Op-Ed., *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011.

offender.”⁷⁷ Proponents of this theory claim that the money used to incarcerate “non-violent” drug offenders would better serve society if invested into public programs.

There are also the downstream costs that indirectly stem from the incarceration of so many Americans. Incarceration, as the argument goes, fragments families, and makes it extremely difficult for convicted individuals to reintegrate back into society, thus forcing the government to pour more money into those communities.⁷⁸

As an alternative to incarceration, supporters of this theory would spend more money on the rehabilitation of drug offenders. They tout the fact that this would also have the effect of drastically reducing our prison population, which is the highest in the world.

Aside from the economic and moral aspects of this theory, its proponents often cite the clear failures of the current regime as an indication of the need for change. Even the most ardent supporters of the War on Drugs cannot plausibly make the claim that the war has been won, or is being won. The mere fact that there continues to be thousands of drug arrests each month proves this, for if the war was being won, presumably drug convictions would be on a steady decline. One particular Judge, Wm. F. Sanderson of the United States District Court, Dallas, Texas would routinely ask DEA agents “if we are winning the war on drugs?” prior to each search and/or arrest warrant.⁷⁹ He then stated “To this date, I have never received an affirmative response.”⁸⁰ Furthermore, the Drug Policy Alliance states “The demand for drugs in the United States has remained constant despite the United States’ enormous financial commitment to fighting the war on drugs with well-equipped drug taskforces and the full force of mass incarceration.”⁸¹

⁷⁷ Heather Schoenfeld, *War On...The Fallout of Declaring War on Social Issues: The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. Gender Race & Just. 315, 317.

⁷⁸ O’Hear, *supra*, at 800.

⁷⁹ JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS*, (2012).

⁸⁰ *Id.*

⁸¹ MAKING ECONOMIC SENSE, drugpolicy.org/issues/making-economic-sense.

C. The Degradation of Civil Liberties

Few can argue that the War on Drugs brought about a scheme of policing that James Madison would not have even been able to imagine when he drafted our Constitution. Critics will cite the fact that during wars fought by the United States, individual civil liberties have been suppressed.⁸² Look no further than the imprisonment of anti-war activists during World War One, or most glaringly the internment of Japanese Americans during World War Two. It follows that the War on Drugs will have a similar effect on civil liberties.

Unlike the wars mentioned in the previous paragraph, the War on Drugs is and has been predominantly a domestic war. The “battlefields” are within American cities.⁸³ The combatants are American citizens; and more importantly, the “collateral damage” directly harms American citizens.⁸⁴ This “collateral damage” is loss of constitutionally protected civil liberties in the name of ridding our nation of drugs.

While the War on Drugs has had some effects on the First Amendment rights of Americans, the most contentious area is the Fourth Amendment right against unreasonable searches and seizures. Many now claim in retrospect that “the Fourth Amendment has been a major casualty of the war on drugs.”⁸⁵

The Fourth Amendment protects Americans against unreasonable searches and seizures by police. However, throughout the course of the War on Drugs this protection has undisputedly been limited. As mentioned earlier, police have been given the green light to fly airplanes and helicopters at low altitudes over private backyards in the name of looking for evidence of drugs.⁸⁶

⁸² Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. Cal. L. Rev. 1389, 1394

⁸³ *Id.* at 1387.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1411

⁸⁶ *California v. Ciraolo*, 476 U.S. 207, 209 (1986), *Florida v. Riley*, 488 U.S. 445, 448 (1989)

There is also the recent innovation of “drug courier profiles,” which police rely on in deciding when to stop and question individuals they believe may be involved in drug related activity.⁸⁷ These profiles include “how people dress, the cars they drive, and even whether they prefer to pay for their airline tickets with cash, rather than with credit cards.”⁸⁸ This in essence substitutes the belief that a crime is being committed with a profile of someone who may commit a crime. The police then will question an individual based on a match to the profile, rather than based on a good faith belief that a crime is being committed. DEA agents at a Buffalo bus station, for example, admitted to stopping roughly eighty passengers per month based on their “drug courier profile.”⁸⁹ Of these eighty stops, they only averaged three or four arrests per month.⁹⁰ This tells us that seventy-six to seventy-seven people (or about 96% of those stopped) were not engaged in any wrongdoing. A system that produces a four percent success rate while inconveniencing innocent American citizens raises “profound questions not only about the right of citizens to dress as they please but also the right of citizens to freely travel without police harassment or interference.”⁹¹

D. Drugs Should Not Be Regulated at All

This is a very interesting argument because it criticizes not the methods used to prevent drug use, but the fact that the government is regulating drugs in the first place. This can generally be broken down into two schools of thought: (1) the federal government ought not to be regulating vice at all as a constitutional issue, and (2) the legalization and subsequent taxation of drugs would greatly improve the economy.

PART III: RESPONSES TO CRITICISMS

⁸⁷ Finkelman, *supra*, at 1416.

⁸⁸ *Id.* at 1410.

⁸⁹ *United States v. Montilla*, 733 F.Supp. 579, 580 (W.D.N.Y. 1990)

⁹⁰ *Id.*

⁹¹ Finkelman, *supra*, at 1416.

A. In Response to the Racial Argument

Let me preface this response by saying race is undoubtedly a factor in the War on Drugs. However, as will be subsequently outlined, the disproportionate effects on race are a downstream consequence of a neutral set of policies. In fact, it will be shown that minority communities were vital in establishing the policies that we have come to associate with the war on drugs. While the numbers incontrovertibly demonstrate that certain Americans are disproportionately affected by these policies, the claims that race (and racism) are the primary factors for this disproportionality are ahistorical. They are factors, yet they are not the main factors.

This is by far the most frequently heard argument against the War on Drugs, a response to which will be a more detailed, encompassing one than responses for other arguments. As outlined earlier, this argument revolves around the allegedly disparate impact the War on Drugs has had on certain minority communities.⁹² The critics cite the high incarceration rates among these communities as evidence of a racist system that is attempting to hold back certain people by disproportionately arresting and imprisoning them. One possible assumption here is that, absent the alleged prejudicial intervention by police and the courts, these communities would be far better off. I see this as a deeply flawed school of thought, as it fails to consider the devastation that the presence of drugs brings to these neighborhoods.

Starting with disease, needle borne illnesses are particularly prevalent in communities with high rates of drug use. In 2003, nearly 125,000 adults living with AIDS in the United States contracted the disease from drug use.⁹³

⁹² I use the term “certain minority communities” because the argument revolves mainly around predominantly black and Hispanic communities. Communities of largely Asian ethnicity for example, while a “minority community,” are frequently overlooked. The same can be said for Jewish communities, and countless other “minorities.”

⁹³ NATIONAL DRUG INTELLIGENCE CENTER, THE IMPACT OF DRUGS ON SOCIETY (2006).

Additionally, there is the harm done to children and families. Critics will often talk about the harm done to families by removing one or both guardians from a child. While harm is certainly shown to result from this practice, one could certainly argue that the greater harm is allowing children to grow up in an environment where drugs are prevalent. Studies show that children with parents or other close family members who abuse drugs are “often physically or emotionally abused, and often lack proper immunizations, medical care, dental care, and necessities such as food, water, and shelter.”⁹⁴ A 2005 study also showed that “substance abuse is a factor in at least seventy percent of all reported cases of child maltreatment.”⁹⁵ The case is predictably much worse when the child comes from parents who engage in the manufacturing of illicit drugs. “Children who inhabit such homes often inhale dangerous chemical fumes and gases or ingest toxic chemicals or illicit drugs. These children commonly test positive for methamphetamine and suffer from both short-term and long-term health consequences.”⁹⁶ The response to this would be that harm is also done to children by rendering them in a situation where one or both parents are incarcerated, and admittedly this is also harmful to our youth. However, out of the two undeniably harmful options, there is a strong case for incarceration being the lesser of the evils.

One possible rebuttal would refer back to the issue with using the criminal justice system to solve the drug problem, rather than less punitive measures. However, a case for the use of criminal punishments to combat drugs is articulated in section III of this paper.

The radical claim that the War on Drugs was concocted by the white majority to oppress particular minorities is also a case of revisionist history. The often-overlooked fact is that Black and Hispanic communities historically supported tougher drug laws. Members of these

⁹⁴ *Id.*

⁹⁵ THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, FAMILY MATTERS: SUBSTANCE ABUSE IN THE AMERICAN FAMILY (2005).

⁹⁶ NATIONAL DRUG INTELLIGENCE CENTER, THE IMPACT OF DRUGS ON SOCIETY (2006).

communities were the ones who faced the horrors brought by drug use on a day-to-day basis. They “felt constantly accosted by drug addicts, by pushers, by crime.”⁹⁷ In the 1960s, “residents of black neighborhoods felt constantly under threat from addicts and others associated with the drug trade, and their calls for increased safety measures resonated at community meetings.”⁹⁸ In the 1970s, Harlem was amidst a heroin epidemic, and members of the Mother A.M.E. Zion Church called for drug dealers to receive life sentences.⁹⁹ The same could be said at the federal level, as the Congressional Black Caucus urged President Nixon to “ramp up the drug war as fast as possible.”¹⁰⁰

The timing of the War on Drugs is very important when evaluating its impact on urban communities. This came on the heels of the civil rights movement, only five years after Martin Luther King, Jr. was assassinated. Black communities were struggling, not because police were constantly harassing them¹⁰¹, but because their problems were being ignored by police.¹⁰² There are also many black individuals who view the use of drugs as an affront to the civil rights movement, seeing it as undermining the cause.¹⁰³ As one judge put it, when sentencing a young black defendant, “Martin Luther King fought and died for your freedom, he didn’t fight and die for you to be out there running...and carrying a gun.”¹⁰⁴

The last thing I will address is the crack versus cocaine sentencing disparity. You will often here that much harsher sentences for crack¹⁰⁵ were based solely on the desire of the white

⁹⁷ Arun Venugopal, *Black Leaders Once Championed the Strict Drug Laws They Now Seek to Dismantle*, WNYC NEWS, Aug. 15, 2013.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ This is not to say police harassment of African Americans never took place; it most certainly did. However, the police’s tendency to turn a blind eye to crimes in which African Americans were victims was arguably the larger issue.

¹⁰² JAMES FORMAN, JR., *LOCKING UP OUR OWN* (2017).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 100:1 until 2010

majority to target and stifle the growth of urban minorities. They often claim that the two drugs are substantively identical, therefore leaving prejudice as the only plausible answer for the sentencing disparity. While I am not claiming racism played no part in the sentencing scheme, it is not as simple as some would have you believe.

There are some differences between crack and powder cocaine which renders crack a much more dangerous substance. When cocaine is smoked as crack, the high is experienced within seconds, as opposed to several minutes when snorted as powder.¹⁰⁶ The high produced from crack also does not last as long as cocaine, which often causes users to “crash,” leading them to repeat the process.¹⁰⁷ Add this to the fact that crack cocaine is much more concentrated than powder and it is not difficult to see why crack is the far more addictive and therefore dangerous substance of the two.¹⁰⁸

Finally with respect to the crack versus cocaine disparity, crack was the epidemic of the time, bringing crime, gangs, and violence with it wherever it went. One study attributed the rise of crack (in the years 1984-1989) with a “doubling of homicide victimizations of Black males aged 14-17,” and a thirty percent increase for Black males aged 18-24.¹⁰⁹ Crack was also attributed to a five percent overall rise in violent crimes and property crimes.¹¹⁰ Powder cocaine, on the other hand, was used more by wealthy individuals¹¹¹ and did not bring with it the same amounts of devastation that crack did.¹¹² The law will naturally attack the greater threat more vehemently, and legislatures accordingly treated crack much more harshly than powder cocaine.

¹⁰⁶ DUKE UNIVERSITY PHARMACOLOGY EDUCATION PARTNERSHIP, CONTENT BACKGROUND: WHY IS SMOKED COCAINE (CRACK) MORE LIKELY TO BE ABUSED OR ADDICTIVE THAN SNORTED COCAINE? (2016).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ ROLAND G. FRYER ET AL., MEASURING CRACK COCAINE AND ITS IMPACT (2006).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² This is not to say that powder cocaine had no negative effects on society

Once again, this is not to say that race was not a factor, but it certainly was not the only factor, as many people claim it was.

B. Resources Must Be Spent on Enforcement

As the argument goes, the billions of dollars the United States has spent incarcerating drug offenders would be better off having gone back into the community. A counter to this is that spending money on attempting to rid our communities of drugs is in and of itself a service to the community. As outlined earlier, drugs pose a massive risk to communities, and their presence breeds violence, disease, gangs, and poverty, among other things.

Critics of the War on Drugs will inevitably bring up the prison population in the United States, and how it is the highest in the world. They blame this on our harsh drug laws, and claim that relaxing said laws would help solve prison overcrowding. The counter to this would be that the same can be said for any crime. In fact, in federal prisons, around thirty-five percent of the nearly 230,000 inmates are there for drug offenses.¹¹³ At the state level the number is even lower: of the 1.2 million people in state prisons, only about sixteen percent are there for drug offenses.¹¹⁴ If the goal is to end “mass incarceration,” ceasing the enforcement of property crimes such as burglary and fraud would statistically be more efficient, as it is responsible for approximately nineteen percent of the state prison population.¹¹⁵

No one would realistically argue for the legalization of property crimes in furtherance of the goal to lower the prison population, but they do with drug crimes. They treat drug crimes as inherently different than other offenses; something that is rather perplexing. You will often hear the claim that these offenses are “nonviolent.” This is a questionable argument on two fronts. Firstly, it is not necessarily true. Thirty-one percent of those incarcerated in state prisons for drug

¹¹³ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (Mar. 24, 2020).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

offenses are for possession,¹¹⁶ the rest are presumably dealers and manufacturers. It is also shown that drugs and violence go hand in hand. According to a 2004 survey, thirty-two percent of state prisoners, and twenty-six percent of federal prisoners admit to having committed their offenses while under the influence of drugs.¹¹⁷ The need for money to purchase drugs also leads to violent crimes, with eighteen percent of prisoners admitting they committed their offenses to obtain money for drugs.¹¹⁸ It is clear that these are not the “nonviolent” innocent people that critics of the War on Drugs paint them to be. The categorical claim that drug offenses are “nonviolent” overlooks mountains of complexity. Drugs and violence are so entangled with one another that they cannot be separated.

As drugs and violence are so intertwined they cannot be separated from one another puts a major hole in the case for rehabilitation as a replacement for incarceration. Often ignored are the proponents for punitive justice who want the law to merely punish rather than rehabilitate. However, putting that theory aside, there are issues with the case for rehabilitation. This is not a cure all solution that will magically transform those battling drug addictions into upstanding citizens. On average, it takes five separate admissions into a rehabilitation clinic before one becomes “clean”.¹¹⁹ One can certainly argue that, considering the correlation between drug use and violence, that rehabilitation rather than incarceration will lead to an uptick in crimes. While long, mandatory minimum sentences are by no means an ideal solution, it does ensure potentially violent people spend less time in society.

The second issue is that, assuming *arguendo* that drug crimes are completely nonviolent, the absence of violence is not a justification for not incarcerating an offender. If we look back to

¹¹⁶ *Id.*

¹¹⁷ BUREAU OF JUST. STATISTICS, U.S. DEPT. OF JUST., DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004, (October 2006, revised January 2007).

¹¹⁸ *Id.*

¹¹⁹ J.F. Kelly, *How Many Recovery Attempts Does It Take to Successfully Resolve an Alcohol or Drug Problem?*, 43 *Alcoholism: Clinical and Experimental Research* 1533-1544.

common law, we see clear examples of punishments given for nonviolent offenses. Larceny for example was punishable by death for a long period of time.¹²⁰ Hopefully we are not prepared to cease incarcerating individuals for tax evasion, prostitution offenses, insider trading, money laundering, and running illegal gambling rings because they are “nonviolent.” The idea that nonviolent crimes should categorically be excluded from incarceration is wholly inconsistent with the purposes of punishment, which is to attempt to curb activities deemed harmful to society.

The response will often be that drug offenses are inherently different because the offenders suffer from a disease (i.e., addiction). As stated earlier, this is often not the case, as most people incarcerated for drug crimes committed more than mere possession offenses.¹²¹ However, “disease” is not a justification against incarceration. The aforementioned example of gambling carries with it the potential for abuse and subsequent addiction. The same can be said for prostitution and sex addiction. Going one step further, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-5”) describes “Pedophilic Disorder” as an individual above the age of sixteen who has “arousing fantasies, urges for, or behaviors with a prepubescent child.”¹²² In no way is this meant to somehow justify pedophilia. On the contrary, it is being used as an example of why a “disease” should not be immune from the criminal law. Lastly, some may claim that drugs are different because it is victimless. However, the other sections of this paper have shown and will show that the victims of drug use include the users themselves, their family, friends, community, and society as a whole.

¹²⁰ *What Was the Bloody Code?*, Nat. Just. Museum, <https://www.nationaljusticemuseum.org.uk/what-was-the-bloody-code/>

¹²¹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (Mar. 24, 2020).

¹²² DSM-5 302.2

Arguing against the War on Drugs on the basis of it not being won is a troubling contention. A defeatist mentality should not be the basis for a systemic overhaul, especially when it revolves around something as potentially dangerous and volatile as drugs. The inability of our drug laws to eliminate all drug use does not mean those laws are not useful. Our nation's murder laws have failed to eliminate all murder, yet we undoubtedly need those laws on the books. Just because a law is not one hundred percent successful is not alone a sufficient justification for abandoning the effort all together.

C. The Degradation of Civil Liberties

Other than those who hold the strict libertarian belief that government should not be regulating drugs at all, most people can agree that drugs are harmful to society. Furthermore, most would agree that there must be some system in place to discourage drug use. The criticism comes in the way the War was fought; not in the cause itself. As described earlier, they point to alleged prejudicial enforcement by police and courts, as well as the loosening of Fourth Amendment protections. However, these criticisms are misplaced.

It was not the War on Drugs, declared by the executive and legislative branches, that validated the vast expansion of police power and the erosion of civil liberties; it was the judiciary. The cause was a noble one: prevent dangerous drugs from harming our communities. However, once the battles waged in support of that cause begin to tread upon the constitutional rights of Americans, it is the duty of the judiciary to step in and right the situation. It can certainly be argued that this duty has been neglected. Over the fifty-year history of the War on Drugs the courts have given police more power to stop, frisk, search, seize, surveil, and arrest. The cases outlined in Part I of this paper showed some examples of the courts allowing police to do things like search without probable cause¹²³, fly helicopters and planes over private

¹²³ *Terry v. Ohio*, 392 U.S. 1 (1968)

backyards¹²⁴, make pretextual stops, and search incident to arrests resulting from those pretextual stops.¹²⁵

Critics will often deride the negative impacts the War on Drugs has left on society. Yet these effects were sanctioned not by the generals of the war (i.e., the legislators), but the supposedly independent referees (i.e., the judiciary). Therefore, the criticism should not be of the War on Drugs, but of the courts who green-lit atrocities.

D. A Case for the Regulation and Criminalization of Drugs

The staunch libertarian contention that the government should not be involved in the regulation of illicit drugs at all is a difficult one to contend with, as it is a matter of political opinion rather than a statistical based contention.¹²⁶ Accordingly, this section will admittedly be more of an overarching policy argument rather than a legalistic one, as it is the only way to respond to the libertarian school of thought.

As the argument goes, the government ought not to be regulating vice at all, and people should have the right to decide what types of activities they engage in their own private lives. Yet many would say that when an individual's actions begin to wreak havoc on communities and society, it is the duty of government to intervene. This is certainly the case with drugs. As outlined before, the presence of drugs brings violence, crime, and poverty wherever they go. When something is that harmful to society, government has the responsibility to step in and regulate it.

The second school of thought is easier to contend with. This argument is more of an economic one, claiming that society would be better off if government legalized, then taxed drugs in order to boost the economy. There are two major issues with this idea. The first of

¹²⁴ *California v. Ciraolo*, 476 U.S. 207, 209 (1986), *Florida v. Riley*, 488 U.S. 445, 448 (1989)

¹²⁵ *Wren v. United States*, 517 U.S. 806 (1996)

¹²⁶ *Libertarians Believe that the War on Drugs is Ineffective, unfair, and Immoral. We Advocate Ending It*, Libertarian Party, <https://www.lp.org/issues/war-on-drugs/>

which is to what extent are we willing to sell our national morality for economic profit? Taken to its extreme, why should the government not legalize and tax all crimes? Prostitution, gambling, counterfeiting, animal fighting, organ selling, and child pornography are just some examples of things which the government can “legalize and tax” in the spirit of helping the economy, rather than spending millions (or billions) of dollars to criminalize. This economic utilitarian concept has the potential to bring our once pious society crumbling to its knees if taken to its extreme end.

The second issue with this concept is that its advocates fail to realize what a devastating effect the presence of drugs will have on the economy, and society as a whole. Many drug users find it difficult to hold steady, full-time employment.¹²⁷ More worrisome is the idea of having drug users in important positions in society. While almost every profession poses significant and dangerous risks if performed while under the influence of drugs, some pose an extreme risk to society. Pilots, truck and bus drivers, machine operators, police officers, fire fighters, and doctors are just some examples. Obviously, these professions would have a private drug policy seeking to prevent the risks posed, but the social acceptance of drug use would make it extremely difficult for private entities alone to curb drug use. Also, internal drug policies would presumably result in termination for offenders, which brings us back to the first point about drug users being unable to hold steady employment. This entire cycle would have disastrous effects on our economy.

Furthermore, the disastrous health effects that inevitably come with drug use are rarely accounted for. When you factor these in, the alleged economic benefits do not seem so definite. The DEA has studied this issue, and concluded that the “cost of treatment and rehabilitation from addiction and usage associated illnesses far outweighs the cost of any revenue possibly

¹²⁷ NATIONAL DRUG INTELLIGENCE CENTER, THE IMPACT OF DRUGS ON SOCIETY (2006).

generated.”¹²⁸ There are precedents for this too, as Alcohol and tobacco are two areas which can prove this contention, as the taxes collected from these activities “only cover a portion of the costs of their misuse.”¹²⁹

Lastly, a more lenient system of drug regulation has been tried in other nations. Until the 1960s, doctors in the United Kingdom had the ability to prescribe heroin to certain addicts. This experiment led to minimum “30-fold increase in the number of addicts in 10 years.”¹³⁰ In the 1980s, Switzerland allowed drug use and sales in a section of Platzpitz, later referred to as “Needle Park.”¹³¹ By 1992, there were 20,000 drug users in the park, and crime spiked in the surrounding areas. The policy has since been ended.¹³² Perhaps the country most associated with drug culture is the Netherlands. After their liberalization of drug laws, communities began to suffer from increased crime and gang related activity.¹³³ Taking all this into consideration, it is clear that the legalization and subsequent taxation of narcotics will not have the great economic benefit that is touted by many, and will in fact cause great harm to the economy.

PART IV: CONCLUSION

After examining the related articles, policies, statistics, and cases surrounding the War on Drugs, it seems clear that the modern narrative needs to be reevaluated. This is not an outright support for the War on Drugs, but it is meant to offer somewhat of a rebuttal to the zeitgeist of the day, which is our efforts in curtailing drugs are, and have been a total disaster. Many of the criticisms fail to take into account important concepts and nuances of the infinitely complex issue. It is the intention of this writing that the nuances illustrated, when taken in conjunction

¹²⁸ DRUG ENFORCEMENT ADMINISTRATION, SPEAKING OUT AGAINST DRUG LEGALIZATION (2010).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Roger Cohen, *Amid Growing Crime, Zurich Closes a Park it Reserved for Drug Addicts*, NEW YORK TIMES, Feb. 11, 1992.

¹³³ Marlise Simons, *Cannabis Cafes Get Nudge to Fringes of a Dutch City*, NEW YORK TIMES, Aug. 20, 2006.

with the countless other writings detailing the successes (but mostly failures) of the War on Drugs will help give you a more robust and complete understanding of one of the major social, legal, and criminal issues of our time.