The War on Drugs: Moral Panic and Excessive Sentences

Michael Vitiello
McGeorge School of Law

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THE WAR ON DRUGS: MORAL PANIC AND EXCESSIVE SENTENCES

MICHAEL VITIELLO*

ABSTRACT

The United States’ War on Drugs has not been pretty. Moral panic has repeatedly driven policy when states and the federal government have regulated drugs. Responding to that panic, legislators have authorized severe sentences for drug offenses.

By design, Article III gives federal judges independence, in part, to protect fundamental rights against mob rule. Unfortunately, the Supreme Court has often failed to protect fundamental rights in times of moral panic. For example, it eroded Fourth Amendment protections during the War on Drugs. Similarly, it failed to protect drug offenders from excessive prison sentences during the War on Drugs.

This Article examines whether it is time for the Supreme Court to rethink its precedent upholding extremely long sentences for drug crimes.

In 1983, in *Solem v. Helm*, the Supreme Court held that the Eighth Amendment’s Cruel and Unusual Punishment Clause applies to terms of imprisonment. There, it found the imposition of a true-life sentence imposed on a repeat offender to be grossly disproportionate to the gravity of the defendant’s offense. Whatever hope *Solem* created that courts might limit excessive sentences proved to be false.

Two Supreme Court cases dealing with drug sentences, bracketing *Solem*, demonstrate the Court’s unwillingness to override legislatures’ discretion in imposing sentences. In 1982, the Court upheld a 40-year term of imprisonment imposed on an offender who possessed less than nine ounces of marijuana. In 1991, the Court upheld a true-life sentence imposed on an offender who possessed 672 grams of cocaine. The Court’s refusal to curtail such extreme sentences reflects its willingness to accede to the nation’s moral panic over drug usage.

Since the height of the War on Drugs, Americans have changed their views about drugs. Significant majorities of Americans favor legalization of marijuana for medical and recreational use. Many Americans favor a wholesale rethinking of drug policy. Despite studies in the 1950s and 1960s demonstrating beneficial use of drugs like LSD and psilocybin, Congress yielded to moral panic and included them in Schedule I when it enacted the Controlled Substances Act of 1970. Efforts are afoot at the state level to legalize the study of and to decriminalize the use of those and other drugs.

This Article argues that the Court should rethink its Eighth Amendment caselaw upholding severe drug sentences. The Court’s Eighth Amendment caselaw balances the severity of punishment against the gravity of an offense. In turn, the gravity of an offense turns on its social harm and the culpability of the offender. The Court upheld extreme drug sentences based on the view that drugs were a national scourge. Moral

* Michael Vitiello, Distinguished Professor of Law, the University of Pacific, McGeorge School of Law; University of Pennsylvania, J.D. 1974; Swarthmore College, B.A., 1969. I want to extend my thanks to my research assistants Mikayla Anderson and Mark Cayaba for their excellent research help with this Article.
panic led it to overstate the social harm and the culpability of drug offenders. Scientifically based examination of drugs and drug policy should compel the Court to rethink its excessive punishment caselaw because the balance between severity of punishment and the gravity of drug offenses looks different when one has a better understanding of true costs and benefits of drug use.

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I. INTRODUCTION

The War on Drugs is over. Or at least, we have tacitly declared a ceasefire. Policymakers across the political spectrum see the war as a failure and even a dysfunctional Congress has enacted legislation intended to undo some of its damage.

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The United States has waged war on drugs at various times in our history. Like most wars, these wars have not been pretty. Moral panic has repeatedly driven policy when states and the federal government have regulated drugs. Responding to that panic, legislators have authorized severe sentences for many drug offenses.

By design, Article III gives federal judges independence, in part, to protect fundamental rights against mob rule. Unfortunately, the Supreme Court has often failed to protect fundamental rights in times of moral panic. Examples abound: The Court failed to protect free speech rights during the Red Scare. It failed to protect Japanese Americans from the denial of their freedom and property during World War II. It eroded Fourth Amendment protections during the War on Drugs. Similarly, it failed to protect drug offenders from excessive prison sentences during the War on Drugs.

Elsewhere, I have argued that one “peace dividend” of the end of the War on Drugs is a reinvigorated Fourth Amendment. This Article examines a different question:

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4 See infra Part II.

5 STANLEY COHEN, FOLK DEVILS AND MORAL PANICS I (2011) (defining moral panic as such: “A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.”).


7 See infra Part III. Americans have recently become aware of the racial bias in enforcement of drug laws and the devastating effects on minority communities. Whether the current cease fire in the War on Drugs will lead to long term remedial action is open to question. Inquiry into that issue is ripe for discussion, especially as I write this Article during the summer of 2020 at a moment when minority community members and supporters are calling for a change in policing and prison policies.

8 See ERWIN CIMMERINSKY, THE CASE AGAINST THE SUPREME COURT 4 (2014) (reciting his former belief that “the Supreme Court was the primary institution in society that existed to stop discrimination and to protect people’s rights”).

9 See generally id.


13 See generally id.

14 Id.
despite earlier Supreme Court precedent upholding extremely long sentences for drug crimes, is it time for the Court to rethink those holdings?\(^\text{15}\)

In 1983, in *Solem v. Helm*, the Supreme Court held that the Eighth Amendment’s Cruel and Unusual Punishment Clause applies to terms of imprisonment.\(^\text{16}\) There, it found the imposition of a true life sentence\(^\text{17}\) on a repeat offender to be grossly disproportionate to the gravity of the defendant’s offense.\(^\text{18}\) Whatever hope *Solem* created that courts might limit excessive sentences proved to be false.\(^\text{19}\)

Two Supreme Court cases dealing with drug sentences, bracketing *Solem*, demonstrate the Court’s unwillingness to override legislatures’ discretion in imposing sentences. In 1982, the Court upheld a 40-year term of imprisonment imposed on an offender who possessed less than nine ounces of marijuana.\(^\text{20}\) In 1991, the Court upheld a true life sentence imposed on an offender who possessed 672 grams of cocaine.\(^\text{21}\) The Court’s refusal to curtail such extreme sentences reflects its willingness to accede to the nation’s moral panic over drug usage.\(^\text{22}\)

Since the height of the War on Drugs, Americans have changed their views about drugs. Since California’s experiment with legalizing medical marijuana in 1996,\(^\text{23}\) public attitudes have undergone an epic change. A Kentucky poll showed over 90% of individuals support legalization of marijuana for medical purposes.\(^\text{24}\) Over two-thirds support legalization of marijuana for recreational use.\(^\text{25}\) Voter initiatives and now legislatures are changing marijuana laws to reflect those views. Most Americans

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15 See infra Part V.


17 As was the case in *Solem*, 463 U.S. at 277, a true life sentence is a life sentence that does not allow parole for the prisoner.

18 Id. at 303.

19 See infra Part III.


22 See infra Part III.

23 CAL. HEALTH & SAFETY CODE § 11362.5 (West 2003).


live in states where marijuana is available for medical use and increasing numbers live in states where it is available for recreational use. Many Americans favor a wholesale rethinking of drug policy. Despite studies in the 1950s and 1960s demonstrating beneficial use of drugs like lysergic acid diethylamide (LSD) and psilocybin, Congress yielded to moral panic and included them in Schedule I when it enacted the Controlled Substances Act of 1970. Also included in Schedule I is methylenedioxymethamphetamine (MDMA, or as known by its street name, Ecstasy), which, during the 1970s, showed promise in treating several conditions as well. Serious scientific interest in those drugs has increased in recent years. Efforts are afoot at the state level to decriminalize the study of and use of those drugs.

As this Article argues, these developments should lead the Court to rethink its Eighth Amendment caselaw upholding severe drug sentences. The Court’s Eighth Amendment caselaw balances the severity of punishment against the gravity of an


28 See Dustin Marlan, Beyond Cannabis: Psychedelic Decriminalization and Social Justice, 23 LEWIS & CLARK L. REV. 851, 853–56 (“[D]espite the persisting stigma of hedonism, rebellion, and social upheaval surrounding them, public support for psychedelics is growing . . . This trend toward general decriminalization appears likely to continue as popular support for psychedelics grows and the stigma surrounding the substances lessens.”).

29 See id. at 866 (“With minimal restrictions, research and interest in psychedelics continued to increase, peaking in the 1950s and into the 1960s. Studies during those decades produced many clinical findings, suggesting beneficial effects in the treatment of anxiety, mood, and substance use disorders.”); see also Michael Pollan, How to Change Your Mind: What the New Science of Psychedelics Teaches Us About Consciousness, Dying, Addiction, Depression, and Transcendence 3 (2018) (“For most of the 1950s and 1960s, many in the psychiatric establishment regarded LSD and psilocybin as miracle drugs.”).


32 Marlan, supra note 28, at 892 (describing the “new wave” of research into the effects and benefits of psychedelics).

offense. The Court upheld extreme drug sentences based on the view that drugs were a national scourge. Moral panic led it to overstate the social harm and the culpability of drug offenders.

Science-based examination of drugs and drug policy should compel the Court to rethink its excessive punishment caselaw because the balance between the severity of punishment and the gravity of drug offenses looks different when one has a better understanding of the true costs and benefits of drug use. The result should be more successful challenges to drug sentences. Greater activism by the courts should lead states and Congress to move the United States towards more medically-based – and less prison-oriented – drug policies.

Part II offers a brief history of how moral panic has dictated much of our drug policy. Part III explores the Court’s Cruel and Unusual Punishment caselaw and how the Court succumbed to the moral panic created by Anti-Drug Warriors. Part IV focuses on the epic shift in our understanding of marijuana and visits the new interest in other Schedule I drugs. Part V turns to how new insights learned from the failure of the War on Drugs should lead the Court to rethink its Eighth Amendment’s caselaw dealing with draconian drug sentences.

II. DRUG LEGISLATION AND MORAL PANIC

For centuries, people around the world used marijuana for medicinal purposes. Medical practitioners in the United States discovered its benefits later than


35 See Solem, 463 U.S. at 292 (“Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.”).

36 See infra Part III.

37 See infra Part III.

38 See infra Part IV.

39 See infra Part IV.

40 See infra Part V.

41 See infra Part II.

42 See infra Part III.

43 See infra Part IV.

44 See infra Part V.

45 See generally Antonio Waldo Zuardi, História da Cannabis como Medicamento: Uma Revisão [History of Cannabis as a Medicine: A Review], 28 Revista Brasileira De
elsewhere. But by the nineteenth century, the practice of medicine had changed. For example, by the mid-nineteenth century, the United States Pharmacopeia recommended marijuana for several conditions, including pain, convulsions, menstrual cramps, lack of appetite, depression, and other mental illnesses. An 1889 article in the medical journal *Lancet* touted cannabis as a treatment for opium addiction, a claim that has a modern ring to it. Within a short time, public perceptions about marijuana would change dramatically.

By the 1930s, marijuana had become the demon weed. Prohibitionists claimed that it led to violence and insanity. The transition from useful product to scourge, documented elsewhere, is worth examination here.

Early efforts to regulate marijuana were based on some legitimate concerns. Notably, the earliest efforts to do so were part of legislation compelling accurate labeling for products sold in interstate commerce. The 1906 Pure Food and Drug Act included cannabis but focused primarily on addictive substances, including morphine, laudanum, and cocaine, in patent medicines. However, much of the

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46 Id. at 154–55 (stating that the first clinical conference about cannabis was not held in the United States until the 19th century, whereas there is evidence that cannabis was used for medicinal purposes in ancient China as early as 2700 B.C.).


51 See *The History of Demon Weed*, supra note 49.


53 See *id.*


impetus to criminal marijuana was based on moral panic and racism.56 Those forces were in evidence when Congress adopted the Marihuana Tax Act of 1937.57

At the start of the twentieth century, states began criminalizing marijuana based on unquestionably racist grounds.58 Led by states in the Southwest, early marijuana laws were the response to an influx of Mexicans fleeing the Mexican Revolution.59 Many of them used marijuana.60 Even the term “marihuana” or “marijuana,” not cannabis, reflects the racist sentiments:

[U]ntil the influx of Mexicans, “cannabis” was the usual term of art. Mexicans referred to it as “marihuana” and used it for recreational purposes. Often, politicians used the term “marijuana” or “marihuana” when they described the new drug menace that they claimed was taking over the country. Anti-marijuana advocates made extravagant, unverified claims about marijuana and often did so with explicitly racist language.61

Elsewhere, legislators were motivated to regulate marijuana because of its association with African Americans.62 Congress would not have enacted the 1937 Marihuana Tax Act without Harry J. Anslinger. During Prohibition, Anslinger served as an agent in the Treasury Department’s Bureau of Prohibition.63 By the end of Prohibition, Anslinger was the founding Commissioner of the Treasury Department’s Federal Bureau of Narcotics.64 Despite his earlier belief that marijuana was not especially harmful,65 Anslinger became an anti-marijuana warrior. His conversion, perhaps motivated by a desire for

59 See Thompson, supra note 57.
60 Id.
62 See Ditchfield & Thomas, supra note 50, at 4–6 (outlining some of Bureau of Narcotics Commissioner Harry Anslinger’s racist comments from the infamous “Gore Files”).
65 In Anslinger’s early years of service, he did not see marijuana as an evil. Indeed, he debunked the idea that it led to violence—or, as he said, “[t]here is probably no more absurd
job security, was timely for him. Federal efforts at regulating marijuana continued through his tenure in the federal government, which did not end until 1962.\textsuperscript{66}

Even in the age of Trump, modern readers find Anslinger’s overly racist appeals to be jarring. Infamously, he is quoted as saying things like the following:

\begin{quote}
Reefer makes darkies think they’re as good as white men. . . . Marihuana influences Negroes to look at white people in the eye, step on white men’s shadows and look at a white woman twice. . . . There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.\textsuperscript{67}
\end{quote}

Many Americans, including media mogul William Randolph Hearst, shared these views.\textsuperscript{68} Hearst’s newspapers supported Anslinger’s efforts to demonize marijuana.\textsuperscript{69} Americans, many of whom feared competition from Mexican workers, were easily persuaded that marijuana was evil.\textsuperscript{70}

During hearings on the 1937 Act, American Medical Association representative physician and lawyer William Creighton Woodward opposed the legislation. His reception was chilly, with one member of Congress telling him that “if you want to advise us on legislation, you ought to come here with some positive proposals.” Few members of Congress were interested in Woodward’s factual arguments.\textsuperscript{71}

Critics suggest that Anslinger’s moment of enlightenment came towards the end of Prohibition when his job security might have been at risk.” Vitiello, \textit{supra} note 61, at 798.

\begin{itemize}
\item \textsuperscript{66} See McWilliams, \textit{supra} note 63, at 231–32.
\item \textsuperscript{67} Vitiello, \textit{supra} note 61, at 799.
\item \textsuperscript{68} See \textit{Ditchfield & Thomas}, \textit{supra} note 50, at 6–8 (explaining how Hearst showed his support for Anslinger’s efforts and racist rhetoric by publishing propaganda from Anslinger’s Bureau of Narcotics’ “Gore Files”).
\item \textsuperscript{69} See id.
\item \textsuperscript{71} See David F. Musto, \textit{The Marihuana Tax Act of 1937}, 26 \textit{Archives Gen. Psychiatry} 419, 436 (1972). As I argued in a previous article, despite medical use of marijuana and industrial use of hemp, by the time Congress took up the 1937 Act, Big Pharma had patented medications to treat many conditions for which marijuana had provided relief and Big Agriculture was producing cotton, for example, that provided a substitute for hemp fiber. Vitiello, \textit{supra} note 61, at 795–96. As a result, marijuana supporters lacked financial clout to oppose the legislation.
\end{itemize}
While Congress made changes to laws governing marijuana between 1937 and 1970, the Controlled Substances Act of 1970 (hereinafter the “CSA”) remains the most important legislation regulating marijuana. The CSA’s approach to marijuana and drugs like LSD has roots in moral panic and racism.

No doubt, Congress had legitimate purposes in enacting the CSA. Congress needed to revise drug laws for several reasons. In 1969, the Supreme Court struck down key provisions of the 1937 Tax Act. The United States had also entered into treaties requiring scheduling of drugs for more uniform international coordination. In addition, the United States at that point had about 200 laws in place regulating legal and illegal drugs. Congress needed to bring those laws into a coherent scheduling scheme.

Legitimate reasons aside, moral panic played a major role in the enactment of the CSA. During the 1960s, marijuana became a drug of choice on college campuses. Increasing support among middle class students and some prominent academics forced a reexamination of federal law governing its use.

As the CSA worked its way through Congress, there were calls for legalization of marijuana. President Nixon created a commission to study and recommend marijuana policies. The National Commission on Marihuana and Drug Abuse became known as the Shafer Commission after its Chair, former Pennsylvania

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72 Bromberg et al., supra note 56, at 55.
73 See generally id.
76 See Osbeck & Bromberg, supra note 55, at 76.
77 See Alex Kreit, Controlled Substances, Uncontrolled Law, 6 Alb. Gov’t L. Rev. 332, 335 (2013) (noting the myriad of legislation passed to cover several different types of illegal substances, leading to general confusion, coupled with the Supreme Court finding aspects of the pre-CSA scheme unconstitutional with decisions in 1969 and 1970).
79 See Osbeck & Bromberg, supra note 55, at 46–47.
80 See id. at 50 (comparing more liberal societal views regarding drug use in general, and marijuana in particular, with President Nixon’s strict “War on Drugs” outlook during the year 1970).
Governor Raymond Shafer.\textsuperscript{82} Nixon’s appointment of Shafer, a well-recognized Republican moderate, seemed to signal that Nixon was open to rethinking the federal approach to marijuana.\textsuperscript{83}

While awaiting the results of the report, Congress enacted the CSA.\textsuperscript{84} As a compromise, it included marijuana in Schedule I.\textsuperscript{85} Schedule I substances are ones for which there is no recognized medical use and a high potential for abuse.\textsuperscript{86} Some members of Congress expected marijuana to be rescheduled or decriminalized consistent with recommendations that the Shafer Commission was expected to make.\textsuperscript{87} That would not be the case. When the Commission recommended decriminalizing possession of marijuana, Nixon simply ignored the recommendation.\textsuperscript{88}

As with other efforts to criminalize marijuana, Nixon’s motives were suspect. Nixon won the presidential election in large part because of his not-so-subtle appeals to racial animus.\textsuperscript{89} Nixon successfully countered openly racist Alabama Governor George Wallace’s attempt to outflank Nixon on the right.\textsuperscript{90} While Nixon shunned overtly racist appeals, race was close to the surface in his messages:

Nixon used the increasingly frequent “dog whistle” appeal to racial animus; most listeners understood that “law and order” meant clamping down on African Americans, whose demands for equality often led to inner city riots. Somewhat reminiscent of then-candidate Trump’s appeals to racism and nativism, Nixon was able to chip away at the Democrats’ advantage among white working class voters. While many members of the white middle class, even among Republicans, favored a new approach to marijuana regulation, Nixon’s rejection of the Shafer Commission recommendation was a sop to his base. Years later, former Nixon Domestic Policy Chief John Ehrlichman reportedly confirmed Nixon’s motivations for launching his war on drugs; among his most hated opponents were antiracist activists and African

\textsuperscript{82} See Peter Reuter, \textit{Why Has US Drug Policy Changed So Little over 30 Years?}, 42 CRIME \& JUST. AMERICA 75, 86 (2013).

\textsuperscript{83} Id.

\textsuperscript{84} Stephen Siff, \textit{The Illegalization of Marijuana: A Brief History}, ORIGINS (May 2014), http://origins.osu.edu/article/illegalization-marijuana-brief-history/page/0/1 [https://perma.cc/KQ9S-8XG3].

\textsuperscript{85} Hudak, supra note 81.


\textsuperscript{87} See generally Hudak, supra note 81.

\textsuperscript{88} See id. Not only did Nixon ignore the recommendations of his commission, but his administration, like virtually every administration since then, has fought hard against rescheduling of marijuana. BROMBERG ET AL., supra note 56, at 62–64.

\textsuperscript{89} IAN HANEY LOPEZ, \textit{DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM \& WRECKED THE MIDDLE CLASS} 24–25 (2014).

\textsuperscript{90} Id. at 23.
Americans. Maintaining federal drug laws allowed Nixon to demonize his enemies, and his enemies included the minority community.\footnote{Vitiello, \textit{supra} note 61, at 802.}

Thus, Nixon, like his predecessors who demonized marijuana, followed policies not based on good science but based on raw political and racist opportunism.\footnote{See Marlan, \textit{supra} note 28, at 870 (“[A]n interview with Nixon’s top advisor . . . was recently uncovered in which he admits that the Nixon Administration’s motive for starting the entire drug war was both racist and culturist. Erlichman confesses: ‘You want to know what [the War on Drugs] was really about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people.’” (quoting \textit{A Brief History of the Drug War, Drug Pol’y All., https://www.drugpolicy.org/issues/brief-history-drug-war [https://perma.cc/D4QZ-XGHE])).}

President Reagan’s drug policies would make Nixon’s seem tame.\footnote{See, \textit{e.g.}, \textit{The Impact of the War on Drugs on U.S. Incarceration}, HUM. RTS. WATCH, https://www.hrw.org/reports/2000/usa/Rcedrg00-03.htm#P222_42059 [https://perma.cc/YB7S-TDGG] (demonstrating how U.S. prison populations skyrocketed in the 1980s, due in large part to the federal government’s strict anti-drug policies).}

\footnote{See, \textit{e.g.}, \textit{The Impact of the War on Drugs on U.S. Incarceration}, HUM. RTS. WATCH, https://www.hrw.org/reports/2000/usa/Rcedrg00-03.htm#P222_42059 [https://perma.cc/YB7S-TDGG] (demonstrating how U.S. prison populations skyrocketed in the 1980s, due in large part to the federal government’s strict anti-drug policies).}

He pushed for much longer prison sentences for drug offenses generally.\footnote{WAYNE DAWKINS, \textit{RUGGED WATERS: BLACK JOURNALISTS SWIM THE MAINSTREAM} 31 (2003).}


Reagan, like Nixon, used “dog whistles” rather than overt appeals to racism.\footnote{LOPEZ, \textit{supra} note 89, at 57–58.}

The resulting penalties, much higher for crack cocaine than for powdered cocaine, were symptomatic of that process.\footnote{See \textit{Sarah Childress, Michelle Alexander: “A System of Racial and Social Control,”} PBS (Apr. 29, 2014), https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/ [https://perma.cc/3RB8-URAM]. As Alexander explains, it was due to the Reagan Administration’s efforts that crack cocaine was associated with inner city ghettos, unlike powdered cocaine, the drug of choice of many well-to-do individuals.}

The consistent thread through much of this history is moral panic. Politicians appealed to “ordinary” Americans by portraying a national emergency that required drastic measures. Seldom were policymakers driven by good data.\footnote{Michael Winerip, \textit{Revisiting the “Crack Babies” Epidemic That Was Not}, N.Y. TIMES (May 20, 2013), https://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html [https://perma.cc/TM7E-6YGW].}

Instead, they ignored existing data.\footnote{See Musto, \textit{supra} note 71, at 436.}
Some states resisted the call for more extreme measures against drug offenders. Most, however, followed the federal lead. Many states adopted frameworks like the CSA. That trend increased during the Reagan era, with many states cooperating with federal law enforcement agencies. Their cooperation was rewarded with federal funds as well.

Many Americans have recognized the unfortunate war on marijuana. Less well understood is the moral panic that has resulted in adding some other drugs to Schedule I and punishing their use severely.

Several Schedule I drugs may have some significant benefits for their users. Psilocybin, a mushroom, has been used in many cultures for religious and sacramental purposes for centuries. During the 1950s, scientists studied it as a possible treatment for various conditions, including anxiety and depression.

Similarly, LSD showed promise as a treatment for several conditions. Developed in a pharmaceutical lab in Switzerland in 1938, LSD generated interest among various researchers. Studies in the 1950s suggested that LSD could be successful in treating alcoholism. It seemed to hold promise for other conditions as well, including autism, schizophrenia, and depression.

100 See Osbeck & Bromberg, supra note 55, at 52.

101 See id. at 82.

102 See id. at 206.

103 See generally, e.g., Reauthorization of the Drug Enforcement Administration for Fiscal Year 1988: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 100th Cong. (1987) (summarizing the federal government’s previous spending on drug enforcement, including allocation of funds to state efforts, and reauthorizing additional funds).

104 See Daniller, supra note 25.

105 See Marlan, supra note 28, at 853 (explaining that psychedelics were included as Schedule I substances along with cannabis but have now been shown to produce medical benefits).

106 See id. at 860.


108 See Marlan, supra note 28, at 861.


110 Id.; see also Jose Ramon Alonso, LSD as a Therapeutic Agent for Autism, MAPPING IGNORANCE (June 7, 2017), https://mappingignorance.org/2017/06/07/lsd-therapeutic-agent-autism/ [https://perma.cc/C9ET-G2W4]; see also Juan Jose Fuentes et al., Therapeutic Use of LSD in Psychiatry: A Systematic Review of Randomized-Controlled Clinical Trials, FRONTIERS
MDMA emerged in the 1970s, before it became associated with raves, as a possible treatment for mental disorders.\textsuperscript{111} Developed in Germany over one hundred years ago, the drug became the focus of studies in the 1970s.\textsuperscript{112} Before the drug was added to Schedule I, psychiatrists believed that it helped in therapy for depression.\textsuperscript{113} It also showed some promise for patients suffering from Post-Traumatic Stress Disorder.\textsuperscript{114}

As one writer summarized research into psychedelic drugs:

Between 1950 and the mid-1960s there were more than a thousand clinical papers discussing 40,000 patients, several dozen books, and six international conferences on psychedelic drug therapy. It aroused the interest of many psychiatrists who were in no sense cultural rebels or especially radical in their attitudes. It was recommended for a wide variety of problems including alcoholism, obsessional neurosis, and childhood autism.\textsuperscript{115}

Despite the promise of such drugs, they would become taboo.

As with marijuana, prohibitionists were able to criminalize use of these drugs without sound scientific evidence. No one deserves more blame than drug advocate Timothy Leary for the moral panic that led to inclusion of marijuana and psychedelic drugs in Schedule I.\textsuperscript{116} Initially, Leary and other researchers at Harvard University began serious studies of psychedelic drugs, before they began using them for the recreational experience.\textsuperscript{117}

Leary and others became the public face for rebellion during the Vietnam War.\textsuperscript{118} As Michael Pollan, a well-regarded University of California at Berkeley Journalism Professor has written, the uncontrolled recreational use of drugs like LSD produced a media frenzy:

\begin{center}
\textit{Psychiatry}, Jan. 21, 2020, at 3 (reporting that schizophrenic patients may not have benefitted from LSD dosing as other, non-schizophrenic patients did in early studies).
\end{center}

\textsuperscript{111} See Alyssa C. Hennig, \textit{An Examination of Federal Sentencing Guidelines’ Treatment of MDMA (“Ecstasy”), 1 Belmont L. Rev. 267, 279 (2014).}

\textsuperscript{112} Id.


\textsuperscript{115} See Marlan, \textit{supra} note 28, at 866 (quoting \textsc{Lester Grinspoon & James B. Bakalar, Psychedelic Drugs Reconsidered} 192 (1997)).

\textsuperscript{116} See Pollan, \textit{supra} note 29, at 205 (explaining Leary’s contribution to the moral panic surrounding psychedelic drugs).

\textsuperscript{117} See Marlan, \textit{supra} note 28, at 867.

\textsuperscript{118} See id. at 869 (“[P]sychedelics were blamed by those in power for anti-Vietnam War attitudes and the rejection of mainstream culture and social norms by the younger generation.”).
The dark side of psychedelics began to receive tremendous amounts of publicity—bad trips, psychotic breaks, flashbacks, suicides—and beginning in 1965 the exuberance surrounding these new drugs gave way to moral panic. As quickly as the culture and the scientific establishment had embraced psychedelics, they now turned sharply against them. By the end of the decade, psychedelic drugs—which had been legal in most places—were outlawed and forced underground.\textsuperscript{119}

Contributing to public rejection of psychedelics was the perception that drug use contributed to the anti-war movement. Again, as described by Pollan, “the Nixon Administration sought to blunt the counterculture by attacking its neurochemical infrastructure.”\textsuperscript{120} Nixon lumped LSD along with marijuana as a drug used by his political enemies.\textsuperscript{121}

Not surprisingly, Congress included LSD and other psychedelic drugs in Schedule I in 1970.\textsuperscript{122} It would add MDMA to that list later.\textsuperscript{123} Officially, serious research into those drugs had to cease once they were added to Schedule I.\textsuperscript{124}

The common thread through this country’s drug policy is that anti-drug policymakers act in moral panic. Often, overt racism has driven anti-drug policy.\textsuperscript{125} Seldom has anti-drug policy been based on good science. Policymakers have used blunt instruments; for example, despite promise from drugs like LSD, the government’s response was a total ban.\textsuperscript{126} During Reagan’s ill-founded War on Drugs, Congress made the problem even worse by adding severe punishments for drug offenses, often including mandatory minimum prison terms.\textsuperscript{127}

Often, drug offenders have faced long prison terms that seem out of line with other penalties for crimes with much greater social harm. For example, some drug offenders end up in prison for terms longer than defendants found guilty of various forms of

\textsuperscript{119} Pollan, supra note 29, at 3.

\textsuperscript{120} Id. at 58.

\textsuperscript{121} See Pollan, supra note 29, at 58; see also Marlan, supra note 28, at 870.

\textsuperscript{122} See Marlan, supra note 28, at 871–72.

\textsuperscript{123} See Joseph Hartunian, Getting Back on Schedule: Fixing the Controlled Substances Act, 12 ALB. Gov’t L. REV. 199, 205–06 (2018–2019) (explaining how the DEA included MDMA as a Schedule I drug in the late 1980s after its first scheduling was reversed by the First Circuit Court of Appeals).

\textsuperscript{124} See Marlan, supra note 28, at 872 (“The other consequence of scheduling psychedelics is that applications and procedures necessary to conduct research on the substances became extremely burdensome and expensive.”).

\textsuperscript{125} See supra text accompanying notes 58–73.

\textsuperscript{126} Drugs included in Schedule I, like LSD, are characterized as those “with no currently accepted medical use and a high potential for abuse.” Drug Scheduling, U.S. Drug Enf’t Admin., https://www.dea.gov/drug-scheduling [https://perma.cc/W2GF-EPJG].

homicide. For example, Louisiana imposed a sentence of life without the benefit of parole for an offender distributing heroin. In Louisiana, someone found guilty of voluntary manslaughter is subject to a term of imprisonment of forty years but has the chance for parole. Michigan imposed a true life sentence for anyone possessing more than 1,000 grams of cocaine. In Michigan, a sentencing judge may sentence someone found guilty of second-degree murder to any term of years in prison. While, no doubt, heroin and cocaine do not provide benefits like LSD, marijuana, MDMA and psilocybin, empirical data demonstrate long prison terms produce worse outcomes for drug usage than drug treatment and other alternatives to prison.

What about the role of the Supreme Court in limiting such severe sanctions? Ideally, an independent federal judiciary, especially the Supreme Court, should be immune from moral panic. But how has the Supreme Court responded when faced with long prison terms that were the product of moral panic? That is the topic in the next Part.

III. EXCESSIVE SENTENCES

The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Not clear from the text is whether the amendment prohibits excessive punishment. With a few fits and starts, the Court now recognizes that the Eighth Amendment does include a proportionality provision, not only in death penalty cases.

In 1980, in Rummel v. Estelle, the Supreme Court rejected a recidivist’s claim that his life sentence under Texas’ repeat offender statute violated the Eighth

128 In Georgia, for example, an individual charged with manufacturing, delivering, distributing, dispensing, administering, selling, or possessing any controlled substance with intent to distribute for a second or subsequent time faces no less than ten and up to 40 years to life in prison. A person convicted of second-degree murder, on the other hand, faces a sentence of ten to 30 years in prison. Ga. Code Ann. § 16-13-30 (2017); id. § 16-5-1.


130 Id. § 14:31 (amended by 2020 La. Sess. Law Serv. 105 (West)).


132 Id. § 750.317.

133 See infra notes 368–281, 374–75 and accompanying text.

134 See supra Part I.

135 See infra Part III.

136 U.S. Const. amend. VIII.

137 It is worth noting here that while the Eighth Amendment explicitly prohibits excessive bail and excessive fines, it markedly does not disallow excessive punishment. See id.

A deeply divided Court upheld his sentence. While upholding Rummel’s life sentence, the Court begrudgingly recognized that a term of imprisonment might violate the Eighth Amendment. Three years later, the Court held that a true life sentence imposed on a repeat offender violated the Eighth Amendment’s prohibition against Cruel and Unusual Punishment. Again, the Court was deeply divided. Defendant Helm’s record was somewhat more serious than was Rummel’s; but, like Rummel’s record, it included a series of relatively minor, nonviolent felonies. Recognizing that successful challenges to terms of imprisonment would be exceedingly rare, the Court found that Helm’s true life sentence was cruel and unusual. On balance, the severity of the punishment far exceeded the gravity of the offense.

In Rummel, the Court focused on the difficult determination of what might constitute an excessive term of imprisonment. Solem v. Helm borrowed an approach taken by some state courts, which urged lower courts to examine comparable sentences for similar conduct in other states (an interjurisdictional comparison). The Solem Court also suggested that a court compare punishments within the same state (an intra-jurisdictional comparison). That is, a court might compare punishments for different crimes to see whether those sentences were less severe than the sentence imposed on the defendant. The inter- and intra-jurisdictional comparisons seemed


140 The Rummel decision was 5-4, as many of the subsequent cases have been. Id. at 285 (Powell, J., dissenting).

141 Id. at 271 (majority opinion).

142 Solem, 463 U.S. at 303.

143 The Solem decision was also a 5-4 split. Justice Blackmun was the swing vote, joining the majority in both cases. Id. at 304 (Burger, J., dissenting).


145 Solem, 463 U.S. at 303.

146 See id.

147 Rummel, 445 U.S. at 271–78.


149 Solem, 463 U.S. at 291.

150 Id.

151 Id.
to address the *Rummel* Court’s concern about unmeasurable comparisons of different sentences.¹⁵²

Allowing offenders to challenge their sentences too easily presents legitimate policy concerns. Generally, legislatures have broad latitude in determining criminal sentences.¹⁵³ In addition to separation of power concerns, constitutionalizing sentencing review raises federalism concerns.¹⁵⁴ In theory, any state-imposed sentence may become a federal case.¹⁵⁵ The *Solem* Court addressed those concerns when it stated that successful challenges to terms of imprisonment will be exceedingly rare.¹⁵⁶

Subsequent Supreme Court cases made Justice Powell’s statement seem like an understatement. Decided in the heyday of the War on Drugs, *Harmelin v. Michigan*¹⁵⁷ eroded the slim promise in *Solem* that federal courts might limit exceedingly long prison sentences. There, the Court considered whether a true life sentence imposed on an offender in possession with more than 650 grams of cocaine violated the Eighth Amendment.¹⁵⁸ (Harmelin possessed 672 grams.)¹⁵⁹

The Court was more divided than in *Rummel* and *Solem*.¹⁶⁰ Justice Scalia delivered the opinion of the Court, in part, but not on the core issues for purposes of this discussion.¹⁶¹ Five Justices held that Harmelin’s true life sentence did not violate the Eighth Amendment.¹⁶² Writing only for himself and Chief Justice Rehnquist, Justice Scalia, after a long discussion of the original understanding of the Eighth Amendment, concluded that the amendment does not include a proportionality provision.¹⁶³

Justice Kennedy, Justice Powell’s replacement on the Court, wrote for himself and Justices O’Connor and Souter.¹⁶⁴ They agreed with *Solem* that the Eighth Amendment


¹⁵⁴ See id. at 999–1000.


¹⁵⁶ *Solem*, 463 U.S. at 289–90.

¹⁵⁷ *Harmelin*, 501 U.S. at 1008–09.

¹⁵⁸ Id. at 961 n.1.

¹⁵⁹ Id. at 961.

¹⁶⁰ Both *Rummel* and *Solem* were 5–4 decisions, but each produced a majority opinion. *Harmelin* did not. Compare *Rummel v. Estelle*, 445 U.S. 263, 285 (1980), and *Solem*, 463 U.S. at 303, with *Harmelin*, 501 U.S. at 961.

¹⁶¹ *Harmelin*, 501 U.S. at 961.

¹⁶² Id. at 961, 996.

¹⁶³ Id. at 976–84.

¹⁶⁴ Id. at 996 (Kennedy, J., concurring in part).
does include a proportionality principle. However, they did not believe that, absent a threshold showing that the punishment was disproportionate to the offense, a court is required to make intra- and inter-jurisdictional comparisons.

Since Harmelin, the Court has found that true life sentences imposed on juvenile offenders were unconstitutional. Beyond that, the Court has not upheld a challenge to a term of imprisonment imposed on a non-juvenile offender. Decided by another deeply divided Court, a majority rejected a challenge to long terms of imprisonment imposed under California’s Three Strikes law. Again, in Ewing v. California, the Court divided 5–4 on the result. No Justice secured a majority. Justice O’Connor’s plurality opinion largely tracked Justice Kennedy’s Harmelin approach.

One can cobble together a rule from Harmelin and Ewing: four dissenting Justices in both cases still see Solem as setting the standard. In both cases, some Justices in the majority agreed that the Eighth Amendment does allow judicial review of terms of imprisonment. But those Justices subscribe to Justice Kennedy’s view:

A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. In Solem and Weems, decisions in which the Court invalidated sentences as disproportionate, we performed a comparative analysis of sentences after determining that the sentence imposed was grossly excessive punishment for the crime committed.

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165 Id.

166 Id. at 1004. As in Harmelin’s case, not being able to rely on such comparisons reduces an offender’s chances of success. As indicated in the dissent, Michigan’s sentencing scheme was extreme by comparison to other jurisdictions. In addition, Justice Kennedy stated that one overriding concern was to be sure that judges did not impose their own values in place of the legislature’s evaluation. Ironically, the most objective measure of disproportionality may be the intra- and interjurisdictional comparisons. Surely, if the only state in which one might receive a long prison sentence is, in this case, Michigan, that is strong evidence that the punishment is unusual, if nothing else.


170 Id. at 32.

171 Id. at 14–23.

172 Id. at 35 (Breyer, J., dissenting) (stating that Ewing’s case was similar enough to Solem and that the two cases should reach the same conclusion).

173 Id. at 20 (plurality opinion).

But as Harmelin and Ewing demonstrate, the first hurdle is difficult to clear. Ewing and Harmelin reflect moral panic. California’s Three Strikes law resulted from the overreaction to fears about crime. The law passed with huge majorities both in the legislature and then by way of voter initiative when the facts of the kidnapping, rape, and murder of Polly Klaas dominated the news cycle. California’s Three Strikes law became the most extreme of all three strikes laws enacted in that period of national moral panic over the perception of rising crime rates. As Professor Frank Zimring and his coauthors demonstrated in Punishment and Democracy: Three Strikes and You’re Out in California, the law led to unnecessarily long sentences, unnecessary to protect the public.

Harmelin involved anti-drug legislation enacted in 1978, shortly before President Reagan announced his War on Drugs. The Michigan legislature expanded its drug laws, extending long prison sentences for drug offenses in the 1980s as well. The Court’s decision came in the middle of the War.

One might hope that the independent federal judiciary would provide relief to protect against legislation resulting from moral panic. Sadly, in these cases, the Court did not do so.

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177 See Sze, supra note 175, at 1055 (“Touted as ‘the toughest criminal law in the country,’ three strikes, flaws and all, became the litmus test for toughness on crime.” (quoting Carl Ingram, Support Sought for ‘3 Strikes’ Alternative, L.A. Times, June 10, 1994, at A3)).


182 See CHEMERINSKY, supra note 8, at 5–6 (describing his own hope-turned-disappointment that the Supreme Court would protect individuals’ rights when they were threatened).

Harmelin involved cocaine, a drug that has fewer beneficial uses than other drugs, including marijuana. By way of transition, one might ask how the Court would apply its proportionality cases to long prison terms in marijuana cases. We need not look far for the answer.

Police arrested Roger Davis for the possession of less than nine ounces of marijuana. A Virginia jury convicted him of two counts of possession of marijuana with intent to distribute. The jury imposed a fine of $10,000 and a term of imprisonment of 20 years on each count. The prison terms were to run consecutively. Although based on a conviction from the 1970s, the case came to the Supreme Court on a habeas petition in the 1980s, as President Reagan’s War on Drugs was picking up steam.

The Supreme Court reversed the Fourth Circuit Court of Appeals, which had found that the sentence violated the Eighth Amendment. The opinion acknowledged language in Rummel, supporting an Eighth Amendment proportionality principle. However, the per curiam opinion accused the lower court of failing to recognize how truly limited any such principle might be. The Court of Appeals, according to the

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186 Id. at 371.

187 Id.

188 Id.


190 Hutto, 454 U.S. at 372.

191 Id. at 373 (“In rejecting that argument, we distinguished between punishments-such as the death penalty-which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration. This distinction was based upon two factors. First, this ‘Court’s Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.’ And second, the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make ‘any constitutional distinction between one term of years and a shorter or longer term of years.’”).

192 Id. at 374–75.
per curiam opinion, consciously or unconsciously disregarded Rummel’s teachings.\(^{193}\)

In summing up its disagreement with the Court of Appeals, the opinion stated:

And arguments may be made one way or the other whether the present case
is distinguishable, except as to its facts, from Rummel. But unless we wish
anarchy to prevail within the federal judicial system, a precedent of this Court
must be followed by the lower federal courts no matter how misguided the
judges of those courts may think it to be.\(^{194}\)

Ouch. That strong language suggests that the Court had little concern about such
a long term of imprisonment.

While Davis preceded Solem by a year,\(^{195}\) Solem has had little impact in the past
37 years and has been eroded by Harmelin and Ewing.\(^{196}\)

An occasional court has disagreed with the Court’s begrudging approach to claims
of excessive punishment.\(^{197}\) Other courts have taken to the extreme the Court’s
statement that successful challenges to terms of imprison shall be exceedingly rare.\(^{198}\)
Along with cases like Hutto v. Davis and Harmelin v. Michigan, lower courts’
resistance to overturn long prison terms invites the following question: Does Solem
still have a pulse?

Perhaps.

IV. CHANGING PERCEPTIONS OF MARIJUANA AND BEYOND

Timing is everything, of course. California’s Proposition 215, legalizing medical
marijuana, was the product of the HIV/AIDS crisis and then-Governor Pete Wilson’s
rigid adherence to the view of marijuana as the demon weed, despite emerging support

\(^{193}\) Id.

\(^{194}\) Id.


\(^{196}\) See supra notes 157–94.

\(^{197}\) See, e.g., Ramirez v. Castro, 365 F.3d 755, 756–57 (9th Cir. 2004). But see Davis v.
Davis, 585 F.2d 1226, 1233 (4th Cir. 1978).

\(^{198}\) For example, the United States Court of Appeals for the Fifth Circuit, en banc, upheld a
true life sentence imposed on a heroin addict who set up a drug deal between his supplier and
two undercover agents. The majority’s opinion included the following comparison of murder
and distribution of heroin:

Except in rare cases, the murderer’s red hand falls on one victim only,
however grim the blow; but the foul hand of the drug dealer blights life after
life and, like the vampire of fable, creates others in its owner’s evil image-
others who create others still, across our land and down our generations,
sparing not even the unborn.

The Fifth Circuit ignored the reality of heroin distribution. Often, as in the defendant’s case,
one becomes a distributor after having been a victim of someone else’s conduct in persuading
the offender to become a heroin user and eventually an addict. Terrebonne v. Butler, 820 F.2d
156, 157–58 (5th Cir. 1988).
for its limited medical use. The proposition’s adoption would become a pivotal moment in the march towards legalization nationwide.

Despite well-recognized medical uses for marijuana, until the HIV/AIDS crisis, medical proponents were few and far between after adoption of the CSA. Some HIV/AIDS patients used marijuana to alleviate various symptoms, alerting some

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199 See Letter from Pete Wilson, Governor of California, to the California Senate (Sept. 30, 1994) [hereinafter Letter from Pete Wilson], http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_1351-1400/sb_1364_vt_940930 [https://perma.cc/DJ69-MZ9H] (Wilson asserting no reason to sign SB 1364 into law due to a perceived preemption by existing federal law, the FDA’s findings that THC was an effective medical treatment alternative, and concern that physicians would be placed in danger of facing prosecution); see, e.g., Tracie Cone, Reefer Madness: Law-Abiding Regular Folks Descend Into a Netherworld to Get Relief for Themselves or Others with Grave Diseases. Why Morphine and Not Marijuana?, SAN JOSE MERCURY NEWS, May 14, 1995, at 12 (citing a statewide survey showing that although very few Californians wanted to legalize marijuana, 66% of those surveyed would support a law allowing medicinal use of marijuana with a doctor's prescription). See generally Clinton A. Werner, Medical Marijuana and the AIDS Crisis, J. CANNABIS THERAPEUTICS, 2001, at 17, 20–21 (detailing the use of marijuana as a treatment for AIDS during the AIDS pandemic).

200 See Michael Berkey, Mary Jane’s New Dance: The Medical Marijuana Legal Tango, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 417, 429–30 (2011) (noting that following the passage of Proposition 215, the Northern District of California enjoined the Department of Justice and the Department of Health and Human Services from revoking physicians’ DEA registrations for prescribing medical marijuana, and how the U.S. Court of Appeals for the Ninth Circuit held that the physicians’ First Amendment rights permitted them to issue recommendations of medical marijuana); see also Michael Vitiello, Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy, 31 U. MICH. J.L. REFORM 707, 737–41 (1998) (explaining the defense of necessity against a charge for the possession of medicinal marijuana and noting how the adoption of Proposition 215 provided an express defense against the possession of marijuana within the state of California, a basis of which could set a precedent for other laws in other states).

201 See, e.g., Hearing on S.B. 535 Before the Assemb. Comm. on Higher Education, 1996-1997 Reg. Sess. (Cal. 1996) (bill analysis) (recognizing evidence that smoked marijuana was more effective in combating nausea in cancer patients and was safer than the drug’s legal, oral counterpart, Marinol).

physicians treating HIV/AIDS patients to its potential benefits. Other patients, for example, some cancer patients, also got relief from marijuana use.

Activists in California pushed for legislation allowing the use of marijuana for enumerated medical conditions. Governor Wilson vetoed one such narrow bill. He argued that allowing medical use of marijuana would change public perceptions by creating the impression that because marijuana was “medical,” it was therefore beneficial. He also sounded the usual prohibitionist rhetoric about the evils of marijuana. As developed below, he was correct in believing that legalizing medical marijuana would open the door to its wider public acceptance. But his claims about marijuana’s social harms has been proven false in large part.

Wilson’s veto of a narrow medical marijuana bill resulted in reformers’ recourse to the initiative process. Unlike the proposed legislation, Proposition 215 included an intentionally open-ended provision that a physician could recommend marijuana for any qualifying condition. As the late Dennis Peron, one of the initiative’s

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204 Id.

205 Vitiello, supra note 200, at 759; Marijuana by Prescription, SACRAMENTO BEE, Jan. 13, 1979 (on file with the University of Michigan Journal of Law Reform); Marijuana Benefits?, UNION, Jan. 12, 1979 (on file with the University of Michigan Journal of Law Reform).

206 See Letter from Pete Wilson, supra note 199.

207 Id.

208 Id.


210 Despite the extreme claims by opponents, many of the claimed harms have not occurred. Compare David Boaz, A Drug-Free America – Or a Free America?, 24 U.C. DAVIS L. REV. 617, 620–22 (1991) (noting the lack of effect anti-drug laws in the War on Drugs had for curbing drug arrests or reducing their number), with Roxanne Nelson, Does Legalizing Marijuana Increase Teen Use?, AM. J. NURSING, Oct. 2017, at 18 (noting that, while some data is conflicting, marijuana use among teenagers has remained at the same numbers prior to legalization).

211 See Greg Lucas, Bill Flow Slows As Senate, Assembly Fight Over Funds, S.F. CHRON., Sept. 13, 1995, at A16 (observing that at a time when Governor Wilson’s veto of Assembly Bill 1529 was still speculative, Dennis Peron claimed he had already drafted an initiative to make marijuana legal for seriously ill patients).

212 See CAL. HEALTH & SAFETY CODE §11362.5(b)(A) (West 1998) (stating that one of the purposes of the Compassionate Use Act of 1996 is “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia,
organizers, famously stated, all marijuana use is medical.\footnote{Peron was quoted as saying, “I believe all marijuana use is medical—except for kids.” Editorial, \textit{Marijuana for the Sick}, N.Y. TIMES, Dec. 30, 1996, at A14.} The open-ended language gave anyone interested in the new law’s protections access to marijuana because of the broad interpretation of “any qualifying condition” for which marijuana could provide relief.\footnote{See, e.g., \textit{Hung Jury Frees Man in Pot-Growing Case: Podiatrist Claimed Plants Were Medicinal}, SACRAMENTO BEE, Aug. 22, 1997, at B3.}

Proposition 215 had a major impact in moving the country towards legalization of marijuana.\footnote{See Vitiello, \textit{supra} note 200, at 737–40 (noting that the passing of Proposition 215 has allowed for the creation of more cannabis clubs as well as a basis to invoke the medical necessity defense for marijuana).} Its impact was not inevitable. A few moments in history are worth one’s attention.

The first occurred not long after California adopted Proposition 215. Federal agencies gave notice that “a doctor’s ‘action of recommending or prescribing Schedule I controlled substances is not consistent with the “public interest” (as that phrase is used in the federal Controlled Substances Act)’ and that such action would lead to revocation of the physician’s registration to prescribe controlled substances.”\footnote{Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002).} The government sent letters indicating the government’s position to various medical organizations indicating that doctors who recommended marijuana risked revocation of their authority to prescribe drugs.\footnote{Id. at 633.} Doctors potentially faced prosecutions for aiding and abetting patients’ violation of the Controlled Substances Act as well.\footnote{Id.}

The Ninth Circuit upheld an injunction limiting the federal government’s authority to investigate a doctor merely for recommending medical use of marijuana.\footnote{Id. at 639.} \textit{Conant v. Walters} relied, in part, on the traditional distinction that a defendant must intend to aid (not merely have knowledge that her conduct will aid) a person to be guilty as an accomplice.\footnote{Id. at 635.} In addition, the court recognized First Amendment implications of communications within a physician-patient relationship.\footnote{Id. at 637.} The result of the court’s decision was that, without more, a doctor’s recommendation of marijuana for medical use was not a proper basis for federal intervention.\footnote{Id. at 636.}
Although some physicians may have been willing to risk losing prescribing privileges, Conant opened the way for many doctors to enter the field. Many did so as well, adding to the proliferation of medical marijuana dispensaries.223 California entered a period of chaos.224 Some local law enforcement agencies worked with medical marijuana advocates to regulate the industry.225 Other agencies strongly opposed the emerging industry.226 Cooperation with federal authorities at times led to ugly confrontations between medical marijuana proponents and law enforcement authorities.227 Shutting down benign marijuana facilities caring for seriously ill patients shifted public sentiment against law enforcement.228

President George W. Bush’s Department of Justice’s aggressive stance against medical marijuana became an issue in the 2008 Presidential election campaign.229 Candidate Barack Obama promised a gentler approach to the subject.230 Obama’s election led to a new era in the relationship between the federal government and states that wanted to legalize medical and then recreational marijuana

223 See Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?, 91 OR. L. REV. 869, 881 (2013) (noting that the 2009 Justice Department’s memorandum instructing a uniform enforcement of core federal enforcement priorities on the enforcement of marijuana laws, against the CSA’s disclaimer intending to preempt the field of regulation, was seen as an opportunity to open more marijuana dispensaries).

224 See generally Michael Vitiello, Chapter 5: State Regulatory Schemes 14–15 (Jan. 7, 2019) (unpublished manuscript) (on file with author) (noting that Proposition 215 created several conflicts between lower courts and law enforcement, such as a defense for possessing marijuana but not transporting it, the definition of a physician’s “recommendation” of marijuana, and repeated instances of law enforcement targeting bona fide medical marijuana users).

225 Id.

226 Id. at 16.

227 See, e.g., PETER HECHT, WEED LAND 186–202 (2014) (detailing several instances where federal law enforcement had come into conflict with marijuana cultivation in California, including Matt Cohen’s marijuana dispensary in Mendocino County and Oaksterdam University’s marijuana dispensary, Oaksterdam Blue Sky); see also Vitiello, supra note 224, at 15.

228 See, e.g., HECHT, supra note 227, at 198–202.

229 See Alex Johnson, DEA to Halt Medical Marijuana Raids, MSNBC (Feb. 27, 2009, 5:42 PM), https://web.archive.org/web/20101212235001/http://www.msnbc.msn.com/id/29433708/ns/health-healthcare/ (“‘My attitude is if the science and the doctors suggest that the best palliative care and the way to relieve pain and suffering is medical marijuana, then that’s something I’m open to,’ Obama said in November 2007 at a campaign stop in Audubon, Iowa. ‘There’s no difference between that and morphine when it comes to just giving people relief from pain.’”); see also Sarah Trumble & Nathan Kasai, The Past – and Future – of Federal Marijuana Enforcement, THIRD WAY (Feb. 12, 2017), https://www.thirdway.org/memo/the-past-and-future-of-federal-marijuana-enforcement [https://perma.cc/UHR2-KTLS].

230 Trumble & Kasai, supra note 229.
within their borders.\textsuperscript{231} Not long after Obama’s election, the Justice Department issued a memorandum, the Ogden memo, laying out federal law enforcement priorities.\textsuperscript{232} In effect, the memo signaled that if states adhered to certain federal law enforcement priorities, the DOJ would give states room to regulate their industries.\textsuperscript{233}

In California, many marijuana proponents, often recreational marijuana proponents, took the Ogden memo as a green light to open thinly disguised “medical” dispensaries.\textsuperscript{234} Ironically, that led to more raids during Obama’s first term than during the Bush administration.\textsuperscript{235}

Other states, notably Colorado, were more circumspect.\textsuperscript{236} Colorado law required careful monitoring from seed-to-sale.\textsuperscript{237} The federal government’s tolerance of Colorado’s medical marijuana industry was a pivotal moment.\textsuperscript{238} Proponents of


\textsuperscript{232} See D. Douglas Metcalf, Federal Supremacy and Arizona’s Medical Marijuana Act, ARIZ. ATT’Y, July/Aug. 2011, at 22, 24 (noting how the memo directed attorneys to focus resources on individuals in clear compliance with existing state laws, citing certain examples).

\textsuperscript{233} Id. at 24.


\textsuperscript{235} Lucia Graves, Obama Administration’s War on Pot: Oaksterdam Founder Richard Lee’s Exclusive Interview After Raid, HUFF. POST (Apr. 18, 2012, 10:15 AM), http://www.huffingtonpost.com/2012/04/18/obama-war-on-weed-richard-lee-oaksterdam-raid_n_1427435.html [https://perma.cc/U9U7-YQAK] (“Since then, the administration has unleashed an interagency cannabis crackdown that goes beyond anything seen under the Bush administration, with more than 100 raids, primarily on California pot dispensaries, many of them operating in full compliance with state laws. Since October 2009, the Justice Department has conducted more than 170 aggressive SWAT-style raids in 9 medical marijuana states, resulting in at least 61 federal indictments, according to data compiled by Americans for Safe Access, an advocacy group.”).

\textsuperscript{236} See Joe Mozingo, Colorado’s New Growth Industry: Pot, L.A. TIMES (Jan. 26, 2013, 12:00 AM), http://www.latimes.com/news/local/la-me-pot-colorado-20130127-0,5071536.story [https://perma.cc/SW4R-73WA] (“In Colorado, sellers of medical marijuana must go through a background check, pay between $15,000 and $20,000 a year in licensing fees and submit to regular inspections by the state. Every plant is tagged and numbered, from seed to sale. No such system exists in California.”).

\textsuperscript{237} Id.

recreational marijuana saw that tolerance as an invitation to put recreational marijuana initiatives on the ballot in Colorado and Washington in 2012. Proponents timed their efforts to coincide with the presidential election when young voters were likely to vote.

The initiatives passed in both states. Again, the Obama administration issued a memorandum, the Cole memo, stating federal law enforcement guidelines. If a state adhered to those priorities, it would be free to regulate its recreational marijuana industry.

In 2014, Congress passed a rider to the federal omnibus spending bill. Known first as the Rohrabacher-Farr Amendment, it prohibits the Justice Department from spending funds to interfere with state laws implementing medical marijuana laws.

The rest is history. In rapid succession, other states have adopted laws allowing medical or recreational marijuana sales. States have done so in part because of the experience in states like Colorado and Washington. Indeed, today, most Americans live in states where medical marijuana is available in one form or another and millions

239 See Michael Vitiello, Joints or the Joint: Colorado and Washington Square off Against the United States, 91 OR L. REV. 1009, 1012 (2013) (detailing Colorado Assembly Bill 64 and Washington’s statute from Initiative 502).


241 Vitiello, supra note 61, at 808.


243 Id.


245 Id.


live in states where recreational marijuana may be purchased without violating state law.\textsuperscript{248}

States have legalized marijuana, in part, because it produces tax revenues.\textsuperscript{249} Colorado, for example, has received over $1 billion in tax revenues from its industry, funds used for various socially beneficial programs.\textsuperscript{250} Other states, including Washington, have benefitted from revenues generated by the industry.\textsuperscript{251} The industry also employs thousands of workers, with some estimates as high as 300,000 workers.\textsuperscript{252} During the COVID-19 epidemic, some states like California have declared dispensary workers as essential.\textsuperscript{253}

Billions of dollars have flowed into the industry.\textsuperscript{254} Some marijuana companies are publicly traded.\textsuperscript{255} Neighbors to the north and south have changed their marijuana laws.\textsuperscript{256}

\begin{itemize}
\item \textsuperscript{248} Marijuana Legal States, supra note 247.
\item \textsuperscript{249} See generally Mystica M. Alexander & William P. Wiggins, The Lure of Tax Revenue from Recreational Marijuana: At What Price?, 15 U.C. DAVIS BUS. L.J. 131, 136–38 (detailing the taxation of marijuana in Colorado and Washington and noting the background precedent of overturning prohibition, increasing tax revenues as a result); see also Danielle Grant-Keane, The Unattainable High of the Marijuana Industry, WIS. LAW., April 2017, at 14, 15 (noting Colorado’s 77% increase in total revenue between taxes, licenses, and fees from the legalization of marijuana).
\item \textsuperscript{253} Reed Albergotti, Weed Is Deemed ‘Essential’ in California, but Many Businesses Are on the Brink of Failure, WASH. POST (Apr. 14, 2020, 7:00 AM), https://www.washingtonpost.com/business/2020/04/14/california-weed-industry-coronavirus/ [https://perma.cc/T9LL-2F6Q].
\item \textsuperscript{254} Sean Williams, Marijuana’s Billion-Dollar Pot Stocks: Only 7 Remain, NASDAQ (Apr. 9, 2020 7:21AM), https://www.nasdaq.com/articles/marijuanas-billion-dollar-pot-stocks%3A-only-7-remain-2020-04-09 [https://perma.cc/TRK4-A5FA].
\item \textsuperscript{256} Cannabis Act, S.C. 2018, c 16 (Can.); see also Kyle Jaeger, Mexican Supreme Court Again Extends Marijuana Legalization Deadline, MARIJUANA MOMENT (Apr. 17, 2020), https://www.marijuanamoment.net/mexican-supreme-court-again-extends-marijuana-legalization-deadline/ [https://perma.cc/495C-LLBS].
\end{itemize}

announcement, “the money [invested in the industry] is not red money or blue money. It is green money.”

The period of federal forbearance benefitted legalization proponents. Apart from wanting increased tax revenues, policymakers saw emerging empirical evidence tipping in favor of legalization. In January 2017, the National Academies of Sciences, Engineering, and Medicine published a report summarizing the results from studies of the benefits and harms from marijuana use. Most of the news was good for the industry. While some studies demonstrated, for example, harm to brain development among young people, most of the results debunked the prohibitionists’ claims.

Other studies similarly support legalization proponents. One study focused on the claim that marijuana users committed violent acts. In a study comparing counties in south Washington and northern Oregon (before Oregon legalized recreational marijuana), researchers found that the level of violence declined in Washington and remained steady in Oregon. Other researchers have reported benefits in dealing with the opioid crisis: marijuana provides an effective alternative to opioids in pain management at the outset and may help opioid users segue off opioids after they have become addicted. The scale has tipped in favor of legalization of marijuana.


268 See Amanda Goff Connors, Public Policy Arguments for Enacting Kentucky’s Cannabis Freedom Act, 9 KY. J. EQUINE AGRIC. & NAT. RES. L. 237, 257–66 (2017) (arguing that the proposed Cannabis Freedom Act would reduce the number of arrests made for marijuana and the resources spent on them, which would similarly reduce arrests made disproportionately toward black people for possession; an increase in tax revenue for public schools and similar state projects; and that the arguments that marijuana will increase the number of DUls regarding marijuana, increase the adoption rate of children for the drug, and that more people would overdose on marijuana are all unconvincing compared to the benefits); see also Mark A.R. Kleiman, The Public–Health Case for Legalizing Marijuana, NAT’L AFFS. (2019), https://www.nationalaffairs.com/publications/detail/the-public-health-case-for-legalizing-marijuana [https://perma.cc/YKQ9-SX4X].


270 Id.

271 Id. at 13–22, 270.

272 Davide Dragone et al., Crime and the Legalization of Recreational Marijuana, 159 J. ECON. BEHAV. & ORG. 488 (2019).

Sanjay Gupta’s multipart series Weed demonstrates the dramatic changing perceptions about marijuana.274 At the outset, Gupta was a skeptic about marijuana’s medical benefits.275 By the end of the series, he was a convert276

One dramatic change in public perception came about because of benefits to young children who suffer from Dravet Syndrome, a severe form of epilepsy afflicting infants and presenting them with lifetime challenges to normal development.277 Gupta’s show followed families as they traveled to Colorado to a medical marijuana farm that produced a special strain of marijuana.278 Weed introduced viewers to the families of the children and their children suffering from Dravet Syndrome and the marijuana producers who were developing a special strain that provide the children relief. Viewers learned about the relief provided by marijuana and about the difficulties faced by the children’s families.279 For example, they learned that parents feared crossing state lines with marijuana products.280 Even former Utah Senator Orrin Hatch announced his support for allowing the study of marijuana derivative products for use in such cases.281

After years of resisting any rescheduling efforts, the federal government approved Epidiolex®, a marijuana-based product.282 Epidiolex® is a Schedule V drug.283 Marijuana supporters suggest that this is only the beginning of the development of marijuana-based products.284

275 Id.
276 Id.
278 WEED – A CNN Special Report by Dr. Sanjay Gupta, supra note 274.
279 Id.
280 Id.
284 See FDA Approves First Drug, supra note 282.
Governor Wilson’s concern that allowing medical use of marijuana would change perception of the substance has proven to be true. Over 90% of Americans support legalization of medical marijuana. Two-thirds of Americans support legalization of marijuana for recreational purposes as well.

Proposition 215 and the Ninth Circuit’s decision in Conant began a process of normalizing marijuana. Its quasi-legal status allowed Americans to see that prohibitionists’ claims were exaggerated. Forbearance during the Obama administration led to expansion from medical to recreational use of marijuana. The money that has flowed into the industry and the many thousands of jobs created by the industry have created economic leverage needed to pass additional legislation to protect the industry. Throughout, legalization proponents have been able to demonstrate that the extravagant claims of prohibitionists are just that.

Exhaustion with the War on Drugs is having other effects as well. More surprising than the increased support for legalization of marijuana is the call for medical use of other Schedule I drugs. For example, Denver became the first city to decriminalize psilocybin. States like Oregon may legalized “shrooms,” psychedelic mushrooms,

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285 See Letter from Pete Wilson, supra note 199.
286 Daniller, supra note 25.
287 Id.
291 See Vitiello, supra note 202, at 1368–72.
292 See, e.g., Michael H. Andreae et al., An Ethical Exploration of Barriers to Research on Controlled Drugs, AM. J. BIOETHICS, March 2016, at 36, 40 (“Increased knowledge about therapeutic benefit of substances currently classified as Schedule I, II, or III could lead to improved treatment options for HIV+ patients and thus reduce their abuse of inefficient or illegal alternatives. Information from studies of these drugs could reduce cost burdens on the health care system by promoting the prescription of effective treatments, reducing inappropriate drug use, optimizing and integrating indicated administration of controlled substances, and avoiding the untoward societal effects associated with illegal drug use.”). See generally Kreit, supra note 77, at 352–54 (outlining the restrictive criteria of the Controlled Substances Act’s definition of Schedule I and how it stymies research, and how marijuana’s legalization had made it a special case under its previous Schedule I classification).
293 Esther Honig, In Close Vote, Denver Becomes 1st U.S. City to Decriminalize Psychedelic Mushrooms, NPR (May 9, 2019, 3:22 AM), https://www.npr.org/sections/health-
which hold promise for treatment for various conditions. As Professor Dustin Marlan has observed:

[A] new wave of research from major universities such as NYU, Johns Hopkins, UCLA, and Imperial College London finds that psychedelics do not lead to dependence, are generally considered physiologically safe, and have demonstrated medical benefits. In fact, psychedelics are being shown to be viable therapeutic alternatives in treating depression, substance use disorders, and other mental illnesses, and even to increase the well-being of individuals without health problems via the powerful mystical or psychological experiences they induce.

In effect, researchers are rediscovering what researchers learned in the 1950s, 1960s, and 1970s about drugs like LSD, psilocybin and MDMA. Some of this research is underground. Some therapists engage in various treatment modalities, including microdosing of psychedelics cautiously. But evidence of the success of such projects is coming above ground, increasing the call for rethinking America’s prohibition against the use or at least study of such substances.

Again, as Marlan has written:

[Referenda for the decriminalization of psilocybin are now set to reach voters in Oregon and California in 2020. Legislation has also been proposed in Iowa to remove the substance from the state’s controlled substances list. Billionaires are investing heavily in psychedelics research. Microdosing—the practice of ingesting a very small dose of a psychedelic while an individual goes about daily life—is a common and accepted practice among many artists and entrepreneurs. Popular intellectuals and entertainers advocate for the use of psychedelics as tools for personal development, at times reaching millions of people on podcasts and other new media. Myriad popular periodicals have published recent editorials on psychedelics.]

Michael Pollan has brought all this to the nation’s attention in his best-selling book *How to Change Your Mind.* The documentary film *Fantastic Fungi* preaches a

 shots/2019/05/09/721660053/in-close-vote-denver-becomes-first-u-s-city-to-decriminalize-psychedelic-mushrooms [https://perma.cc/DZ4Q-E5P8].


295 Marlan, supra note 28, at 853.

296 Id. at 857–65.

297 See Pollan, supra note 29, at 332–37.

298 Marlan, supra note 28, at 854.

299 Pollan, supra note 29.
similar message of the miraculous natural benefits of mushrooms, including psychedelic mushrooms.\textsuperscript{300}

All this resonates with Americans today. Proponents offer hope for treating depression more successfully than possible with once-considered-miracle drugs like Prozac.\textsuperscript{301} The earlier studies about using psychedelics to treat alcoholism are reemerging.\textsuperscript{302} Today, almost any alternative to opioids or any substance to help opioid addicts produces excitement.\textsuperscript{303}

Some policymakers are pushing for even more dramatic changes to drug laws. For example, in 2020, Oregon voters approved an initiative decriminalizing possession of a small amount of drugs, including heroin and cocaine.\textsuperscript{304} Philadelphia has defied the federal government by allowing private organizations to set up facilities to allow illegal drug users to “shoot up” under safe conditions.\textsuperscript{305}

Efforts like those in Oregon and Philadelphia are reflective of an understanding about how ineffective prison is as a remedy for drugs. Other nations, including Portugal, have effectively decriminalized drug use.\textsuperscript{306} Although debated, such policies seem to work.\textsuperscript{307}

These developments are not just change in public perceptions about the costs and benefits of drug use.\textsuperscript{308} The changes in perception are based, in part, on empirical

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\item[300] Fantastic Fungi (Moving Art 2019).
\item[301] See Pollan, supra note 29, at 375–81. See generally Mason Marks, Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 75–76 (2018) (noting Prozac as the first selective serotonin reuptake inhibitor (SSRI) to be used for treating conditions such as depression and OCD, with speculative results).
\item[302] See David E. Nichols, Psychedelics, 68 PHARMACOLOGICAL REV. 264, 323 (2016).
\item[303] See, e.g., Marlan, supra note 28, at 885–92 (alluding to the idea of a psychedelic identity created from the use of psychedelic drugs, and how its decriminalization would lead to the acceptance and recognition of these groups).
\item[306] Hannah Laqueur, Uses and Abuses of Drug Decriminalization in Portugal, 40 L. & SOC. INQUIRY 746, 751–52 (2015) (discussing Portugal’s history leading up to the decriminalization of drugs and how the law eliminated the possibility of criminal sanctions for use).
\item[307] Id. at 759.
\item[308] See Jordan Blair Woods, A Decade After Drug Decriminalization: What Can the United States Learn From the Portuguese Model?, 15 U.D.C. L. REV. 1, 19–25 (2011) (noting no significant increase in drug use, a decline in drug-related mortality, more international
\end{enumerate}
\end{footnotesize}
evidence, not moral panic. The debate shifts when legalization proponents can back their claims with good science. Prohibitionists are not keeping pace.

Given these profound changes in attitudes about many Schedule I drugs, how does this play out in criminal sentencing? That is the final topic of this Article.

V. AN INVIGORATED EIGHTH AMENDMENT?

In rejecting the defendant’s claim that his prison sentence imposed under California’s Three Strikes law was excessive, Justice O’Connor stated that an argument about excessive punishment should be made to the legislature, not the Court. As a general proposition, that may be true for separation of power and federalism reasons. However, the Court needs to be available as a safety valve when legislatures act out of moral panic.

The United States has too many people in prison, often for far longer than needed to assure public safety. Many are in prison because of the War on Drugs. That has led to legislation lessening sentences and reducing prison populations. For cooperation from the Portuguese law enforcement to stymie drug markets, and a reduction in the percentage of prison sentences for drug-related offenses).

309 Id.

310 Id.

311 See, e.g., Douglas Husak, Predicting the Future: A Bad Reason to Criminalize Drug Use, 2009 Utah L. Rev. 105 (2009) (explaining that certain arguments against the decriminalization of drugs, such as the monetary price of drugs dropping and retaining the fear of punishment to deter drug use, are flawed and have neither the enticing benefit toward nor deterrent from drug use that their proponents believe).


314 See supra Part II.


316 Id. at 60. Although Professor Pfaff had questioned whether Alexander overstates the correlation between the War on Drugs and the massive increase in our prison population, he had to concede that the War did contribute to that increase. See John Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform 21–23 (2017).

example, the First Step Act provides some federal prisoners with relief.\textsuperscript{318} It includes a provision allowing for retroactive application of its provisions.\textsuperscript{319} That should allow relief for some prisoners now serving long terms of imprisonment. It does not provide relief for all prisoners and does nothing for state prisoners.\textsuperscript{320}

Despite those developments, some offenders still face extremely long sentences for drug offenses. Some states still impose severe penalties for drug offenses. Some, like Louisiana, have repeat offender laws that can lead to extremely long sentences.\textsuperscript{321} For example, Bernard Noble had prior drug convictions.\textsuperscript{322} His conviction for possession of two marijuana cigarettes netted him a sentence of 13 years at hard labor in Louisiana’s state prison.\textsuperscript{323} Concerted efforts on his behalf led to his release after 7 years in prison.\textsuperscript{324}

Similar cases are not hard to find. For example, Gulf War Veteran Derek Harris faces a true life sentence under Louisiana’s habitual offender statute.\textsuperscript{325} His last crime was the sale of a small amount of marijuana to an undercover agent.\textsuperscript{326}

Other Southern states like Mississippi impose long prison terms for marijuana offenses. For example, an African American man received an 8-year prison term for possession of marijuana, allegedly for personal, medical use.\textsuperscript{327} Ditto for Alabama.


\textsuperscript{319} Id. at 5220–21.


\textsuperscript{321} LA. STAT. ANN. § 40:966(C)(2) (2019); id. § 40:966(C)(2)(f)(i) (“On a fourth or subsequent conviction the offender shall be sentenced to imprisonment with or without hard labor for not more than eight years, shall be fined not more than five thousand dollars, or both.”).

\textsuperscript{322} Nicole Lewis & Maurice Chammah, Seven Years Behind Bars for Two Joints — And Now He’s Free, MARSHALL PROJECT (Apr. 12, 2018, 6:36 AM), https://www.themarshallproject.org/2018/04/12/seven-years-behind-bars-for-two-joints-and-now-he-s-free [https://perma.cc/34KS-MVWL].

\textsuperscript{323} Id.

\textsuperscript{324} Id.


where a man in his 70s received a life sentence for possession of about three pounds of marijuana.328

The previous examples involve marijuana. Prison terms for possession or distribution of drugs like LSD are comparable or longer. In 2016, President Obama granted Timothy Tyler a pardon.329 Tyler served 26 years of a life-sentence for selling marijuana and LSD to a federal agent.330

Even with changed attitudes, the United States and many states still impose long prison sentences for drug offenses.331 On the assumption that their claims are not procedurally barred, how might they argue that their terms of imprisonment are excessive?332

Sadly, as argued above, much of the drug policy in the United States has been driven by moral panic.333 The Supreme Court has succumbed to that panic as well. Even if Justices have had doubts about extreme punishments, as Justice Kennedy explained in his concurring opinion in Harmelin, the courts should defer to legislatures.334 After describing some of the horrors associated with drug usage, he observed:

These and other facts and reports detailing the pernicious effects of the drug epidemic in this country do not establish that Michigan’s penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole.335

That is, federal courts must almost always defer to legislative prerogative in sentencing matters.


330 Id.


333 See supra Part II.


335 Id.
Some lower federal courts demonstrate similar views about drugs. *Terrebonne v. Butler* involved an offender who received a true life sentence for selling heroin.\textsuperscript{336} Writing for the majority of the Fifth Circuit en banc, Judge Gee wrote about the scourge of drug usage, suggesting that it is comparable to murder:

Except in rare cases, the murderer’s red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner’s evil image—others who create others still, across our land and down our generations, sparing not even the unborn.\textsuperscript{337}

That is powerful rhetoric. However, it is yet another example of moral panic.

To get at the moral panic, examine the facts in *Terrebonne*. The offender was a 21-year-old heroin addict who was approached by two undercover police officers to get them heroin.\textsuperscript{338} He received 3 “bindles” of heroin for serving as a conduit between the two officers and his supplier.\textsuperscript{339} He was typical of many drug addicts. No doubt, he began using heroin with his associates who themselves were probably addicts in need of a source of drugs.\textsuperscript{340} Offenders like Terrebonne were thus at the same time victims and victimizers.\textsuperscript{341}

Legislatures often act out of moral panic, rather than based on good science; Louisiana did in the 1970s concerning drug addiction.\textsuperscript{342} Moral panic results in sentences far greater than necessary for public protection.\textsuperscript{343} Indeed, some commentators have argued that the democratic process is not well-suited for sentencing policy because of the tendency for legislatures to overreact in times of crisis.\textsuperscript{344}

\textsuperscript{336} *Terrebonne v. Butler*, 848 F.2d 500, 501 (5th Cir. 1988) (en banc), aff'd 820 F.2d 156 (5th Cir. 1987). In the interest of full disclosure, the late Judge Alvin Rubin appointed me to serve as Terrebonne’s counsel in 1988, during his second trip to the Fifth Circuit and Fifth Circuit en banc. Although the three-judge panel and court en banc rejected the Eighth Amendment argument, the state trial court ordered his release on other grounds, grounds suggested in Judge Gee’s majority opinion.

\textsuperscript{337} Id. at 504.

\textsuperscript{338} Id. at 501.

\textsuperscript{339} Id.


\textsuperscript{341} Id.

\textsuperscript{342} See supra Part II.

\textsuperscript{343} See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (2001).

\textsuperscript{344} Id.; see also Bridgette Dunlap, *How California’s New Rape Law Could Be a Step Backward*, ROLLING STONE (Sept. 1, 2016, 7:52 PM),
Not only are legislatures likely to act out of moral panic, but elected judges face similar pressures.\(^{345}\) A study published by the Brennan Center in 2015 made several findings about judicial elections.\(^{346}\) For example, judges facing reelection were more likely to give defendants longer sentences than they would were they not up for reelection.\(^{347}\) Thus, one might understand why the Louisiana legislature would impose long prison sentences on drug dealers or why state judges might uphold such sentences. Deference to legislatures, and even to state judges, means that federal judges, given life-tenure to assure independence, provide little in the way as a backstop against excessive sentences.\(^{348}\) That is unfortunate.

Given the shifting views on drugs, however, this may be a time for courts to reinvigorate the Supreme Court’s Eighth Amendment caselaw. What might that look like?

The first step in the Court’s analysis focuses on “the gravity of the offense and the harshness of the penalty.”\(^{349}\) That, in turn, examines the magnitude of the social harm and the culpability of the offender.\(^{350}\) Since the end of the War on Drugs, the calculus under that analysis has changed dramatically.

Imagine the reaction to drug users during the Reagan Administration, when incarceration rates started a sharp increase. Reagan officials made clear that they did not believe in drug treatment.\(^{351}\) First Lady Nancy Reagan offered the shallow advice, Just Say No.\(^{352}\) Reflective of the era, Los Angeles Police Chief Daryl Gates reportedly stated about casual drug users, that they should be taken out and shot.\(^{353}\) The

\(^{345}\) See Michael Vitiello, Brock Turner: Sorting Through the Noise, 49 U. PAC. L. REV. 631, 656 (2018) (noting that judges may feel pressured to modify their sentences due to the threat of being recalled, alluding to the call to recall Judge Aaron Persky following the sentencing of Brock Turner, and that a successful recall may cause the public to attempt to recall additional unpopular judges).


\(^{347}\) Id.

\(^{348}\) See supra notes 345–47.


\(^{350}\) Id. at 293–94.


stereotypical drug user and seller, whether marijuana or other illegal substances, were social pariahs.

Compare that to today when the overwhelming percentage of Americans support medical marijuana and now recreational use of marijuana.\(^{354}\) Compare also the increased benefits reported for marijuana.\(^{355}\) The FDA has approved a marijuana-derived drug as a treatment for a severe form of epilepsy.\(^{356}\) Some Veterans Administration doctors are urging use of marijuana products to help veterans suffering from a variety of conditions, including PTSD and opioid addiction.\(^{357}\) Simply put, certainly with regards to marijuana, a compelling case can be made that members of the marijuana industry or users are far less culpable than the Court viewed them when it upheld Davis’ 40-year prison term. So, too, the social harm: today, millions of Americans receive relief from the use of marijuana products.\(^{358}\) In states like California, marijuana dispensary employees were considered essential workers during the COVID-19 pandemic.\(^{359}\) That is so because Californians see marijuana as medicinal. Penalties like those meted out in states like Mississippi and Louisiana for marijuana offenders seem grossly disproportionate to the gravity of marijuana offenses in the modern setting.\(^{360}\)

An interjurisdictional comparison of punishments provides more support for that conclusion. Most states now allow the sale of medical marijuana.\(^{361}\) Millions of Americans live in states where the state allows them to purchase recreational marijuana.\(^{362}\) Punishing marijuana offenders with significant prison sentences is truly becoming unusual.\(^{363}\)

\(^{354}\) Daniller, supra note 25.

\(^{355}\) Dravet Syndrome, supra note 277.

\(^{356}\) Oakes, supra note 283.


\(^{360}\) Marijuana Legal States, supra note 247.

\(^{361}\) Id.

\(^{362}\) See 2013 S.D. Sess. Laws ch. 101 §§ 53, 228. An individual convicted of a Class 5 Felony is subject to a maximum prison sentence of five years and a Class 6 felony conviction subjects one to up to two years in prison. S.D. CODIFIED LAWS § 22-6-1.8–1.9 (2006 & Supp. 2016); see also Ed. Bd., Outrageous Sentences for Marijuana, N.Y. TIMES (Apr. 14, 2016),
Although at a much earlier stage, similar developments are taking place with other drugs.\textsuperscript{364} The moral panic that led to inclusion of LSD, for example, as a Schedule I drug, has abated.\textsuperscript{365} Nixon and other policymakers acted out of fear and loathing of drug proponents like Timothy Leary.\textsuperscript{366} Those kinds of cartoon stereotypes should not drive drug policy.

Evidence suggests that drugs like LSD, MDMA, and psilocybin are not as harmful as the morally panicked critics claimed.\textsuperscript{367} Beyond that, we know that they provide some significant benefits for users.\textsuperscript{368} These are not substances that should put dealers and users in prison for long periods of time.

Judicial involvement in overturning prison sentences as excessive is not without difficulties. But during the War on Drugs, the Supreme Court failed to check moral panic.\textsuperscript{369} Its arguments against an active role for the courts are not frivolous. For example, allowing federal courts too readily to overturn state sentences creates a federal question in almost any criminal case.\textsuperscript{370} That poses docket problems along with raising federalism concerns.\textsuperscript{371} But a more active role for the judiciary would send the right message: the independent federal judiciary remains a backstop against excessive punishments.\textsuperscript{372}

Having federal courts overturning prison sentences might pressure legislatures to reconsider their policy choices.\textsuperscript{373} Indeed, today, there may be a window of

\textsuperscript{364} Mapes, supra note 33.

\textsuperscript{365} Marlan, supra note 28.

\textsuperscript{366} See supra Part II.

\textsuperscript{367} See generally Johann Hari, Chasing the Scream: The First and Last Days of the War on Drugs (2016).

\textsuperscript{368} See Marlan, supra note 28, at 874–76.

\textsuperscript{369} See supra Part III.


\textsuperscript{371} Id. at 1000.

\textsuperscript{372} In many areas of the law, for example, in constitutional criminal procedure, the Court has a limited ability to regulate day-to-day police conduct. The Court’s decisions limiting police power send a message. For example, after the Court held in Mapp v. Ohio that the exclusionary rule applied to the states, states increased police training rather than risk exclusion of evidence in important cases. Mapp v. Ohio, 367 U.S. 643, 655 (1961); see Samuel Walker, Taming the System: The Control of Discretion in Criminal Justice, 1950–1990, at 127 (1993).

\textsuperscript{373} My argument here is that Supreme Court and lower federal court decisions striking down excessive state prison sentences, even on an occasional basis, would send an important message to the states.
opportunity to shift drug policy from prison-first to treatment-first solutions.\footnote{See, e.g., U.S. Gov’t Accountability Off., GAO-05-219, Report to Congressional Committees: Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes (2005), (finding that adult drug court programs reduced recidivism rates); Deborah Smith Bailey, Alternatives to Incarceration: Drug and Mental Health Courts Give Certain Offenders What They Really Need: Treatment, Monitor on Psych., July–Aug. 2003, at 54 (reporting that alternative court programs may prove more useful for some offenders than prison sentences).}

Anyone familiar with drug policy elsewhere realizes that many other countries have far better results in handling drug usage and care.\footnote{Glenn Greenwald, Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies 14–30 (2009) (analyzing the effects of Portugal’s decriminalization efforts).} With increased attention on racial disparity in drug convictions and sentencing, policy makers may see more science-based drug policy as a way to address that disparity. Lessening police involvement in drug policing would also lower the police profile in minority communities.\footnote{See generally David Schultz, Rethinking Drug Criminalization Policies, 25 Tex. Tech. L. Rev. 151, 161–62 (1993) (indicating the large portion of minorities that are implicated in drug-related arrests, and subsequent treatment that is inflicted on them).}

VI. CONCLUSION

Our constitutional history is replete with examples of when the Court has failed to protect basic freedoms. During the Red Scare, a hundred years ago, the Court failed to protect free speech rights of dissenters.\footnote{Korematsu v. United States, 323 U.S. 214, 215–18 (1944).} During World War II, the Court failed to protect Japanese Americans from loss of their freedom.\footnote{See generally Vitiello, supra note 12, at 1.} During the War on Drugs, the Court eroded the Fourth Amendment.\footnote{See, e.g., Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (”Korematsu was gravely wrong the day it was decided, has been overruled in the court of history and—to be clear—has no place in law under the Constitution.”) (quotations omitted); see also Vitiello, supra note 12, at 3–4.}

In each of these examples, as moral panic abated, the Court acted, if a bit late, to shore up basic protections.\footnote{See supra Part III.}

During the War on Drugs, the Court failed to protect offenders from excessive punishments.\footnote{See supra Part V.} My hope is that in this period of ceasefire the Court might invigorate protections against excessive punishment and give hope to offenders facing cruel prison sentences for drug offenses.\footnote{See supra Part V.}