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BEYOND THE MONEY: EXPECTED (AND UNEXPECTED) CONSEQUENCES OF AMERICA'S WAR ON DRUGS

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I. INTRODUCTION

A cacophony of cries for criminal justice reform reverberates from a growing chorus of discouraged, disillusioned and divergent concerns across America. Though any number of factors supplies ample cause for unease with the current state of our criminal justice system, extraordinarily high rates of incarceration certainly contribute mightily to the turmoil. Hyper-criminalization challenges abound questioning the necessity of the volumes of crime statutes demanding enforcement. Unacceptable rates of recidivism and questionable policing are included in the catalog of troubling dynamics, but top billing on the list may rightfully belong to the country's costly policies and practices adopted to reduce the demand and eradicate the supply of illicit drugs. Few would argue the merit of removing substances responsible for the degree of destruction attributable to many of the psychoactive drugs receiving attention, but the exorbitant costs of America's punitive plan have failed to deliver results that justify the expense.

An examination of the merits of the efforts expended fighting illicit drugs requires a better appreciation of the objectives and the allocation of resources to achieve those objectives. Reaching a sound understanding requires realistic and rational analysis of the costs - fiscal costs, certainly, but also sacrifices exacted from the constitution,

demands placed on public and private institutions, and the prices associated with less quantifiable measures. An accurate accounting of the costs of the “war on drugs” must then necessarily include all of the collateral damage, arguably as the most costly, the caustic erosion of the cornerstones of U.S. democracy. The court cases resulting from this engagement have significantly diminished our civil liberties by shrinking the Bill of Rights, methodically abridging many freedoms we have previously fought so fervently to preserve – freedom of religion, freedom of speech, freedom from unreasonable searches and seizures, and property rights. Perhaps, the only fact more staggering than the total overhead demanded by the fight against drugs is the balance sheet’s telling of our nation’s epic failure.

The purpose of this paper is to provide a high-level survey of our nation’s prohibition policies within the context of the costs of the law enforcement efforts upholding those policies. The discussion will offer a cursory review of the economic expense of the war on drugs with tangential coverage of the constitutional, institutional and intangible expenses that are inseparable from an assessment of the costs of America’s drug control efforts. Part I provides a historical review of illicit drug use in the United States, while Part II supplies the evolution of the country’s efforts to codify its drug control policies. Finally, Part III contains a survey of the costs of the current war on drugs.

II. BACKGROUND

Archaeological evidence collected all over the world chronicles human’s proclivities for the use of psychoactive substances known to engender altered states of consciousness.¹ It is believed that over 12,000 years ago homo sapiens from the Stone Age ingested hallucinogenic mushrooms.² Lake-dwellers in Switzerland more than 4,500 years ago provide the first evidence of the domestication and

¹ Daniel Kunitz, *On Drugs: Gateways to Gnosis, or Bags of Glue?* HARPER’S MAGAZINE, Oct. 2001, at 92. “All the vegetables sedatives and narcotics, all the euphorics that grow on trees, the hallucinogens that ripen in berries or can be squeezed from roots – all, without exception, have been know and systematically used by human beings from time immemorial.” *Id.*

² TERENCE MCKENNA, *FOOD OF THE GODS: THE SEARCH FOR THE ORIGINAL TREE OF KNOWLEDGE* 47 (1992).

consumption of poppy seeds.³ During this same time period in China and Neolithic Europe, there are indications of the cultivation of cannabis or hemp.⁴

Before the lake-dwellers or the Chinese and the Neolithic Europeans, lore from India in the Brahmin tradition recognized the intoxicating properties of cannabis and heralded the plant for granting long life and sexual prowess.⁵ Similarly, use of coca and other stimulants by the inhabitants on the continent of South America has been traced to primordial times.⁶ The Bronze Age witnessed the expansive use of opium as a painkiller, particularly by women to ease the pains of childbirth and by others to relieve the discomforts of sickness and disease.⁷ In 300 B.C., Theophrastus, a Greek naturalist and philosopher who was also a student of Aristotle and a successor to Plato, authored the earliest undisputed reference to the use of poppy juice.⁸

Our ancient predecessors partook of psychoactive plants and plant by-products to alter consciousness, certainly, but also for treating pain, for communing with the gods, and for survival.⁹ These plants, often rich in alkaloids, served additionally as a source of nutrition and

³ RICHARD RUDGLEY, *ESSENTIAL SUBSTANCES: A CULTURAL HISTORY OF INTOXICANTS IN SOCIETY* 24-26 (1993); Ashley Montagu, *The Long Search for Euphoria*, 1 *REFLECTIONS* 1, 62-69 (1966).

⁴ *Id.* at 29.

⁵ ANTONIO ESCOHOTADO, *A BRIEF HISTORY OF DRUGS: FROM THE STONE AGE TO THE STONED AGE* 9 (1996).

⁶ RICHARD DAVENPORT-HINES, *THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS* 26 (2002).

⁷ (2300 B.C. - 500 B.C.). *See, e.g.*, R. GORDON WASSON, *THE WONDROUS MUSHROOM: MYCOLATRY IN MESOAMERICA* (1980); R. GORDON WASSON, ALBERT HOFFMANN AND CARL A. P. RUCK, *THE ROAD TO ELEUSIS* (1978); PETER T. FURST, ED., *FLESH OF THE GODS: THE RITUAL USE OF HALLUCINOGENS* (1976).

⁸ Svend Norn, Poul R. Kruse & Edith Kruse, *History of Opium Poppy and Morphine*, 33 *DANSK MEDICINHISTORISK ARBOG* 171, 174 (2004). In the 2nd Century, Theophrastus includes in his *Historia Plantarum* descriptions of different poppy varieties and methods for extracting "latex." F.J. Carod-Artal, *Psychoactive Plants in Ancient Greece*, 1 *NEUROSCIENCES AND HIST.* 28, 31 (2013). Theophrastus's use of latex from the poppy refers to opium, using the term *mekonio* to specifically designate the juice. *Id.* His descriptions include opium's medicinal uses. *Id.* *See also*, Halil Tekiner & Muberra Kosar, *The Opium Poppy as a Symbol of Sleep in Bertel Thorvaldsen's Relief of 1815*, 19 *SLEEP MEDICINE* 123, 123-25 (2016), and John Scarborough, *Theophrastus on Herbs and Herbal Remedies*, 11 *J. OF THE HIST. OF BIOLOGY* 353, 353-385 (1978).

⁹ Abbie Thomas, *Survival of the Druggies*, *NEW SCIENTIST*, Mar. 30, 2002, at 11.

energy.¹⁰ It is, however, the ancient attraction to intoxicating fruits, berries, roots and other plants that is cited as support for the proposition that intoxication may be a universal human need, the “fourth drive.”¹¹

Akin to the consumption of psychoactive substances across the globe, drugs have been part of America’s story even before it was a country. Native Americans introduced early settlers to tobacco, a crop that eventually financed America’s development as a nation.¹² European and Asian settlers brought other products—coffee, tea, alcohol, hemp and the opiates—to America.¹³ Until the late 19th century, Americans were largely indifferent to the consumption of these drugs, which were then used legally and with very little government interference.¹⁴

The turn of the 20th century would witness growing concerns about drug use in America. Interestingly, concerns were compartmentalized to some degree and divided by a drug’s specific association with a vulnerable subgroup of American society. For instance, opium use was associated with the Chinese and a rising Chinese immigrant population on the West Coast. Concerns about cocaine grew from the drug’s association with the “Negro” population, particularly in the South. Alcohol use was associated with urban Catholic immigrants, while the abuses of heroin were attributed to the

¹⁰ *Id.*

¹¹ RONALD K. SEIGEL, *INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE* 10 (1989); *see generally*, ANDREW WEIL, *THE NATURAL MIND: A NEW WAY OF LOOKING AT DRUGS AND THE HIGHER CONSCIOUSNESS* (1972); and HELEN PHILLIPS & GRAHAM LAWTON, *THE INTOXICATION INSTINCT* (2004).

¹² *See, e.g.*, IAIN GATELY, *TOBACCO: A CULTURAL HISTORY OF HOW AN EXOTIC PLANT SEDUCED CIVILIZATION* (2001).

¹³ KING COUNTY BAR ASSOCIATION, *DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS* 6 (2005).

¹⁴ The National Commission on Marijuana and Drug Abuse reported to Congress in 1973, “[d]rug policy as we know it today is a creature of the 20th Century. Until the last third of the 19th Century, America’s total legal policy regarding drugs was limited to regulation of alcohol distribution, localized restrictions on tobacco smoking, and the laws of the various states regulating pharmacies and restricting the distribution of ‘poisons.’” KING COUNTY BAR ASSOCIATION, *DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS* 6 (2005) (*quoting* DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, SECOND REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE 14 (1973)).

urban immigrants. Concerns of marijuana use and the spread of its popularity were associated with Mexican immigrants.

CHINESE OPIUM AND THE "YELLOW PERIL"

The Civil War was a marker for great change in the United States, including what some consider the beginning of the march toward the country's criminalization of drugs.¹⁵ It was the use of morphine, an opium derivative, during the war that solidified the support of the medical community for the drug.¹⁶ American's use of opiates expanded with the spread of patent medicines containing opium, the invention of the hypodermic syringe, and the broad acceptance of opium derivatives, such as morphine and heroin.¹⁷ Doctors frequently recommended opium, legal and widely available, as a treatment for any number of ailments, and in particular, physicians favored opium as a remedy for "female troubles" related to menstrual and menopausal conditions.¹⁸

¹⁵ By the Civil War, morphine had received broad acceptance in medical practice. See, EDWARD M. BRECHER & THE EDITORS OF CONSUMER REPORTS MAGAZINE, LICIT AND ILLICIT DRUGS. THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA – INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL 3 (1972). Morphine derives from opium and was first discovered in 1804 by German chemist Friedrich Wilhelm Adam Serturmer, responsible for isolating morphine. THOMAS SZASZ, CEREMONIAL CHEMISTRY 189 (1974). By 1826, the Merck Company was producing substantial quantities of the drug. *Id.*

¹⁶ *Id.*

¹⁷ Heroin is a byproduct of morphine after it is subjected to chemical processing, first discovered in 1874. David T. Courtwright, *The Roads to H: The Emergence of the American Heroin Complex, 1889-1956*, ONE HUNDRED YEARS OF HEROIN 3 (David F. Musto, ed., 2002). Bayer Pharmaceuticals secured heroin's popularity when it introduced it in 1898 as "The Sedative for Coughs." *Id.* Heroin was also used as a cure for morphine dependency and to relieve symptoms of morphine withdrawal. *Id.* Its greatest medical demand, however, was in the treatment of patients suffering from tuberculosis, pneumonia and other common respiratory conditions and was widely prescribed by physicians into the 1920s. *Id.*

¹⁸ BRECHER, ET. AL, *supra* note 14, at 1. Many cure-alls and elixirs legally contained opium, frequently in the form of morphine, an opium derivative, though the pharmacological mixes were not required to disclose their

Large numbers of Chinese also began immigrating to America and accepting low paying jobs, primarily in mines and building railroads, in search of better lives not only for themselves but also for their families. With large populations of Chinese settling on America's west coast, businesses and the business class exploited the Chinese as a moral scapegoat to deflect attention away from the actual causes of California's economic depression in the 1870s.¹⁹ The search for places to lay blame for the poor economic conditions found traction in the assessment of the "moral" aspects of the Chinese inhabitants, with special attention paid to the vices of the Asian communities, not the least of which was their proclivities for opium.²⁰ The result was duplicitous in that it was, in actuality, part of a thinly veiled discrimination program against Chinese. Anti-Chinese sentiment intensified, Chinese exclusionary laws became commonplace and anti-Chinese hostility toward Chinese workers escalated.²¹ By 1890, racism toward the Chinese was rampant, driving the proliferation of negative public sentiment concerning opium.

The Chinese brought with them to America the practice of smoking opium.²² Although opium was commonly used in the United

ingredients. *Id.* The popular patent medicines rarely contained labels identifying their contents. *Id.* As a result, an unsuspecting population became accidental addicts, finding themselves addicted to the opium in the cure-alls and elixirs. *Id.* The addict population consisted largely of middle and upper class white middle-aged women. *Id.*

¹⁹ Patricia A. Morgan, *The Legislation of Drug Law: Economic Crisis and Social Control*, 8 J. OF DRUG ISSUES 56, n.1 (1978). President Rutherford B. Hayes signed the Chinese Exclusion Treaty in 1880, effectively reversing what had been an open-door policy set in 1868. The new law placed strict limits on the number of Chinese immigrants allowed into the U.S. and the number of Chinese allowed to become naturalized citizens. Two years later, Congress passed the Chinese Exclusion Act of 1882, barring immigration from China and prohibiting the naturalization of Chinese immigrants already in the United States for a period of 10 years. The exclusionary treaty and act represent the federal government's reaction to the public's belief that low-paid Chinese workers were taking needed jobs away from whites, particularly during a period of economic downturn, to the public outrage of influence the Chinese smoking parlors had over the white population, and to an increase in anti-Chinese violence. *Id.* 56-58.

²⁰ *Id.*

²¹ *Id.*

²² The British actually introduced opium to the Chinese. After the Chinese outlawed opium in the late 1700s, the British maintained their lucrative

States and was popular among all classes and races, ingestion of the drug by smoking was a distinctly Chinese practice.²³ As long as the attraction was limited to adventurous young men, the American public voiced little objection, but when white women fell to the temptations of the Chinese opium smoking parlors, Chinese opium sparked public ire. Thus, the smoking of opium quickly became one of the most identifiable Chinese vices and is the reported trigger for the rise of the “yellow menace.”²⁴ Opium and the Chinese smoking dens were synonymous with the corruption of American values and female chastity.²⁵ They also provided a tantalizing explanation for the social problems of the day, emerging as a target for public antipathy and legislative attention.²⁶

Early laws addressing opium addiction varied in their effects, but were consistent in their origins – products of local legislation – and

smuggling trade and began what became known as the Opium Wars. Eventually, China fell to the pressure to re-legalize the opium trade.

²³ See, RICHARD DAVENPORT-HINES, *THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS* 46 (2002). The Chinese habit of smoking opium grew from the marketing efforts of British smugglers who maintained a lucrative trade bringing opium to China from England after China outlawed the substance in the late 1700’s. *Id.* The Chinese ban punished keepers of opium shops with strangulation but was designed to influence a great deal more. *Id.* China hoped to discourage its citizens from comingling with the “barbaric” Europeans, responsible for supplying the drug, and to protect the Chinese economy by curtailing the exporting of China’s silver, which was being traded for opium. *Id.*

²⁴ Patricia A. Morgan, *The Legislation of Drug Law: Economic Crisis and Social Control*, 8 J. OF DRUG ISSUES 58 (1978). William Randolph Hearst, the infamous newspaper publisher, began publishing a series of articles detailing how Chinese men seduced white women with the drug opium, leading them “to ‘contaminate’ themselves by frequenting the dens in Chinatown.” *Id.*; see also, Stanford M. Lyman, *The “Yellow Peril” Mystique: Origins and Vicissitudes of a Racist Discourse*, 13 INT’L J. OF POL., CULTURE AND SOC’Y 683 (2000).

²⁵ The San Francisco Police Department reported that while officers were visiting these opium dens they “found white women and Chinamen side by side under the effects of this drug – a humiliating site to anyone who has anything left of manhood.” S. COMM., *Chinese Immigration, It’s Social, Moral and Political Effects* (testimony of the San Francisco Police Department) (Ca. 1878). During the same period, the *San Francisco Post* published articles opposing the Chinese for having “impoverished our country, degraded our free labor and hoodlumized our children. [The Chinaman] is now destroying our young men with opium.” *Id.*

²⁶ Morgan, *supra* note 23, at 56.

in their purpose – eradication of the socializing of whites, specifically white women, with the Chinese.²⁷ In some instances, city ordinances prohibited Chinese from using opium but permitted use by white people.²⁸ In other instances, local legislation allowed the continued use of the drug by Chinese, but outlawed its use by whites.²⁹

“NEGRO” COCAINE AND THE “SOUTHERN MENACE”

As the opium epidemic engulfed America’s west, cocaine amassed its attack on the South. Not unlike the Chinese immigrant laborers on the West Coast, in the late 1800’s, southern black laborers found cocaine to be of assistance for increasing endurance and withstanding strenuous working conditions. By the turn of the 20th century, poor black laborers were developing habits for the drug and found sniffing or snorting cocaine to be the quickest and cheapest way to reap what was believed to be the drug’s benefits.³⁰ Similar to the Chinese immigrants’ association to opium, the poor black laborers of the South became firmly linked to cocaine in the minds of the American public, but contrary to public perception, the predominant users of cocaine in the early 1900’s were not the black laborers in the South.³¹ The drug was far more popular, in fact, with whites and especially with the white criminal element consisting of prostitutes, pimps, gamblers and other “urban hoodlums.”³²

Notwithstanding the drug’s popularity with the whites, the media provided significant aid in anchoring the public’s association of blacks and cocaine and in stoking the racial tensions that already existed between the blacks and the whites. Another parallel between opium and cocaine at the turn of the last century was the media’s

²⁷ *Id.* at 56-58; Joseph D. McNamara, *The Hidden Costs of America’s War on Drugs*, 26 J. OF PRIVATE ENTERPRISE 97, 98-99 (2011).

²⁸ *Id.*

²⁹ *Id.*

³⁰ CHARLES E. DE M. SAJOUS, ANALYTICAL CYCLOPAEDIA OF PRACTICAL MEDICINE, III 506 (1902). Cocaine’s popularity was certainly not limited to southern black laborers. *Id.* The act of snorting cocaine distinguished the use by common people from the use by the upper and professional class users who preferred injecting it with a syringe. *Id.* Cocaine’s “assistance” was so apparent that some employers, including plantation owners, provided the drug to their black workers to improve productivity and control the laborers. DAVENPORT-HINES, *supra* note 22, at 200.

³¹ DAVENPORT-HINES, *supra* note 22, at 200.

³² *Id.*

sensationalizing the drug's use and its abuses, which the newspapers promptly connected to a marginalized subset of American society. The press fed the whites' fears by publishing shocking fabrications of "cocaine crazed Negro[es]" leaving their farms and job sites on sexual rampages attacking and having their way with white women, reminiscent of the goings on in the Chinese smoking parlors.³³

MEXICAN IMMIGRANTS AND THE MARIJUANA MENACE

As the 20th century progressed, a new drug threatened the country. Immigrants moving north from Mexico, in search of the American Dream, brought with them cannabis, which they called marijuana.³⁴ Although hemp and cannabis were not new to the United States, it was the combined effect of prohibition and the expansive prevalence of the recreational use of marijuana by Mexican immigrants and Mexican-Americans that brought cannabis to the forefront in the 1920s.³⁵

By the 1930s, marijuana's popularity had spread throughout the country from schoolyards to neighborhood bridge parties.³⁶ In fact,

³³ "Most of the attacks upon white women of the South are the direct result of the cocaine crazed Negro brain . . . Negro cocaine fiends are now a known Southern menace." Dr. Edward H. Williams, *Negro Cocaine "Fiends" Are A New Southern Menace*, N.Y. TIMES, Feb. 8, 1914, at IV-12. Superhuman strength provided another legend attributable to the blacks' use of cocaine and led southern law enforcement to transition from .32 to .38 caliber revolvers because cocaine-frenzied blacks were impervious to the smaller rounds. See, MUSTO, *supra* note 16, at 7 (1999). Harry Anslinger, the head of the predecessor to the Drug Enforcement Agency, advocated for harsher penalties related to cocaine use and possession by recounting stories of racially mixed groups dancing together at nightclubs while under the influence of cocaine. See, HARRY SHAPIRO, *WAITING FOR THE MAN: THE STORY OF DRUGS AND POPULAR MUSIC* (1999).

³⁴ RONALD K. SEIGEL, *INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE* 273 (1989). America's prohibition of alcohol in the 1920's kindled an increased use of marijuana. *Id.*

³⁵ BRECHER, ET. AL, *supra* note 14.

³⁶ WILLIAM O. WALKER, III, *DRUG CONTROL IN THE AMERICAS* 102 (1981).

In New Orleans, the reporters in 1926 laid particular stress on the smoking of marijuana by children. "It was definitely ascertained that school children of 44 schools (only a few of these were high schools) were smoking 'mootas.' Verifications came in by the hundreds from harassed parents, teachers, neighborhood pastors, priests, welfare workers and club women . . . The Waif's Home, at this time, was reputedly

marijuana “tea pads,” first surfacing in New Orleans and other southern port cities, had infiltrated most major cities in the United States by 1930.³⁷ The marijuana pads “resembled opium dens or speakeasies except that prices were very low; a man could get high for a quarter on marijuana smoked in the pad, or for even less if he bought the marijuana at the door and took it away to smoke.”³⁸

Not unlike the associations ascribed to opium and to cocaine before it, it was marijuana’s association with Hispanics that attracted negative public attention and opposition.³⁹ The white majority’s bias against anyone not its own now also enveloped Mexicans. The white’s intolerance intensified as competition for jobs grew fiercer while the “roaring twenties” fell to the Great Depression. Again, paralleling the Chinese earlier in the century, the Mexican immigrants became an intentional scapegoat for rising unemployment rates in the 1930s and for other social ailments as the country’s economic depression continued to bear down on its inhabitants.⁴⁰

The public’s indifference and the government’s abeyance concerning psychoactive drugs would not continue. Fear, economic pressures, sensational media reports and an epidemic of addiction joined to create a force demanding a response.

full of children, both white and colored, who had been brought in under the influence of the drug. Marijuana cigarettes could be bought almost as readily as sandwiches. Their cost was two for a quarter. The children solved the problem of cost by pooling pennies among the members of a group and then passing the cigarettes from one to another, all the puffs being carefully counted."

BRECHER, ET. AL, *supra* note 14.

³⁷ SEIGEL, *supra* note 33, at 273. By 1930, New York City served as host to at least 500 marijuana tea pads. See, Mayor's Committee on Marijuana, *The Marijuana Problem in the City of New York*, THE MARIJUANA PAPERS 246 (David Solomon, ed., 1944).

³⁸ BRECHER, ET. AL, *supra* note 14.

³⁹ MUSTO, *supra* note 16, at 219-20. The Federal Bureau of Narcotics furthered public fears of marijuana by publicizing official statements about police estimates that “fifty percent of the violent crimes committed in districts occupied by Mexicans, Spaniards, Latin Americans, Greeks or Negroes may be traced to this evil” of marijuana. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION* 100 (1974).

⁴⁰ C.M. Goethe, N.Y. TIMES, Sept. 15, 1935, IV-9. “[M]arijuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration . . . our nation has more than enough laborers.” *Id.*

III. AMERICA'S CRIMINALIZATION OF DRUGS

The “war on drugs,” at least as we know it, recently marked its forty-fifth anniversary, but America’s criminalization of drugs and the escalation of drug enforcement began just over a century ago. Until the turn of the last century, the federal government generally abstained from becoming involved in drug control efforts. Prior to that, the 19th century witnessed state and local governments promulgating the earliest laws addressing drugs; there were no national drug control policies. The laws the states and local governments enacted were quite mild in their restrictions, and most placed the onus of policing drugs’ distribution on the health professions.⁴¹ Blanket prohibitions on any drug were rare.

Early national legislative attention centered primarily on opium. Congress increased the import tariff on smoking opium in 1883, but left unaffected opium imported for other purposes.⁴² In 1887, Congress barred the importation of opium by any subject of China, but it did not prohibit importing opium by non-Chinese concerns, nor did it restrict importation of opium from Canada.⁴³ Then, in 1890, Congress passed legislation that limited the manufacture of smoking opium to American citizens.⁴⁴

THE PURE FOOD AND DRUG ACT

In 1906, however, the federal government responded to the growing opium and cocaine epidemics with a new approach. By enacting the Pure Food and Drugs Act,⁴⁵ Congress stepped into the realm of public health and safety, an area formerly exclusively held by state governments. The legislation did not prohibit the use of opium, cocaine or any other substance but rather, required all physicians to accurately label medicines to ensure the doctors disclosed the identities and quantities of the medicines’ contents and ingredients to all

⁴¹ Second Report of the National Commission on Marijuana and Drug Abuse, *Drug Use in America: Problem in Perspective* 14 (1973).

⁴² CHARLES E. TERRY & MILDRED PELLEN, *THE OPIUM PROBLEM* 747 (1928).

⁴³ ALEXANDER T. SHULGIN, *CONTROLLED SUBSTANCES: A CHEMICAL AND LEGAL GUIDE TO THE FEDERAL DRUG LAWS* 244 (1988).

⁴⁴ BRECHER ET. AL, *supra* note 14, at 44.

⁴⁵ Pure Food and Drug Act of 1906, 34 Stat. 768. It was also known as the Wiley Act.

potential users.⁴⁶ Additionally, Congress required appropriate notices be included if the medicines contained any dangerous or habit-forming ingredients.⁴⁷

Despite the success of the Pure Food and Drug Act in reducing opiate addiction, Congress passed the Opium Exclusion Act⁴⁸ in 1909, the nation's first federal drug prohibition law. The legislation affected a national ban on imported, non-medicinal smoking opium, and marked the success of the concerted efforts of the U.S. Secretary of State Elihu Root, Dr. Hamilton Wright and others to enact national opium prohibitions in advance of President Roosevelt's Conference of the International Opium Commission in Shanghai in 1909.⁴⁹

Dr. Wright was intent, however, on even greater, more widely sweeping legislation. Upon his return from the Shanghai conference, he drafted legislation entitled the Foster Antinarcotics Bill.⁵⁰ The legislation was founded on Congress' constitutionally granted taxing power and provided for a federal tax on all drug transactions.⁵¹ It also required everyone who sold drugs to register with the government and record all drug sales.⁵² Unfortunately for Dr. Wright and others who backed the legislation, the popular support did not outweigh the nation's drug manufacturers and retailers who opposed the bill, and the legislation failed, never coming to a vote.⁵³

⁴⁶ *Id.* It did not take long for the new act to debunk the belief that the vast majority of addicts consisted of accidental addicts. It was soon discovered that many opium addicts genuinely sought out the drug solely for its psychoactive effects.

⁴⁷ *Id.*

⁴⁸ Smoking Opium Exclusion Act of 1909, 35 Stat. 614.

⁴⁹ *Id.* It was a proposal drafted by Dr. Hamilton Wright, the U.S. State Department's appointee to the American delegation to the Conference of the International Opium Commission. Dr. Wright advocated strongly that the U.S. serve as a model for other nations by enacting its own exemplary opium laws. MUSTO, *supra* note 16, at 33. [1999] At the time, America had no legal ban limiting the use, sale, or manufacture of products containing opium or coca. *Id.*

⁵⁰ H.R. 25241, 61st Cong. (1910); *see also*, Hamilton Wright, *Report on the International Opium Commission and on the Opium Problem as Seen within the United States and Its Possessions*, OPIUM PROBLEM: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. 377 at 45 (1910).

⁵¹ *Id.*

⁵² *Id.*

⁵³ The Foster Antinarcotics Bill included cumbersome record-keeping and reporting requirements opposed by business and industry. MUSTO, *supra* note 16, at 47-48. [1999]

THE HARRISON NARCOTICS TAX ACT: “. . . A ROUTINE SLAP AT MORAL EVIL”⁵⁴

Dr. Wright was undaunted in his efforts to acquire prohibitionist legislation despite the earlier failure of the Foster Antinarcotics Bill. During the next session of Congress, he, the other physicians who participated in the drafting of the legislation and other supporters succeeded in having the domestic drug prohibition legislation introduced into the House of Representatives.⁵⁵ Opposition from business and industry, including the American Medical Association (AMA), remained ardent, but grudging compromises resulted in the Harrison Act being signed into law on December 17, 1914.⁵⁶

The new law required drug manufacturers and sellers to register their activity with the federal government, to keep records of their sales, and to pay taxes on each transaction.⁵⁷ For the medical community, the Harrison Narcotics Tax Act provided a legal mechanism to ensure that those responsible for selling and dispensing addictive drugs, drugs such as opium and its derivatives – morphine and heroin, cocaine and others, did so in an orderly fashion, whether the amount distributed was smaller in quantities sold over the counter or was larger and required a physician’s prescription.⁵⁸ Physicians and pharmacists had participated in drafting the statute, and they felt protected by its language, particularly the language shielding them from government interference in their practices.⁵⁹

⁵⁴ MUSTO, *supra* note 16, at 65. [1999]

⁵⁵ MUSTO, *infra* note 66. [1972]

⁵⁶ 36 Stat. 785-90 (1914). The official title of the Harrison Narcotics Tax Act was the following: “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.” *Id.*

⁵⁷ *Id.*; see also, EVA BERTRAM, MORRIS BLACHMAN, KENNETH SHARPE, & PETER ANDREAS, *DRUG WAR POLITICS: THE PRICE OF DENIAL* 68 (1996).

⁵⁸ BRECHER, ET. AL, *supra* note 14, at 48.

⁵⁹ The Harrison Act included, “Nothing contained in this section shall apply to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only.” Harrison Narcotic Act of 1914, Pub. L. No. 223, 36 Stat. 785, 789.

Little did they know that in only a few short years, the Harrison Narcotic Act would transform from a relatively innocuous revenue measure into a powerful tool for federal authorities to regulate, and ultimately prohibit, a wide range of narcotics-related activities. Further, instead of enjoying protection of the language of the Harrison Act, physicians and pharmacists would soon learn that the language they believed provided them security would be language used against them. Ultimately the language in question, the wording that shielded them from government interference “in their practices,” was deemed to be language subject to multiple interpretations. Some interpretations supplied undercover Treasury agents the authority to arrest thousands of doctors and pharmacists for prescribing and administering drugs to narcotics addicts.⁶⁰ In the 1920s, the Treasury Department charged and prosecuted more than 25,000 doctors for alleged Harrison Act violations, and over 3,000 of those charged served sentences in the penitentiary.⁶¹ Although contentious legal issues arose, the Court rejected the Treasury Department’s attempts to use the Harrison Act as a prohibition against physicians and their patients.⁶²

⁶⁰ DAVENPORT-HINES, *supra* note 22, at 230. The U.S. Treasury Department took advantage of the ambiguous language “in pursuit of their professional practice” and instigated initiatives to adopt regulations forbidding physicians from providing drugs for addiction maintenance in cases where addiction was unrelated to medical issues. “The manifest lack of federal power to regulate medical practice as well as the need to unify professional support of the Harrison Act may have required these vague phrases.” MUSTO, *supra* note 16, at 125 (1999).

⁶¹ LAWRENCE KOLB, DRUG ADDICTION: A MEDICAL PROBLEM 145-46 (1962).

⁶² *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916), provided the first major legal challenge to the constitutionality of the Harrison Narcotic Act. *Id.* In its decision the Supreme Court limited the scope of the statute denying the U.S. Treasury Department’s attempt to prosecute a doctor for prescribing drugs to an addict and the Treasury Department’s efforts to criminalize the addict’s possession of an illicit drug prescribed by his doctor. *Id.* at 401. The Court recognized that an act of Congress is only valid if carried out pursuant to an expressly granted constitutional power and, in so doing, held that the Harrison Act was not required under international treaty as had been promoted. *Id.* at 401. Therefore, where the Act was passed under Congress’ taxing power, it could only be valid for raising revenue. *Id.* The Court then found that both preventing a doctor from exercising professional judgment to prescribe drugs and prohibiting mere possession of drugs were actions unrelated to revenue collection, and the federal government could not use the Harrison Act to prosecute doctors who prescribed drugs or to prosecute the individuals who possess the drugs. *Id.*

The victory enjoyed by doctors and pharmacists would prove to be short-lived.⁶³

⁶³ Notwithstanding the decision in *Jin Fuey Moy*, the Treasury Department refused to abandon its attempts to regulate the prescription practices of physicians and pharmacists. Rather, it continued its efforts under the pretext of conducting “tax” law enforcement in a fashion it argued was consistent with the language of the Harrison Act and the Court’s interpretation in *Jin Fuey Moy*. In *United States v. Doremus*, 249 U.S. 86 (1919), and *Webb v. United States*, 249 U.S. 96 (1919), two companion cases whose decisions the Supreme Court delivered on the same day, the Court explicitly upheld the statute as a legitimate revenue measure in *Doremus*, writing,

[i]f the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, if cannot be invalidated because of the supposed motives which induced it...The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue.

249 U.S. at 93-94. In the *Webb* decision, the Court went further holding that the legitimate practice of medicine could not include prescribing drugs to patients simply to maintain their addiction with no intent to cure them. 249 U.S. at 97-98. The Treasury Department seized on this language to justify their continued pursuit of doctors and pharmacists.

Three years later, the Treasury Department obtained an undeniable triumph that would consign significant and lasting effects on America’s drug enforcement policy. In *United States v. Behrman*, 258 U.S. 280 (1922), the Supreme Court upheld the Treasury Department’s criminalization of physicians’ prescribing drugs to narcotics addicts whose only medical ailment was the addiction, affirming the federal government’s position that providing a narcotics prescription to an addict was a *de facto* criminal act, regardless of the physician’s intent or “good faith.” *Id.* at 289. The effects of the *Behrman* decision would not be undone by the Court’s subsequent decision in *Linder v. United States*, 268 U.S. 5 (1925). In *Linder*, the Court reversed course recognizing constitutional issues with the Harrison Act if in expanding the statute’s meaning beyond its taxing authority the Court’s interpretation was correct. *Id.* at 21-23. The Court’s decision recognized that there could be medically appropriate justifications for prescribing narcotics to an addict “to relieve conditions incident to addition.” *Id.* at 22. By 1925, however, the government’s punitive enforcement practices were so firmly entrenched that “few were willing to challenge Treasury’s actions politically or in court, and the ruling had little real impact.”

BERTRAM, ET. AL, *supra* note 56, at 75.

THE MARIJUANA TAX ACT OF 1937

The next major piece of legislation in the criminalization of drugs in America was legislation proposed by Narcotics Commissioner Harry J. Anslinger and the Federal Bureau of Narcotics.⁶⁴ Proponents sought to bring marijuana under federal control, but they needed a way to do so without running afoul of the Constitution. Relying, again, on Congress' authority to tax presented the solution.

To garner popular support, Anslinger looked to the power of the press. Working through the media, Anslinger perpetuated the public's fear of drugs by arguing that the use of marijuana caused insanity and led to violent crime.⁶⁵ The Senate followed Anslinger's lead and issued a report to accompany the bill, describing marijuana's threats in the following way:

[u]nder the influence of this drug marijuana the will is destroyed and all power of directing and controlling thought is lost. Inhibitions are released. As a result of these effects, many violent crimes have been committed under the influence of this drug.... [M]arijuana is being placed in the hands of high school children.... by unscrupulous peddlers. Its continued use results many times in impotency and insanity.⁶⁶

Though there was opposition, particularly from the American Medical Association, President Franklin D. Roosevelt signed the

⁶⁴ Congress established the Federal Bureau of Narcotics as a division of the U.S. Treasury Department in 1930, and Treasury Secretary Andrew Mellon appointed his nephew-in-law Harry J. Anslinger as the bureau's first commissioner. SHULGIN, *supra* note 42, at 245. Anslinger would become one of the most influential and prominent figures in the history of America's criminalization of drugs. *Id.* He would become one of the most influential individuals in America's criminalization of drugs and would later earn notoriety as the "father of the drug war." See, John C. McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930-1962*, 113 PENN. MAG. OF HIST. AND BIOGRAPHY 207, 207-236 (1989).

⁶⁵ "How many murders, suicides, robberies, criminal assaults, hold-ups, burglaries, and deeds of maniacal insanity it [marijuana] causes each year, especially among the young, can only be conjectured." JOHN KAPLAN, *MARIJUANA, THE NEW PROHIBITION* 92 (1971) (quoting Commissioner Harry J. Anslinger); see also, NORMAN E. ZINBERG & JOHN A. ROBERTSON, *DRUGS AND THE PUBLIC* 178 (1969).

⁶⁶ *Id.* at 178-79 (quoting the U.S. Senate report accompanying the proposed Marijuana Tax Act of 1937).

Marijuana Tax Act into law on October 1, 1937.⁶⁷ The statute imposed a tax on all marijuana imported, sold, or otherwise handled by placing a transfer tax on each transaction involving the substance.⁶⁸ Additionally, though the new legislation did not actually prohibit the sale or possession of marijuana, it did require anyone handling cannabis to register with the federal government.⁶⁹ If one failed to register, to pay the required taxes and to acquire the mandated transfer stamp, he was subject to fines commanding substantial payments and incarceration carrying sentences up to twenty years.⁷⁰

THE BOGGS ACT OF 1951

The Boggs Act of 1951⁷¹ established the country's first mandatory minimum sentences for drug-related offenses.⁷² The legislation was in response to the concerns of the Federal Bureau of Narcotics over the rise in illicit drug use following World War II.⁷³ During wartime, the United States experienced a decline in drug use, a decline attributable to a variety of factors.⁷⁴ One factor, a shortage of supply through medical channels, fostered the need for alternative sources for the drugs' supply and unwittingly cultivated a black market demand.⁷⁵ As the drug supply steadily diminished, the street price of the drugs continued to rise, attracting even greater numbers of criminal enterprises.⁷⁶ In addition to creating mandatory minimum sentences for drug violations, and in part, to address the increased

⁶⁷ Marijuana Tax Act of 1937, 50 Stat. 551; *see also*, David F. Musto, *The Marijuana Tax Act of 1937*, 26 ARCHIVES OF GEN. PSYCHIATRY 101, 101-08 (1972).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Boggs Act of 1951, Pub. L. No. 255, 65 Stat. 767.

⁷² WALKER, *supra* note 35, at 170-71.

⁷³ Harry J. Anslinger, *The Federal Narcotic Laws*, 6 FOOD, DRUG, AND COSM. L. J. 743, 743-48 (1951).

⁷⁴ WALKER, *supra* note 35, at 170-71.

⁷⁵ DANIEL GLASER, *Interlocking Dualities in Drug Use, Drug Control and Crime*, DRUGS AND THE CRIMINAL JUSTICE SYSTEM 46 (James A. Inciardi & Carl D. Chambers, eds. 1974).

⁷⁶ *Id.*

numbers of black market drug dealers, the Boggs Act modified the prior penalties associated with Harrison Act violations increasing them fourfold.⁷⁷

THE NARCOTIC CONTROL ACT OF 1956

The American Medical Association and the American Bar Association (ABA), troubled by the federal government's punitive drug policies, joined forces to persuade a congressional subcommittee to reexamine the country's drug dilemma, the degree to which narcotic drugs were an issue, and the efficacy of the drug laws in place.⁷⁸ The double-team effort succeeded in persuading Senator Price Daniel of Texas to hold hearings across the country to study America's approach to the drug problem.⁷⁹

Daniel's committee concluded in 1956 and reported finding a severe drug problem requiring drastic punitive measures.⁸⁰ The committee "accused the Supreme Court of permitting major dope traffickers to escape trial by its too-liberal interpretation of constitutional safeguards; it found the Narcotics Bureau could not fight the traffic effectively without being freed to tap telephones; the allowance of bail in narcotics cases was intensifying the flow of drugs into the country; and Bureau agents ought to have statutory authority to carry weapons."⁸¹ Further, Daniel's committee condemned the concept of drug treatment clinics and demanded increased penalties for drug offenses, including the addition of the death penalty for smuggling and for heroin sales.⁸²

Regrettably, it was not what the AMA and the ABA intended when they lobbied for reexamination of America's drug policies, and Daniel's study resulted in Congress' passage of additional, even more repressive legislation – the Narcotic Control Act of 1956, known as the Daniel Act.⁸³ The newly enacted statute eliminated suspended sentences, probation, and parole for drug violations and, not

⁷⁷ 65 Stat. 767.

⁷⁸ RUFUS KING, *THE DRUG HANG-UP, AMERICA'S FIFTY YEAR FOLLY* 14 (1972).

⁷⁹ *Id.*; see also, WILLIAM O. WALKER III, *DRUG CONTROL POLICY: ESSAYS IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 19-20 (2004).

⁸⁰ WALKER, *supra* note 78, at 19-20.

⁸¹ *Id.* at 16.

⁸² SHULGIN, *supra* note 42, at 246.

⁸³ Narcotic Control Act of 1956, 70 Stat. 567.

surprisingly, established new longer mandatory minimum sentences.⁸⁴ In addition to raising minimum sentences, the act increased both prison terms and fines for violations of the drug laws.⁸⁵ Heeding Daniel's request, Congress also included a provision for imposing the death penalty against anyone over the age of eighteen who provided heroin to anyone under the age of eighteen.⁸⁶

THE DRUG ABUSE CONTROL ACT OF 1965

The Drug Abuse Control Act created provisions that closely paralleled the Harrison Narcotics Act in their mandate requiring registration, inspection, and record-keeping by all persons concerned with any controlled substance covered under the Act and with the trafficking of those substances.⁸⁷ Pursuant to the statute, the Food and Drug Administration (FDA) assumed responsibility for enforcement of the addition to America's drug policies through its newly created Bureau of Drug Abuse Control, named for the legislation responsible for its creation.⁸⁸ The FDA also promulgated new regulations under the Drug Abuse Control Act establishing quotas and limiting supplies of certain narcotics and placing severe restrictions on the manufacture of pharmaceutical amphetamines.⁸⁹ The restrictions did little to forestall the proliferation of users of illicit psychoactive substances but did much to motivate the growth of a black market in "speed."⁹⁰

THE MODERN ERA OF AMERICA'S DRUG POLICIES

Until the late 1960s, the federal government's role in drug enforcement would have been considered minimal, and the U.S.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*; see also, ALFRED R. LINDESMITH, *THE ADDICT AND THE LAW* 26 (1965).

⁸⁷ KING, *supra* note 77, at 26.

⁸⁸ Drug Abuse Control Act of 1965, 79 Stat. 226.

⁸⁹ *Id.*

⁹⁰ The supply shortages created by the statute's restrictions in turn sparked an escalation in pricing of the black market drugs sufficient enough to make the street's profit potential attractive to new criminal organizations, a veteran business model first developed with alcohol in the 1920s, and later repeated with the opiates in the 1940s and 1950s. DAVENPORT-HINES, *supra* note 22, at 312-13.

Department of Justice played no role at all.⁹¹ Federal efforts consisted predominantly of customs officials seizing what they could at the nation's borders, the Treasury Department's Federal Bureau of Narcotics investigating heroin rings, and the FDA regulating pharmaceuticals.⁹² A "war on drugs" did not exist.

Richard Nixon, however, adopted controlling narcotics as a sizable plank in his campaign platform, and Nixon's proclamation of a nation-wide necessity to restrict the availability, sale and use of illicit drugs gathered increasingly greater popular accord as his campaign progressed.⁹³ After his election, President Nixon unveiled a global campaign to eradicate drugs and drug traffickers.⁹⁴ He established the National Commission on Marijuana and Drug Abuse in 1970 and the Special Action Office for Drug Abuse Prevention.⁹⁵ A year later, he declared drugs to be "public enemy number one," becoming the first American president to officially declare a "war on drugs," and setting the stage for each executive that followed.⁹⁶

THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

A hallmark of Nixon's crusade against drugs was the passage of the Controlled Substances Act as Title II of the Comprehensive Drug Abuse Prevention and Control Act.⁹⁷ In addition to wholly replacing the Harrison Act as the nation's chief legislative instrument of drug control, it positioned the manufacture, importation, distribution, and possession of certain psychoactive substances under federal authority and regulation.⁹⁸ Congress relied on its authority to regulate interstate commerce as the basis to subordinate *all* previously existing drug laws under federal power, but an immediate effect of the legislation was to

⁹¹ DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 206-91 (1996).

⁹² *Id.*

⁹³ MUSTO, *supra* note 16, at 253-57. [1988]

⁹⁴ DAVENPORT-HINES, *supra* note 6, at 421-423.

⁹⁵ *Id.*

⁹⁶ In 1971, Nixon declared "total war . . . on all fronts against an enemy with many faces." See, SHULGIN, *supra* note 42, at 247.

⁹⁷ 84 Stat. 1236 (1970).

⁹⁸ *Id.* Three years later, Congress consolidated all anti-drug activities under a newly created Drug Enforcement Administration, further strengthening the federal bureaucratic mechanism for drug control nurtured by the Nixon administration. See, Reorganization Plan No. 2 of 1973, 87 Stat. 1091.

“effectively destroy the Federal-State relationship that existed between the Harrison Act and the Uniform Narcotic Drug Act.”⁹⁹

In an effort to restore the balance between state and federal authorities that existed prior to the passage of the Controlled Substances Act, the Commissioner on Uniform State Laws drafted the Uniform Controlled Substances Act.¹⁰⁰ It replaced the Uniform Narcotic Drug Act of 1932, and presented an arrangement of complementary federal and state drug control laws that soon became the national standard for the control and legislative enforcement of narcotic and dangerous drugs.

Another feature of the Controlled Substances Act, it introduced five schedules or categories for drugs, arranged in descending order based on a substance’s potential for abuse and ascending order determined by a substance’s approved medicinal use.¹⁰¹ As an example, neither of the illicit drugs heroin and Ecstasy have any accepted medical use, but their potential for abuse is quite high. They both fall under Schedule I.¹⁰² While substances that are widely accepted medicinal drugs, like medications that treat diarrhea, fall within Schedule V.¹⁰³

President Gerald Ford’s brief administration brought some amount of pragmatism to Nixon’s anti-drug measures. Though President Ford maintained pressure for stronger controls, he acknowledged that eliminating drug abuse was an illusory exercise.¹⁰⁴

⁹⁹ Shulgin, *supra* note 42, at 247

¹⁰⁰ 84 Stat. 1285 (1970); *see also*, Rufus King, *The 1970 Act: Don’t Sit There, Amend Something*, <http://www.druglibrary.ent/special/king/dhu/dhu23.htm>. (last visited X)

¹⁰¹ 84 Stat. 1236 (1970).

¹⁰² Arthur J. Lurigio, *A Century of Losing Battles: The Costly and Ill-Advised War on Drugs in the United States* (Loyola Univ. Chicago Social Justice Centers, Loyola eCommons, Working Paper, Paper No. 21, 2014), http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1020&context=social_justice&sei-redir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fhl%3Den%26q%3DLurigio%2Bcentury%2Bof%2Blosing%2Bbattles%26btnG%3D%26as_sdt%3D1%252C25%26as_sdt%3D#search=%22Lurigio%20century%20losing%20battles%22. (last visited X)

¹⁰³ *Id.*

¹⁰⁴ Musto, *supra* note 16, at 257. [1999] The Domestic Council Drug Abuse Task Force released its White Paper on Drug Abuse during Ford’s administration. *See*, Domestic Council Drug Abuse Task Force, *White Paper*, (1975), <https://www.fordlibrarymuseum.gov/LIBRARY/document/0067/1562951>.

The more pragmatic tenor of Ford's administration also found footing in the subsequent administration of President Jimmy Carter. President Carter, addressing Congress, urged that "penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself; and where they are, they should be changed."¹⁰⁵ Federal law never reflected President Carter's suggestions of decriminalizing marijuana nor his more realistic approaches to drug control, and any softening positions eventually dissolved.

When President Ronald Reagan took office, he brought with him an attitude toward drug control reminiscent of the Nixon administration. America was emerging from the Vietnam War, and the reach of the Columbian drug cartels was international. American's fear of drugs experienced renewed momentum and found respite in President Reagan's support of a strong law enforcement approach to drug control.¹⁰⁶ From the White House Rose Garden in 1982, President Ronald Reagan declared, "[w]e can put drug abuse on the run through stronger law enforcement, through cooperation with other nations to stop the trafficking, and by calling on the tremendous volunteer resources of parents, teachers, civic in religious leaders, and state and local officials."¹⁰⁷ Congress' additions to America's drug policies reflected the prohibitionist stance of the Reagan administration.

THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

pdf. (last visited X) The Council's white paper indicated the problem of drug abuse was one that the government could only hope to contain, and it warned that the government's ability to totally eliminate drug abuse was an unlikely prospect. *Id.* at 97-98.

¹⁰⁵ Quoted in Musto, *supra* note 16, at 261. [1999] Carter campaigned on a platform that included decriminalizing marijuana and repealing federal laws that penalized people for less than one ounce of an illicit drug. *See, e.g.,* MICHAEL MASSING, *THE FIX* (1998). – need more detailed reference

¹⁰⁶ *Id.* at 266-67.

¹⁰⁷ President Ronald Reagan, Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions (June 24, 1982) (*in* William Richard Files, White House Staff Files, Ronald Reagan Library), <http://www.presidency.ucsb.edu/ws/index.php?pid=42671>. (last visited X) Nancy Reagan's antidrug campaign "Just Say No" became a controversial component of the broad national approach to the elimination of drug abuse but was very popular with parents, schools and the media. The administration's fight focused on white middle-class youth and received funding from corporate and private donations. Musto, *supra* note 16, at 266-68. [1999]

In 1984, the Controlled Substances Act underwent change with a variety of additions known as the Comprehensive Crime Control Act of 1984.¹⁰⁸ The new amendments included provisions for placing certain “designer drugs” into the scheduling formula and for seizing the profits derived from criminal acts.¹⁰⁹

THE ANTI-DRUG ABUSE ACT OF 1986

By signing the Anti-Drug Abuse Act of 1986¹¹⁰, President Reagan significantly intensified the federal government’s fight for drug control and recognized the bipartisan support for tough new penalties for those who violated the nation’s drug laws. The legislation established mandatory minimum sentences for violations of heroin and cocaine statutes, and in so doing Congress created marked disparities in legal penalties for the possession and sales of powder cocaine and crack cocaine.¹¹¹ Congress also established the possibility of a capital sentence for certain drug offenses.¹¹²

THE ANTI-DRUG ABUSE ACT OF 1988

President Reagan’s intensification of nationwide efforts to control illicit drugs continued with the passage of the Anti-Drug Abuse Act of 1988.¹¹³ With this legislation, the Reagan administration sought

¹⁰⁸ 98 Stat. 1976 (1984).

¹⁰⁹ *Id.*

¹¹⁰ 100 Stat. 3207. The legislation received almost unanimous congressional support, partly in reaction to the overdose death of Len Bias. Earlier that year, Bias, a promising collegiate basketball star, died suddenly from a suspected cocaine overdose. His death and the prominence played by illicit drugs garnered front-page news nationwide.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 102 Stat. 4181. President Reagan was adamant about getting “tough on drugs.” RONALD REAGAN, RADIO ADDRESS TO THE NATION ON ECONOMIC GROWTH AND THE WAR ON DRUGS, The American Presidency Project (Oct. 8, 1988), <http://www.presidency.ucsb.edu/ws/?pid=34997>. (last visited X) Reagan announced that “we will no longer tolerate those who sell drugs and those who buy drugs . . . they must pay.” *Id.* President Reagan’s declaration was an outward demonstration of his having harnessed the existing public momentum seeking a crackdown on drug use in America. By 1982, over 3,000 parents’ groups had assembled and organized under the National

to prevent the manufacture of scheduled drugs and to further discourage drug use by adopting even more stringent penalties.¹¹⁴ Congress opined "the legalization of illegal drugs, on the Federal or State level is unconscionable surrender in a war in which . . . there can be no substitute for total victory . . . it is the declared policy of the United States Government to create a drug-free America in 1995."¹¹⁵ The United States would spend billions of dollars and convict thousands of drug offenders, but the notable goal was unattainable.

THE 21ST CENTURY "WAR ON DRUGS"

Each decade of the last century witnessed ever increasing government effort to eradicate addiction, thwart drug trafficking, and prevent drug-related crime. The 1990s and the move into the 21st century continued the pattern – new legislation continues, as does unprecedented spending, increased numbers of arrests and incarceration of drug offenders, and even longer prison sentences with little or no rehabilitative component. The sad reality is that after billions of dollars, millions of man-hours, and untold numbers of lives, America's punitive approach has wholly failed to eradicate drug addiction, failed to thwart trafficking and failed to prevent drug-related crime. In fact, the government's expenditures and efforts have failed even to reduce these numbers for any sustained period.

Success, however, has not been altogether elusive. Our nation's governing bodies, including the individual state governments, have realized unparalleled accomplishments regarding a variety of drug-related matters, though these hallmarks cannot truly be counted as triumphs in the war on drugs. Among those accomplishments, we have allocated and spent more money, enacted more drug-related legislation, created thousands of new drug-related crimes, and prosecuted and jailed more people, all with little in the way of corresponding victories to claim as a result. The prevalence of drug use continues, epidemics of drug abuse are spreading, the rise of incidences of drug offenses and drug-related crimes abound, and the toll of the public costs escalates. The hard truth is that the costs and consequences of America's drug policy, with its increased

Federation of Parents for Drug Free Youth. Gonzales, Laurence, *The War on Drugs: A Special Report*, April PLAYBOY 134 (1982).

¹¹⁴ *Id.*

¹¹⁵ Shulgin, *supra* note 42, at 250.

criminalization of drugs and drug-related activities, its ever-exacting retributive sanctions and the intensified enforcement efforts have simply failed.

IV. THE COSTS AND CONSEQUENCES OF AMERICA'S WAR ON DRUGS

America's national policy on drug control espouses a commitment to maintaining health, welfare and public safety, a commitment that arguably provides undergirding for all of the nation's drug legislation, regulations, rules, and ordinances.¹¹⁶ The implementation of our nation's drug policy, however, is realized almost exclusively through prohibitive measures and the application of severe punishment touted as the best means of eliminating drug availability and deterring people from drug consumption through fear of punishment. The upshot is that the entirety of our national drug policy, supposedly aimed at protecting both individuals and society at large from drugs and drug-related harm, is based on the myth that these aims can be achieved through police enforcement. Almost fifty years of practice reveals a different story, but these lessons are not affecting a reduction in the allocation of resources—both capital and human—budgeted for drug control. Below is an overview of some of the costs and consequences of America's war on drugs.

INCARCERATION

The United States has the highest incarceration rate per capita of any country on the planet.¹¹⁷ Our numbers dwarf those of nearly every developed country, including those of highly repressive regimes, such as Russia, China, and Iran.¹¹⁸ America's war on drugs is the driving force of these astounding numbers of mass incarcerations over the last four decades, the single largest contributor to new prison

¹¹⁶ The commitment of the United States is not unlike that adopted by the United Nations. In the preamble of the 1961 United Nations Single Convention on Narcotic Drugs, "the health and welfare of mankind" is the described impetus for the UN drug policies. UNITED NATIONS, SINGLE CONVENTION ON NARCOTIC DRUGS, 1961, 1 (1961), *available at* https://www.unodc.org/pdf/convention_1961_en.pdf.

¹¹⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (rev. ed. 2012).

¹¹⁸ *Id.*

admissions being drug law violations.¹¹⁹ The mechanics of these swelling incarceration rates consist of increased numbers of convictions in relation to arrests and increases in average sentence lengths, both influenced by the nation's drug enforcement policies.¹²⁰ The Brookings Institution reported that in sixteen years, between 1993 and 2009, thirty million people were arrested on drug charges.¹²¹ Of those arrested, more than three million received convictions with accompanying prison sentences resulting in prison admissions.¹²² In fact, each year during the sixteen-year study period, more people were admitted to prison for drug law violations than for violent crimes.¹²³

Considering the last 25 years, the number of federal prisoners serving time for drug-related offenses has risen by nearly 2,000%, from approximately 5,000 inmates in 1980 to over 95,000 in 2015.¹²⁴ When state prisons and local jail populations are added to the federal numbers, our nation's incarcerated swell from approximately 320,000

¹¹⁹ DRUG POLICY ALLIANCE, *THE DRUG WAR, MASS INCARCERATION AND RACE 1* (2016), http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Drug%20War%20Mass%20Incarceration%20and%20Race_%28Feb.%202016%29.pdf. (last visited X)

¹²⁰ There are a variety of contributing causes to the explosion in incarceration rates, but regardless of the dynamics that have led to the increase, growing numbers of non-drug related offenses are not part of the equation. In fact, the number of non-drug related convictions has remained relatively constant, if not in a state of decline. The multiplier is a rise in numbers of convicted drug offenders coupled with longer sentences. Criminal justice policies, not changes in underlying crime, account for nearly all of the growth in our nation's incarcerated population in recent decades. Practices of law enforcement, prosecutors and the court systems are also contributors to the growth of America's prisons. See, e.g., STEVEN RAPHAEL & MICHAEL A. STOLL, *WHY ARE SO MANY AMERICANS IN PRISON?* (2013). NOT CLEAR IF THIS LAST ONE IS A BOOK ETC.

¹²¹ Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Distinction Between Stock and Flow*, Brookings Institution (2015), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/11/25-drug-offenders-stock-flow-prisons-rothwell>. (last visited X)

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

in 1980 to over 2.2 million today.¹²⁵ Individuals incarcerated for drug offenses increased more than ten-fold during this same time period.¹²⁶

Related to these statistics is an even more dramatic growth in the numbers of inmates not convicted of a crime and being housed in local jails. Increases in convictions and increases in bail amounts have contributed significantly to the rise in the number of individuals detained in local jails awaiting conviction. Between 1983 and 2014, the proportion of convicted inmates at the local level grew by 90 percent, but the numbers of jail inmates not convicted of a crime escalated by more than 200 percent.¹²⁷ Although data indicates that bail may be assigned more often than it was two decades ago, the bail amounts have increased pursuant to statutory amendments making it less financially feasible for defendants to secure bail. For instance, in 1990, large U.S. counties assigned bail to 53 percent of their felony defendants, and in 2009, 72 percent of these defendants were assigned bail.¹²⁸ Because of limited resources, a higher percentage of the accused have been unable to finance bail and must remain incarcerated in local jails while awaiting conviction.

Additionally, between 1980 and 2011, the average length of prison sentences for federal drug offenses rose by 36 percent.¹²⁹ This is an increase in prison time from approximately fifty-five months to seventy-four months.¹³⁰ During the same period, the average prison sentence for all other federal offenders declined.¹³¹ Contributing to the higher numbers of incarcerated drug offenders is the disappearance of probation as a sanction for those convicted. In 1980, 26 percent of those convicted of drug violations received probation.¹³² By 2014, judges

¹²⁵ THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (2016), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>. (last visited X)

¹²⁶ *Id.*

¹²⁷ Bureau of Justice Statistics. 1990-2009. Felony Defendants in Large Counties, Department of Justice. – How can you find this? Not clear from cite.

¹²⁸ *Id.*

¹²⁹ THE PEW CHARITABLE TRUSTS, FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN (2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return>. (last visited X)

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

were sending nearly all those convicted of drug offenses to prison, reducing the numbers receiving probation to only 6 percent.¹³³

Vast numbers of drug convictions, longer sentences for those convicted, and greater numbers of accused being housed in local jails combine to effect ballooning incarceration costs. In the federal system alone, one out of every four dollars spent by the U.S. Department of Justice, more than \$6.7 billion per year, is expended on housing federal convicts.¹³⁴ Maintaining state prisons and jails demands an additional \$80 billion, an 89 percent increase since 1988.¹³⁵ When considering the economic costs of America's "war on drugs," costs associated with incarcerating those convicted occupy a single line item among the legal institutional costs in the pursuit of a drug-free nation.

DRUG USE

According to 2014 National Survey on Drug Use and Health, an estimated 27 million Americans aged twelve or older were current illicit drug users, indicating that they had used an illegal drug during the month prior to the interview.¹³⁶ This means that approximately one out of every ten Americans in 2014 was a current illegal drug user. These numbers are higher than those in every year since 2002.¹³⁷ The National Institute on Drug Abuse reports that cocaine use among

¹³³ *Id.*

¹³⁴ THE PEW CHARITABLE TRUSTS, FEDERAL PRISON SYSTEM SHOWS DRAMATIC LONG-TERM GROWTH (2015), http://www.pewtrusts.org/-/media/Assets/2015/02/Pew_FederalPrison_Growth.pdf. (last visited X)

¹³⁵ U.S. DEPARTMENT OF EDUCATION, STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>. (last visited X)

¹³⁶ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 4 (2015), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf>. (last visited X) The National Survey on Drug Use and Health is an annual survey civilian, nine institutionalized population of the United States aged 12 years old or older. It includes residents of households and individuals in non-institutional groups, but excludes homeless, active military personnel, and residents of jails, prisons, nursing homes, mental institutions, and long-term hospitals.

¹³⁷ *Id.* at 5.

college-aged adults has risen sharply,¹³⁸ and according to the World Drug Report, heroin use in the United States is up 145 percent.¹³⁹ Trafficking numbers in the United Nations' report are based in part on drug seizures. The research reports that heroin and morphine seizures grew from an average of four tons per year from 1998 to 2008, to an average of seven tons per year between 2009 and 2014.¹⁴⁰

OVERDOSE DEATHS

For the last fifteen years, deaths related to drug overdose have been on a steep rise,¹⁴¹ nearly tripling between 1999 and 2014.¹⁴² After recording alarming increases in drug overdoses, the Centers for Disease Control (CDC) undertook an examination of overdose deaths in the United States occurring between 2010 and 2015.¹⁴³ The drug overdose death rate in 2010 was 38,329, representing 12.3 deaths per 100,000 people.¹⁴⁴ Five years later, overdose death rates increased to 52,404, or 16.3 deaths per 100,000 people, a 37 percent increase.¹⁴⁵ From 2014 to 2015, deaths resulting from drug overdose increased by 5,349

¹³⁸ National Institute on Drug Abuse, *Drug and Alcohol Use in College-Age Adults*, 2015 MONITORING THE FUTURE (2016), <https://www.drugabuse.gov/related-topics/trends-statistics/infographics/drug-alcohol-use-in-college-age-adults-in-2015>. (last visited X)

¹³⁹ UNITED NATIONS, *WORLD DRUG REPORT 4* (2016), *available at* http://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf.

¹⁴⁰ *Id.* at xiii.

¹⁴¹ Press Release, *Opioids Drive Continued Increase in Drug Overdose Deaths*, Centers for Disease Control (February 20, 2013), https://www.cdc.gov/media/releases/2013/p0220_drug_overdose_deaths.html. (last visited X)

¹⁴² Rose A. Rudd, Puja Seth, Felicita David, & Lawrence Scholl, *Increases in Drug and Opioid-Involved Overdose Deaths – United States, 2010-2015*, Centers for Disease Control, 65 MORBIDITY AND MORTALITY WEEKLY REPORT 1445, 1446 (2016), *available at* <https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm>.

¹⁴³ *Id.* The CDC report includes drug overdose deaths recorded by the National Vital Statistics System multiple cause-of-death mortality files.; *see also*, http://www.cdc.gov/nchs/nvss/mortality_public_use_data.htm. (last visited X)

¹⁴⁴ CDC, *supra* note 140.

¹⁴⁵ *Id.* at 1446.

persons or 11.4 percent, continuing the rising trend that began in 1999.¹⁴⁶

CDC researchers suggest that heroin and synthetic opioids (other than methadone) are responsible for the rapid increase in overdose deaths.¹⁴⁷ They report a frightening increase from 2014 to 2015 in the number of deaths caused from overdoses of synthetic opioids (including fentanyl), a staggering 72 percent surge in the death rate in a single year.¹⁴⁸ Heroin overdoses leading to death increased by nearly 21 percent for the same time period.¹⁴⁹ Combining the deaths as a result of overdoses of synthetic opioids and heroin, researchers found increases across all demographic groups, all regions and in twenty-eight states. At least one study reports that illicitly manufactured fentanyl is responsible for some portion of these increased deaths.¹⁵⁰

The increases are consequences, as unintended as they may be, of failing drug policies and enforcement approaches focused on punishing offenders. The CDC warns of an

urgent need for a multifaceted, collaborative public health and law enforcement approach to the opioid epidemic, including implementing the CDC Guideline for Prescribing Opioids for Chronic Pain; improving access to and use of prescription drug monitoring programs; expanding naloxone distribution; enhancing opioid use disorder treatment capacity and linkage into treatment, including medication-assisted treatment; implement and harm reduction approaches, such as during services program; and supporting law enforcement strategies to reduce the illicit opioid supply.¹⁵¹

¹⁴⁶ Rose A. Rudd, Noah Aleshire, Jon E. Zibbell, & R. Matthew Gladden, *Increases in Drug and Opioid Overdose Deaths – United States, 200-2014*, Centers for Disease Control, 64 MORBIDITY AND MORTALITY WEEKLY REPORT 1378 (2016), available at

<https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm>.

¹⁴⁷ [CDC](#), *supra* note 141.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ R. Matthew Gladden, P Martinez, P Seth, *Fentanyl Law Enforcement Submission and Increases in Synthetic Opioid-involved Overdose Deaths – 27 States, 2013-2014*, Centers for Disease Control, 65 MORBIDITY AND MORTALITY WEEKLY REPORT 837 (2016), available at

<http://dxdoi.org/10.15585/mmwr.mm6533a2>.

¹⁵¹ CDC, *supra* note 141.

CONSTITUTIONAL COSTS

The War on Drugs raises constitutional alarms dating back to the passage of the Harrison Act. Since adoption of our nation's drug control strategies, much of the enforcement of the drug policies and the effort to eradicate drug use have come with substantial costs extending far beyond monetary expenditures. There are real questions concerning the constitutionality of many of the drug control efforts and the high cost exerted on the Bill of Rights. Legal evolutions of mandatory minimum sentences, drug courts, drug testing in schools, and no-knock warrants arguably in violation of the eighth, sixth, fifth and fourth amendments, respectively, are taking their toll, shrinking civil rights and civil liberties, and threatening the freedoms associated with American democracy.

Because the drug industry arises from the voluntary transactions of tens of millions of people—all of whom try to keep their actions secret—the aggressive law enforcement schemes that constitute the war must aim at penetrating the private lives of those millions. And because nearly anyone may be a drug user or seller of drugs or an aider and abettor of the drug industry, virtually everyone has become a suspect. All must be observed, checked screened, tested, and admonished – the guilty and innocent alike.¹⁵²

As Professor Wisotsky points out, there is tragic irony in the fact that “while the War on Drugs has failed completely to halt the influx of cocaine and heroin, both of which are cheaper, purer, and more abundant than ever,”¹⁵³ America's drug strategy and crackdown efforts have systematically curtailed the liberty and privacy of Americans. The law related to search and seizure provides just one example of how our civil rights and civil liberties have become yet another consequence of America's war on drugs.

¹⁵² STEVEN WISOTSKY, CATO INSTITUTE POLICY ANALYSIS NO. 180: A SOCIETY OF SUSPECTS: THE WAR ON DRUGS AND CIVIL LIBERTIES (1992), <https://www.cato.org/publications/policy-analysis/society-suspects-war-drugs-civil-liberties>. (last visited X)

¹⁵³ *Id.*

SEARCHES AND SEIZURES

Most recently, the U.S. Supreme Court eroded the exclusionary rule in historic proportions, all but erasing it, upholding the admissibility of evidence seized during an admittedly unlawful stop by police.¹⁵⁴ The Court's holding is simply the latest in a long list of decisions evidencing a slide toward the "anything-goes-in-the-War-on-Drugs attitude."¹⁵⁵ During the Reagan years, the Court usually upheld the government's exercise of power when the power was exercised in the fight against drugs, notwithstanding constitutional challenges, but the trend in judicial decisions was not limited to the Reagan administration and has continued long after President Reagan left office. We see this trend as the Court failed to find objectionable drug agents' use of a drug courier profile to stop, detain, and question people without a warrant and without probable cause;¹⁵⁶ to subject a traveler's luggage to a sniffing examination by a drug-detection canine without a warrant and without probable cause;¹⁵⁷ to search a public school student's purse without a warrant and without probable cause;¹⁵⁸ and to search ships in inland waterways at will.¹⁵⁹

Homes, too, began to fall to the government's power as the drug war escalated. The right to privacy Americans enjoyed in their residences experienced serious restriction. The Supreme Court approved the use of search warrants for residences obtained on the basis of an anonymous tip alone.¹⁶⁰ It also upheld the use of illegally seized evidence under a "good faith exception" to the exclusionary

¹⁵⁴ See, *Utah v. Strieff*, 136 S. Ct. 2056 (2016). In addition to protection from unlawful search and seizure, the exclusionary rule is also designed to provide a remedy, short of criminal prosecution, in response to prosecutors and police who illegally gather evidence in violation of the Bill of Rights.

¹⁵⁵ See, *Wisotsky*, *supra* note 151.

¹⁵⁶ *Florida v. Royer*, 460 U.S. 491, 498 (1983); see also, *United States v. Montoya*, 473 U.S. 531 (1985); and *Florida v. Rodriguez*, 469 U.S. 1, 5 (1984).

¹⁵⁷ *United States v. Place*, 462 U.S. 606, 706 (1983).

¹⁵⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

¹⁵⁹ *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983).

¹⁶⁰ *Illinois v. Gates*, 462 U.S. 213 (1983).

rule;¹⁶¹ the right of law enforcement to make a warrantless search while trespassing in “open fields” that were surrounded by fencing and posted with “No Trespassing” signs;¹⁶² the right of the police to conduct a warrantless search of a barn adjacent to a residence;¹⁶³ law enforcement’s ability to conduct a warrantless search of a motor home occupied as a residence;¹⁶⁴ the power to conduct a warrantless search of a home on the consent of an occasional visitor lacking legal authority over the premises;¹⁶⁵ and the ability of law enforcement to conduct a “knock-and-announce” procedure allowing less than five seconds before entry.¹⁶⁶ Relatedly, the Court approved the warrantless aerial surveillance over private property.¹⁶⁷

The Court also significantly expanded the powers of police to stop, question, and detain drivers of vehicles on suspicion with less than probable cause,¹⁶⁸ or with no suspicion at all at fixed checkpoints or roadblocks;¹⁶⁹ to conduct warrantless searches of automobiles and closed containers situated within the vehicles;¹⁷⁰ and to conduct surveillance of suspects by placing transmitters or beepers on vehicles or in containers therein.¹⁷¹ In another erosive decision, the Court reversed the Florida Supreme Court in upholding the constitutionality of the interrogation of a Greyhound bus passenger and the search of his baggage by armed officers within the confines of the bus.¹⁷²

¹⁶¹ *United States v. Leon*, 468 U.S. 897, 905 (1984). The Court applied the rule to the search of a home made pursuant to a defective warrant issued without probable cause. *Id.* See also, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

¹⁶² *Oliver v. United States*, 466 U.S. 170 (1984).

¹⁶³ *United States v. Dunn*, 480 U.S. 294 (1987).

¹⁶⁴ *California v. Carney*, 471 U.S. 386, 390 (1985).

¹⁶⁵ *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

¹⁶⁶ *Hudson v. Michigan*, 547 U.S. 586 (2006).

¹⁶⁷ *California v. Ciraolo*, 476 U.S. 207 (1986); see also, *Florida v. Riley*, 488 U.S. 445 (1989) (allowing aerial surveillance by fixed-wing aircraft at an altitude of 1,000 feet and by helicopter at 400 feet).

¹⁶⁸ *United States v. Sharpe*, 470 U.S. 675 (1985).

¹⁶⁹ *Texas v. Brown*, 460 U.S. 730 (1983); *Michigan v. Sitz*, 496 U.S. 444 (1990).

¹⁷⁰ *California v. Acevedo*, 500 U.S. 565 (1991).

¹⁷¹ *United States v. Knotts*, 460 U.S. 276, 284 (1983); *United States v. Karo*, 468 U.S. 705, 721 (1984).

¹⁷² *Florida v. Bostick*, 501 U.S. 429 (1991).

UNINTENDED CONSEQUENCES

Mass incarceration and hyper-criminalization are a catalyst for poverty in America. Convicted felons are substantially more likely to face challenging circumstances attempting to re-integrate into society following their release from incarceration. The history of imprisonment and their accompanying criminal record impedes success in the labor market – employment limitations and depressed wages severely restrict a convicted individual’s abilities to attain self-sufficiency. A person’s criminal conviction negatively impacts him far beyond imprisonment and its associated loss of freedoms. Criminal sanctions affect the felon’s health, debt situation, transportation options, housing opportunities, nutrition and security.¹⁷³ They also produce adverse consequences for children and contribute to financial and emotional stresses that undermine marriages and familial relationships.¹⁷⁴ At the community level, criminal sanctions promote inequality and often deteriorate citizens’ trust in the government.

Convictions create criminal records that can present significant barriers to employment, housing, public assistance, education, family reunification, developing good credit and more.¹⁷⁵ Even a minor criminal record, such as a misdemeanor or arrest without conviction, constructs potential barriers that can prevent an individual’s successful acclamation in society.¹⁷⁶

¹⁷³ See, Economic Perspectives on Incarceration and the Criminal Justice System 45 (2016). – How can you find this? Seems to need a little more in the cite.

¹⁷⁴ *Id.*

¹⁷⁵ The Sentencing Project, *Americans with Criminal Records*, HALF IN TEN 1 <http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>. (last visited X) In one experiment, researchers randomly assigned a criminal record to otherwise identical job applicants finding that those with criminal records were 50 percent less likely to receive an invitation to interview or job offer; percentages for blacks was even higher. Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 THE ANNALS OF THE ACAD. OF POLITICAL AND SOC. SCIENCE 195-213 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AMERICAN J. OF SOCIOLOGY 937-975 (2003).

¹⁷⁶ *Id.* An examination of individual earnings before and after arrest suggests that even arrests without conviction can decrease earning and employment.

As of July 1, 2015, more than seventy million Americans, roughly a third of the nation's adult population, possessed some type of criminal record.¹⁷⁷ By way of comparison, this number is greater than the entire U.S. population in 1900; approximately equal to the number of Americans holding college diplomas; and if criminal record holders were a separate nation, they would comprise the eighteenth largest country on Earth (larger than France and Canada and three times larger than Australia).¹⁷⁸

To further exacerbate the issues for criminal record holders, recent surveys indicate that more than 70 percent of American employers conduct criminal background checks as a prerequisite for employment.¹⁷⁹ The costs of possessing a criminal record include severely limited employment options. Additionally, individuals with criminal records are often barred from obtaining occupational licenses that would assist them not only with employment opportunities, but also enhance their prospects for improving their socio-economic status. The American Bar Association estimates that there are over 1,000 mandatory license exclusions for individuals with minor records, which may include misdemeanor convictions or arrests without conviction, and nearly 3,000 exclusions for those with felony records.¹⁸⁰

The incarcerated population is comprised largely of individuals who, even pre-conviction, are disproportionately poor and experience lower education levels.¹⁸¹ As few as 10 percent of these individuals

Jeffrey Grogge, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 THE QUARTERLY J. OF ECONOMICS 51-71 (1995).

¹⁷⁷ Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, Brennan Center for Justice (2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>. (last visited X)

¹⁷⁸ *Id.*

¹⁷⁹ Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. OF LAW AND ECONOMICS 451, 452 (2006).

¹⁸⁰ American Bar Association, *National Inventory of Collateral Consequences of Conviction*, <http://www.abacollateralconsequences.org/search/>. (last visited X)

¹⁸¹ See, Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings* 494 (Princeton Univ. - Industrial Relations Section, Working Paper, 2006) - How can we find this as a working paper? Just checking the cite.; see also, Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Report (2006); and William J. Sabol, *Local Labor Market Conditions and Post-prison Employment: Evidence from Ohio* (Bureau of Justice, Working Paper 2007).

have positive pre-incarceration earnings.¹⁸² The period of incarceration further reduces any earnings and places additional strains on families already experiencing a shortage of resources. One study indicates the incarceration of a father increases by 38 percent the probability that a family's economic status will decline to or remain at poverty level.¹⁸³

Incarceration impacts health, posing health risks during imprisonment and increasing the likelihood of health risks post-confinement. Prisons at maximum capacity or, worse, at greater than maximum capacity, amplify the risks of the incarcerated magnifying the possibility of inmate injury, sexual victimization, disease transmission, and even death. Overcrowded prisons forced to reduce their inmate population witnessed a reduction of six inmate deaths per year.¹⁸⁴ Additionally, incidents of sexual assault are higher among the incarcerated than the general population.¹⁸⁵

Criminal convictions also impact housing, not only for an individual, but potentially for his family as well. The U.S. Department of Housing and Urban Development (HUD) does not unilaterally bar individuals with criminal records from residing in public housing, but it does allow each local Public Housing Authority (PHA) the latitude to establish its own practice concerning criminal record policies. More often than not the restrictions of the PHAs are greater than the federal departmental guidelines, preventing individuals with a criminal history from qualifying for housing. Even low-level, nonviolent offenders, like those convicted of alcohol and drug-related crimes, are

¹⁸² *Id.*

¹⁸³ Rucker Johnson, *Ever-increasing Levels of Parental Incarceration and the Consequences for Children*, DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 177-206 (Steven Rafael & Michael A. Stoll eds., 2009).

¹⁸⁴ Richard T. Boylan & Naci Mocan, *Intended and Unintended Consequences of Prison Reform*, 30 J. OF LAW AND ECONOMICS 558-586 (2013).

¹⁸⁵ Reports chronicle 3.7 percent of incarcerated men experience sexual abuse, as compared to 8.5 percent of incarcerated women. Allen J. Beck, Marcus Berzofsky, Rachel Caspar, & Christopher Krebs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, Bureau of Justice Statistics, U.S. Department of Justice (2013). Where can we find this document? Seems the cite needs a little more information.

included in the PHAs prohibitions, making them ineligible for public housing assistance.¹⁸⁶

There are other government assistance programs moved beyond the reach of individuals convicted of crimes. Federal safety net programs, such as Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) have restricted access to those with criminal records. Many states have overridden federal restrictions to provide access to convicted felons, unless an individual received a felony drug conviction.¹⁸⁷ Thirty states deny SNAP benefits to convicted drug felons and thirty-six states deny them access to TANF.¹⁸⁸

Beyond the ramifications related to housing and federal assistance programs, parental incarceration negatively impacts children. More than five million children have at least one parent who is currently or has been imprisoned.¹⁸⁹ The demographics of incarcerated parents indicate that 1 percent of white children have an incarcerated parent, 7 to 9 percent of black children, and 2 percent of Hispanic children.¹⁹⁰ Further, individuals convicted of non-violent drug offenses are 20 percent more likely to be parents than those persons serving time for violent or property crimes.¹⁹¹

For the children, parental incarceration becomes a prominent risk factor for a number of adverse outcomes that include antisocial and violent behavior, mental health problems, school dropout, and unemployment.¹⁹² Boys as young as five years old who had one or

¹⁸⁶ Marah A. Curtis, Sarah Garlington, & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: A J. OF POL. DEV. AND RES. 37-52 (2013).

¹⁸⁷ Rebecca Beitch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, The Pew Charitable Trusts (2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons>. (last visited X)

¹⁸⁸ *Id.*

¹⁸⁹ David Murphrey & P. Mae Cooper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS (2015).

¹⁹⁰ Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U. S. Department of Justice (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>. (last visited X)

¹⁹¹ *Id.*

¹⁹² Joseph Murray and David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME AND JUSTICE 133, 133-206 (2008). The

more parents in prison exhibited higher levels of physical aggression.¹⁹³ Equally disconcerting is a Swedish study reporting children of incarcerated fathers are more likely to be convicted of a crime and subsequently incarcerated, continuing perpetual incarceration throughout generations.¹⁹⁴

V. CONCLUSION

It is all but impossible to portray a true picture of the costs and consequences of America's war on drugs without a complete assessment, and no complete study of the subject has yet to be undertaken. Certainly, aspects of the costs have been covered over time, but a comprehensive undertaking of the easily quantifiable costs alongside the more subjective consequences warrants attention. Nevertheless, despite the lack of an accurate accounting of the full costs and consequences, there is little doubt that the government attention, human capital, fiscal outlay, constitutional erosions, and hosts of unintended consequences suffered by those convicted and their families present a bill too large for Americans to pay. The unquestionable lack of any measurable success demands significant and expedient reform, and the longer reform is delayed, the greater the costs that will be extracted.

National Task Force on Children Exposed to Violence found parental arrest and incarceration were among the traumatic events that increase the risk of post-traumatic stress disorder in children. ROBERT L. LISTENBEE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, U.S. Department of Justice (2012), *available at* <https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

¹⁹³ Christopher Wildeman, *Parental Incarceration and Children's Physically Aggressive Behaviors: Evidence from the Fragile Families and Child Wellbeing Study*, 89 SOCIAL FORCES 285, 285-309 (2010).

¹⁹⁴ Randi Hjalmarsson & Matthew J. Lindquist, *Like Godfather, Like Son: Exploring the Intergenerational Nature of Crime*, 47 J. OF HUMAN RESOURCES 550, 550-582 (2012).