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## The War on Drugs: Moral Panic and Excessive Sentences

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### Recommended Citation

Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 Clev. St. L. Rev. 441 (2021) available at <https://engagedscholarship.csuohio.edu/clevstrev/vol69/iss2/8>

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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

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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.<sup>1</sup> Or at least, we have tacitly declared a ceasefire. Policymakers across the political spectrum see the war as a failure<sup>2</sup> and even a dysfunctional Congress has enacted legislation intended to undo some of its damage.<sup>3</sup>

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<sup>1</sup> See Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs> [<https://perma.cc/X4CS-J6G8>] (describing the failure of the War on Drugs across all fronts); see also Johann Hari, Opinion, *Op-Ed: The Old Global Consensus on the War on Drugs is Crumbling*, L.A. TIMES (Apr. 10, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-0410-hari-un-drug-rebellion-20160410-story.html> (describing the shift away from the historical focus on eradicating drugs across the globe); see also, e.g., PEW RSCH. CTR., *America's New Drug Policy Landscape* (Apr. 2, 2014), <https://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/> [<https://perma.cc/D7KV-RN6H>] (demonstrating public support for an end to America's War on Drugs through several public opinion polls).

<sup>2</sup> See, e.g., Dennis Schrantz, Stephen DeBor & Marc Mauer, *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENT'G PROJECT (Sept. 5, 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [<https://perma.cc/Z76X-EWCZ>] (outlining how 5 politically diverse states reduced prison populations, frequently through reimagining their drug policies); see also Jamiles Lartey, *Trump Signs Bipartisan Criminal Justice Overhaul First Step Act Into Law*, GUARDIAN (Dec. 21, 2018, 2:12 PM), <https://www.theguardian.com/us-news/2018/dec/21/trump-prison-reform-first-step-act-signed-law> [<https://perma.cc/EUC4-5BA4>] (explaining how the First Step Act garnered bipartisan support in a typically fractured Congress).

<sup>3</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C.).

The United States has waged war on drugs at various times in our history.<sup>4</sup> Like most wars, these wars have not been pretty. Moral panic<sup>5</sup> has repeatedly driven policy when states and the federal government have regulated drugs.<sup>6</sup> Responding to that panic, legislators have authorized severe sentences for many drug offenses.<sup>7</sup>

By design, Article III gives federal judges independence, in part, to protect fundamental rights against mob rule.<sup>8</sup> Unfortunately, the Supreme Court has often failed to protect fundamental rights in times of moral panic.<sup>9</sup> Examples abound: The Court failed to protect free speech rights during the Red Scare.<sup>10</sup> It failed to protect Japanese Americans from the denial of their freedom and property during World War II.<sup>11</sup> It eroded Fourth Amendment protections during the War on Drugs.<sup>12</sup> Similarly, it failed to protect drug offenders from excessive prison sentences during the War on Drugs.<sup>13</sup>

Elsewhere, I have argued that one “peace dividend” of the end of the War on Drugs is a reinvigorated Fourth Amendment.<sup>14</sup> This Article examines a different question:

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<sup>4</sup> See *infra* Part II.

<sup>5</sup> STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (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.”).

<sup>6</sup> See Ashley Crossman, *A Sociological Understanding of Moral Panic*, THOUGHTCO. (July 14, 2019), <https://www.thoughtco.com/moral-panic-3026420> [<https://perma.cc/DSN6-VBHH>].

<sup>7</sup> 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.

<sup>8</sup> See ERWIN CHERMERINSKY, *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”).

<sup>9</sup> See *generally id.*

<sup>10</sup> See *Debs v. United States*, 249 U.S. 211, 217 (1919); see *Schenck v. United States*, 249 U.S. 47, 53 (1919).

<sup>11</sup> See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

<sup>12</sup> See Michael Vitiello, *The End of the War on Drugs, the Peace Dividend and the Renewed Fourth Amendment?*, 73 OKLA. L. REV. 285 (2021).

<sup>13</sup> See *generally id.*

<sup>14</sup> *Id.*

despite earlier Supreme Court precedent upholding extremely long sentences for drug crimes, is it time for the Court to rethink those holdings?<sup>15</sup>

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.<sup>16</sup> There, it found the imposition of a true life sentence<sup>17</sup> on a repeat offender to be grossly disproportionate to the gravity of the defendant's offense.<sup>18</sup> Whatever hope *Solem* created that courts might limit excessive sentences proved to be false.<sup>19</sup>

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.<sup>20</sup> In 1991, the Court upheld a true life sentence imposed on an offender who possessed 672 grams of cocaine.<sup>21</sup> The Court's refusal to curtail such extreme sentences reflects its willingness to accede to the nation's moral panic over drug usage.<sup>22</sup>

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,<sup>23</sup> public attitudes have undergone an epic change. A Kentucky poll showed over 90% of individuals support legalization of marijuana for medical purposes.<sup>24</sup> Over two-thirds support legalization of marijuana for recreational use.<sup>25</sup> Voter initiatives and now legislatures are changing marijuana laws to reflect those views. Most Americans

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<sup>15</sup> See *infra* Part V.

<sup>16</sup> *Solem v. Helm*, 463 U.S. 277, 288–89 (1983).

<sup>17</sup> 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.

<sup>18</sup> *Id.* at 303.

<sup>19</sup> See *infra* Part III.

<sup>20</sup> *Hutto v. Davis*, 454 U.S. 370, 370–71, 375 (1982).

<sup>21</sup> *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991).

<sup>22</sup> See *infra* Part III.

<sup>23</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (West 2003).

<sup>24</sup> Jonathan Greene, *Poll: Medical Marijuana Support High*, RICH. REG. (Feb. 15, 2020), [https://www.richmondregister.com/news/politics/poll-medical-marijuana-support-high/article\\_55c5a278-30ed-50ea-b4a0-5c21629af407.html](https://www.richmondregister.com/news/politics/poll-medical-marijuana-support-high/article_55c5a278-30ed-50ea-b4a0-5c21629af407.html) [https://perma.cc/WD79-6DSC].

<sup>25</sup> Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/CA7G-GQ83].

live in states where marijuana is available for medical use<sup>26</sup> and increasing numbers live in states where it is available for recreational use.<sup>27</sup>

Many Americans favor a wholesale rethinking of drug policy.<sup>28</sup> Despite studies in the 1950s and 1960s demonstrating beneficial use of drugs like lysergic acid diethylamide (LSD) and psilocybin,<sup>29</sup> Congress yielded to moral panic and included them in Schedule I when it enacted the Controlled Substances Act of 1970.<sup>30</sup> Also included in Schedule I is methylenedioxyamphetamine (MDMA, or as known by its street name, Ecstasy), which, during the 1970s, showed promise in treating several conditions as well.<sup>31</sup> Serious scientific interest in those drugs has increased in recent years.<sup>32</sup> Efforts are afoot at the state level to decriminalize the study of and use of those drugs.<sup>33</sup>

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

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<sup>26</sup> Jeremy Berke et al., *Legal Marijuana Just Went on Sale in Illinois. Here Are All the States Where Cannabis is Legal*, BUS. INSIDER (Jan. 1, 2020, 5:41 PM), <https://www.businessinsider.com/legal-marijuana-states-2018-1> [<https://perma.cc/AR75-MU49>].

<sup>27</sup> Casey Leins, *States Where Recreational Marijuana Is Legal*, U.S. NEWS (Dec. 17, 2019, 12:22 PM), <https://www.usnews.com/news/best-states/slideshows/where-is-pot-legal>.

<sup>28</sup> 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.”).

<sup>29</sup> 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.”).

<sup>30</sup> See *infra* Part II; 21 U.S.C. § 801.

<sup>31</sup> See generally Torsten Passie, *The Early Use of MDMA (“Ecstasy”) in Psychotherapy (1977–1985)*, 4 DRUG SCI. POL’Y & L. 1 (2018) (summarizing the use of MDMA in psychotherapy in the 1970s and 1980s).

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

<sup>33</sup> *Id.* at 872–74; see also Jeff Mapes, *Oregon Voters Could Decide This Year Whether to Decriminalize Drugs*, OR. PUB. BROAD. (Feb. 29, 2020, 11:00 AM), <https://www.opb.org/news/article/oregon-voters-decriminalize-drugs-initiative-petition-44/> [<https://perma.cc/BXF4-PKUH?type=image>]; Tom Jackman, *Denver Voters Approve Decriminalization of ‘Magic Mushrooms,’* WASH. POST (May 8, 2019, 7:58 PM), <https://www.washingtonpost.com/crime-law/2019/05/08/denver-voters-apparently-reject-decriminalization-magic-mushrooms/> [<https://perma.cc/F8ZW-8GHF>].

offense.<sup>34</sup> In turn, the gravity of an offense turns on its social harm and the culpability of the offender.<sup>35</sup> The Court upheld extreme drug sentences based on the view that drugs were a national scourge.<sup>36</sup> Moral panic led it to overstate the social harm and the culpability of drug offenders.<sup>37</sup>

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.<sup>38</sup> The result should be more successful challenges to drug sentences.<sup>39</sup> 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.<sup>40</sup>

Part II offers a brief history of how moral panic has dictated much of our drug policy.<sup>41</sup> 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.<sup>42</sup> Part IV focuses on the epic shift in our understanding of marijuana and visits the new interest in other Schedule I drugs.<sup>43</sup> 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.<sup>44</sup>

## II. DRUG LEGISLATION AND MORAL PANIC

For centuries, people around the world used marijuana for medicinal purposes.<sup>45</sup> Medical practitioners in the United States discovered its benefits later than

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<sup>34</sup> See *Solem v. Helm*, 463 U.S. 277, 290–91 (1983) (“[W]e look to the gravity of the offense and the harshness of the penalty.”); *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring in part) (discussing the proportionality principle found in the Court’s Eighth Amendment jurisprudence); *Ewing v. California*, 538 U.S. 11, 35–37 (2003) (Breyer, J., dissenting).

<sup>35</sup> 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.”).

<sup>36</sup> See *infra* Part III.

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See *infra* Part IV.

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> See *infra* Part V.

<sup>41</sup> See *infra* Part II.

<sup>42</sup> See *infra* Part III.

<sup>43</sup> See *infra* Part IV.

<sup>44</sup> See *infra* Part V.

<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Within a short time, public perceptions about marijuana would change dramatically.

By the 1930s, marijuana had become the demon weed.<sup>49</sup> Prohibitionists claimed that it led to violence and insanity.<sup>50</sup> The transition from useful product to scourge, documented elsewhere, is worth examination here.<sup>51</sup>

Early efforts to regulate marijuana were based on some legitimate concerns.<sup>52</sup> Notably, the earliest efforts to do so were part of legislation compelling accurate labeling for products sold in interstate commerce.<sup>53</sup> The 1906 Pure Food and Drug Act<sup>54</sup> included cannabis but focused primarily on addictive substances, including morphine, laudanum, and cocaine, in patent medicines.<sup>55</sup> However, much of the

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PSYCHIATRIA [BRAZ. J. PSYCHIATRY] 153 (2006) (Braz.) (describing the spread of the use of cannabis for medicinal purposes throughout history).

<sup>46</sup> *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.).

<sup>47</sup> Michael Aldrich, *History of Therapeutic Cannabis*, in CANNABIS IN MEDICAL PRACTICE: A LEGAL, HISTORICAL AND PHARMACOLOGICAL OVERVIEW OF THE THERAPEUTIC USE OF MARIJUANA 37–38 (Mary Lynn Mathre ed., 1997); William Wanlund, *Marijuana Industry*, in ISSUES FOR DEBATE IN AMERICAN PUBLIC POLICY: SELECTIONS FROM CQ RESEARCHERS 61 (17th ed. 2017).

<sup>48</sup> MARTIN BOOTH, CANNABIS: A HISTORY 114 (2003).

<sup>49</sup> *The History of Demon Weed*, AGATE DREAMS, <https://www.agatedreams.com/history-demon-weed/> [<https://perma.cc/4BRW-DHBW>].

<sup>50</sup> See JEFF DITCHFIELD & MEL THOMAS, THE MEDICAL CANNABIS GUIDEBOOK 4–6 (2014), [https://saltonverde.com/wp-content/uploads/2017/09/14-The\\_Medical\\_Cannabis\\_Guidebook.pdf](https://saltonverde.com/wp-content/uploads/2017/09/14-The_Medical_Cannabis_Guidebook.pdf) [<https://perma.cc/C43M-46W3>].

<sup>51</sup> See *The History of Demon Weed*, *supra* note 49.

<sup>52</sup> See John P. Swann, *The History of Efforts to Regulate Dietary Supplements in the USA*, 8 DRUG TESTING & ANALYSIS 272, 272–73 (2015).

<sup>53</sup> See *id.*

<sup>54</sup> Federal Food and Drugs Act of 1906, ch. 3915, Pub. L. No. 59-384, 34 Stat. 768 (codified as amended in 21 U.S.C.).

<sup>55</sup> See MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 37 (2017).



impetus to criminal marijuana was based on moral panic and racism.<sup>56</sup> Those forces were in evidence when Congress adopted the Marihuana Tax Act of 1937.<sup>57</sup>

At the start of the twentieth century, states began criminalizing marijuana based on unquestionably racist grounds.<sup>58</sup> Led by states in the Southwest, early marijuana laws were the response to an influx of Mexicans fleeing the Mexican Revolution.<sup>59</sup> Many of them used marijuana.<sup>60</sup> 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.<sup>61</sup>

Elsewhere, legislators were motivated to regulate marijuana because of its association with African Americans.<sup>62</sup>

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.<sup>63</sup> By the end of Prohibition, Anslinger was the founding Commissioner of the Treasury Department’s Federal Bureau of Narcotics.<sup>64</sup>

Despite his earlier belief that marijuana was not especially harmful,<sup>65</sup> Anslinger became an anti-marijuana warrior. His conversion, perhaps motivated by a desire for

<sup>56</sup> HOWARD BROMBERG, MARK K. OSBECK & MICHAEL VITIELLO, *CASES AND MATERIALS ON MARIJUANA LAW* 19 (2019).

<sup>57</sup> Matt Thompson, *The Mysterious History of ‘Marijuana,’* NPR (July 22, 2013, 11:46 AM), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana> [<https://perma.cc/T9GA-FCQ2>].

<sup>58</sup> *Id.*; see also Eric Schlosser, *Reefer Madness*, ATLANTIC (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/> [<https://perma.cc/T6YL-MRG8>].

<sup>59</sup> See Thompson, *supra* note 57.

<sup>60</sup> *Id.*

<sup>61</sup> Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 798–99 (2019).

<sup>62</sup> 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”).

<sup>63</sup> See John C. McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930–1962*, 113 PA. MAG. HIST. & BIOGRAPHY 207, 215–16 (1989).

<sup>64</sup> Rebecca Carroll, *Under the Influence: Harry Anslinger’s Role in Shaping America’s Drug Policy*, in FED. DRUG CONTROL 61, 64–65 (Jonathon Erlen & Joseph F. Spillane eds., 2004).

<sup>65</sup> 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.<sup>66</sup>

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:

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.<sup>67</sup>

Many Americans, including media mogul William Randolph Hearst, shared these views.<sup>68</sup> Hearst's newspapers supported Anslinger's efforts to demonize marijuana.<sup>69</sup> Americans, many of whom feared competition from Mexican workers, were easily persuaded that marijuana was evil.<sup>70</sup>

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.<sup>71</sup>

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fallacy" than the claim that it led to violence. Nor did he believe that it caused harm to users. Critics suggest that Anslinger's moment of enlightenment came towards the end of Prohibition when his job security might have been at risk." Vitiello, *supra* note 61, at 798.

<sup>66</sup> See McWilliams, *supra* note 63, at 231–32.

<sup>67</sup> Vitiello, *supra* note 61, at 799.

<sup>68</sup> See DITCHFIELD & THOMAS, *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").

<sup>69</sup> See *id.*

<sup>70</sup> See, e.g., Erin Blakemore, *The Brutal History of Anti-Latino Discrimination in America*, HISTORY (Sept. 27, 2017), <https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america> [<https://perma.cc/VJG8-SCDH>]; see also Christen D. Shepherd, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 249 (1999) (noting how Hearst's characterization of Hispanics as "frenzied beasts under the influence of marijuana" would, in conjunction with the anti-Mexican sentiment, result in public opinion turning against both).

<sup>71</sup> See David F. Musto, *The Marihuana Tax Act of 1937*, 26 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, *supra* note 61, at 795–96. As a result, marijuana supporters lacked financial clout to oppose the legislation.

While Congress made changes to laws governing marijuana between 1937 and 1970,<sup>72</sup> the Controlled Substances Act of 1970 (hereinafter the “CSA”) remains the most important legislation regulating marijuana.<sup>73</sup> 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.<sup>74</sup> The United States had also entered into treaties requiring scheduling of drugs for more uniform international coordination.<sup>75</sup> In addition, the United States at that point had about 200 laws in place regulating legal and illegal drugs.<sup>76</sup> Congress needed to bring those laws into a coherent scheduling scheme.<sup>77</sup>

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.<sup>78</sup> Increasing support among middle class students and some prominent academics forced a reexamination of federal law governing its use.<sup>79</sup>

As the CSA worked its way through Congress, there were calls for legalization of marijuana.<sup>80</sup> President Nixon created a commission to study and recommend marijuana policies.<sup>81</sup> The National Commission on Marihuana and Drug Abuse became known as the Shafer Commission after its Chair, former Pennsylvania

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<sup>72</sup> BROMBERG ET AL., *supra* note 56, at 55.

<sup>73</sup> See generally *id.*

<sup>74</sup> *Leary v. United States*, 395 U.S. 6 (1969).

<sup>75</sup> 21 U.S.C. § 801(7).

<sup>76</sup> See OSBECK & BROMBERG, *supra* note 55, at 76.

<sup>77</sup> 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).

<sup>78</sup> See Lana D. Harrison, Michael Backenheimer & James A. Inciardi, *The Nature and Extent of Marijuana Use in the United States*, in CANNABIS USE IN THE UNITED STATES: IMPLICATIONS FOR POLICY 206, 206–07 (Peter Cohen & Arjan Sas eds., 1996), <http://www.cedro-uva.org/lib/harrison.cannabis.pdf> [<https://perma.cc/4D8N-EY7M>] (describing the rise of marijuana use among college students throughout the 1960s and early 1970s).

<sup>79</sup> See OSBECK & BROMBERG, *supra* note 55, at 46–47.

<sup>80</sup> 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).

<sup>81</sup> See John Hudak, Opinion, *How Racism and Bias Criminalized Marijuana*, WASH. POST (Apr. 28, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana/> [<https://perma.cc/3R6W-FUBZ>].

Governor Raymond Shafer.<sup>82</sup> Nixon's appointment of Shafer, a well-respected Republican moderate, seemed to signal that Nixon was open to rethinking the federal approach to marijuana.<sup>83</sup>

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

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.<sup>89</sup> Nixon successfully countered openly racist Alabama Governor George Wallace's attempt to outflank Nixon on the right.<sup>90</sup> 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 antiwar activists and African

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<sup>82</sup> See Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, 42 CRIME & JUST. AMERICA 75, 86 (2013).

<sup>83</sup> *Id.*

<sup>84</sup> Stephen Siff, *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>].

<sup>85</sup> Hudak, *supra* note 81.

<sup>86</sup> *Drug Scheduling*, U.S. DRUG ENF'T ADMIN. <https://www.dea.gov/drug-scheduling> [<https://perma.cc/W2GF-EPJG>].

<sup>87</sup> See generally Hudak, *supra* note 81.

<sup>88</sup> 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.

<sup>89</sup> IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 24–25 (2014).

<sup>90</sup> *Id.* at 23.

Americans. Maintaining federal drug laws allowed Nixon to demonize his enemies, and his enemies included the minority community.<sup>91</sup>

Thus, Nixon, like his predecessors who demonized marijuana, followed policies not based on good science but based on raw political and racist opportunism.<sup>92</sup>

President Reagan's drug policies would make Nixon's seem tame.<sup>93</sup> He pushed for much longer prison sentences for drug offenses generally.<sup>94</sup> Reagan era legislation dramatically increased penalties for marijuana and other drug offenses, including the possibility of the death sentence for a drug kingpin.<sup>95</sup> Reagan, like Nixon, used "dog whistles" rather than overt appeals to racism.<sup>96</sup> The resulting penalties, much higher for crack cocaine than for powdered cocaine, were symptomatic of that process.<sup>97</sup>

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.<sup>98</sup> Instead, they ignored existing data.<sup>99</sup>

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<sup>91</sup> Vitiello, *supra* note 61, at 802.

<sup>92</sup> See Marlan, *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 *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>])).

<sup>93</sup> See, e.g., *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://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).

<sup>94</sup> WAYNE DAWKINS, *RUGGED WATERS: BLACK JOURNALISTS SWIM THE MAINSTREAM* 31 (2003).

<sup>95</sup> Gerald M. Boyd, *Reagan Proposes Stiffer Drug Laws*, N.Y. TIMES (Sept. 16, 1986), <https://www.nytimes.com/1986/09/16/us/reagan-proposes-stiffer-drug-laws.html> [<https://perma.cc/E536-ACXH>].

<sup>96</sup> LOPEZ, *supra* note 89, at 57–58.

<sup>97</sup> See 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.

<sup>98</sup> Michael Winerip, *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>].

<sup>99</sup> See Musto, *supra* note 71, at 436.

Some states resisted the call for more extreme measures against drug offenders.<sup>100</sup> Most, however, followed the federal lead. Many states adopted frameworks like the CSA.<sup>101</sup> That trend increased during the Reagan era, with many states cooperating with federal law enforcement agencies.<sup>102</sup> Their cooperation was rewarded with federal funds as well.<sup>103</sup>

Many Americans have recognized the unfortunate war on marijuana.<sup>104</sup> 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.<sup>105</sup> Psilocybin, a mushroom, has been used in many cultures for religious and sacramental purposes for centuries.<sup>106</sup> During the 1950s, scientists studied it as a possible treatment for various conditions, including anxiety and depression.<sup>107</sup>

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.<sup>108</sup> Studies in the 1950s suggested that LSD could be successful in treating alcoholism.<sup>109</sup> It seemed to hold promise for other conditions as well, including autism, schizophrenia, and depression.<sup>110</sup>

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<sup>100</sup> See OSBECK & BROMBERG, *supra* note 55, at 52.

<sup>101</sup> See *id.* at 82.

<sup>102</sup> See *id.* at 206.

<sup>103</sup> 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).

<sup>104</sup> See Daniller, *supra* note 25.

<sup>105</sup> 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).

<sup>106</sup> See *id.* at 860.

<sup>107</sup> See Tor-Morten Kvam et al., *Psykedeliske stoffer i behandling av angst, depresjon og avhengighet* [Psychedelic Drugs in the Treatment of Anxiety, Depression and Addiction], TIDSSKRIFTET DEN NORSKE LEGEFORENING (Nov. 13, 2018), <https://tidsskriftet.no/en/2018/11/oversiktsartikkel/psychedelic-drugs-treatment-anxiety-depression-and-addiction> [https://perma.cc/39M6-P3RH].

<sup>108</sup> See Marlan, *supra* note 28, at 861.

<sup>109</sup> *LSD-Assisted Psychotherapy*, MAPS, <https://maps.org/research/psilo-ld> [https://perma.cc/95AG-HAP4].

<sup>110</sup> *Id.*; see also Jose Ramon Alonso, *LSD as a Therapeutic Agent for Autism*, MAPPING IGNORANCE (June 7, 2017), <https://mappingignorance.org/2017/06/07/ld-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.<sup>111</sup> Developed in Germany over one hundred years ago, the drug became the focus of studies in the 1970s.<sup>112</sup> Before the drug was added to Schedule I, psychiatrists believed that it helped in therapy for depression.<sup>113</sup> It also showed some promise for patients suffering from Post-Traumatic Stress Disorder.<sup>114</sup>

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.<sup>115</sup>

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.<sup>116</sup> Initially, Leary and other researchers at Harvard University began serious studies of psychedelic drugs, before they began using them for the recreational experience.<sup>117</sup>

Leary and others became the public face for rebellion during the Vietnam War.<sup>118</sup> 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:

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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).

<sup>111</sup> See Alyssa C. Hennig, *An Examination of Federal Sentencing Guidelines' Treatment of MDMA ("Ecstasy")*, 1 BELMONT L. REV. 267, 279 (2014).

<sup>112</sup> *Id.*

<sup>113</sup> See Benedict Carey, *A 'Party Drug' May Help the Brain Cope with Trauma*, N.Y. TIMES (Nov. 20, 2012), <https://www.nytimes.com/2012/11/20/health/ecstasy-treatment-for-post-traumatic-stress-shows-promise.html?smid=url-share> [https://perma.cc/R4SB-5VER].

<sup>114</sup> *MDMA-Assisted Therapy for PTSD Edges Closer*, ALCOHOL & DRUG FOUND. (June 25, 2020), <https://adf.org.au/insights/mdma-ptsd/> [https://perma.cc/HJM9-KSTL].

<sup>115</sup> See Marlan, *supra* note 28, at 866 (quoting LESTER GRINSPOON & JAMES B. BAKALAR, *PSYCHEDELIC DRUGS RECONSIDERED* 192 (1997)).

<sup>116</sup> See POLLAN, *supra* note 29, at 205 (explaining Leary's contribution to the moral panic surrounding psychedelic drugs).

<sup>117</sup> See Marlan, *supra* note 28, at 867.

<sup>118</sup> 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.<sup>119</sup>

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.”<sup>120</sup> Nixon lumped LSD along with marijuana as a drug used by his political enemies.<sup>121</sup>

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

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.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup>

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

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<sup>119</sup> POLLAN, *supra* note 29, at 3.

<sup>120</sup> *Id.* at 58.

<sup>121</sup> See POLLAN, *supra* note 29, at 58; see also Marlan, *supra* note 28, at 870.

<sup>122</sup> See Marlan, *supra* note 28, at 871–72.

<sup>123</sup> 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).

<sup>124</sup> 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.”).

<sup>125</sup> See *supra* text accompanying notes 58–73.

<sup>126</sup> 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>].

<sup>127</sup> See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.).



homicide.<sup>128</sup> For example, Louisiana imposed a sentence of life without the benefit of parole for an offender distributing heroin.<sup>129</sup> In Louisiana, someone found guilty of voluntary manslaughter is subject to a term of imprisonment of forty years but has the chance for parole.<sup>130</sup> Michigan imposed a true life sentence for anyone possessing more than 1,000 grams of cocaine.<sup>131</sup> In Michigan, a sentencing judge may sentence someone found guilty of second-degree murder to any term of years in prison.<sup>132</sup> 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.<sup>133</sup>

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.<sup>134</sup> But how has the Supreme Court responded when faced with long prison terms that were the product of moral panic?<sup>135</sup> 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.”<sup>136</sup> Not clear from the text is whether the amendment prohibits excessive punishment.<sup>137</sup> 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.<sup>138</sup>

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

<sup>128</sup> 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.

<sup>129</sup> LA. STAT. ANN. § 40:966 (2019) (amended by 2020 La. Sess. Law Serv. 147 (West)).

<sup>130</sup> *Id.* § 14:31 (amended by 2020 La. Sess. Law Serv. 105 (West)).

<sup>131</sup> MICH. COMP. LAWS § 333.7403(2)(A)(i) (2017).

<sup>132</sup> *Id.* § 750.317.

<sup>133</sup> *See infra* notes 368–281, 374–75 and accompanying text.

<sup>134</sup> *See supra* Part I.

<sup>135</sup> *See infra* Part III.

<sup>136</sup> U.S. CONST. amend. VIII.

<sup>137</sup> 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.*

<sup>138</sup> *See also* *Robinson v. California*, 370 U.S. 660, 667 (1962); *Solem v. Helm*, 463 U.S. 277, 284 (1983). *See generally* *Weems v. United States*, 217 U.S. 349, 357 (1910) (outlining the historically confusing definition of “cruel and unusual punishment”).

Amendment.<sup>139</sup> A deeply divided Court upheld his sentence.<sup>140</sup> While upholding Rummel's life sentence, the Court begrudgingly recognized that a term of imprisonment might violate the Eighth Amendment.<sup>141</sup>

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.<sup>142</sup> Again, the Court was deeply divided.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> On balance, the severity of the punishment far exceeded the gravity of the offense.<sup>146</sup>

In *Rummel*, the Court focused on the difficult determination of what might constitute an excessive term of imprisonment.<sup>147</sup> *Solem v. Helm* borrowed an approach taken by some state courts,<sup>148</sup> which urged lower courts to examine comparable sentences for similar conduct in other states (an interjurisdictional comparison).<sup>149</sup> The *Solem* Court also suggested that a court compare punishments within the same state (an intra-jurisdictional comparison).<sup>150</sup> 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.<sup>151</sup> The inter- and intra-jurisdictional comparisons seemed

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<sup>139</sup> *Rummel v. Estelle*, 445 U.S. 263, 264–65 (1980).

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

<sup>141</sup> *Id.* at 271 (majority opinion).

<sup>142</sup> *Solem*, 463 U.S. at 303.

<sup>143</sup> 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).

<sup>144</sup> See *Rummel*, 445 U.S. at 265–66; *Solem*, 463 U.S. at 279–81 (majority opinion); *Ewing v. California*, 538 U.S. 11, 20–22 (2003) (Breyer, J., dissenting).

<sup>145</sup> *Solem*, 463 U.S. at 303.

<sup>146</sup> See *id.*

<sup>147</sup> *Rummel*, 445 U.S. at 271–78.

<sup>148</sup> See, e.g., *In re Lynch*, 503 P.2d 921, 932–33, 938–39 (Cal. 1972).

<sup>149</sup> *Solem*, 463 U.S. at 291.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

to address the *Rummel* Court's concern about unmeasurable comparisons of different sentences.<sup>152</sup>

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

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*<sup>157</sup> 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.<sup>158</sup> (Harmelin possessed 672 grams.)<sup>159</sup>

The Court was more divided than in *Rummel* and *Solem*.<sup>160</sup> Justice Scalia delivered the opinion of the Court, in part, but not on the core issues for purposes of this discussion.<sup>161</sup> Five Justices held that Harmelin's true life sentence did not violate the Eighth Amendment.<sup>162</sup> 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.<sup>163</sup>

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

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<sup>152</sup> *Rummel*, 445 U.S. 282–84. For a particularly thorough discussion of assessing excessive punishment, see Justice Breyer's dissenting opinion in *Ewing v. California*, 538 U.S. 11, 35–53 (2003) (Breyer, J., dissenting).

<sup>153</sup> *Harmelin v. Michigan*, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring in part).

<sup>154</sup> *See id.* at 999–1000.

<sup>155</sup> 28 U.S.C. § 2254.

<sup>156</sup> *Solem*, 463 U.S. at 289–90.

<sup>157</sup> *Harmelin*, 501 U.S. at 1008–09.

<sup>158</sup> *Id.* at 961 n.1.

<sup>159</sup> *Id.* at 961.

<sup>160</sup> 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.

<sup>161</sup> *Harmelin*, 501 U.S. at 961.

<sup>162</sup> *Id.* at 961, 996.

<sup>163</sup> *Id.* at 976–84.

<sup>164</sup> *Id.* at 996 (Kennedy, J., concurring in part).

does include a proportionality principle.<sup>165</sup> 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.<sup>166</sup>

Since *Harmelin*, the Court has found that true life sentences imposed on juvenile offenders were unconstitutional.<sup>167</sup> Beyond that, the Court has not upheld a challenge to a term of imprisonment imposed on a non-juvenile offender.<sup>168</sup> Decided by another deeply divided Court, a majority rejected a challenge to long terms of imprisonment imposed under California's Three Strikes law.<sup>169</sup> Again, in *Ewing v. California*, the Court divided 5-4 on the result.<sup>170</sup> No Justice secured a majority. Justice O'Connor's plurality opinion largely tracked Justice Kennedy's *Harmelin* approach.<sup>171</sup>

One can cobble together a rule from *Harmelin* and *Ewing*: four dissenting Justices in both cases still see *Solem* as setting the standard.<sup>172</sup> In both cases, some Justices in the majority agreed that the Eighth Amendment does allow judicial review of terms of imprisonment.<sup>173</sup> 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.<sup>174</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *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.

<sup>167</sup> *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

<sup>168</sup> See, e.g., *Harmelin*, 501 U.S. at 996; *Ewing v. California*, 538 U.S. 11, 30–31 (2003).

<sup>169</sup> *Ewing*, 538 U.S. at 30–31.

<sup>170</sup> *Id.* at 32.

<sup>171</sup> *Id.* at 14–23.

<sup>172</sup> *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).

<sup>173</sup> *Id.* at 20 (plurality opinion).

<sup>174</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part).

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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

*Harmelin* involved anti-drug legislation enacted in 1978, shortly before President Reagan announced his War on Drugs.<sup>179</sup> The Michigan legislature expanded its drug laws, extending long prison sentences for drug offenses in the 1980s as well.<sup>180</sup> The Court's decision came in the middle of the War.<sup>181</sup>

One might hope that the independent federal judiciary would provide relief to protect against legislation resulting from moral panic.<sup>182</sup> Sadly, in these cases, the Court did not do so.<sup>183</sup>

<sup>175</sup> See generally Victor S. Sze, *A Tale of Three Strikes: Slogan Triumphs over Substance as Our Bumper-Sticker Mentality Comes Home*, 28 LOY. L.A. L. REV. 1047, 1051–54 (1995) (describing the public's vehement fears about crime after the murders of Kimber Reynolds and Polly Klaas).

<sup>176</sup> Legis. Hist. of Assemb. B. 971, 1994 Cal. Stat. ch. 12, in 1 ASSEMBLY FINAL HISTORY 712; Dan Morain & Virginia Ellis, *Voters Approve 'Three Strikes' Law, Reject Smoking Measure*, L.A. TIMES (Nov. 9, 1994), <https://www.latimes.com/la-me-threestrikesprop-samuel-timeline-story.html> [<https://perma.cc/Z6BE-QVBQ>].

<sup>177</sup> 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)).

<sup>178</sup> See generally FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2003) (analyzing the effects of California's Three Strikes Law).

<sup>179</sup> MICH. COMP. LAWS § 333.7403(2)(A)(i) (2017).

<sup>180</sup> Greg Newburn & Sal Nuzzo, *Mandatory Minimums, Crime, and Drug Abuse: Lessons Learned, Paths Ahead* 2, [https://www.jamesmadison.org/wp-content/uploads/2019/02/PolicyBrief\\_MandatoryMinimums\\_Feb2019\\_v04.pdf](https://www.jamesmadison.org/wp-content/uploads/2019/02/PolicyBrief_MandatoryMinimums_Feb2019_v04.pdf) [<https://perma.cc/6XAB-DKJY>].

<sup>181</sup> *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007, 5:56 PM), <https://www.npr.org/templates/story/story.php?storyId=9252490> [<https://perma.cc/3PHS-U25X>].

<sup>182</sup> 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).

<sup>183</sup> See Ryan Felton, *Jailed at 17 for a Drug Crime in 1988, Rick Wershe Jr. is Still Behind Bars. Why?*, GUARDIAN (Sept. 5, 2015), <https://www.theguardian.com/us>

*Harmelin* involved cocaine, a drug that has fewer beneficial uses than other drugs, including marijuana.<sup>184</sup> 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.<sup>185</sup> A Virginia jury convicted him of two counts of possession of marijuana with intent to distribute.<sup>186</sup> The jury imposed a fine of \$10,000 and a term of imprisonment of 20 years on each count.<sup>187</sup> The prison terms were to run consecutively.<sup>188</sup> 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.<sup>189</sup>

The Supreme Court reversed the Fourth Circuit Court of Appeals, which had found that the sentence violated the Eighth Amendment.<sup>190</sup> The opinion acknowledged language in *Rummel*, supporting an Eighth Amendment proportionality principle.<sup>191</sup> However, the per curiam opinion accused the lower court of failing to recognize how truly limited any such principle might be.<sup>192</sup> The Court of Appeals, according to the

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news/2015/sep/05/rick-wershe-jr-life-without-parole-michigan-drug-laws  
[<https://perma.cc/QX65-URLZ>].

<sup>184</sup> *Compare Marijuana as Medicine DrugFacts*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine> [<https://perma.cc/62BG-XLXF>] (listing various beneficial uses of marijuana, such as pain and inflammation management, seizure control, and the possible treatment of mental illness and addiction), *with Cocaine DrugFacts*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/cocaine> [<https://perma.cc/4AZ6-R386>] (listing local anesthesia as the only beneficial use of cocaine).

<sup>185</sup> *Hutto v. Davis*, 454 U.S. 370, 370 (1982) (per curiam).

<sup>186</sup> *Id.* at 371.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *Watch: Ronald Reagan and His "War on Drugs,"* TIMELINE (June 26, 2017), <https://timeline.com/ronald-nancy-reagan-war-on-drugs-crack-baby-just-say-no-cia-communism-racial-injustice-fcfeadb3548d> [<https://perma.cc/DF7Z-SMHL>].

<sup>190</sup> *Hutto*, 454 U.S. at 372.

<sup>191</sup> *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.'").

<sup>192</sup> *Id.* at 374–75.

per curiam opinion, consciously or unconsciously disregarded *Rummel*'s teachings.<sup>193</sup> 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.<sup>194</sup>

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,<sup>195</sup> *Solem* has had little impact in the past 37 years and has been eroded by *Harmelin* and *Ewing*.<sup>196</sup>

An occasional court has disagreed with the Court's begrudging approach to claims of excessive punishment.<sup>197</sup> Other courts have taken to the extreme the Court's statement that successful challenges to terms of imprison shall be exceedingly rare.<sup>198</sup> 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

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Solem v. Helm*, 463 U.S. 277, 284 (1983).

<sup>196</sup> *See supra* notes 157–94.

<sup>197</sup> *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).

<sup>198</sup> 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.<sup>199</sup> The proposition's adoption would become a pivotal moment in the march towards legalization nationwide.<sup>200</sup>

Despite well-recognized medical uses for marijuana,<sup>201</sup> until the HIV/AIDS crisis, medical proponents were few and far between after adoption of the CSA.<sup>202</sup> Some HIV/AIDS patients used marijuana to alleviate various symptoms, alerting some

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<sup>199</sup> 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](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).

<sup>200</sup> 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).

<sup>201</sup> 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).

<sup>202</sup> See generally John Thomas, *The Past, Present, and Future of Medical Marijuana in the United States*, PSYCHIATRIC TIMES (Jan. 7, 2010), <https://www.psychiatristimes.com/view/past-present-and-future-medical-marijuana-united-states> [<https://perma.cc/5RE6-MA2T>] (noting that President Richard Nixon was vehemently opposed to the decriminalization of marijuana); Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 2009 WIS. L. REV. 1349, 1369–70 (2009) (detailing how there are speculative revenue gains that may not be fulfilled from the legalization of marijuana, including the street price for illegal marijuana and drug cartels).



physicians treating HIV/AIDS patients to its potential benefits.<sup>203</sup> Other patients, for example, some cancer patients, also got relief from marijuana use.<sup>204</sup>

Activists in California pushed for legislation allowing the use of marijuana for enumerated medical conditions.<sup>205</sup> Governor Wilson vetoed one such narrow bill.<sup>206</sup> 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.<sup>207</sup> He also sounded the usual prohibitionist rhetoric about the evils of marijuana.<sup>208</sup> As developed below, he was correct in believing that legalizing medical marijuana would open the door to its wider public acceptance.<sup>209</sup> But his claims about marijuana’s social harms has been proven false in large part.<sup>210</sup>

Wilson’s veto of a narrow medical marijuana bill resulted in reformers’ recourse to the initiative process.<sup>211</sup> Unlike the proposed legislation, Proposition 215 included an intentionally open-ended provision that a physician could recommend marijuana for any qualifying condition.<sup>212</sup> As the late Dennis Peron, one of the initiative’s

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<sup>203</sup> See, e.g., Matthew W. Grey, *Medical Use of Marijuana: Legal and Ethical Conflicts in the Patient/Physician Relationship*, 30 U. RICH. L. REV. 249, 252 (1996) (noting the use of marijuana to treat symptoms of nausea and loss of appetite by AIDS patients undergoing chemotherapy).

<sup>204</sup> *Id.*

<sup>205</sup> 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).

<sup>206</sup> See Letter from Pete Wilson, *supra* note 199.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *infra* text accompanying notes 215–48, 285–87.

<sup>210</sup> 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).

<sup>211</sup> 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).

<sup>212</sup> See CAL. HEALTH & SAFETY CODE §11362.5(b)(1)(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.<sup>213</sup> 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.<sup>214</sup>

Proposition 215 had a major impact in moving the country towards legalization of marijuana.<sup>215</sup> 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."<sup>216</sup> 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 proscribe drugs.<sup>217</sup> Doctors potentially faced prosecutions for aiding and abetting patients' violation of the Controlled Substances Act as well.<sup>218</sup>

The Ninth Circuit upheld an injunction limiting the federal government's authority to investigate a doctor merely for recommending medical use of marijuana.<sup>219</sup> *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.<sup>220</sup> In addition, the court recognized First Amendment implications of communications within a physician-patient relationship.<sup>221</sup> 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.<sup>222</sup>

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AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief").

<sup>213</sup> Peron was quoted as saying, "I believe all marijuana use is medical—except for kids." Editorial, *Marijuana for the Sick*, N.Y. TIMES, Dec. 30, 1996, at A14.

<sup>214</sup> See, e.g., *Hung Jury Frees Man in Pot-Growing Case: Podiatrist Claimed Plants Were Medicinal*, SACRAMENTO BEE, Aug. 22, 1997, at B3.

<sup>215</sup> See Vitiello, *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).

<sup>216</sup> *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002).

<sup>217</sup> *Id.* at 633.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 639.

<sup>220</sup> *Id.* at 635.

<sup>221</sup> *Id.* at 637.

<sup>222</sup> *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.<sup>223</sup>

California entered a period of chaos.<sup>224</sup> Some local law enforcement agencies worked with medical marijuana advocates to regulate the industry.<sup>225</sup> Other agencies strongly opposed the emerging industry.<sup>226</sup> Cooperation with federal authorities at times led to ugly confrontations between medical marijuana proponents and law enforcement authorities.<sup>227</sup> Shutting down benign marijuana facilities caring for seriously ill patients shifted public sentiment against law enforcement.<sup>228</sup>

President George W. Bush's Department of Justice's aggressive stance against medical marijuana became an issue in the 2008 Presidential election campaign.<sup>229</sup> Candidate Barack Obama promised a gentler approach to the subject.<sup>230</sup>

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

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<sup>223</sup> 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).

<sup>224</sup> 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).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 16.

<sup>227</sup> 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.

<sup>228</sup> See, e.g., HECHT, *supra* note 227, at 198–202.

<sup>229</sup> 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-health\\_care/](https://web.archive.org/web/20101212235001/http://www.msnbc.msn.com/id/29433708/ns/health-health_care/) (“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>].

<sup>230</sup> Trumble & Kasai, *supra* note 229.

within their borders.<sup>231</sup> Not long after Obama's election, the Justice Department issued a memorandum, the Ogden memo, laying out federal law enforcement priorities.<sup>232</sup> 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.<sup>233</sup>

In California, many marijuana proponents, often recreational marijuana proponents, took the Ogden memo as a green light to open thinly disguised "medical" dispensaries.<sup>234</sup> Ironically, that led to more raids during Obama's first term than during the Bush administration.<sup>235</sup>

Other states, notably Colorado, were more circumspect.<sup>236</sup> Colorado law required careful monitoring from seed-to-sale.<sup>237</sup> The federal government's tolerance of Colorado's medical marijuana industry was a pivotal moment.<sup>238</sup> Proponents of

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<sup>231</sup> See Sadie Gurman, *Justice Department Ending Obama Policy that Let Legal Pot Flourish*, CHI. TRIB. (Jan. 4, 2018, 4:05 PM), <http://www.chicagotribune.com/business/ct-biz-sessions-legal-marijuana-policy-20180104-story.html> [<https://perma.cc/5AGD-YFB5>].

<sup>232</sup> 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).

<sup>233</sup> *Id.* at 24.

<sup>234</sup> See Melissa Corker, *Feds Crack Down on Medical Marijuana Dispensaries*, SACRAMENTO PRESS (Oct. 12, 2011, 11:28 PM), <https://sacramento.press.com/2011/10/12/feds-crack-down-on-medical-marijuana-dispensaries/> [<https://perma.cc/9PT7-F9US>] ("A new influx of dispensaries – including some large-scale, industrial marijuana cultivation centers with revenue projections in the millions of dollars – quickly caught the attention of the DOJ.").

<sup>235</sup> 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](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.").

<sup>236</sup> 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.").

<sup>237</sup> *Id.*

<sup>238</sup> See Bob Giles, *Washington and Colorado as Precedent for Cannabis Legalization?*, GLOB. POST (Dec. 29, 2012, 1:47 PM), <http://www.globalpost.com/dispatches/news/americas/united-states/washington-and-colorado-precedent-cannabis-legalizati> [<https://perma.cc/4SZR-7CAK>] ("In Colorado, the

recreational marijuana saw that tolerance as an invitation to put recreational marijuana initiatives on the ballot in Colorado and Washington in 2012.<sup>239</sup> Proponents timed their efforts to coincide with the presidential election when young voters were likely to vote.<sup>240</sup>

The initiatives passed in both states.<sup>241</sup> Again, the Obama administration issued a memorandum, the Cole memo, stating federal law enforcement guidelines.<sup>242</sup> If a state adhered to those priorities, it would be free to regulate its recreational marijuana industry.<sup>243</sup>

In 2014, Congress passed a rider to the federal omnibus spending bill.<sup>244</sup> Known first as the Rohrabacher-Farr Amendment, it prohibits the Justice Department from spending funds to interfere with state laws implementing medical marijuana laws.<sup>245</sup>

The rest is history. In rapid succession, other states have adopted laws allowing medical or recreational marijuana sales.<sup>246</sup> States have done so in part because of the experience in states like Colorado and Washington.<sup>247</sup> Indeed, today, most Americans live in states where medical marijuana is available in one form or another and millions

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federal government has largely allowed the state-regulated medical-marijuana industry to operate. . . .”).

<sup>239</sup> 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).

<sup>240</sup> See John Hudak, ‘Cannabis Coattails’ and the Challenges of Polling in 2016, BROOKINGS (Oct. 28, 2016), <https://www.brookings.edu/blog/fixgov/2016/10/28/cannabis-coattails/> [<https://perma.cc/NY2X-A7XH>].

<sup>241</sup> Vitiello, *supra* note 61, at 808.

<sup>242</sup> Memorandum from Deputy Att’y Gen. James M. Cole to U.S. Att’ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/BQ6J-QLS9>].

<sup>243</sup> *Id.*

<sup>244</sup> Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217.

<sup>245</sup> *Id.*

<sup>246</sup> See Matthew Ginder, *The Impact of U.S. Attorney General’s Decision to Rescind the “Cole Memo” on Florida’s Nascent Medical Marijuana Program*, GREENSPOON MARDER LLP: CANNABIS BLOG (Feb. 7, 2018), <https://www.gmlaw.com/news/impact-u-s-attorney-generals-decision-rescind-cole-memo-floridas-nascent-medical-marijuana-program/> [<https://perma.cc/D7BR-EDL7>].

<sup>247</sup> See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL’Y REV. 359, 361 n.11 (2014) (noting how following Colorado’s and Washington’s legalization of marijuana, several states have begun decriminalizing marijuana); see generally *Marijuana Legal States*, MARIJUANASEO (Nov. 5, 2020), <https://www.marijuanaseo.com/marijuana-legal-states/> [<https://perma.cc/D75Z-KJEV>] (noting several states decriminalizing marijuana in some form following Colorado’s and Washington’s decisions).

live in states where recreational marijuana may be purchased without violating state law.<sup>248</sup>

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

Billions of dollars have flowed into the industry.<sup>254</sup> Some marijuana companies are publicly traded.<sup>255</sup> Neighbors to the north and south have changed their marijuana laws.<sup>256</sup>

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<sup>248</sup> *Marijuana Legal States*, *supra* note 247.

<sup>249</sup> 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).

<sup>250</sup> COLO. DEP'T OF REVENUE, 2019 ANNUAL REPORT 29 (2019), <https://cdor.colorado.gov/data-and-reports/cdor-annual-reports> [https://perma.cc/SF5H-Y66H].

<sup>251</sup> *Washington Marijuana Revenues, and Health*, WASH. ST. TREASURER, <https://tre.wa.gov/portfolio-item/washington-state-marijuana-revenues-and-health/> [https://perma.cc/4CW2-GEVN].

<sup>252</sup> *Report: Legal Marijuana Industry Employs over 240,000 Full-Time Workers*, NORML (Feb. 20, 2020), <https://norml.org/news/2020/02/20/report-legal-marijuana-industry-employs-over-240000-full-time-workers/> [https://perma.cc/H7V2-XLFR].

<sup>253</sup> 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].

<sup>254</sup> 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].

<sup>255</sup> Nathan Reiff, *Top Marijuana Stocks for March 2021*, INVESTOPEDIA, <https://www.investopedia.com/investing/top-marijuana-stocks/> [https://perma.cc/CD3V-BA6J] (updating monthly).

<sup>256</sup> 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].

Despite these developments, briefly in January 2018, the Trump administration seemed ready to close the industry. On January 4, 2018, then-Attorney General Jeff Sessions, a longtime opponent of marijuana, announced that the Department of Justice would no longer follow the Obama Department of Justice policies reflected in the Ogden and Cole memos.<sup>257</sup> The reaction to Sessions' announcement initially scared legalization proponents.<sup>258</sup> In retrospect, Sessions has done the industry a service.

For the first time, policymakers who had no reason to defend legalization efforts voiced support for the industry.<sup>259</sup> Colorado's Republican Senator Cory Gardner was an early critic of Sessions' position.<sup>260</sup> Many others have followed suit.<sup>261</sup> Those reactions should not surprise observers; states are benefiting from tax revenues,<sup>262</sup> public support for marijuana has increased rapidly,<sup>263</sup> employment in the industry is ballooning,<sup>264</sup> and many studies undercut prohibitionists' extravagant claims about marijuana's social costs.<sup>265</sup> Most importantly, the flow of capital into the industry has created powerful pressure on legislators.<sup>266</sup> As I stated shortly after Sessions'

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<sup>257</sup> Memorandum from Att'y Gen. Jefferson B. Sessions, III to U.S. Att'ys (Jan. 4., 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [https://perma.cc/6XRE-3WRH].

<sup>258</sup> See Eli McVey, *Chart: Marijuana Stocks Stumble, Then Rebound After Sessions Announcement*, MARIJUANA BUS. DAILY (Jan. 8, 2018), <https://mjbizdaily.com/chart-marijuana-stocks-stumble-rebound-sessions-announcement/> [https://perma.cc/4Q6V-7GFT].

<sup>259</sup> James Higdon, *Legal Marijuana's Big Moment*, POLITICO (Apr. 24, 2018), <https://www.politico.com/magazine/story/2018/04/24/pot-marijuana-2018-congress-218069>.

<sup>260</sup> Camila Domonoske, *Colorado Sen. Cory Gardner Continues His Standoff With Jeff Sessions over Marijuana*, NPR (Jan. 10, 2018, 4:00 PM), <https://www.npr.org/sections/thetwo-way/2018/01/10/577103864/colorado-sen-cory-gardner-continues-his-standoff-with-jeff-sessions-over-marijua> [https://perma.cc/97TR-4T7A].

<sup>261</sup> Christopher Ingraham, *What Republicans Are Saying About Jeff Sessions's War on Marijuana*, WASH. POST (Jan. 4, 2018, 8:35 PM), <https://www.washingtonpost.com/news/wonk/wp/2018/01/04/what-republicans-are-saying-about-jeff-sessions-war-on-marijuana/> [https://perma.cc/3MJN-RLT4].

<sup>262</sup> Chris Hudock, *U.S. Legal Cannabis Market Growth*, NEW FRONTIER DATA (Sept. 8, 2019), <https://newfrontierdata.com/cannabis-insights/u-s-legal-cannabis-market-growth/> [https://perma.cc/FAU2-G4X9].

<sup>263</sup> Daniller, *supra* note 25.

<sup>264</sup> NORML, *supra* note 252.

<sup>265</sup> See COMM. ON SUBSTANCE ABUSE & HABITUAL BEHAV., NAT'L RSCH. COUNCIL, AN ANALYSIS OF MARIJUANA POLICY (1982).

<sup>266</sup> See Bill Barlow, *Marijuana Reform, Led by States, Puts Pressure on Congress to Legalize*, WEEDMAPS (Feb. 27, 2019, 6:20 PM), <https://weedmaps.com/news/2019/02/marijuana-reform-led-by-states-puts-pressure-on-congress-to-legalize/> [https://perma.cc/LM73-BF8K].

announcement, “the money [invested in the industry] is not red money or blue money. It is green money.”<sup>267</sup>

The period of federal forbearance benefitted legalization proponents. Apart from wanting increased tax revenues, policymakers saw emerging empirical evidence tipping in favor of legalization.<sup>268</sup> 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.<sup>269</sup> Most of the news was good for the industry.<sup>270</sup> While some studies demonstrated, for example, harm to brain development among young people, most of the results debunked the prohibitionists’ claims.<sup>271</sup>

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.<sup>272</sup> 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.<sup>273</sup> The scale has tipped in favor of legalization of marijuana.

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<sup>267</sup> Katy Steinmetz, ‘Right Now It’s Chaotic.’ *Jeff Sessions’ Marijuana Move Is Jeopardizing the Pot Industry*, TIME (Jan. 4, 2018, 5:37 PM), <https://time.com/5088442/jeff-sessions-marijuana-legal/> [<https://perma.cc/YZ6Q-S5ND>].

<sup>268</sup> 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 DUIs 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>].

<sup>269</sup> THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS, COMM. OF THE HEALTH EFFECTS OF MARIJUANA, NAT’L ACADS. OF SCIS. ENG’G & MED. (2017).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 13–22, 270.

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

<sup>273</sup> See Kevin Murphy, *New York Points the Way In Dealing With Opioid Crisis*, FORBES (Aug. 2, 2018, 11:50 AM), <https://www.forbes.com/sites/kevinmurphy/2018/08/02/new-york-points-the-way-in-dealing-with-opioid-crisis/#1463f4c78f62> [<https://perma.cc/76ZG-Q6ZA>].



Sanjay Gupta's multipart series *Weed* demonstrates the dramatic changing perceptions about marijuana.<sup>274</sup> At the outset, Gupta was a skeptic about marijuana's medical benefits.<sup>275</sup> By the end of the series, he was a convert.<sup>276</sup>

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.<sup>277</sup> Gupta's show followed families as they traveled to Colorado to a medical marijuana farm that produced a special strain of marijuana.<sup>278</sup> *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.<sup>279</sup> For example, they learned that parents feared crossing state lines with marijuana products.<sup>280</sup> Even former Utah Senator Orrin Hatch announced his support for allowing the study of marijuana derivative products for use in such cases.<sup>281</sup>

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

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<sup>274</sup> *WEED – A CNN Special Report by Dr. Sanjay Gupta*, CANNATECH (June 16, 2016), <https://www.canna-tech.co/uncategorized/weed-a-cnn-special-report-by-dr-sanjay-gupta/> [<https://perma.cc/EBX5-LNCJ>].

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *What Is Dravet Syndrome?*, DRAVET SYNDROME FOUND., <https://www.dravetfoundation.org/what-is-dravet-syndrome/> [<https://perma.cc/9KYN-BYNU>] [hereinafter *Dravet Syndrome*].

<sup>278</sup> *WEED – A CNN Special Report by Dr. Sanjay Gupta*, *supra* note 274.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Tom Angell, *The Marijuana Evolution of Senator Orrin Hatch*, MARIJUANA MOMENT (Oct. 23, 2017), <https://www.marijuanamoment.net/marijuana-evolution-senator-orrin-hatch/> [<https://perma.cc/PDE3-MFXR>].

<sup>282</sup> *FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy*, FDA (June 25, 2018), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms> [<https://perma.cc/8CMX-AJQZ>] [hereinafter *FDA Approves First Drug*].

<sup>283</sup> Kari Oakes, *DEA Reclassifies Epidiolex as Schedule V*, EPILEPSY RES. CTR. (Nov. 26, 2018), <https://www.mdedge.com/neurology/epilepsyresourcecenter/article/175943/epilepsy-seizures/dea-reclassifies-epidiolex> [<https://perma.cc/GH9S-T4V8>].

<sup>284</sup> *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.<sup>285</sup> Over 90% of Americans support legalization of medical marijuana.<sup>286</sup> Two-thirds of Americans support legalization of marijuana for recreational purposes as well.<sup>287</sup>

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.<sup>288</sup> Forbearance during the Obama administration led to expansion from medical to recreational use of marijuana.<sup>289</sup> 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.<sup>290</sup> Throughout, legalization proponents have been able to demonstrate that the extravagant claims of prohibitionists are just that.<sup>291</sup>

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.<sup>292</sup> For example, Denver became the first city to decriminalize psilocybin.<sup>293</sup> States like Oregon may legalize "shrooms," psychedelic mushrooms,

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<sup>285</sup> See Letter from Pete Wilson, *supra* note 199.

<sup>286</sup> Daniller, *supra* note 25.

<sup>287</sup> *Id.*

<sup>288</sup> See David G. Evans, *The Economic Impacts of Marijuana Legalization*, J. GLOB. DRUG POL'Y & PRAC., Winter 2013, at 2. *Contra* Lee Romney, *Prop 215 Passed, but Uncertainty Hasn't*, L.A. TIMES (Jan. 5, 1997, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1997-01-05-mn-18103-story.html>.

<sup>289</sup> See Keith Speights, *Timeline for Marijuana Legalization in the United States: How the Dominoes Are Falling*, MOTLEY FOOL (Jan. 2, 2020, 1:06 PM), <https://www.fool.com/investing/timeline-for-marijuana-legalization-in-the-united.aspx> [<https://perma.cc/F4YV-ABR4>].

<sup>290</sup> See Mrinalini Krishna, *The Economic Benefits of Legalizing Weed*, INVESTOPEDIA (Dec. 11, 2019), <https://www.investopedia.com/articles/insights/110916/economic-benefits-legalizing-weed.asp> [<https://perma.cc/TAT3-ZZ94>].

<sup>291</sup> See Vitiello, *supra* note 202, at 1368–72.

<sup>292</sup> 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).

<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

In effect, researchers are rediscovering what researchers learned in the 1950s, 1960s, and 1970s about drugs like LSD, psilocybin and MDMA.<sup>296</sup> Some of this research is underground. Some therapists engage in various treatment modalities, including microdosing of psychedelics cautiously.<sup>297</sup> 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:

[R]eferenda 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.<sup>298</sup>

Michael Pollan has brought all this to the nation's attention in his best-selling book *How to Change Your Mind*.<sup>299</sup> The documentary film *Fantastic Fungi* preaches a

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

<sup>294</sup> Zachary Folk, *Oregon Pushes Forward with Public Vote to Legalize Psychedelic Mushrooms*, N.Y. POST (June 30, 2020, 2:22 AM), <https://nypost.com/2020/06/30/oregon-voters-push-to-legalize-psychedelic-mushrooms/> [https://perma.cc/VXW3-S73A].

<sup>295</sup> Marlan, *supra* note 28, at 853.

<sup>296</sup> *Id.* at 857–65.

<sup>297</sup> See POLLAN, *supra* note 29, at 332–37.

<sup>298</sup> Marlan, *supra* note 28, at 854.

<sup>299</sup> POLLAN, *supra* note 29.

similar message of the miraculous natural benefits of mushrooms, including psychedelic mushrooms.<sup>300</sup>

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

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.<sup>304</sup> 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.<sup>305</sup>

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.<sup>306</sup> Although debated, such policies seem to work.<sup>307</sup>

These developments are not just change in public perceptions about the costs and benefits of drug use.<sup>308</sup> The changes in perception are based, in part, on empirical

<sup>300</sup> FANTASTIC FUNGI (Moving Art 2019).

<sup>301</sup> 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).

<sup>302</sup> See David E. Nichols, *Psychedelics*, 68 PHARMACOLOGICAL REVS. 264, 323 (2016).

<sup>303</sup> 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).

<sup>304</sup> Thomas Fuller, *Oregon Decriminalizes Small Amounts of Heroin and Cocaine; Four States Legalize Marijuana*, N.Y. TIMES, <https://www.nytimes.com/2020/11/04/us/ballot-measures-propositions-2020.html> [<https://perma.cc/JN8V-GMKU>] (last updated Dec. 2, 2020).

<sup>305</sup> Eric Levenson & Lauren del Valle, *Judge Clears Path for Philadelphia Nonprofit to Open Safe-Injection Site to Combat Overdoses*, CNN (Feb. 26, 2020, 2:22 PM), <https://www.cnn.com/2020/02/26/us/philadelphia-supervised-injection-site/index.html> [<https://perma.cc/QKD6-98W9>].

<sup>306</sup> 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).

<sup>307</sup> *Id.* at 759.

<sup>308</sup> 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

evidence, not moral panic.<sup>309</sup> The debate shifts when legalization proponents can back their claims with good science.<sup>310</sup> Prohibitionists are not keeping apace.<sup>311</sup>

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.<sup>312</sup> As a general proposition, that may be true for separation of power and federalism reasons.<sup>313</sup> However, the Court needs to be available as a safety valve when legislatures act out of moral panic.<sup>314</sup>

The United States has too many people in prison, often for far longer than needed to assure public safety.<sup>315</sup> Many are in prison because of the War on Drugs.<sup>316</sup> That has led to legislation lessening sentences and reducing prison populations.<sup>317</sup> For

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cooperation from the Portuguese law enforcement to stymie drug markets, and a reduction in the percentage of prison sentences for drug-related offenses).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> 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).

<sup>312</sup> *Ewing v. California*, 538 U.S. 11, 25 (2003).

<sup>313</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring in part).

<sup>314</sup> See *supra* Part II.

<sup>315</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW* 92, 110–12, 117 (10th anniversary ed. 2020).

<sup>316</sup> *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).

<sup>317</sup> See Drew Desilver, *Feds May Be Rethinking the Drug War, but States Have Been Leading the Way*, PEW RSCH. CTR. (Apr. 2, 2014), <https://www.pewresearch.org/fact-tank/2014/04/02/feds-may-be-rethinking-the-drug-war-but-states-have-been-leading-the-way/> [<https://perma.cc/QXN3-BVNL>]; see also John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/> [<https://perma.cc/YN5R-DVXM>] (noting that the racial disparity between white and blacks in prisons has significantly reduced, from a spread of 64% white and 12% black of the U.S. adult male population to 33% black and 30% white).

example, the First Step Act provides some federal prisoners with relief.<sup>318</sup> It includes a provision allowing for retroactive application of its provisions.<sup>319</sup> 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.<sup>320</sup>

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.<sup>321</sup> For example, Bernard Noble had prior drug convictions.<sup>322</sup> His conviction for possession of two marijuana cigarettes netted him a sentence of 13 years at hard labor in Louisiana's state prison.<sup>323</sup> Concerted efforts on his behalf led to his release after 7 years in prison.<sup>324</sup>

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.<sup>325</sup> His last crime was the sale of a small amount of marijuana to an undercover agent.<sup>326</sup>

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.<sup>327</sup> Ditto for Alabama,

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<sup>318</sup> First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237–49.

<sup>319</sup> *Id.* at 5220–21.

<sup>320</sup> See, e.g., Alejandra S. Alvarez, *Habeas Mentem: Revisiting Sufficiency-of-Counsel Standards in Post-AEDPA Habeas Corpus Proceedings*, 71 FLA. L. REV. 1481, 1504 (2019) (noting that there are significantly fewer federal prisoners than state prisoners, weakening the impact of the First Step Act).

<sup>321</sup> 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.”).

<sup>322</sup> 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>].

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Veteran Challenges Life Sentence for Selling \$30 Worth of Marijuana*, PROMISE OF JUST. INITIATIVE, <https://promiseofjustice.org/news/2020/01/24/veteran-challenges-life-sentence-for-selling-30-worth-of-marijuana?rq=d> [<https://perma.cc/2PSU-698P>].

<sup>326</sup> Brief of Petitioner at 1, *Louisiana v. Harris*, No. 2018-KH-1012, 2020 WL 3867207 (La. July 9, 2020).

<sup>327</sup> Ezekiel Edwards, *Mississippi Sentences Man to 8 Years in Prison for Medical Marijuana He Purchased Legally in Another State*, ACLU (Oct. 22, 2018, 12:15 PM), <https://www.aclu.org/blog/criminal-law-reform/drug-law-reform/477mississippi-sentences-man-8-years-prison-medical-marijuana> [<https://perma.cc/T6MG-VHX7>].

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

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.<sup>329</sup> Tyler served 26 years of a life-sentence for selling marijuana and LSD to a federal agent.<sup>330</sup>

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

Sadly, as argued above, much of the drug policy in the United States has been driven by moral panic.<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup>

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

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<sup>328</sup> Kathryn Casteel & Will Tucker, *Alabama Resident Lee Carroll Brooker Garnered National Attention in 2016 When the U.S. Supreme Court Declined to Review the Marijuana Trafficking Case that Put Brooker, in His 70s at the Time, in Prison for Life*, S. POVERTY L. CTR. (Mar. 28, 2020), <https://www.splcenter.org/news/2020/03/28/arbitrary-excessive-marijuana-trafficking-sentences-alabama> [<https://perma.cc/D4QP-K8T7>].

<sup>329</sup> Alexander Lexhtman, *After 26 Years in Prison for LSD, and Clemency from Obama, Timothy Tyler Is a Free Man*, PSYMPIOSIA, <https://www.psymposia.com/magazine/timothy-tyler-clemency-obama-isd/> [<https://perma.cc/2MV4-GDP2>].

<sup>330</sup> *Id.*

<sup>331</sup> See *Drug and Crime Facts*, BUREAU JUST. STAT., <https://www.bjs.gov/content/dec/ptrpa.cfm> [<https://perma.cc/LPV4-X77D>].

<sup>332</sup> See *Wall v. Kholli*, 562 U.S. 545, 547 (2011).

<sup>333</sup> See *supra* Part II.

<sup>334</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part).

<sup>335</sup> *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.<sup>336</sup> 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.<sup>337</sup>

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.<sup>338</sup> He received 3 “bindles” of heroin for serving as a conduit between the two officers and his supplier.<sup>339</sup> 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.<sup>340</sup> Offenders like *Terrebonne* were thus at the same time victims and victimizers.<sup>341</sup>

Legislatures often act out of moral panic, rather than based on good science; Louisiana did in the 1970s concerning drug addiction.<sup>342</sup> Moral panic results in sentences far greater than necessary for public protection.<sup>343</sup> 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.<sup>344</sup>

<sup>336</sup> *Terrebonne v. Butler*, 848 F.2d 500, 501 (5th Cir. 1988) (en banc), *aff'g* 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.

<sup>337</sup> *Id.* at 504.

<sup>338</sup> *Id.* at 501.

<sup>339</sup> *Id.*

<sup>340</sup> See John Gillen, *Peer Pressure and Drug Addiction*, CASSIOBURY CT. (Jan. 17, 2019, 10:09 AM), <https://cassioburycourt.com/2019/01/peer-pressure-and-drug-addiction/> [<https://perma.cc/E6PJ-F2VR>].

<sup>341</sup> *Id.*

<sup>342</sup> See *supra* Part II.

<sup>343</sup> See FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001).

<sup>344</sup> *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.<sup>345</sup> A study published by the Brennan Center in 2015 made several findings about judicial elections.<sup>346</sup> For example, judges facing reelection were more likely to give defendants longer sentences than they would were they not up for reelection.<sup>347</sup> 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.<sup>348</sup> 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."<sup>349</sup> That, in turn, examines the magnitude of the social harm and the culpability of the offender.<sup>350</sup> 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.<sup>351</sup> First Lady Nancy Reagan offered the shallow advice, Just Say No.<sup>352</sup> Reflective of the era, Los Angeles Police Chief Daryl Gates reportedly stated about casual drug users, that they should be taken out and shot.<sup>353</sup> The

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<http://www.rollingstone.com/culture/news/how-californias-new-rape-law-could-be-a-step-backward-w437373> [<https://perma.cc/2B2V-JFEA>].

<sup>345</sup> 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).

<sup>346</sup> Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (2015), [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf) [<https://perma.cc/VY7R-X36N>].

<sup>347</sup> *Id.*

<sup>348</sup> See *supra* notes 345–47.

<sup>349</sup> *Solem v. Helm*, 463 U.S. 277, 278 (1983).

<sup>350</sup> *Id.* at 293–94.

<sup>351</sup> See JUSTIN S. VAUGHN & JOSÉ D. VILLALOBOS, *CZARS IN THE WHITE HOUSE: THE RISE OF POLICY CZARS AS PRESIDENTIAL MANAGEMENT TOOLS* 77 (2015).

<sup>352</sup> See *Just Say No*, HISTORY, <https://www.history.com/topics/1980s/just-say-no> [<https://perma.cc/JJ8G-N3LE>].

<sup>353</sup> See *A Brief History of the Drug War*, DRUG POL'Y ALL., <https://www.drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/3STE-L56L>].

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.<sup>354</sup> Compare also the increased benefits reported for marijuana.<sup>355</sup> The FDA has approved a marijuana-derived drug as a treatment for a severe form of epilepsy.<sup>356</sup> Some Veterans Administration doctors are urging use of marijuana products to help veterans suffering from a variety of conditions, including PTSD and opioid addiction.<sup>357</sup> 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.<sup>358</sup> In states like California, marijuana dispensary employees were considered essential workers during the COVID-19 pandemic.<sup>359</sup> 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.<sup>360</sup>

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

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<sup>354</sup> Daniller, *supra* note 25.

<sup>355</sup> *Dravet Syndrome*, *supra* note 277.

<sup>356</sup> Oakes, *supra* note 283.

<sup>357</sup> See, e.g., Kyle Jaeger, *Letting VA Doctors Recommend Medical Marijuana to Veterans Won't Cost Anything*, *Congressional Analysts Say*, MARIJUANA MOMENT (Mar. 26, 2020), <https://www.marijuanamoment.net/letting-va-doctors-to-recommend-medical-marijuana-to-veterans-wont-cost-anything-congressional-analysts-say/> [https://perma.cc/JC7Y-FBP3].

<sup>358</sup> Peter Grinspoon, *Medical Marijuana*, BLOG: HARV. HEALTH PUBL'G, <https://www.health.harvard.edu/blog/medical-marijuana-2018011513085> [https://perma.cc/3W9D-QEJJ] (last updated Apr. 10, 2020, 12:00 AM).

<sup>359</sup> See John Schroyer, *Amid Coronavirus Pandemic, California Gov Classifies Cannabis Industry as 'Essential' During State's Effective Lockdown*, MARIJUANA BUS. DAILY (Mar. 21, 2020), <https://mjbizdaily.com/california-gov-classifies-cannabis-industry-as-essential-during-lockdown/> [https://perma.cc/B3MH-9YFZ].

<sup>360</sup> LA. STAT. ANN. § 40:966(C)(2) (2019).

<sup>361</sup> *Marijuana Legal States*, *supra* note 247.

<sup>362</sup> *Id.*

<sup>363</sup> 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.<sup>364</sup> The moral panic that led to inclusion of LSD, for example, as a Schedule I drug, has abated.<sup>365</sup> Nixon and other policymakers acted out of fear and loathing of drug proponents like Timothy Leary.<sup>366</sup> 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.<sup>367</sup> Beyond that, we know that they provide some significant benefits for users.<sup>368</sup> 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.<sup>369</sup> 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.<sup>370</sup> That poses docket problems along with raising federalism concerns.<sup>371</sup> But a more active role for the judiciary would send the right message: the independent federal judiciary remains a backstop against excessive punishments.<sup>372</sup>

Having might federal courts overturning prison sentences might pressure legislatures to reconsider their policy choices.<sup>373</sup> Indeed, today, there may be a window of

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<https://www.nytimes.com/2016/04/14/opinion/outrageous-sentences-for-marijuana.html> [https://perma.cc/6S9F-WFP5].

<sup>364</sup> Mapes, *supra* note 33.

<sup>365</sup> Marlan, *supra* note 28.

<sup>366</sup> *See supra* Part II.

<sup>367</sup> *See generally* JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS (2016).

<sup>368</sup> *See* Marlan, *supra* note 28, at 874–76.

<sup>369</sup> *See supra* Part III.

<sup>370</sup> Harmelin v. Michigan, 501 U.S. 957, 1006–07 (1991) (Kennedy, J., concurring in part).

<sup>371</sup> *Id.* at 1000.

<sup>372</sup> 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).

<sup>373</sup> 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.<sup>374</sup> Anyone familiar with drug policy elsewhere realizes that many other countries have far better results in handling drug usage and care.<sup>375</sup> 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.<sup>376</sup>

## 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.<sup>377</sup> During World War II, the Court failed to protect Japanese Americans from loss of their freedom.<sup>378</sup> During the War on Drugs, the Court eroded the Fourth Amendment.<sup>379</sup> In each of these examples, as moral panic abated, the Court acted, if a bit late, to shore up basic protections.<sup>380</sup>

During the War on Drugs, the Court failed to protect offenders from excessive punishments.<sup>381</sup> 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.<sup>382</sup>

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<sup>374</sup> 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).

<sup>375</sup> 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).

<sup>376</sup> 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).

<sup>377</sup> See CHEMERINSKY, *supra* note 8, at 60–68.

<sup>378</sup> *Korematsu v. United States*, 323 U.S. 214, 215–18 (1944).

<sup>379</sup> See generally Vitiello, *supra* note 12, at 1.

<sup>380</sup> 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.

<sup>381</sup> See *supra* Part III.

<sup>382</sup> See *supra* Part V.