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André Douglas Pond Cummings^{a1} Steven A. Ramirez^{d1}

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ROADMAP FOR ANTI-RACISM: FIRST UNWIND THE **WAR ON DRUGS** NOW

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I. INTRODUCTION

The **War on Drugs** (WOD) transmogrified into a **war** on communities of color early in its history, and its impact has devastated communities of color first and foremost.¹ People of color *470 disproportionately suffer incarceration in the WOD even though people of color use illegal narcotics at substantially lower rates than white Americans.² As a result, the WOD led

to mass incarceration of people of color at many times the rate of white Americans.³ Indeed, as a stark illustration of the power of race in America, even after Illinois and Colorado legalized cannabis, over-policing in communities of color resulted in a substantial increase in arrests of people of color while white youth arrests declined.⁴ Thus, when police brutality against communities of color exploded into the consciousness of America in 2020, it vindicated many voices suggesting a close link to the WOD and its implicit targeting of people of color.⁵

*471 The WOD devolved into a literal decades-long military style offensive played out on the streets of urban and poor communities of color throughout the United States, replete with battering rams, tanks, helicopters, grenades, and SWAT tactical teams killing, maiming, and imprisoning primarily people of color.⁶ By 2020, when the durability of racial oppression exploded into the open in the United States with the killings of George Floyd and Breonna Taylor (among others), the costs of this particular mechanism of the replication of the nation's racial hierarchy became vividly clear.⁷ This Article catalogues the costs *472 of the WOD to communities of color across America.⁸ It then uses that reckoning to fashion a legal means for ending the WOD and repairing the human and economic carnage it has inflicted on our nation.⁹

Across the political spectrum a range of voices now recognize that the WOD failed to achieve its goals and inflicted massive costs worldwide.¹⁰ In fact, mainstream economics now recognizes that “[i]t is time to end the ‘war on drugs’ ... [which] has produced enormous negative outcomes and collateral damage.”¹¹ These enormous costs include: negative health outcomes from lack of treatment, mass *473 incarceration of people of color in particular, failing to interdict supplies, corruption of police forces and the rule of law, fostering illicit markets with accompanying violence, human rights abuses, significant macroeconomic costs to the entire nation, trillions in wasted government expenditures, and failing to secure the supply of important medicines.¹² Within each category of costs, injuries fall disproportionately upon communities of color, which necessarily suffer from senseless destruction of human capital and productivity, to the great detriment of families and local economies.¹³ Ending the nightmare of drug prohibition and mass incarceration will require the diversion of resources now committed to the WOD to investments in those very same communities--and this Article shows the abundance of such resources.¹⁴

Part II reviews the history of the WOD with a focus on the emergence of mass incarceration and the dynamics by which implicit bias and actual bias translated into disproportionate suffering in communities of color, including suffering at the hands of brutal policing in those communities.¹⁵ Part III builds upon Part II but seeks to quantify the costs of the continued harms of the WOD in order to identify cost-effective resolutions of this fundamental source of systemic racism in our society.¹⁶ Part IV critiques the first and, as of yet, primary federal legislative remedy on offer for the resolution of the WOD. It also proposes mechanisms beyond that pending federal bill for repairing the damage to communities of color inflicted upon them by the WOD.¹⁷ The Article concludes that repairing the damage of the *474 WOD will require more aggressive steps than those currently on offer. Any serious anti-racist legislative remedy must immediately address the ongoing catastrophe of the WOD on communities of color as the WOD has fallen into its place following behind slavery, convict leasing, Jim Crow, and lynching as the current pernicious subordinator of Americans of color.¹⁸ More specifically, we argue that the federal government should utterly exit drug policing (as opposed to its regulatory role) and commit completely to the indefinite diversion of federal WOD expenditures to the communities suffering the greatest from ill-conceived drug prohibition.¹⁹ State competition and experimentation should displace federal prohibition for the complex *475 problem and resolution of drug addiction and harm.²⁰ The federal government should limit its focus to repairing the devastation its racist policies inflicted on communities of color across the nation.²¹

II. A SHORT HISTORY OF THE WAR ON DRUGS AND MASS INCARCERATION

Richard Nixon inaugurated the War on Drugs in the 1970s,²² and Ronald Reagan instrumentalized and militarized this “War” in the 1980s.²³ Reagan’s anti-drug crusade culminated in the Anti-Drug Abuse Act of 1986.²⁴ This infamous Act punished use of crack cocaine, *476 most often used in low income communities of color, 100 times more severe than powdered cocaine, typically used by upper-class whites.²⁵ This racially disparate treatment of cocaine users continued until 2010.²⁶ The continuation of this racially disproportionate punishment supports the broad scholarly proposition that the WOD targeted communities of color from its inception.²⁷ Both Nixon and Reagan openly pursued political campaigns that

deployed the now widely acknowledged “Southern Strategy” whereby GOP candidates courted southern white votes at the expense of Black and Hispanic voters in efforts to politically exploit racial polarization.²⁸ Overwhelming evidence in support of these racially driven politics includes public admissions from two former GOP chairpersons.²⁹

*477 The WOD captured the political imagination of an America steeped in racial stereotypes and implicit bias.³⁰ “The **War** on **Drugs**, cloaked in race-neutral language, offered whites opposed to racial reform a unique opportunity to express their hostility toward blacks and black progress, without being exposed to the charge of racism.”³¹ Democrats joined the fray with President Clinton, determined not to appear soft on crime. They signed the draconian Violent Crime Control and Law Enforcement Act of 1994,³² which, among other things, expanded the WOD and even imposed the death penalty on those convicted of large-scale **drug** distribution.³³ Fundamentally, politicians simply played the hands that a resentful American body politic dealt, even styling young Black men as “super predators.”³⁴ That body politic wanted no further civil rights progress for decades after the civil rights acts of the 1960s.³⁵

Domestic incarceration rates exploded thereafter, particularly in Black and Latinx populations.³⁶ The WOD also empowered other actors throughout the criminal justice system to both knowingly and unwittingly allow bias to infect a range of decisions from traffic stops to charging to sentencing—all disproportionately punishing people of color.³⁷ The racially disparate punishment then operated to create permanent encumbrances and disabilities in terms of voting, *478 employment, housing, eligibility for student loans, and all the problems faced by convicted felons and their families.³⁸

The Attorney General of the State of New York describes this same reality in our criminal justice system today:

[F]or decades in this country, our communities have been trying to get out from under the overwhelming burden of the misguided **war on drugs**. Because the sad truth is that this **war on drugs** has far too long been a **war** on people of color, a **war** on poor Americans, a **war** on our sons, our brothers, our fathers and friends—mostly men of color, mostly *young* men of color. We see this scene play out over and over again. A young white seventeen-year-old gets caught selling a dime bag and he’s described as an impulsive kid who made a mistake. A young black seventeen-year-old is caught selling the same dime bag and he’s called a juvenile delinquent and sometimes even worse. One is forgiven and shown mercy for succumbing to the impetuosity of his youth. The other is tagged for life, burdened with a stigma that our society does not allow to be easily forgotten.³⁹

In short, the entire community and nation suffers from this familiar systemic racism that law enforcement and the judiciary now know operates with patent racial bias.⁴⁰

Politicians on both sides of the partisan divide advocate for harsh **drug** laws and severe criminal sanctions arguing that a strong correlation existed between **drug** addiction and crime, particularly crimes committed by people of color.⁴¹ In fact, the prohibition of **drugs** *479 in the United States evinces a long history of racist efforts to link **drug** use to criminality and communities of color.⁴² Race played a central role in explaining why cannabis possession warrants the same level of sanction as possession of heroin.⁴³ Mass incarceration reinforces and reflects the implicit and explicit bias that pervades our society as well as all facets of our criminal injustice system.⁴⁴ Thus, race drives the WOD, just as the WOD operates to reproduce the American racial hierarchy indefinitely.⁴⁵

These same dubious facts dominated legislative enactments from the 1970s through the 1990s, ignoring health professionals’ argument that **drug** addiction should be viewed and treated as a public health issue rather than a criminal one.⁴⁶ When President Reagan signed the Anti-**Drug** Abuse Act in 1986,⁴⁷ he effectively criminalized **drug** addiction, leading to the mass and disproportionate incarceration of **drug** offenders from disadvantaged populations—nearly eighty percent of whom are Black and Latinx in federal prison.⁴⁸ Ultimately, a vast private prison complex fed off this policy that now exists to profit from ever increasing incarceration.⁴⁹ This all occurred with more subtle but *480 equally invidious appeals to racial hostility and fears that marked federal prohibition from its beginning.⁵⁰

Invariably, the communities left behind by these political prisoners, essentially, suffered devastation.⁵¹ Policing in these communities operated as a constant source of pain and epic police brutality, culminating in the videotaped murder of George Floyd in the summer of 2020.⁵² Police brutality inherently and inexorably follows the logic of the WOD in a society riven with racial divisions.⁵³ Indeed, the federal militarization and prioritization of the WOD bastardized police departments across the nation.⁵⁴ Scholars link this militarization of policing and the WOD to increased police brutality, particularly in communities of color.⁵⁵

President Reagan startled the nation in the 1980s when he prioritized drug enforcement as a major focus within his administration.⁵⁶ Only two percent of the U.S. population believed that drug abuse was the most pressing national problem when Reagan *481 announced his own war on drugs.⁵⁷ When local law enforcement nationwide did not share Reagan's drug prioritization aims at inception, the President incentivized police departments with the promise of federal funding, military-style weaponry, and forfeiture laws as rewards for departments that would make drug enforcement first priority.⁵⁸ Reagan's solution to recalcitrant local law enforcement agencies resisting prioritizing the WOD: "Huge cash grants were made to those law enforcement agencies that were willing to make drug-law enforcement a top priority. The new system of control is traceable ... to a massive bribe offered to state and local law enforcement by the federal government."⁵⁹ From this ensuing flood of federal largesse, later amplified by Clinton, paramilitary weaponry began flowing freely into local police agencies effectively setting military tanks, battering rams, flashbang grenades, helicopters, bazookas, and assault weaponry loose upon communities of color and poor, urban areas across the country.⁶⁰ For example, according to Nick Pastore, a former police chief of New Haven, Connecticut, "I was offered tanks, bazookas, anything I wanted."⁶¹ Reagan effectively declared war on his own people.

With law enforcement incentives now distorted from any semblance of community protection, local police agencies began prioritizing the drug war with its violent accoutrements over community policing, de-escalation, and a startling eschewing of honest police work as departments adopted SWAT team takedowns of its own citizens in its own communities, often propelled by drug-addled informants, unreliable snitches, and shoddy evidentiary workups.⁶² The WOD simply corrupted the already racially-biased policing culture in the United States.⁶³ While quantifying the costs of this militarization *482 and subversion of police operations faces many challenges, the WOD now occupies a central, if sporadic, place on the network news.⁶⁴

Further, the WOD effectively eviscerated Fourth Amendment protections against search and seizure.⁶⁵ Corrupted and co-opted police departments increasingly seized American residents in their never-ending quest to unearth illegal drugs in poor and urban communities, concomitantly trampling on traditional rights against illegal searches, sending case-after-case to the federal courts that chipped away relentlessly at Fourth Amendment protections.⁶⁶ Time and again, police officers searched citizens without warrants or probable cause while scouring for illicit drugs driven by forfeiture laws and their new siege mentality.⁶⁷ Time and again, these officers would tread upon time-worn Fourth Amendment protections, which would thereafter be challenged as illegal by defense lawyers.⁶⁸

These hyper aggressive searches began finding comfort and acceptance by the nation's highest court. *California v. Acevedo* approved a police officer's warrantless search of a package locked in the trunk of a traveling motorist.⁶⁹ *Florida v. Bostick* approvingly allowed law enforcement officers to conduct suspicionless sweeps for *483 drugs of individuals travelling on buses or trains in interstate or intrastate travel.⁷⁰ *Whren v. United States* stamped United States Supreme Court imprimatur upon pretextual stops by police searching for drugs (i.e., police make a stop for a minor traffic violation as pretext and thereafter seek consent to search the vehicle for drugs).⁷¹ *Ohio v. Robinette* rejected an Ohio requirement that police tell motorists that they are free to leave before requesting consent to search a vehicle for drugs.⁷² *Atwater v. City of Lago Vista* allowed police to arrest individuals for misdemeanors upon refusing consent to a vehicle search.⁷³ *Illinois v. Caballes* determined that a police dog's sniffing of a car or luggage for drugs does not constitute a "search" necessitating Fourth Amendment protections.⁷⁴ Each of these United States Supreme Court decisions, all of which dramatically diminished Fourth Amendment search and seizure barriers, were rooted in the drug war and anchored in law enforcement chasing illegal drugs, no matter the minimal quantity or relative danger of the drug. The WOD eviscerated the Fourth Amendment.⁷⁵

Based on the corrupting influence of federal prioritization and militarization, law enforcement across the country suffered

scandal after scandal attributable singularly to the WOD.⁷⁶ These scandals *484 continue today, unabated.⁷⁷ One scholar notes, “It is impossible to fully catalog the abuses of authority, thefts, bribes, and **drug** sales committed by US **police** every day in the **War** on **Drugs**.”⁷⁸ These corrupting abuses occurred, nearly without exception, in precincts “serving” urban communities of color.

The federally sponsored WOD was never waged on Wall Street, in suburban America, or upon fraternity and sorority houses on university campuses across the nation, where documented use of illicit **drugs** is known, open, and notorious.⁷⁹ Instead, the WOD focused *485 strategically on poor communities of color, “the hood” in the words of one scholar.⁸⁰ Even imagining battering rams, military tanks, and SWAT teams in body armor raining down on the Financial District, SoHo, or the Upper East Side in New York City hunting cocaine or upon idyllic college campus fraternity and sorority houses rooting for marijuana borders on the preposterous.⁸¹ Yet, in urban communities of color, battering rams, military style tanks, flashbang grenades, armed forces, helicopters, and SWAT tactical teams became a constant presence throughout the nation as the **drug war** raged.⁸² This is so, according to one scholar, because waging the WOD upon Wall Street, suburbia, or fraternity and sorority houses, would have been “political suicide.”⁸³ Devastating and destabilizing communities of color, if not an original aim of the WOD, is undoubtedly one of its harshest outcomes.⁸⁴ As such, unwinding the WOD plays an essential role in ending the American racial hierarchy.⁸⁵

Therefore, unwinding the WOD means unwinding a key mechanism of our racial hierarchy. Today, the WOD operates with the full impact of yesteryear’s racist intent as our collective ambivalence can only amount to complicity in that intent. Unwinding the WOD *486 requires repairing the damage done to urban communities of color that have suffered mass incarceration and **brutal**, often illegal, and corrupted **policing**. The next Part attempts to account for all the losses suffered in the communities where the WOD was waged. It also proves the availability of abundant resources to fund the community investment are needed to unwind the devastation of the WOD.

III. THE DEVASTATION SUFFERED IN COMMUNITIES OF COLOR

A comprehensive economic reckoning of the damage inflicted on communities of color directly or indirectly arising from the **War** on **Drugs** may not be fully possible. Race always involves the unnecessary and wanton destruction of human capital on a deep and broad basis. Elements of America’s racial hierarchy overlap and intertwine, thereby confounding efforts to disentangle and isolate the costs of the WOD from, say, the cost of discrimination in the employment markets. Nevertheless, this Part seeks to catalogue the costs of the WOD and tie those harms into general economic assessments of the costs of the nation’s racial hierarchy.

Economist Andrew Brimmer produced the first effort at estimating the costs of the continued racial hierarchy in the United States, and updates of his estimates confirm that economic losses from the destruction of human capital implicit in our racial hierarchy exceed \$1 trillion per year.⁸⁶ Expert consultants found that gaps in educational opportunity alone costs the nation over \$500 billion per annum.⁸⁷ To the extent mass incarceration contributes to the massive destruction of human capital and capabilities in communities of color, the replication of implicit and explicit bias, stereotype threat, and other mechanisms underlying those estimates, it plays a central role in the economic hollowing out of communities of color.⁸⁸ This hollowing forms the *487 foundation for a more focused assessment of the costs of the WOD and mass incarceration as an essential propagator of the American racial hierarchy.

A. Direct Economic Costs of the **War** on **Drugs** and Mass Incarceration

The economic harm from a felony conviction and subsequent incarceration literally lasts a lifetime. According to Noble laureate Joseph Stiglitz: “As a perpetual drag on the earning potential of tens of millions of Americans, these costs are not only borne by individuals, their families, and their communities. They are also system-wide drivers of inequality and are so large as to have macroeconomic consequences.”⁸⁹ The Brennan Center for Justice recently released a report, *Conviction, Imprisonment, and Lost Earnings*, that placed the lifetime earnings hit suffered by each “formerly incarcerated” individual at

\$484,400.⁹⁰ Those convicted of felonies but not incarcerated suffer lifetime income losses of \$98,800.⁹¹ These deep economic losses combined with losses attributable to misdemeanor convictions translate into an annual economic loss of \$372.3 billion dollars per year in foregone earnings and productivity.⁹² The U.S. Department of Justice (DOJ) estimated additional annual costs of \$48.1 billion attributable to lost productivity from “illicit-**drug**-induced incarceration.”⁹³ Data limitations suggest caution when combining these numbers; however, the total annual productivity and earnings loss *488 clearly exceeds \$400 billion.⁹⁴ This wanton destruction of human earnings power and human capital represents a constant economic drain on communities of color and diminished economic opportunity for all sellers of goods and services throughout the economy as well as lower government tax revenues.

Indeed, the disproportionate impact of the WOD operates in tandem with the pre-existing encumbrance of race. Thus, Black workers without a criminal record earn around twenty percent less than white workers with a criminal record.⁹⁵ Such “grotesque” inequities burden not just Latinx and African American communities, but our entire economy.⁹⁶ Indeed, the losses in wages means that communities of color often face high poverty rates that transmit the burdens of mass incarceration across generations--entire families effectively face sentences of poverty.⁹⁷ Axiomatically, as America becomes more diverse and more Americans of color suffer from the oppression implicit in our festering racial hierarchy, these costs will soar.

B. Government Expenditures

According to the Human Rights Foundation (HRF), as of 2019, the federal government spends \$33 billion per annum “on **drug** control.”⁹⁸ State and local governments spend another \$30 billion per annum “on criminal justice expenditures related to **drug** crimes.”⁹⁹ Across forty years, that amounts to over \$2.5 trillion in 2019 dollars.¹⁰⁰ The HRF tally does not include costs associated with strain on the criminal justice system.¹⁰¹

The DOJ compiled data to fill that gap. In 2011, the DOJ found that federal, state, and local entities spent another \$23 billion in incarceration costs attributable to the WOD.¹⁰² Additionally, parole, probation, and adjudicatory expenses attributable to **drug** offenses total *489 an additional \$8.5 billion.¹⁰³ These expenditures amount to an extraordinary diversion of public resources to a fundamentally racist project, as shown above.

Yet, the WOD costs governments more. The Cato Institute estimates that tax revenues from bringing the black market of **drug**-dealing into the legitimate economy would generate nearly \$20 billion in tax revenue at the state level and nearly \$40 billion in federal tax revenues.¹⁰⁴ This reckoning does not include any surtax to off-set the manifest externalities in **drug** use--such as additional health care costs and accidents.¹⁰⁵ A ten percent surtax could add another \$5.3 billion per year in revenues from just marijuana.¹⁰⁶ The surtax should aim to fund externalities (such as accidents or drain on medical resources), and therefore not actually lead to any net economic benefit.¹⁰⁷ Nevertheless, the reduced expenditures and enhanced revenues from ending **drug** prohibition could benefit governments to the tune of nearly \$160 billion per year.

While many of these costs currently defy precise quantification, and data problems create some degree of uncertainty, the fact remains that over \$100 billion in cash could be redirected from the failed WOD to more positive uses each year.¹⁰⁸ Indeed, given the magnitude of the failed WOD policies, burning the money makes more sense than the destructive reality of mass incarceration.

After all, the WOD failed to stem **drug** abuse. **Drug** overdoses in the United States more than tripled between 1999 and 2017 (when **drug** overdoses hit a record high) before declining slightly in 2018.¹⁰⁹ By 2021, **drug** overdoses in the United States reached record highs.¹¹⁰ Despite trillions spent to disrupt supply, **Drug** Enforcement Agency *490 (DEA) data shows that prices declined and quality increased since 1986.¹¹¹ Since 2002, the use of illicit **drugs** in the United States has increased.¹¹² The WOD created a militarized **police** culture in the United States that led to increased **police brutality** in communities of color while failing to disrupt the supply or use of **drugs**.¹¹³ In short, the WOD wastes massive resources without reducing overdoses, **drug** flow, or use, while devastating communities of color.

C. Economic and Psychological Costs on Families of Color

Mass incarceration propelled by the WOD hammers families of color and ravages communities of color. “The available research has indicated the largely negative effects of incarceration on offender parents, children, and spouses or intimate partners such that family health declines, child adjustment is compromised, poverty intensifies, and family relationships deteriorate or cease altogether.”¹¹⁴ By focusing nearly exclusively on poor urban communities in enforcing the WOD, law enforcement has imprisoned hundreds of thousands of fathers, sons, daughters, and mothers—all potential providers-- thereby further impoverishing a community already suffering from an enormous median wealth gap.¹¹⁵ According to the Brookings Institute, in 2016, the median net worth of white families was \$171,000 *491 while the median net worth of Black families was \$17,150.¹¹⁶ Notwithstanding that this racial wealth gap is historically persistent,¹¹⁷ the WOD exacerbates the discriminations visited upon families of color by locking up family members who could be working and supporting their children, parents, and family members.

Beyond the economic impact, incarceration of parents has a debilitating impact on the children of those imprisoned.¹¹⁸ Studies reveal that children of incarcerated parents suffer mental health difficulties, behavioral and antisocial problems in school, aggression, deviance, acting out, internalizing problems such as depression, and an undermining of a child’s school success probabilities all contributing to higher rates of dropout, absence, school failure, and disciplinary infractions.¹¹⁹ Further, “[t]rauma is perhaps one of the more visible and long-lasting primary effects of parental incarceration.”¹²⁰ Children that suffer childhood trauma, or Adverse Childhood Experiences (ACEs), often experience very poor life outcomes as they grow into adulthood.¹²¹ Having an incarcerated parent counts as one serious ACE. Research found “overwhelming evidence that increased levels of exposure to trauma in childhood heavily increased the risk of negative health outcomes later in life.”¹²² Shockingly, ACEs studies have determined that significant exposure to childhood trauma, including parental incarceration and traumatic separation, literally shortens an *492 individual’s lifespan.¹²³ “[O]n average, a person with six or more ACEs died *twenty years earlier* than a person with no ACEs.”¹²⁴ Straightforwardly, the WOD and its racially disparate enforcement by **police** injects trauma into the lives of children of color to their lifelong detriment.¹²⁵ Ultimately, this translates into lost earnings, productivity, and macroeconomic output.

D. Indirect Costs of the War on Drugs and Mass Incarceration

Joseph Stiglitz specifically highlights the costs of high economic inequality generated by the WOD and mass incarceration.¹²⁶ Among these costs includes the role of voter suppression based upon felon disenfranchisement and the associated macroeconomic consequences of high inequality.¹²⁷ For example, scholars from a wide array of disciplines attribute much of the Great Financial Crisis of 2008 to these very realities.¹²⁸ One legal case-study linked high inequality and accompanying concentration of economic wealth to certain subverted laws and regulations that spurred the Great Financial Crisis.¹²⁹ Simply stated, high economic inequality undermines the rule of law¹³⁰ and leads to negative economic outcomes and impaired human development.¹³¹ The WOD exacerbates high inequality in the United States through distorted incentives and the wanton destruction of *493 human capital in communities of color, which ultimately drives inequality in the United States.¹³²

Other indirect (and difficult to quantify) costs include the creation of black markets to fuel organized crime. Economists now understand and explain that prohibition policies may lead to temporary price increases at first, but simply create strong production incentives and excess supply with lower prices over the long-term.¹³³ With respect to addictive **drugs**, price-inelasticity of demand means that prohibition creates even more powerful incentives for enhanced production (suppressing price over the long-term) and encouraging violence as less efficient providers and less violent producers are cleared from the market.¹³⁴ Prohibition will not eliminate markets, but rather drive them underground where violence, mass incarceration, and human rights violations predictably arise.¹³⁵ Invariably, gang violence and **police** reactions subvert the rule of law.¹³⁶ These facts feed into a new academic consensus that prohibition cannot work and that treatment and policy pluralism should displace the current near-unanimous policy of only prohibition.¹³⁷

Perhaps the greatest cost of the WOD arises from its key role in propagating our morally reprehensible and nationally self-destructive racial hierarchy. That hierarchy imposes ever greater and more grave costs on every American.¹³⁸ It destroys

human potential through *494 oppressive childhood poverty, disparities in health care, impaired educational outcomes, and other mechanisms that span from cradle to grave.¹³⁹ In 2020 and 2021, the topic of Race in America turned Americans against Americans, leading to spikes in hate crimes and even the murderous attempted insurrection of January 6, 2021,¹⁴⁰ That insurrection attempt proves that white supremacy threatens our constitutional republic, the rule of law, and the freedom of self-governance through democratic rule.¹⁴¹ Mass incarceration and the devastation of the WOD both reflects and replicates the continued power of white supremacy in America.

In sum, ending the WOD would save resources that could repair those communities most harmed from its negative effects. Governments could redirect at least \$150 billion per annum (consisting of lower expenditures and enhanced revenues) from the failed WOD and associated mass incarceration into the communities most damaged by the WOD. In addition, our economy would enjoy a long-term boost from reversing the destruction of human capital and productivity implicit in the annual loss of over \$400 billion in earnings (and associated tax revenues) that would come from ending mass incarceration and making expungements widely and freely available, as discussed below. Most importantly, ending the WOD constitutes the most powerful step our government can now take to preserve our democracy and save our constitutional republic from white supremacist attempts to lawlessly install autocratic minority rule.¹⁴²

*495 IV. PATHWAYS TO REFORM: AN ANALYSIS AND CRITIQUE OF THE MORE ACT

Against the monumental problems arising from the **War on Drugs**, congressional representatives propose a legislative change--the Marijuana Opportunity Reinvestment and Expungement Act (the MORE Act).¹⁴³ The House Judiciary Committee approved the MORE Act in late 2019, in an historic vote that marked the first time since the Controlled Substances Act of 1970 that an actual congressional vote moved marijuana legalization forward at the federal level.¹⁴⁴ As such, it stands as the primary legislation on offer for addressing the costs imposed on communities of color as a result of the WOD.¹⁴⁵ This Part first summarizes the key provisions of the MORE Act and then offers a critique of its shortcomings in light of the harms inflicted by the WOD.¹⁴⁶

A. Summary of the MORE Act

The MORE Act would revolutionize federal **drug** policy with respect to cannabis. Then-Senator Kamala Harris and Representative Jerrold Nadler introduced identical bills in the summer of 2019 in an historic effort to end federal marijuana prohibition.¹⁴⁷

First and foremost, the Act provides for the removal of cannabis from Schedule I of the Controlled Substances Act.¹⁴⁸ This ends the *496 federal **policing** of marijuana with all its sordid and racist history.¹⁴⁹ It leaves the field of cannabis regulation to the states to democratically negotiate.¹⁵⁰ The Act thereby replaces prohibition with state experimentation and economic competition.¹⁵¹ Consequently, the Act operates to create an entirely legitimate industry with all the jobs and tax revenues that such creation entails.

The Act also imposes a five percent tax on cannabis sales nationwide.¹⁵² The funds from this tax will accumulate in a trust fund for the benefit of individuals and communities most adversely affected by the prohibition of marijuana.¹⁵³ Redirecting the funds generated from the de-scheduling of marijuana to the communities harmed by the WOD effectively assists those suffering from the disparate impact of that policy without entailing any suspect classification.¹⁵⁴ Addressing the disparate impact of an unsound policy and unwinding that policy merely undoes the disparate impact.

The MORE Act also facilitates expungements.¹⁵⁵ More specifically, “each Federal district shall conduct a comprehensive review and issue an order expunging each conviction or adjudication of juvenile delinquency for a Federal cannabis offense entered by each Federal court in the district before the date of enactment of this Act and on or after May 1, 1971.”¹⁵⁶ Furthermore, for any person currently incarcerated, the district court imposing the sentence can order an expungement or sentence reduction if the conviction included cannabis charges.¹⁵⁷ Once expunged, the statute authorizes the person suffering

*497 the conviction to treat as it as if it never occurred with civil and criminal immunity.¹⁵⁸

The MORE Act offers a revolutionary approach to the problem of marijuana prohibition. Nevertheless, as the next subpart demonstrates, it does not further resolve the problem of mass incarceration and the failed WOD. The Act does, however, provide a model for future legislative steps and the next subpart suggests guidelines for those more aggressive steps.

B. What More Is Needed?

While the MORE Act might ultimately constitute a necessary and cautious first step, it will prove inadequate by itself to unwinding the WOD and repairing the damage it wrought on communities of color. When measured against the harm inflicted by the WOD, its shortcomings become apparent.

First, given the horrendous record of federally mandated prohibition, the federal government should simply vacate the field and leave illicit **drug** policy to the states and even local governments. This fundamentally gives citizens more voice in the policies affecting their lives.¹⁵⁹ States so far seem willing to take the lead in the process of experimentation necessary to get policy right in any given jurisdiction.¹⁶⁰ Simply stated, while the MORE Act encourages such federalism with respect to cannabis, the logic of state regulation and latitude to experiment and compete (for businesses, workers, tax revenues, and tourism) for the right combination of illicit **drug** policies yields superior outcomes for the citizens of each state given the cultural mores and priorities of its citizens.

Second, the horrendous incarceration rate in the United States and its racially disproportionate effects suggest that much more than release and expungement must be done to achieve any semblance of justice. The government should bear the initial burden of identifying those in prison due to prohibition and release them with an automatic *498 expungement. Congress also should expand this release and expunge approach beyond marijuana for non-violent **drug** addicts.¹⁶¹

Third, the hundreds of billions now spent on the WOD and losses that policy produces suggest that very significant sources of funds are available for rebuilding the most devastated communities. A jobs program, college tuition, and infrastructure investments should play a central role in this effort and funds from government expenditures now devoted to over-**policing** and mass incarceration should instead fund such efforts. These investments will produce economic benefits beyond their cost for many years and will fuel long-term macroeconomic growth.¹⁶²

Finally, the MORE Act fails to address the issue of **policing**. The evidence demonstrates that **policing** practices contribute mightily to the disparate impact of the WOD.¹⁶³ As shown from the experience of Colorado, mere legalization of **drugs** does not translate inexorably into fewer arrests of people of color.¹⁶⁴ Because the WOD has corrupted and bastardized **police** forces across the country,¹⁶⁵ a literal unwinding of **police drug** enforcement policy must be undertaken. Thus, unwinding the WOD will necessitate restructuring **policing** in communities of color.¹⁶⁶

These four shortcomings should not obscure the fundamental efficacy of leaving the decision of illicit **drugs** such as cannabis to state voters to ultimately resolve. One perfect solution to the issue of **drug** abuse and addiction may not fit every jurisdiction. Lessons from other jurisdictions can inform policymakers across jurisdictions. For example, the decriminalization of all **drugs** in Portugal worked to reduce the use of illicit substances, relieved pressure on the criminal *499 justice system, and lowered **drug** overdoses.¹⁶⁷ Yet, scholars recognize that, while this success should encourage the type of bold experimentation that Portugal undertook, its approach may not work everywhere.¹⁶⁸ Portugal's experience establishes that substituting treatment for incarceration does not lead to more **drug** abuse.¹⁶⁹ Given the grave threat of the continuation of the American racial hierarchy, perhaps this key lesson could drive productive experimentation among states subject to competitive pressure from other states responding to the needs of their local constituents and population.¹⁷⁰ Federal prohibition of illicit **drugs** always substituted racial mythology for sound public health policy, and the nation can no longer afford the costs¹⁷¹ of this original sin, nor complicity in its racist origins and impact.¹⁷²

*500 V. CONCLUSION

The **War** on **Drugs** has devastated communities of color across the United States to the tune of hundreds of billions of dollars per year and millions of citizens of color imprisoned. It failed to reduce **drug** abuse or the harm from **drug** abuse. It spawned **police brutality** and gang violence. It unleashed a torrent of ruthless military style **policing** on poor urban citizens. The WOD has wasted trillions in government funds. Consequently, no economic harm or loss would arise from ending the WOD and many benefits would result from diverting the trillions spent on prohibition to productive investment. Ending the WOD can free resources to assist the victims of the WOD in rebuilding their lives. Importantly, the vast scale of the harm of the WOD means that anti-racist goals must begin with unwinding the impact of the WOD.

We posit that defederalization and devolution to the states to determine the best means of regulating **drug** abuse and addiction will operate as the best means of achieving the end of **drug** prohibition. The federal government necessarily imposes a one-size-fits-all solution when heterodox experimentation likely will yield the optimal approach given each jurisdiction's cultural norms and preferences. A new era of regulatory and legal innovation will displace the draconian WOD with all its human carnage and racist origins. State and local competition will test each jurisdiction's approach with tax revenues, new commercial opportunities, and social justice in the balance. Population and talent will gravitate to more successful jurisdictions.

Indeed, unwinding the harm from the WOD poses the best opportunity for anti-racist progress precisely because of the WOD's disparate impact on communities of color. This effort funds itself. Pursuit of this goal involves neither a racial purpose nor a racial classification. Expungement, community reinvestment, treatment instead of incarceration, and community **policing** instead of subsidized **brutality** could operate to help fundamentally break down the nation's festering racial hierarchy. Immediately ending the WOD therefore should top the priorities of anti-racist proponents. Given the lawless and murderous attacks of white supremacists on our democracy and the Constitution, the urgency of ending this patently unjust racial ***501** oppression now must top the political agenda of all Americans committed to freedom.

Footnotes

^{a1} © 2022 andré douglas pond cummings is Associate Dean for Faculty Development & Charles C. Baum Distinguished Professor of Law and Co-Director of the Center for Racial Justice and Criminal Justice Reform, University of Arkansas at Little Rock William H. Bowen School of Law, acummings@ualr.edu. I am grateful to Jamie Cope, University of Arkansas at Little Rock William H. Bowen School of Law, class of 2022, for her excellent research assistance. I am further grateful to the *Tulane Law Review* and its editorial team for their diligent work on our Article. As usual, any errors within are the sole responsibility of the authors.

^{d1} © 2022 Steven A. Ramirez is Abner J. Mikva Professor of Law, Loyola University Chicago, sramir3@luc.edu.

¹ PAUL BUTLER, CHOKEHOLD: **POLICING** BLACK MEN 121-22 (2017) (“Today most people know that ‘the war on drugs’ has been selectively waged against African Americans For **drug** crimes, African Americans are about 13 percent of people who do the crime, but about 60 percent of people who do the time.”); PATRISSE KHAN-CULLORS & ASHA BANDELE, WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR 133-34, 144 (2018) (describing “[t]he **drug war** as ethnic cleansing”); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 433-36 (paperback

ed. 2017) (describing how Ronald Reagan’s WOD disproportionately targeted Black youth and reporting that “[i]n 1996, when two-thirds of the crack users were [w]hite or Latin[x], 84.5 percent of the defendants convicted of crack possession were Black”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1-11 (rev. paperback ed. 2012) (explaining how the WOD led to mass incarceration and demonstrating “that mass incarceration is ... the New Jim Crow and that all those who care about social justice should fully commit themselves to dismantling this new racial caste system”).

² See, e.g., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., 2019 NATIONAL SURVEY OF **DRUG** USE AND HEALTH, tbl.1.22B (2019), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29394/NSDUHDetailedTabs2019/NSDUHDetTabsSect1pe2019.htm> [<https://perma.cc/JRP2-XC5X>] [hereinafter NSDUH RELEASES] (showing that whites use **drugs** at greater rate than African Americans and Latinos in virtually all age groups).

³ ALEXANDER, *supra* note 1, at 7 (“In some states, black men have been admitted to prison on **drug** charges at rates twenty to fifty times greater than those of white men.”).

⁴ William Lee, *Legal Weed’s First Year in Chicago: High Arrest Rates for Black People, a Boutique Experience for Others*, CHI. TRIB. (Apr. 15, 2021), <https://www.chicagotribune.com/news/breaking/ct-marijuana-legalization-parallel-worlds-20210415-4hydfuinvje27mtctklm7dq4r4-story.html> [<https://perma.cc/2RWB-4XXY>] (“[W]hite smokers are enjoying the boutique experience with designer weed in clean, fashionable North Side dispensaries, [while] Black and brown people are left out of the windfall and continue to be arrested for selling weed illegally.”); Ben Markus, *As Adults Legally Smoke Pot in Colorado, More Minority Kids Arrested for It*, NPR (June 29, 2016, 4:50 AM), <https://www.npr.org/2016/06/29/483954157/as-adults-legally-smoke-pot-in-colorado-more-minority-kids-arrested-for-it> [<https://perma.cc/G9LB-F8PK>] (“A Colorado Health Department survey found there wasn’t a huge racial difference in who smokes pot [after legalization]. But the marijuana arrest rate for white 10- to 17-year-olds fell by nearly 10 percent from 2012 to 2014, while arrest rates for Latino and [B]lack youths respectively rose more than 20 percent and more than 50 percent.”). In Colorado, underage youths can still face arrest for possession of pot. *Id.*

⁵ E.g., IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 27 (2019) (describing how Ronald Reagan announcing his **war** on **drugs** sent low-income Black people deeper into poverty and “more Black people into the clutches of violent cops, who killed twenty-two Black people for every [w]hite person in the early 1980s”); Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice*, in **POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT** 3, 14 (Angela J. Davis, ed. 2018) (“We retreated from racial and economic justice and opted for mass incarceration and a misguided ‘**war** on **drugs**’ that has left many poor and minority people marginalized, incarcerated, and condemned.”); CORY BOOKER, *UNITED* 181 (2016) (“The **war** on **drugs** has turned out to be a **war** on *people*--and far too often a **war** on people of color and the poor.”); Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 *HASTINGS CONST. L.Q.* 367, 380-81 (2020) (footnotes omitted) (“Despite the fact that marijuana use was not always associated with people of color, the

criminalization of marijuana has been founded on racism and xenophobia. As a result, one scholar has referred to the WOD as a ‘war on people of color,’ with particular harm suffered by the Black community.”); Theresa Zhen & Vinuta Naik, *A Clean Slate Case Study of Community Lawyering*, 106 CALIF. L. REV. 557, 559 (2018) (footnotes omitted) (“Our first clients taught us firsthand that the War on Drugs and its criminalization of a targeted group of individuals was really a war on people of color, poor people, people with mental illness, and homeless people—a lesson that would repeat itself in our work, time and time again.”).

⁶ andré douglas pond cummings, “Lord Forgive Me, but He Tried to Kill Me”: *Proposing Solutions to the United States’ Most Vexing Racial Challenges*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 50 (2016). According to the U.S. Department of Justice (DOJ), the nation today imprisons about 250,000 Americans primarily for drugs—people of color constitute about 135,000 or fifty-four percent of these prisoners. E. ANN CARSON, U.S. DEP’T. OF JUST., PRISONERS IN 2019, 21 tbl.14, 23 tbl.16 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/W7WR-ELGM>]. In addition, local prisons lock-up another 157,000 on drug charges of which 120,000 await trial and suffer detention without conviction of any crime. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/G9WE-JSFW>]. Based upon DOJ data, the Prison Policy Alliance found that state and local jails across the nation lock-up Black men at three times the rate of white men. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020) (citing ZHEN ZENG, U.S. DEP’T OF JUST., JAIL INMATES IN 2018 4 tbl.2 (2020)), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [<https://perma.cc/AJ36-L88U>]. State and federal authorities incarcerate Black men at more than five times the rate of white men, and Hispanic men at nearly three times the rate of white men. *Id.* (citing E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2018 16 tbl.10 (2020)).

⁷ *E.g.*, Matt Mencarini et al., *Louisville Police’s ‘No-Knock’ Warrants Most Often Targeted Black Residents in the West End*, LOUISVILLE COURIER J. (Jan. 22, 2021, 8:46 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/11/29/louisville-police-no-knock-warrants-usually-targeted-black-residents/6069189002/> [<https://perma.cc/72LQ-59S6>] (investigating use of no-knock warrants like the one used in the narcotics investigation leading to the death of Breonna Taylor and finding that: “Black residents have been disproportionately targeted for no-knock searches the past two years. In fact, 23 of the 28 suspects LMPD identified in the no-knock warrants The Courier Journal analyzed were Black—about 82%. Yet 70% of Jefferson County’s 750,000 residents are white.”); Mohamed Younis, *The Disparate Impact of Law on Black America*, GALLUP PODCAST (June 25, 2020), <https://news.gallup.com/podcast/313076/disparate-impact-law-black-america.aspx> (interview with Dorothy A. Brown, Asa Griggs Candler Professor of Law at Emory University School of Law) (linking George Floyd’s videotaped murder in the summer of 2020 to systemic racism and over-policing in communities of color and highlighting racial bias in drug policy).

⁸ “The cost of the war on drugs has been astronomical for U.S. taxpayers.” ALVARO PIAGGIO & PRACHI VIDWANS, HUM. RTS. FOUND., THE COST AND CONSEQUENCES OF THE WAR ON DRUGS 44 (2019). Tax expenditures, however, form only the tip of the total cost of the WOD, which must reckon with: (1) the costs imposed on communities of color due to so many missing sons, fathers and other family members in those

communities, (2) the destruction of human capital implicit in mass incarceration, (3) undermining the rule of law, (4) undermining our democracy, (5) empowering organized crime and violence, (6) the replication of America's racial hierarchy, and (7) **drug** overdoses and other adverse health outcomes from a prohibitionist approach rather than a treatment approach. *See id.* at 44-45.

⁹ *See generally* KHAN-CULLORS & BANDELE, *supra* note 1, at 133-44 (detailing the devastating impact the WOD has had on the Black community writ large).

¹⁰ *See* George P. Shultz & Pedro Aspe, *The Failed War on Drugs*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html> (“The war on drugs in the United States has been a failure that has ruined lives, filled prisons and cost a fortune.”); *see also* KOFI ANNAN ET. AL., **WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY 2** (2011) (“The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after President Nixon launched the US government’s war on drugs, fundamental reforms in national and global drug control policies are urgently needed.”); Jay-Z et al., *Jay Z: ‘The War on Drugs is an Epic Fail,’* N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/video/opinion/10000004642370/jay-z-the-war-on-drugs-is-an-epic-fail.html?action=click>ype=vhs&verson=vhs-heading&module=vhs®ion=title-area&cvview=true&t=11> (“The War on Drugs is an epic fail.”); Ron Paul, Opinion, *Ending the War on Drugs Would be Better than Escalating It*, ORANGE CNTY. REG. (Dec. 2, 2019, 3:42 PM), <https://www.oregister.com/2019/12/02/ending-the-war-on-drugs-would-be-better-than-escalating-it-ron-paul/> [<https://perma.cc/R33W-JUHH>] (“The 50-year U.S. War on Drugs has been a total failure, with hundreds of billions of dollars flushed down the drain and our civil liberties whittled away fighting a war that cannot be won.”).

¹¹ Kenneth Arrow et al., *Foreword* to **ENDING THE DRUG WARS: REPORT OF THE LSE EXPERT GROUP ON THE ECONOMICS OF DRUG POLICY 3** (John Collins ed., 2014). Five Nobel Prize-winning economists signed the *Foreword* to the London School of Economics and Political Science volume demonstrating that the huge economic costs of the WOD outweigh any supposed benefits. *Id.*

¹² *Id.*; *see supra* note 8.

¹³ CHRISTOPHER J. COYNE & ABIGAIL R. HALL, **POLICY ANALYSIS: FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS** 11-12 (2017).

- ¹⁴ E.g., Claire Suddath, *The War on Drugs*, TIME (Mar. 25, 2009), <http://content.time.com/time/world/article/0,8599,1887488,00.html> (“[W]ithin the past 40 years, the U.S. government has spent over \$2.5 trillion dollars fighting the War on Drugs.”).
- ¹⁵ E.g., Hannah LF Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1192 (2015) (finding that the empirical evidence suggests that “War on Drugs policing tactics appear to increase police brutality [targeting Black communities], even as they make little progress in reducing street-level drug activity”).
- ¹⁶ E.g., Nathaniel Lee, *America Has Spent over a Trillion Dollars Fighting the War on Drugs. 50 Years Later, Drug Use in the U.S. Is Climbing Again*, CNBC (June 17, 2021, 1:15 PM), <https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html> [<https://perma.cc/WB9D-ALWH>] (noting that despite the expenditure of \$1 trillion on the WOD, and \$182 billion per annum on mass incarceration, drug use stands at a forty-year high and overdoses soared to over ninety thousand in 2020).
- ¹⁷ On Friday, December 4, 2020, the U.S. House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act). “The House voted to decriminalize marijuana at the federal level, the first legislation of its kind to get a vote in the chamber, though it isn’t expected to move forward and become law.” Natalie Andrews, *House Passes Bill Decriminalizing Marijuana at Federal Level*, WALL ST. J. (Dec. 4, 2020, 2:13 PM), <https://www.wsj.com/articles/house-passes-bill-decriminalizing-marijuana-at-federal-level-11607107693> (“The bill, which passed 228-164, would remove cannabis from the Controlled Substances Act, leaving it to states to determine its legality. The legislation would also expunge some criminal records and impose a 5% federal tax on cannabis products to help fund programs in communities hurt by the war on drugs.”); see also Carlie Porterfield, *Two in Three Americans Approve of House Vote to Decriminalize Marijuana*, FORBES (Dec 9, 2020, 04:57 PM), <https://www.forbes.com/sites/carlieporterfield/2020/12/09/two-in-three-americans-approve-of-house-vote-to-decriminalize-marijuana/> (noting that polls show that two-thirds of voters support decriminalization of cannabis). The Bill paves the way for the states to open-up an industry estimated to reach \$23 billion by 2022. *Id.* More importantly, the Bill would partially unwind a key mechanism of the American racial hierarchy--the mass incarceration of people of color despite no racial differences in illicit drug use. Andrews, *supra*.
- ¹⁸ See generally ALEXANDER, *supra* note 1 (tracing the subordination of African American citizens from slavery to Black Codes to Jim Crow through the New Jim Crow, which she defines as mass incarceration); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (describing the clear track of subordination from slavery through convict leasing and lynching to massive populations of racially oppressed people into America’s prisons); SHANE BAUER, AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT (2018) (detailing the massive increase in the Black American prison population as connected with a profit incentive from convict leasing through current private for-profit prison corporations).

- ¹⁹ According to a recent poll, “63% [of American voters] say **drug** use should be addressed as a public health issue while only 33% say it should be addressed as a criminal justice issue.” Matt Sutton, *On 50th Anniversary of “War on Drugs,” New Poll Shows Majority of Voters Support Ending Criminal Penalties for Drug Possession, Think Drug War Is a Failure*, **DRUG POL’Y ALL.** (June 9, 2021), <https://drugpolicy.org/press-release/2021/06/50th-anniversary-war-drugs-new-poll-shows-majority-voters-support-ending> (noting also that over eighty percent of Republicans and Democrats believe the WOD failed). Recently, proposed legislation would decriminalize all narcotics at the federal level and thereby partially implement our proposal, as discussed more fully in Part IV. See Bryan Lowry, *Missouri Democrat Cori Bush Offers Bill Aimed at Ending the Federal War on Drugs*, **KAN. CITY STAR** (June 15, 2021, 11:43 AM), <https://www.kansascity.com/news/politics-government/article252108193.html> [<https://perma.cc/PA5D-PMSE>].
- ²⁰ Internationally, Portugal experimented with **drug** decriminalization more than fifteen years ago with positive results. See Tiago S. Cabrai, *The 15th Anniversary of the Portuguese Drug Policy: Its History, Its Success and Its Future*, 3 **DRUG SCI., POL’Y & L.** 1, 1-3 (2017) (showing that Portugal’s decriminalization of all illicit **drugs** led to a decline in **drug** use, fewer overdoses and more **drug** users seeking treatment).
- ²¹ See John McWhorter, *How the War on Drugs Is Destroying Black America*, 9 **CATO’S LETTER** 1, 2-3 (Winter 2011) (arguing that the WOD disrupts Black families, narrows employment opportunities, diverts talent and potential leaders into illicit activities, and corrupts incentives).
- ²² See Courtney Harper Turkington, Comment, *Louisiana’s Addiction to Mass Incarceration by the Numbers*, 63 **LOY. L. REV.** 557, 560 (2017) (quoting presidential aid John Ehrlichman for the proposition that Nixon focused on illicit **drugs** in order to attack Black people and the anti-**war** left). The first federal prohibition of narcotics occurred in 1914 with the passage of the Harrison Narcotics Tax Act. David Borden, *If Hard Drugs Were Legalized, Would More People Use Them?*, 12 **CARDOZO PUB. L. POL’Y & ETHICS J.** 569, 578 (2014); J. Matthew Gorga, ‘Retribution, Not a Solution’: *Drug-Induced Homicide in North Carolina*, 42 **CAMPBELL L. REV.** 161, 166 (2020). From the beginning, the federal government’s response to the problems of **drug** abuse suffered from the taint of racism. *Id.* at 165-66 (“The nation’s first **drug** laws were less about the dangers of the **drugs** and more about the people associated with them.”) In fact, “[t]hose advocating for the Harrison Act’s passage perpetuated false and racially fueled narratives--black men under the influence of **drugs** ‘murdering whites,’ ‘degenerate Mexicans smoking marijuana,’ and “‘Chinamen’ seducing white women.” *Id.* at 166 (quoting Joseph D. McNamara, *The American Junkie*, **HOOVER INST.** (Apr. 30, 2004), <https://www.hoover.org/research/american-junkie> [<https://perma.cc/9LHW-AA2B>]).
- ²³ See *Watch: Ronald Reagan and His ‘War on Drugs,’* **TIMELINE** (June 26, 2017), <https://timeline.com/ronald-nancy-reagan-war-on-drugs-crack-baby-just-say-no-cia-communism-racial-injustice-fcfe>

adb3548d; *see also* KENDI, *supra* note 1, at 433-34 (describing Ronald Reagan's WOD).

- ²⁴ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). The Act included punitive provisions for anyone providing drugs to another resulting in death:

In 1986, Len Bias, a college basketball player at the University of Maryland, died from a cocaine overdose at the age of twenty-two. Following his death, federal legislative committees began drafting the Anti-Drug Abuse Act of 1986, which prescribed a minimum sentence of twenty years and a maximum sentence of life in prison for a person who distributed drugs that resulted in death. Many states followed suit, codifying versions of the federal law. Today, thirty-six states have a Len Bias law in effect. The original purpose of these laws was to hold drug dealers and manufacturers liable for drug deaths, but with the onset of the opioid crisis, more drug users are being prosecuted under these laws for their connection to other users' overdose deaths.

Emily O'Brien, *A Willful Choice: The Ineffective and Incompassionate Application of Wisconsin's Criminal Laws in Combating the Opioid Crisis*, 2020 WIS. L. REV. 1065, 1072 (2020) (footnotes omitted).

- ²⁵ *See, e.g.*, Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2574 (2010) (footnotes omitted) ("The dangers of crack cocaine are not one hundred times worse than those of powder cocaine or any other form of cocaine, rendering the sentencing scheme unsound. Instead of accurately targeting dangerous, high-volume drug dealers, the 1986 Act has promulgated a troubling racial disparity, with African Americans sentenced to jail more frequently than Caucasians."); *id.* at 2548-49.

- ²⁶ *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). The sentencing disparity continues today, just now at lower disparity rate of 18-1. *See id.*

- ²⁷ *See* BUTLER, *supra* note 1, at 121-22.

- ²⁸ IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 24-27 (2014); Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST (July 26, 2019), <https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/>.

- ²⁹ *See* STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN

ECONOMIC RULE OF LAW 152 (2013); *see also* Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22, 22 (describing an interview with former Richard Nixon domestic-policy adviser and Watergate co-conspirator John Ehrlichman admitting to the racist underpinnings of the War on Drugs). Ehrlichman is quoted as stating:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Id.

³⁰ ALEXANDER, *supra* note 1, at 52-55; KENDI, *supra* note 1, at 433-36.

³¹ ALEXANDER, *supra* note 1, at 54.

³² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

³³ ALEXANDER, *supra* note 1, at 56.

³⁴ *See* 13TH (Netflix 2016) (approximately twenty-eight minutes and fifty-seven seconds into Ava Duvernay's documentary film connecting the Thirteenth Amendment to mass incarceration, Hillary Clinton describes young Black males as "super predators" while supporting passage of the 1996 Crime Bill); *see also* Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on 'Super-Predators' After Encounter with Activist*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/> (quoting Secretary Clinton saying, "Looking back, I shouldn't have used those words, and I wouldn't use them today"); Priyanka Boghani, *They Were Sentenced as "Superpredators." Who Were They Really?*, PBS: FRONTLINE (May 2, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> [<https://perma.cc/A8A8-QN95>] (noting that the super predator stereotype led to more youths getting sentenced to life without parole and that youths of color suffered disproportionately).

³⁵ *E.g.*, STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* 29 (2d ed. 1996).

³⁶ *E.g.*, **DRUG** POLICY ALLIANCE, *THE DRUG WAR*, MASS INCARCERATION AND RACE 1-2 (2018) (showing that people of color comprise out-sized proportions of U.S. prison population and acceleration of arrests since 1980).

³⁷ ALEXANDER, *supra* note 1, at 185-87.

³⁸ *Id.*

³⁹ *Remarks from Hon. Letitia James--Rewriting the Sentence: Summit on Alternatives to Incarceration*, 32 FED. SENT. REP. 28, 29-30 (2019).

⁴⁰ *See, e.g.*, ELIZABETH TSAI BISHOP ET AL., CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 2 (2020) (highlighting that Massachusetts incarcerates "Black people at a rate 7.9 times that of [w]hite people and Latinx people at 4.9 times that of [w]hite people" and concluding that people of color are disproportionately subject to the criminal justice system, charged more harshly, and sentenced more severely); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014) (finding similar disparities in the federal system).

⁴¹ Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. SOC. SCI. 41, 43 (2011) ("The government's **war** on recreational **drugs** did not really get underway until 1930 when Harry Anslinger left his post in the Bureau of Prohibition to become the first commissioner of the Federal Bureau of Narcotics. He used his post--which he held for a remarkable 32 years--to argue that **drug** addicts were the most serious criminals in the nation."). Anslinger epitomized "the goal ... to establish harsh criminal sanctions for selected **drugs**. The most fruitful approach has been to link the **drug** with a disliked racial minority. The specter of out-of-control behavior by the feared racial 'other' helps to make the case for strong criminal sanctions." *Id.* at 42.

⁴² Using racist fearmongering, Anslinger reframed **drug** use from a public health issue to a community threat, solvable only by criminal sanctions. *Id.* at 43. "Commissioner Anslinger, though at first hesitant to direct his aim at marijuana because of its prevalence and domestic production, was soon persuaded to campaign against it, deploying the mass

media and antipathy toward Mexicans and Mexican Americans to demonize ‘loco weed.’” *Id.*

43 *Id.*

44 “Factors as wide-ranging as the history of racism in American society and the role of implicit bias in **policing** and sentencing” influence carceral outcomes. Boghani, *supra* note 34; *see also* BISHOP ET AL., *supra* note 40, at 63 (finding that “the evidence is most consistent with Black and Latinx defendants receiving more severe initial charges than [w]hite defendants for similar conduct” and noting that juries are more likely to convict Black defendants than white defendants); Rehavi & Starr, *supra* note 40, at 1323 (mirroring the finding from Massachusetts at federal level).

45 Provine, *supra* note 41, at 53-55 (noting that **drug** felons suffer deeply depressed wages, political disenfranchisement, and loss of social services and benefits stunting the economic prospects of families and communities).

46 *Id.* at 54; *see also* Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013, 3:04 AM), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> [<https://perma.cc/YN5W-JFKP>] (describing the implementation of harsh **drug** laws in New York in the 1970s); Michael Specter, *Getting a Fix: Portugal Decriminalized Drugs a Decade Ago. What Have We Learned?*, NEW YORKER (Oct. 10, 2011), <https://www.newyorker.com/magazine/2011/10/17/getting-a-fix>; Carlos Dobkin & Nancy Nicosia, *The War on Drugs: Methamphetamine, Public Health, and Crime*, 99 AM. ECON. REV. 324, 324-32 (2009).

47 Anti-**Drug** Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

48 **DRUG** POLICY ALLIANCE, *supra* note 36, at 2.

49 *See generally* andré douglas pond cummings, “All Eyez on Me”: America’s **War** on **Drugs** and the Prison-Industrial Complex, 15 IOWA J. GENDER, RACE & JUST. 417 (2012) (discussing how the WOD created the prison industrial complex through mass incarceration); Robert Craig & andré douglas pond cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 U. BALT. L. REV. 261 (2020) (discussing the disparate impact of private prisons).

- ⁵⁰ E.g., Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 791-802 (2019) (tracing the role of race in driving federal prohibition of marijuana).
- ⁵¹ See cummings, *supra* note 6, at 50-52.
- ⁵² *Id.* at 10 (describing recent instances of **police brutality** caught on camera and the tragedy of its regularity); Jon Collins, *Ex-cops' Attorneys Attribute Floyd's Death to Drugs, Foreshadowing Central Theme at Trial*, MPR NEWS (Sept. 10, 2020, 9:50 PM), <https://www.mprnews.org/story/2020/09/10/excops-attorneys-attribute-floyds-death-to-drugs-foreshadowing-central-theme-at-trial> [<https://perma.cc/7EUY-ZU7J>] (“**Drugs** have often been after the fact to justify **police** violence.”).
- ⁵³ See andré douglas pond cummings, *Reforming Policing*, 10 DREXEL L. REV. 573, 583-91 (2018) [hereinafter *Reforming Policing*]; see also andré douglas pond cummings, *Just Another Gang: “When the Cops are Crooks Who Can You Trust?”*, 41 How. L.J. 383, 384 (1998) [hereinafter *Just Another Gang*] (“[N]early 80 officers carrying guns, sledgehammers and crowbars stormed the [dwelling] Rushing through [one woman’s] door, **police** began kicking her, while a visiting male [sic] friend ... was knocked to the floor, handcuffed, and then thrown like a cord of wood through the open door and onto ... [the] parched front lawn.”) (quoting Joe Domanick, *Police Power*, in *INSIDE THE L.A. RIOTS* 21, 21 (Don Hazen ed., 1992)).
- ⁵⁴ See generally ALEXANDER, *supra* note 1 (discussing how the WOD enables the criminal justice system to exert racial control); *Reforming Policing*, *supra* note 53 (exploring the history and development of **police brutality** used as racial control).
- ⁵⁵ “Erosions to the 4th Amendment to the Constitution and to the Posse Comitatus Act set the foundations for two **War on Drugs policing** strategies: stop and frisk and Special Weapons and Tactics (SWAT) teams. These strategies have created specific conditions conducive to **police brutality** targeting Black communities.” Cooper, *supra* note 15, at 1188.
- ⁵⁶ KENDI, *supra* note 1, at 433.
- ⁵⁷ *Id.* at 433-34.

⁵⁸ See ALEXANDER, *supra* note 1, at 73-75, 78-80; KENDI, *supra* note 1, at 433.

⁵⁹ ALEXANDER, *supra* note 1, at 73.

⁶⁰ See ALEX S. VITALE, THE END OF **POLICING** 10-11 (2017); ALEXANDER, *supra* note 1, at 74-80; *Reforming Policing*, *supra* note 53, at 622-26; ACLU, **WAR** COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN **POLICING** 3 (2014).

⁶¹ Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES (Mar. 1, 1999), <https://www.nytimes.com/1999/03/01/us/soldiers-of-the-drug-war-remain-on-duty.html> (“Encouraged by Federal grants, surplus equipment handed out by the military and seizure laws that allow **police** departments to keep much of what their special units take in raids, the Kevlar-helmeted brigades have grown dramatically, even in the face of plummeting crime figures.”).

⁶² See VITALE, *supra* note 60, at 134-40; ALEXANDER, *supra* note 1, at 74-80.

⁶³ See andré douglas pond cummings, *The Anti-Black Culture of Policing in the United States--Part I: History*, OXFORD HUM. RTS. HUB (June 27, 2020), <https://web.archive.org/web/20201021030933/http://ohrhlaw.ox.ac.uk/the-anti-black-culture-of-policing-in-the-united-states-part-i-history/>; see also VITALE, *supra* note 60, at 137-40 (describing **police** corruption); ALEXANDER, *supra* note 1, at 74-76; *Reforming Policing*, *supra* note 53, at 622-24.

⁶⁴ Elliott C. McLaughlin, *We’re Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), <https://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/index.html> [<https://perma.cc/EJT4-EV8P>].

⁶⁵ See ALEXANDER, *supra* note 1, at 74-80 (describing a series of searches and seizures targeting people of color); see also Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER, RACE & JUST. 47, 61-68 (2012) (detailing the erosion of Fourth

Amendment protections through the federal courts based on **drug** stops and searches); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1452 (1993) (concluding that the **war** on **drugs** endangers “our Bill of Rights and our political freedom”).

⁶⁶ See Tibbs, *supra* note 65, at 62, 65 (“The legal formula ‘Young + Black + Male’ is routinely equated with ‘reasonable suspicion’--authorizing state-sponsored unconstitutional stops, searches, questioning, and seizures of thousands of African American males every year In the decades since *Terry*, however, the standard for reasonable suspicion has reached new lows. The steady lowering of the threshold of evidence required to satisfy *Terry*’s reasonable suspicion standard means that Fourth Amendment privacy rights have all but dissipated.”).

⁶⁷ See *Just Another Gang*, *supra* note 53, at 383 (describing the rise of the “Warrior Mentality” or “Siege Mentality” that permeated **police** departments at that time).

⁶⁸ See ALEXANDER, *supra* note 1, at 74-80.

⁶⁹ 500 U.S. 565, 567-68, 580 (1991) (overturning long-held precedent requiring a warrant to search a container within an automobile).

⁷⁰ 501 U.S. 429, 433-34, 439-40 (1991).

⁷¹ 517 U.S. 806, 815-19 (1996).

⁷² 519 U.S. 33, 35, 39-40 (1996).

⁷³ 532 U.S. 318, 323, 354 (2001).

⁷⁴ 543 U.S. 405, 409-10 (2005).

⁷⁵ See MASS. CONST. art. XIV (“Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation”); see also VA. CONST. art. I, § 10 (“That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.”); DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, HELD IN THE YEAR 1788, AND WHICH FINALLY RATIFIED THE CONSTITUTION OF THE UNITED STATES 86-87 (Bradford K. Pierce et al. eds., 1856) (“And that the said Constitution be never construed to authorize Congress ... to subject the people to unreasonable searches and seizures of their persons, papers or possessions.”).

⁷⁶ See Ben Marshall, *Badge of Dishonour*, GUARDIAN (June 26, 2004, 3:21 PM), <https://www.theguardian.com/media/2004/jun/26/tvandradio.theguide> [<https://perma.cc/HE3S-LVEG>] (describing the 1990s LAPD Rampart Scandal where elite gang unit officers fabricated evidence, stole **drugs**, and beat suspects, leading to more than 3,000 cases being reviewed); see also FREE MEEK (Amazon Prime Video 2019) (detailing the Philadelphia **Police** Department manufacturing **drug** evidence against rapper Meek Mill leading to jail time and numerous probation and parole revocations); VITALE, *supra* note 60, at 137 (“Most of the major **police** scandals of the last fifty years have had their roots in the prohibition of **drugs**. The Rampart Scandal in Los Angeles involved officers abusing their authority and engaging in **brutality** toward **drug** dealers ... and eventually involved the stealing of **drugs** from evidence rooms and selling it on the streets.”); cummings, *supra* note 6, at 49 n.155 (“Because the **War on Drugs** has been waged in poor urban communities, it has unilaterally cast disproportionate racial consequences upon minority citizens.”).

⁷⁷ See VITALE, *supra* note 60, at 137 (identifying both the corrupt “Dirty Thirty” **police** precinct in Harlem-uncovered by the Mollen Commission-and the *Prince of the City* book and movie detailing corrupt narcotics detectives in NYC); see also David Ovalle, *Ex-Miami-Dade Lieutenant Gets 10 Years Prison for Helping Cocaine Ring*, MIA. HERALD (Dec. 2, 2015, 6:49 PM), <https://www.miamiherald.com/news/local/crime/article47627235.html> (“The disgraced ex-cop worked for a group of smugglers who had for years illegally imported **drugs** in shipping containers containing bananas from Ecuador and the Dominican Republic In a federal complaint, agents also said Mata helped plan the execution of two rival **drug** dealers, even proposing that his ‘contacts’ could dress up like cops and pull over the men before killing them.”); Carmen George, *Fresno Deputy Police Chief Arrested in Federal Drug Investigation*, FRESNO BEE (Apr. 26, 2015, 2:37 PM), <https://www.fresnobee.com/news/local/crime/article19643307.html> (“Fresno Deputy **Police** Chief Keith Foster was among six people arrested Thursday on federal **drug** charges, including conspiracy to distribute oxycodone, heroin and marijuana. Foster, 51, who oversaw patrol operations for the department’s four districts, was arrested for conspiracy to distribute and/or possess with the intent to distribute oxycodone, heroin and marijuana.”); Kevin P. Connolly, *Former Titusville Police Officer Gets 10 Years in Prison in DEA Coke Sting*, ORLANDO SENTINEL (Mar. 31, 2015), <https://www.orlandosentinel.com/news/breaking-news/os-richard-irizarry-prison-cocaine-cop-20150331-story.html> (“Richard Irizarry, 45, a former Titusville **police** officer, was found guilty in January of attempting to help distribute one kilogram of cocaine and using a cellular telephone to commit a **drug**-trafficking offense, the U.S. Attorney’s

Office said Once, federal prosecutors allege, Irizarry looked up a license plate in a confidential database and told the informant the plate belonged to an undercover DEA car.”).

78 VITALE, *supra* note 60, at 137.

79 See *Wall Street Millennials Living Fast and Hard*, BARRON’S (Mar. 9, 2017, 12:15 PM), <https://www.barrons.com/articles/wall-street-millennials-living-fast-and-hard-1489083342> (Wall Street therapist Jonathan Alpert notes, “In an effort to cope with job stress and self-imposed pressure, these Type A’s are working murderous hours while relying on prescription medication and—primarily among the men— street **drugs**, such as cocaine and crystal meth, to help them focus and reach peak job performance.”); see also Linette Lopez & Mike Nudelman, *Drug Use on Wall Street-The History*, BUS. INSIDER (Jan. 14, 2014, 9:42 AM), <http://www.businessinsider.com/drug-use-on-wall-street--the-history-2014-1> (detailing the history of **drug** abuse on Wall Street). For a Hollywood take on rampant **drug** use amongst the financial elite, see *THE WOLF OF WALL STREET* (Paramount Pictures 2013). Regarding **drug** use on college campuses, see, for example, *Marijuana Use at Historic Highs Among College-Age Adults*, NAT’L INST. ON **DRUG** ABUSE, (Sept. 13, 2019), <https://www.drugabuse.gov/news-events/news-releases/2019/09/marijuana-use-at-historic-highs-among-college-age-adults> [<https://perma.cc/74PN-UY27>] (“The survey shows that past-year use of marijuana is similar for college students and their non-college peers at about 43%, representing an approximate 7% five-year increase for college students with rates for both groups at historic highs over the past 35 years.”); Ben Lesser, *Frequently Drug Abuse by College Students*, DUALDIAGNOSIS (March 15, 2021), <https://www.dualdiagnosis.org/drug-addiction/college-drug-abuse/> [<https://perma.cc/A4HE-QYPN>]; Donna Leinwand, *College Drug Use, Binge Drinking Rise*, USA TODAY (Mar. 15, 2007), http://usatoday30.usatoday.com/news/nation/2007-03-15-college-drug-use_N.htm (“Nearly half of America’s 5.4 million full-time college students abuse **drugs** or drink alcohol on binges at least once a month, according to a new study that portrays substance and alcohol abuse as an increasingly urgent problem on campuses across the nation.”).

80 See ALEXANDER, *supra* note 1, at 124 (“[W]hen **police** go looking for **drugs**, they look in the ‘hood.’”).

81 See *Reforming Policing*, *supra* note 53, at 625 (“**Drug** use and its prevalence permeates Wall Street culture and colleges across the country just like it does in Baltimore, Compton, and the west and south sides of Chicago. So, why have there never been SWAT raids in Skokie, Evanston, Hermosa Beach, Ocean City, Westwood, or Cambridge? Why do Wall Street traders, surfers in Huntington Beach, and fraternity boys and sorority girls receive a get-out-of-jail-free card when it comes to using and selling **drugs**?”).

82 *Id.* at 623-25.

⁸³ See ALEXANDER, *supra* note 1, at 124 (“Tactics that would be political suicide in an upscale white suburb are not even newsworthy in poor black and brown communities.”).

⁸⁴ See McWhorter, *supra* note 21, at 1-3.

⁸⁵ *Id.* at 5 (“If we truly want to get past race in this country, we must be aware that it will never happen until the futile **War** on **Drugs** so familiar to us now is a memory.”).

⁸⁶ Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 372 (2004) (citing Andrew F. Brimmer, *The Economic Cost of Discrimination Against Black Americans*, in ECONOMIC PERSPECTIVES ON AFFIRMATIVE ACTION 11, 11 (Margaret C. Simms ed., 1995)).

⁸⁷ The internationally renowned consulting firm of McKinsey & Company found that U.S. GDP in 2008 was \$525 billion lower than it could have been if there was no education gap between whites and communities of color. Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & CO. (June 1, 2009), <http://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap> [<https://perma.cc/C2F9-C233>].

⁸⁸ These economic assessments anchor their conclusions on the indisputable fact that racial categories are socially constructed. *E.g.*, The Am. Soc’y of Hum. Genetics, *ASHG Denounces Attempts to Link Genetics and Racial Supremacy*, 103 AM. J. HUM. GENETICS 636, 636 (2018) (“Genetics demonstrates that humans cannot be divided into biologically distinct subcategories.”). Therefore, all material differences in indicia of social well-being, including economic disparities, among so-called race or ethnic groups arise from flawed law and other social mechanisms of racial oppression--such as the WOD. AAA *Statement on Race*, AM. ANTHROPOLOGICAL ASS’N (May 17, 1998), <http://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=2583> [<https://perma.cc/SF5R-3EYK>] (“Given what we know about the capacity of normal humans to achieve and function within any culture, we conclude that present-day inequalities between so-called ‘racial’ groups are not consequences of their biological inheritance but products of historical and contemporary social, economic, educational, and political circumstances.”).

⁸⁹ Joseph E. Stiglitz, *Foreword* to TERRY-ANN CRAIGIE ET AL., *CONVICTION, IMPRISONMENT, AND LOST EARNINGS* 4, 5 (2020) (“There is much that has to be done if our society is to fully come to terms with our long

history of racial injustice. Stopping mass incarceration is an easy place to begin. This report makes a compelling case for the enormous economic benefits to be derived from doing so.”).

⁹⁰ CRAIGIE ET AL., *supra* note 89, at 7.

⁹¹ *Id.*

⁹² *Id.*

⁹³ NAT’L DRUG INTEL. CTR., U.S. DEP’T OF JUST., THE ECONOMIC IMPACT OF ILLICIT DRUG USE ON AMERICAN SOCIETY ix, x, 4-5 (2011).

⁹⁴ The DOJ used 2007 data. *Id.* at ix. The Brennan Center report uses data from 2017. CRAIGIE ET AL., *supra* note 89, at 6.

⁹⁵ CRAIGIE ET AL., *supra* note 89, at 2.

⁹⁶ Stiglitz, *supra* note 89, at 4.

⁹⁷ CRAIGIE ET AL., *supra* note 89, at 18-19 (“[T]he average early-career wages of formerly imprisoned people hover at around half of the federal poverty threshold for a family of two. Indeed, they never exceed it.”).

⁹⁸ PIAGGIO & VIDWANS, *supra* note 8.

⁹⁹ *Id.* The DOJ found totals similar to these 2019 numbers in 2011. U.S. DEP'T OF JUST., *supra* note 93, at ix.

¹⁰⁰ Suddath, *supra* note 14.

¹⁰¹ PIAGGIO & VIDWANS, *supra* note 8.

¹⁰² U.S. DEP'T OF JUST., *supra* note 93, at 13.

¹⁰³ *Id.*

¹⁰⁴ Jeffrey Miron, *The Budgetary Effects of Ending Drug Prohibition*, CATO INST. (July 23, 2018), <https://www.cato.org/tax-budget-bulletin/budgetary-effects-ending-drug-prohibition> [<https://perma.cc/Z6TJ-LDG2>].

¹⁰⁵ *See id.*

¹⁰⁶ GAVIN EKINS & JOSEPH HENCHMAN, MARIJUANA LEGALIZATION AND TAXES: FEDERAL REVENUE IMPACT 1-2 (Tax Found. ed., 2016).

¹⁰⁷ William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307, 307-08, 320 (1972) (when an activity imposes costs on others not subject to contract negotiation those costs should be recovered from the profits of the producer of costs).

¹⁰⁸ Miron, *supra* note 104.

- ¹⁰⁹ HOLLY HEDEGAARD ET AL., NCHS DATA BRIEF: **DRUG** OVERDOSE DEATHS IN THE UNITED STATES, 1999-2018 1 (Nat'l Ctr. for Health Stats. ed., 2020).
- ¹¹⁰ **Drug** Overdose Deaths Hit Record High, HARVARD T.H. CHAN SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/news/hsph-in-the-news/drug-overdose-deaths-hit-record-high/> [<https://perma.cc/G2CK-UKEE>] (last visited Feb. 19, 2022).
- ¹¹¹ Talia Bronshtein, *Interactive: Explore How Illegal **Drugs** Have Become Cheaper and More Potent over Time*, STAT (Nov. 16, 2016), <https://www.statnews.com/2016/11/16/illegal-drugs-price-potency/> [<https://perma.cc/EKB3-STFE>] (illustrating an increase in purity of heroin and methamphetamine since 1986 and a decrease in price for heroin, methamphetamine, cocaine, and crack).
- ¹¹² **DRUG** FACTS: NATIONWIDE TRENDS 1 (Nat'l Inst. on **Drug** Abuse ed., 2014); NSDUH RELEASES, *supra* note 2, at tbl.7.1A.
- ¹¹³ Cooper, *supra* note 15.
- ¹¹⁴ JOYCE A. ARDITTI, PARENTAL INCARCERATION AND THE FAMILY 101 (2012).
- ¹¹⁵ See Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/TUB9-9GJ2>] (“A close examination of wealth in the U.S. finds evidence of staggering racial disparities. At \$171,000, the net worth of a typical white family is nearly ten times greater than that of a Black family (\$17,150) in 2016. Gaps in wealth between Black and white households reveal the effects of accumulated inequality and discrimination, as well as differences in power and opportunity that can be traced back to this nation’s inception.”); see also Sarah Hansen, *Here’s What the Racial Wealth Gap in America Looks Like Today*, FORBES (June 5, 2020, 5:39 PM), <https://www.forbes.com/sites/sarahhansen/2020/06/05/heres-what-the-racial-wealth-gap-in-america-looks-like-today/?sh=60e54c14164c> (“‘No progress has been made in reducing income and wealth inequalities [sic] between black and white households over the past 70 years,’ according to economists Moritz Kuhn, Moritz Schularick and Ulrike I. Steins”) (quoting Moritz Kuhn et al., *Income and Wealth Inequality in America, 1949-2016*, 128 J. POL. ECON. 3469, 3500 (2020)).

¹¹⁶ See McIntosh et al., *supra* note 115.

¹¹⁷ Catarina Saraiva, *The Historical Reasons Behind the U.S. Racial Wealth Gap*, BLOOMBERG (May 23, 2021, 12:01 AM), <https://www.bloomberg.com/news/articles/2021-05-24/the-historical-reasons-behind-u-s-racial-wealth-gap-quicktake> [<https://perma.cc/8RTQ-J552>].

¹¹⁸ See ARDITTI, *supra* note 114, at 101-03.

¹¹⁹ *Id.* at 101.

¹²⁰ *Id.* at 102; see also andré douglas pond cummings & Caleb Gregory Conrad, *From “Mind Playing Tricks on Me” to “Trauma”: Adverse Childhood Experiences and Hip Hop’s Prescription*, 59 WASHBURN L.J. 267, 271-74, 288 (2020) (describing that a child is often saddled with poor future life outcomes when impacted by an Adverse Childhood Experience (ACE)). ACEs are the trauma resulting from household dysfunction experienced by a child:

Today, ACEs are generally placed in seven to nine categories of childhood adversities: (1) physical abuse, (2) sexual abuse, (3) emotional abuse, (4) having a mother who was treated violently, (5) living with someone who was mentally ill, (6) living with someone who abused alcohol or **drugs**, (7) incarceration of a member of a household, (8) parental divorce or separation, and (9) social disadvantage, meaning economic hardship, homelessness, community violence, discrimination, and/or historical trauma.

Id. at 269 (footnotes omitted).

¹²¹ Cummings & Conrad, *supra* note 120, at 271.

¹²² *Id.* at 270; ARDITTI, *supra* note 114, at 101-09.

¹²³ See cummings & Conrad, *supra* note 120, at 271 (“The research is clear. The higher an individual’s ACE score, the

more likely it is that he or she will experience negative outcomes later in life, including an increased risk of contracting chronic disease or attempting suicide, engaging in risky behaviors, developing addictions to alcohol or **drugs**, and ultimately dying an earlier death. Also known is that people of color and those of low socioeconomic status consistently experience more ACEs and, in turn, are more at risk for these harmful outcomes.”).

¹²⁴ *Id.* at 270.

¹²⁵ *See* ARDITTI, *supra* note 114, at 102-09.

¹²⁶ *See* Stiglitz, *supra* note 89, at 4.

¹²⁷ *Id.*

¹²⁸ *See, e.g.*, JAMES K. GALBRAITH, *INEQUALITY AND INSTABILITY: A STUDY OF THE WORLD ECONOMY JUST BEFORE THE GREAT CRISIS* 4, 289 (2012) (linking inequality and the financial crisis); RAGHURAM G. RAJAN, *FAULT LINES* 43 (2010) (attributing financial crisis to structural inequality in the United States).

¹²⁹ RAMIREZ, *supra* note 29, at 1-16.

¹³⁰ According to the World Justice Project, the United States ranks twenty-first worldwide in its Rule of Law Index (and sinking). WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2020* 7 (2020).

¹³¹ Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 L. & CONTEMP. PROBS. 219, 229-30 (2020) (summarizing evidence of economic harm from high economic inequality).

¹³² Indeed, in terms of income and wealth the civil rights era resulted in zero progress for African Americans:

[I]ncome has grown at a comparable rate for black and white households. This means that pre-civil rights era disparities have largely persisted, as black income growth did not accelerate relative to white households. Second, as the numbers indicate, the size of the racial income divide remains substantial. The median black household has about half of the income of the median white household. Third, the wealth gap is much larger than the income gap and equally persistent. The median black household disposes of 12% of the wealth of a median white household.

Kuhn et al., *supra* note 115, at 3497.

¹³³ John Collins, *The Economics of a New Global Strategy, in* ENDING THE **DRUG WARS**: REPORT OF THE LSE EXPERT GROUP ON THE ECONOMICS OF **DRUG** POLICY 8-10 (John Collins ed., 2014).

¹³⁴ *Id.* at 10.

¹³⁵ *Id.* at 11.

¹³⁶ Vanda Felbab-Brown, *Improving Supply-Side Policies: Smarter Eradication, Interdiction and Alternative Livelihoods-arid the Possibility of Licensing, in* ENDING THE **DRUG WARS**: REPORT OF THE LSE GROUP ON THE ECONOMICS OF **DRUG** POLICY 41, 46 (John Collins ed., 2014).

¹³⁷ Collins, *supra* note 133, at 13, 15.

¹³⁸ Steven A. Ramirez, *Race in America 2021: A Time to Embrace Beauharnais v. Illinois?*, 52 LOY. U. CHI. L.J. 1001, 1004, 1008-11 (2021) (“The failure to disrupt the indefinite replication of our racial hierarchy entails manifold costs (beyond the manifest injustice and immorality) that governing elites (including the Supreme Court) either do not currently fully appreciate, or actively ignore.”).

¹³⁹ *Supra* notes 114-125 and accompanying text.

- ¹⁴⁰ Ramirez, *supra* note 138, at 1108-11 (highlighting domestic terrorism and national security risks of racial hierarchy in the United States).
- ¹⁴¹ *Id.* at 1028 (“If we allow white supremacy to persist, all our core values will dissolve before an antidemocratic, murderous mob that would rather kill the Constitution than see the emergence of a diverse and inclusive democracy with forced power sharing with people of color and other marginalized communities.”).
- ¹⁴² In a related Article, we argue that racial animus pervading the history of the WOD violates the U.S. Constitution, andré douglas pond cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453 (2022).
- ¹⁴³ See Marijuana Opportunity Reinvestment and Expungement Act of 2019, S. 2227, 116th Cong. (2019); Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020).
- ¹⁴⁴ *Lawmakers Prepare for Historic House Floor Vote on the MORE Act*, NORML (Aug. 28, 2020), <https://norml.org/blog/2020/08/28/lawmakers-prepare-for-historic-house-floor-vote-on-the-more-act/>.
- ¹⁴⁵ Victor Reklaitis, *House Panel Passes Bill That Aims to Legalize Marijuana, but Top Democrat Concedes ‘Senate Will Take Its Own Time,’* MARKETWATCH (NOV. 20, 2019, 12:45 PM), <https://www.marketwatch.com/story/house-judiciary-chief-nadler-says-his-panel-will-pass-bill-legalizing-marijuana-but-concedes-senate-will-take-its-own-time-2019-11-19> (reporting on first-ever congressional vote (before the House Judiciary Committee) to remove marijuana from federal criminal prohibition).
- ¹⁴⁶ Other narcotics reform bills now await congressional approval. However, these initiatives do not hold the promise of the MORE Act. See Lowry, *supra* note 19. Most notably, while proposed legislation would end the WOD, it would not operate to fund community reinvestment in the victimized communities. See generally DRUG POLICY ALLIANCE, SUMMARY OF THE DRUG POLICY REFORM ACT (DPRA) OF 2021111 (2021) (summarizing key components of the DRPA).
- ¹⁴⁷ Angelica LaVito, *Nadler, Harris to Introduce Bill Decriminalizing Pot, Expunge Marijuana Convictions*, CNBC (July 23, 2019, 2:08 PM), <https://www.cnbc.com/2019/07/22/nadler-harris-to-introduce-bill-decriminalizing-pot-expunge-prior-convictions.htm>

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¹⁴⁸ S. 2227, §2.

¹⁴⁹ See J. Herbie DiFonzo & Ruth C. Stern, *Divided We Stand: Medical Marijuana and Federalism*, 27 HEALTH L. 17, 17-18 (2015) (explaining the racist rhetoric that surrounded discussion on marijuana).

¹⁵⁰ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”).

¹⁵¹ E.g., Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954) (“The federal system has the immense advantage of providing ... separate centers for ... experimentation.”).

¹⁵² S. 2227, § 4.

¹⁵³ *Id.*

¹⁵⁴ E.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

¹⁵⁵ S. 2227, § 9.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6-8, 24-25 (2010) (articulating traditional benefits of federalism and modern learning regarding limitations).

¹⁶⁰ See, e.g., Andrew Whalen, *Magic Mushrooms Guide: Where Shrooms Are Legal and How to Take Psilocybin*, NEWSWEEK (July 3, 2019, 3:00 AM), <https://www.newsweek.com/magic-mushrooms-psilocybin-shrooms-denver-legal-how-take-1445041> [<https://perma.cc/F4FH-XY3G>].

¹⁶¹ See Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016, 5:01 AM), <https://time.com/4596081/incarceration-report/> (“We found that approximately 39% of the nationwide prison population (576,000 people) is behind bars with little public safety rationale. And they can be released, significantly and safely cutting our prison population.”).

¹⁶² See, e.g., Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 570-72 (2003).

¹⁶³ Shytierra Gaston, *Producing Race Disparities: A Study of Drug Arrests Across Place and Race*, 57 CRIMINOLOGY 424, 424 (2019) (finding in St. Louis that drug arrests in white neighborhoods arise from reactive policing while drug arrests in Black neighborhoods arise from discretionary stops).

¹⁶⁴ See Markus, *supra* note 4.

¹⁶⁵ See discussion *supra* Part II.

¹⁶⁶ Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 778 (2021) (suggesting that giving power to communities most damaged by mass incarceration can repair such communities in a way consistent with anti-subordination principles).

¹⁶⁷ Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. CRIMINOLOGY 999, 1018 (2010) (“The Portuguese evidence suggests that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent **drug** users offers several advantages. It can reduce the burden of **drug** law enforcement on the criminal justice system, while also reducing problematic **drug** use.”).

¹⁶⁸ *Id.* (“[T]his article [suggests] the need for more nuanced discussions of decriminalization, with acknowledgement of the different models and approaches that can be adopted and of their various costs and benefits.”) Hughes and Stevens also recognize that “the choice to decriminalize is not simply a question of the research. It is also an ethical and political choice of how the state should respond to **drug** use.” *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”).

¹⁷¹ In a related Article, we critique the Illinois legislative effort to unwind the WOD. André Douglas Pond Cummings & Steven A. Ramirez, *The Illinois Cannabis Social-Equity Program: Toward a Socially Just Peace in the War on Drugs*, 53 LOY. U. CHI. L.J. 793 (2022). While these efforts stop short of perfection, the fact that state legislatures seek to undo the damage caused by the WOD suggests that America’s racial hierarchy need not bedevil the nation in perpetuity. See Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 338 (2018) (concluding that demographic reality and economic rationality create a “significant probability” that the U.S. legal system will reduce the influence of the American racial hierarchy).

¹⁷² The medical establishment generally opposed federal prohibition as early as 1915:

[T]he immediate effects of the Harrison antinarcotic law were seen in the flocking of **drug** habitues [sic] to hospitals and sanatoriums. Sporadic crimes of violence were reported too, due usually to desperate efforts by addicts to obtain **drugs**, but occasionally to a delirious state induced by sudden withdrawal The really serious results will be the failures of promising careers, the disrupting of happy families, the commission of crimes which will never be traced to their real cause, and the influx into hospitals to the mentally disordered of many who would otherwise live socially competent lives.

EDWARD M. BRECHER, LICIT AND ILLICIT **DRUGS**; THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS AND MARIJUANA--INCLUDING CAFFEINE, NICOTINE, AND ALCOHOLLLL ch. 8 (1972) (quoting *Mental Sequelae of the Harrison Law*, N.Y. MED. J. 102, 1014 (1915)).

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