CONTROLLED SUBSTANCES: FEDERAL POLICIES AND ENFORCEMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTROLLED SUBSTANCES: FEDERAL POLICIES AND ENFORCEMENT

Thursday, March 11, 2021

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:25 a.m., in Room 2141, Rayburn House Office Building, Hon. Sheila Jackson Lee [chairwoman of the subcommittee] presiding.

Members present: Representatives Jackson Lee, Nadler, Demings, McBath, Dean, Scanlon, Bush, Cicilline, Lieu, Correa, Cohen, Biggs, Jordan, Chabot, Gohmert, Steube, Tiffany, Spartz, and Owens.

Staff present: David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Cierra Fontenot, Staff Assistant; John Williams, Parliamentarian; Keenan Keller, Senior Counsel; Joe Graupensperger, Chief Counsel; Christine Leonard, Counsel; Veronica Eligan, Professional Staff Member; Analia Mireles, Intern; Ken David, Minority Counsel; Caroline Nabity, Minority Counsel; James Lesinski, Minority Counsel; Kyle Smithwick, Minority Counsel; Sarah Trentman, Minority Senior Professional Staff Member; Michael Koren, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Ms. JACKSON LEE. Good morning. The Subcommittee will come to order. Without objection, the chair is authorized to declare witnesses of the Subcommittee at any time.

Members, let me thank you and hope that all of you have voted for the first two votes. What we will do is we will continue to proceed until the end of the third vote. We will go break for the third vote and do the fourth vote and then return. So, there will only be one break and then we will continue with our hearing and we thank you for your cooperation. We will all be watching the clock, but we will proceed at this time.

We welcome everyone for this morning's hearing on Controlled Substances: Federal Policies and Enforcement. Some of us are doing double duty. I am wearing an orange mask, I believe, because I know that we are working towards a good response of the American people on ending gun violence. Today we are talking about trying to be problem solvers, if you will, in the on-going war on drugs and the approach that has been taken.

Before we begin, I would like to remind Members and so we welcome everyone to this morning's hearing on Controlled Substances: Federal Policies and Enforcement. Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the materials to Members and staff as quickly as we can.

I would also ask all Members, both those in person and those attending remotely, to mute your microphone when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself any time you seek recognition. I would also remind all Members that guidance from the Office of the Attending Physician calls for all Members to wear masks even when they are speaking. I will now recognize myself for an opening statement.

An important early focus of this Subcommittee will be examining the many challenging issues relating to our federal drug laws. For far too long, our country has taken the wrong approach to drug abuse, criminalizing substance use instead of preventing and treating it. I am particularly concerned about how our past failed policy has disproportionately impacted communities of color. For instance, in the 1980s, Congress adopted harsh mandatory minimum sentences for crack cocaine offenses, subjecting thousands of individuals to needlessly lengthy terms of imprisonment, even during the era of Just Say No. That didn't apply across the board evenly, and there were those who tried to say no, but could not because of their sickness. That approach was wrong and continues to be wrong, disparately impacting African American communities while fueling mass incarceration.

The data is compelling. According to Sentencing Commission statistics, from 2019, 75 percent of the people sentenced for federal drug laws were people of color. Half of the people incarcerated in federal prisons right now, 68,000 people were convicted of drug offenses; 56 percent were convicted of a drug offense, carrying a mandatory minimum sentence.

In the past and now, we know that many of these cases involves people with a minor role in the offense. Federal prosecutions are not targeting the most serious offenders at the top of the chain. I believe it is important for us to see and remember the impact of our failed past approaches during the so-called war on drugs.

Now I want to make sure that we have not lost our Members. Okay. I want to put that on the record. We have not lost our Members, but we are getting ready for a video.

At this time, I would like to play an impactful video demonstrating its effects. I would like to pause for the staff to get the video. Thank you.

[Video played]

Ms. JACKSON LEE. Thank you. As the video narrated by Jay-Z illustrates so well, we need to acknowledge the failures of the drug war and the pain of over incarceration and we must then commit ourselves to reform. I am reminded of the proceedings that we had

when we were overwhelmed by opioids and I, in this process of writing legislation, insisted to our then-Chair that we must include crack cocaine or crack in the legislation as it related to the idea that it should be treated the same way that opioids, as it was raging across the nation, was treated in terms of sickness, addiction, and trying to provide support on treatment for those who are addicted to crack.

In recent years, we have taken a more comprehensive approach to at least some types of drug use, including the opioid crisis, as I said. Yet, we unwisely have kept in place mandatory minimum penalties related to these substances. At least there has been a greater focus on the need for treatment, as illustrated by the enactment of the Comprehensive Addiction and Recovery Act, directed at those substances five years ago right out of this committee. We must learn from our mistakes.

One of the concerns that we will discuss today is our policy concerning the penalties for crime involving fentanyl and fentanyl analogue. In 2018, DEA used temporary authority to prosecute cases involving fentanyl-related substances not listed in the Controlled Substances Act. A year ago, the Congress extended DEA's temporary authority to group all fentanyl-related substances under a class-wide ban. I oppose this measure and continue to object to this excessive approach that expands the application of mandatory minimum sentences, particularly when there are other mechanisms available for the federal prosecution in appropriate cases.

I do not deny the deadly aspect of fentanyl. That would be foolish. I do believe that we have a way and a pathway of addressing this question, saving lives, prosecuting as necessary, but not doing the broad sweep and continue to mount individuals from neighborhoods into incarceration for life.

We need to listen to experts and the data to determine the right approaches to our evidence-based and data-driven. It is time to turn the page and to create a new drug policy for America, including offering alternatives to incarceration and increasing access to treatment, enacting the MORE Act to decriminalize marijuana and treating drug abuse as a public health issue instead of a driver of mass incarceration. We have seen that with meth and then we have seen that with the extensive opioid use.

At the same time, we need to address the harm to communities and families torn apart by the war on drugs. There is a better way.

I look forward to hearing from our witnesses today as we move forward in a better direction for our communities and for our country.

It is now my pleasure to recognize the Ranking Member of this committee, my co-leader on this committee, and that is the gentleman from Arizona, Mr. Biggs, for his opening statement.

Mr. BIGGS. I thank the chair and appreciate the opportunity to speak this morning and I also apologize for my tardiness due to the floor vote, Madam Chair. So, thank you, Madam Chair.

This morning's hearing should be called Biden's border crisis is fueling drug smuggling which in turn will fuel drug addiction, death by drug overdose, and economic and societal distress.

This Subcommittee should be focusing on the impacts of the border crisis which has been created by President Biden's policies and the impact of those policies on drug trafficking.

Additionally, how can we have a serious hearing on federal policies if we don't have a single witness from the Federal Government? No one from the Department of Justice, no one from the Drug Enforcement Administration, no one from the Department of Health and Human Services, no one from the Department of Homeland Security, and here we are. I think that if we want to have serious dialogue about issues that all of us agree we are facing, we should have folks and representatives from all sides here.

I think there should be agreement that federal drug policy must include border security and an enforcement approach that is balanced with other critical public health and safety initiatives. Such an approach is critical to enforce drug laws and help combat the current drug crisis in America that has reached unprecedented levels even during the coronavirus pandemic.

According to recent provisional data from the Centers for Disease Control and Prevention between June 2019 and the first half of 2020, more than 81,000 died from drug overdoses signifying the highest number of overdose deaths ever recorded in a 12-month period. The Centers for Disease Control and Prevention reported that synesthetic opioids, predominantly illicitly manufactured fentanyl, commonly laced with other poisonous drugs like heroin and cocaine appear to be the main driver of the dramatic increase in overdose deaths in the United States.

Similarly, the Drug Enforcement Administration, which is the primary federal agency responsible for enforcing federal drug law recently reported that illicit fentanyl is one of the key drugs fueling the on-going opioid crisis in the United States. Other poisonous drugs like heroin, methamphetamine, and cocaine also remain difficult challenges to public health and law enforcement. How do these poisonous drugs pour into American communities and cities? Well, primarily through drug traffickers and cartels who smuggle them in between—at and between our southern border's ports of entry.

Just this month, the Drug Enforcement Administration's latest national drug threat assessment underscored that the production and supply of fentanyl to the United States is being driven by Mexican drug trafficking organizations while China remains the main source of supply for precursor chemicals.

The Biden Administration's immigration policies are exactly the wrong type of action we need to fight drug abuse in this country. We have all seen the news reports. There is a surge of people down at the border because of President Biden's magnet policies. Whether the Biden Administration or our Democrat colleagues want to admit it, there is a crisis on the border. The porous southern border and the Biden Administration's inaction to secure it is a recipe for chaos and disorder. The Biden border crisis is also an opportunity for dangerous drug and human traffickers to exploit non-existent or ineffective border controls which is becoming a real problem given that the Biden Administration has an open border policy and lacks enforcement.

The crisis here today that we are discussing is frankly more than just about drugs coming across the border. Drugs, people, and other contraband are now able to flow across the border because CBP has focused on caring for aliens flooding the borders and therefore is less focused on enforcement activities.

In a recent conversation, I learned that right now 80 percent of CBP's activities is used to processing paperwork and processing individuals and only 20 percent for enforcing the border. We must not turn a blind eye to what is happening at our southern border. The Trump Administration worked hard to secure our southern border, and now the current Administration, right out of the gate, and just 50 days in office is reversing all of the progress that was made in the past in the past four years. For example, the Biden Administration stopped construction on the border wall, even in dangerous, drug smuggling corridors that were in the process of being sealed. As the co-chair of the Board of Security Caucus earlier this year, I led a tour of the United States–Mexico border in southern Arizona with a number of Members of Congress. The situation at the border is a crisis and drug traffickers are exploiting the chaos to conduct illegal activities.

On February 9th, I along with over 50 Republican Members of Congress wrote to President Biden about the rising crisis at our southern border which must be taken seriously if we are going to address the use and abuse of fentanyl and other dangerous drugs in our communities. We must not treat this as a political game. We must not allow drug traffickers to be empowered by soft border policies that overlook enforcement of our laws.

I hope this Subcommittee will examine how our border's insecurity contributes to the opioid epidemic in this country.

Madam Chair, I thank you again, and I yield back.

Ms. JACKSON LEE. I thank the gentleman for his statement and his views. I now am pleased to recognize Chair Nadler for his opening statement.

Chair NADLER. Well, thank you very much for holding this important hearing today. Drug addiction is a serious problem in our communities. The current pandemic has further worsened the tragic impact of overdoses as so many Americans continue to struggle through this isolating and stressful crisis.

It is time for us to Act quickly to advance smart, effective solutions at the federal, state, and local level. This Congress, we need to continue our committee's work to take steps to right the wrongs from the failed drug war. As we have all seen, that failure has been both exorbitantly expensive and frequently counterproductive producing staggering incarceration rates for drug offenses and immeasurable harm to families, especially those coming from low-income communities and communities of color.

As our witnesses will highlight today, too many people are serving unjustly lengthy prison sentences as a result of laws that were enacted decades ago imposing mandatory minimum sentences. That approach was wrong then and it continues to be wrong. It is badly impacting minority communities while fueling mass incarceration. Mandatory minimum penalties are unwise, unjust, and unfair. The status quo is unacceptable and we need to take a hard look at reforming these penalties.

We can tackle these problems and set a new course. For example, I was pleased to work with my colleagues in passing the Marijuana Opportunity Reinvestment and Expungement Act or MORE Act at the last—at the end of the last Congress on a bipartisan basis. For far too long, we have treated marijuana as a criminal justice problem instead of as a matter of personal choice and public health. Whatever one's views are on marijuana for recreational and medicinal use, the use of arrest, prosecution, and incarceration at the federal level has been both costly and biased.

I have long believed that the criminalization of marijuana has been a mistake and the racially disparate enforcement of marijuana laws has only compounded this mistake with serious consequences, particularly for minority communities. Thousands of individuals, overwhelmingly people of color, have been subjected by the Federal Government to unjust and lengthy sentences for marijuana offenses, especially because of mandatory minimum sentences that give the judges no discretion. This needs to stop. That is why I will be reintroducing the MORE Act to remove marijuana from the Controlled Substances Act and to provide restorative justice of communities that have been disproportionately impacted by the war on drugs.

We know that the war on drugs, we now know that the war on drugs was a deliberate attack on racial minorities for political purposes executed by President Nixon. It is time we stopped.

We also need to learn lessons from programs and alternatives that have been successfully pursued at the State and local level, not just with marijuana, but with other drugs as well. For instance, the Law Enforcement Assisted Diversion program, known as LEAD, allows law enforcement to divert appropriate arrestees from criminal court, instead to provide treatment and other services that address addiction and reduce recidivism. Developed and initially implemented in Seattle, the LEAD approach is now being used with success in other cities, in other areas. We should support these efforts, as well as other innovative approaches, at the local level such as medication-assisted treatment, supervised injection facilities, expanding the availability of overdose reversal drugs and better education of doctors and the public about the proper prescription and use of opioids as pain medication.

We will not able to arrest and incarcerate our way out of the drug abuse crisis that has many causes. Instead, we must support the development and implementation of a variety of solutions as we consider our contribution to addressing this crisis.

Additional reform is long overdue, especially now that we know from the testimony of Mr. Haldeman, who was one of Mr. Nixon's assistants, of the deliberately racially biased intention of the war on drugs from which we are still suffering.

I look forward to hearing from our witnesses today and I hope that we can continue to find bicameral and bipartisan support to our legislative proposals.

Thank you and I yield back the balance of my time.

Ms. JACKSON LEE. The gentleman yields back the balance of his time and now it is my pleasure to yield to the distinguished Ranking Member of the Full Committee, the gentleman from Ohio, Mr. Jordan for his opening statement.

Mr. JORDAN. Thank you, Madam Chair. The chairman of the full Committee talked about smart, effective action to deal with the drug crisis. Smart, effective action would be to get control of our border as the Ranking Member, Mr. Biggs, highlighted in his opening statement. That would be just common sense, but that is not what is happening right now with this Administration.

In fact, it is so bad, they are now putting migrant children in NASA facilities. So if we are going to deal with this drug crisis and this drug issue and I look forward to hearing from our witness, Mr. Maltz, here in a few minutes, if we are going to do that, we need to get control of the border. Frankly, it is about time that the full Committee have a hearing on something.

I would suggest the border crisis would be a great issue to have a hearing on. Maybe the cancel culture, which is denying people their First amendment of free speech rights, would be a good issue to have a full Committee hearing on. There are lots of things we can be discussing, but we have yet now two months into the Congress had a full Judiciary Committee hearing, the busiest Committee typically in all of Congress, the Committee charged with protecting people's liberties. We have got a crisis on our border. We have got a crisis with people attacking the First amendment free speech rights of Americans and we have yet to have a hearing.

Maybe we should be doing that at some point here, but I think, obviously, right now, the border crisis is front and center and this is something that we need to get a handle if we are going to ever have a chance to deal with the drug issues that confront so many of our communities around the country. With that, I yield back.

Ms. JACKSON LEE. The gentleman yields back. I am sure we welcome the gentleman's very pointed suggestions and if I might, as a resident of a border state, having gone to the border many, many times and have seen the influx of unaccompanied children in the last decade, I know that this Administration is working extremely hard not to put children in cages, but I thank the gentleman for his comments and welcome them all the time.

We now welcome all our distinguished witnesses and we thank them for their participation. I will begin by swearing in our witnesses. I ask our witnesses testifying in person to rise and I ask our witnesses testifying remotely to turn on their audio and make sure I can see your face and your raised right hand while I administer the oath. Please be unmuted at this time.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief so help you God?

[Witnesses sworn.]

Thank you. Let the record show that the witnesses answered in the affirmative. Thank you and please be seated.

We will now proceed with this introduction. Nicole Austin-Hillery is Executive Director of U.S. programs for Human Rights Watch. Ms. Austin-Hillery leads Human Rights Watch efforts to end violations in abusive systems within the United States. Her work is focused on addressing and combating systemic racism, as well as tackling problems within the criminal justice system. Human Rights Watch, under her leadership, has become an expanded and

outstanding organization as a true watch dog of human rights in America and around the world, welcome.

Dr. Howard Henderson is the Director of the Center for Justice Research at Texas Southern University. He is a Senior Fellow in Governance Studies at Brookings Institution and founding Director of the Center for Justice Research. He is an expert on culturally responsive criminal justice research, has provided approaches to reducing disparity in the criminal justice system, a multitude of articles, and a great deal of passion. Dr. Henderson, we welcome you.

Derek Maltz spent 28 years in public service with the Drug Enforcement Administration, including 10 years as a special agent in charge for the Special Operations Division of the Department of Justice. He now serves as Executive Director for Government Relations at Pen-Link.

Mr. Maltz, we thank you for your service to this country, welcome.

Dr. Katharine Neil Harris is the Alfred C. Glassell, III, Fellow in Drug Policy at Rice University Baker Institute for Public Policy, a drug policy expert. Her current research focuses on the availability of drug treatment for all at-risk populations, the opioid epidemic, and the legalization of medical and adult use cannabis.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes. To help you stay within that time for our witnesses testifying in person, there is a timing light on your table. When the light switches from green to yellow, you have one minute to conclude your testimony. When the light turns red, it signals your five minutes have expired. For our witnesses testifying remotely, there is a timer in the WebEx view that should be visible on your screen.

Dr. Henderson, you may begin, welcome.

TESTIMONY OF HOWARD HENDERSON

Mr. HENDERSON. Thank you. And allow me to begin my testimony by expressing my humble appreciation for the opportunity to testify on the impact of federal drug policies on the criminalization of people of color.

As a Professor of Justice Administration and the Director for the Center for Justice Research and the Barbara Jordan-Mickey Leland School of Public Affairs at Texas Southern University in Houston, Texas, I would like to take this time to thank Chair Nadler, the Subcommittee Chair; my representative, Sheila Jackson Lee; Ranking Chair Andy Biggs; Subcommittee Vice Chair Cori Bush and the remaining Members of the U.S. House Committee on the Judiciary Subcommittee on Crime, Chair of Homeland Security.

I must express my gratitude and appreciation to Congresswoman Sheila Jackson Lee for her unwavering support of our university, students, faculty, staff. Her expectation of evidence-support research and decision making has served as continued motivation for all of us at Texas Southern University in Houston, one of the largest historically Black colleges and universities in the country. Help supporting our efforts does not go unappreciated.

I present this statement for the record with respect to the congressional hearing on controlled substances, federal policies, and

enforcement on this day, March 11, 2021. The testimony will provide a brief overview of the evolutionary impact of drug policies on the Black community. As suggested, I would present an equity-based framework or re-frame the federal drug policy that will serve as a basis of my conclusion.

In this testimony, I offer a structural and historical overview of the differential impact of the federal drug policies enforcement tradition. It must be understood that the inequality caused by federal drug policy is but a continuation of the historical process of cultural, institutional, and structural repression. Federal drug policy actually has a deep historical and institutional root that predate the 1960s.

In the current testimony, I posit that the contemporary American federal drug policy and its relationship to racial inequality is only the latest chapter in an unremitting narrative in which the drug legislation constitutes the middle ground of a race and class stratified social order. In other words, this inequality has emerged from the dialect of the production and reproduction of racist logics as part of the broader culture of control.

The objective of my testimony is not to say the situation has remained unchanged from America of old, but our current racialized social order is not totally divorced from the past. The crux of today's matters of federal drug policy is really another step in the long arc of history representing an old southern order that directly serves the spirit of White supremacy and absolutely refuses to accept the reality that they actually lost the Civil War.

In this spirit, I posit that racist logic did not disappear with the culmination of the civil rights movement, rather racism in our criminal justice system has transformed over time with many strategies for stratifying and subjugating marginalized racial populations persisting in one form or another.

American criminal justice, particularly federal drug policy, has often been on the front line in the form of such tactics. As African Americans, we are disproportionately displaced in urban ghettos, a connected form in the public mind between ghetto residents and crime which inexplicably links perception of danger through skin color and other forms of expression present among ghetto residents. Ghettos were increasingly becoming places not just for crime, but Black crime. Criminal justice became the intervention of choice, an intervention that involves the direct and indirect control of urban denizens but did little to address the root structural causes of the misery that spawns this crime.

In fact, the impact of federal drug policy in these spaces have only exacerbated the problems confronting African American in urban ghettos. When contemporary African American ghettos were fully established in the 1980s, President Reagan declared the war on drugs. The essential concern of the Reagan Administration and others was the offenses of crack cocaine as the next big drug epidemic. Crack was cast as a societal defense at the hands of crack babies and super predators. Federal drug policy in the United States continues to perpetuate systems of inequality and domination and that many ways mirror forms of control and ultimately violate basic human rights.

As a line between drug legislation and plantation-style justice has become increasingly blurred in recent decades, federal drug policies have helped create and recreate and manage a racialized problem population or a dangerous class that has twisted the margins of labor markets and political priority. In essence, these policies have helped to maintain the color line. Thank you.

[The statement of Mr. Henderson follows:]

STATEMENT OF HOWARD HENDERSON

Overview

I am appreciative of the opportunity to testify on the impact of federal drug policies and their criminalization of people of color and poverty. As a professor of justice Administration and the director of the Center for Justice Research in the Barbara Jordan—Mickey Leland School of Public Affairs, I present this statement for the record with respect to the Congressional hearing on "Controlled Substances: Federal Policies and Enforcement" on March 11, 2021. My testimony will provide a brief overview of the evolutionary impact of federal drug policies on Black communities. A suggested equity-based framework for the reframing of federal drug policies will serve as the basis of this testimony's conclusion.

In this testimony I offer a structural and historical overview of the differential impact of the federal drug policy enforcement tradition. Rather than viewing unequal treatment in drug policy as a result of racism per se, it should be understood that such inequality is in part a continuation of the historical process of cultural, institutional and structural oppression. Similar to Gottschalk's (2006) argument that "contemporary penal policy actually has deep historical and institutional roots that predate the 1960s" (p. 4), in the current testimony I posit that contemporary American federal drug policy, and its relationship to racial inequality, is only the latest chapter in an unremitting narrative in which the drug legislation constitutes the middle ground of a race and class-stratified social order. In other words, this inequality has emerged from the dialectical production and reproduction of racists logics as part of the broader culture of control (Garland, 2001).

The objective of this testimony is not to say that the situation remains unchanged from the America of old. Our current racialized social order, however, is not wholly divorced from the past either. Instead, contemporary society is merely another step in the long arch of history. In this spirit, I posit that racist logics did not disappear with the culmination of the Civil Rights Movement (indeed, many racist policies continue—see Michelle Alexander's The New Jim Crow). Rather, racism in our criminal justice system has transformed over time, with many strategies for stratifying and subjugating marginalized racial populations persisting in one form or another. American criminal justice, particularly federal drug policy, has often been on the front line in the deployment of such tactics.

Staging Federal Drug Policy

As African Americans were disproportionately displaced into urban ghettos, a connection formed in the public mind between ghetto residents and crime, which inextricably linked perceptions of danger to skin color other forms of expression present among ghetto residents (*e.g.*, clothing, dance, music, graffiti art) (Weaver 2007). Ghettos were increasingly becoming places of not just crime but Black crime. Criminal justice became the intervention of choice—an intervention that involves the direct and indirect control of urban denizens but does little to address the root structural causes of the misery that spawns crime. In fact, the impact of federal drug policies in these spaces have only exacerbated the problems confronting African Americans in urban ghettos (Alexander 2010; Murakawa 2014). When contemporary African American ghettos were fully established in the 1980s, President Reagan declared the War on Drugs. The central concern for the Reagan Administration and others was the ascendance of crack cocaine as the next big drug "epidemic." Crack was cast as an antecedent to many current and future problems in America. Experts prophesied about an impending societal descent at the hands of crack babies and superpredators (Murakawa 2014).

The War on Drugs drastically increased police presence and power in disenfranchised communities. The policy mandated drastic increases in police presence throughout many urban areas. Although the heavy policing of these districts was billed as a response to upticks in urban crime (Lea and Young 1984; Miller 2015;

Weaver 2007), much of the legitimacy of this campaign was propelled by unsubstantiated moral panics (Becker 1963; Cohen 1972; Kappeler and Potter 2005). Ghetto spaces were constructed as terrifying abodes of Black urban decay. Crime and victimization were said to run rampant. In addition, paternalistic rhetoric and imagery were deployed that cast poor urban denizens as incapable of resolving the problems wrought by crack cocaine. Criminal justice intervention was thus deemed necessary.

Notions of disrepair, broken communities, and moral deprivation through the crack cocaine epidemic were powerful messages that, for many politicians and Members of the general public, justified and even necessitated intervention in the ghetto. In the process, urban ghettos have become synonymous with war zones in the public imagination. The police are viewed as soldiers on the front line against disorder, becoming increasingly militarized as a result of the War on Drugs, the expansion of criminal justice following the Crime Omnibus Act of 1990, and the changes to American policing in the wake of the events of 9/11 (Kappeler and Kraska 2015; Kraska 2001; Kraska and Kappeler 1997; Murakawa 2014). Many departments began to deploy more aggressive tactics and adopt military equipment and technology (Kraska 2007; Kraska and Kappeler 1997). In the next section I will detail policies and practices that manage urban ghettos utilizing drug enforcement as the modus operandi.

The aggressive and militarized policing of drug activity provides an exploitive funding stream for municipal governments and police departments. The Institute of Justice reports the U.S. Treasury and the Justice Department forfeited more than $5 billion largely through narcotic warrants and arrests (Carpenter et al. 2015). Narcotic seizures and forfeitures are just one form whereby police departments exploit the underclasses, especially minorities, through monetary dispossession, resulting from federal drug policy. Federal drug legislation set the stage for 'Zero Tolerance' policing models, which have been shown to lead to the exacerbation of fines and outstanding warrants that contribute to local government coffers. In Ferguson, Missouri, the municipal court issued 32,975 arrest warrants in 2013, despite the city's population of only 21,000 residents (U.S. Department of Justice, Civil Rights Division 2015). 90-two percent of these warrants were issued to African Americans, who were 68 percent less likely than others to have their court cases dismissed. The City of Ferguson (2014) accumulated $2.4 million in revenue from court fees and fines in 2013. The practice of accumulating revenue through fines and fees is related to the carceral State expanding by enforcing civil and administrative laws (Beckett and Murakawa 2012). Revenue generation through seizures, forfeitures, fines, and warrants exploits the economically vulnerable and especially harms African American populations (Alexander 2010; Beckett and Murakawa 2012; Goffman 2009; Murakawa 2014). Districts affected by such practices are essentially subjected to resource extraction, a prototypical objective of federal legislation, as codified through the War on Drugs, mandated by Federal Drug Policy.

Conclusion

As I have attempted to articulate in this testimony, federal drug policy in the United States continues to perpetuate systems of inequality and domination that, in many ways, mirror Jim Crow-like forms of control and ultimately violations of basic human rights. As the line between drug legislation and plantation style justice has become increasingly blurred in recent decades, federal drug policies have helped create, recreate, and manage a racialized "problem population" or "dangerous class" pushed to the margins of the labor market and political priority—or, as Brucato (2014) explained, they maintain the "color line" (Shelden 2008; Spitzer 1975).

The testimony offered here is undoubtedly incomplete. Addressing failed federal drug policy is an expansive and pervasive process. There are, therefore, a multitude of dynamics left unexplored in this single testimony. It is critical for this Committee to recognize the contemporary and historical linkages between race, class and federal drug policy, as well as the structures and processes of its institutionalization. The crises in America's failed drug policy are not new developments. They are the products of long-running contradictions in American society—contradictions and attunement to policies disproportionately and unnecessarily impacting historically marginalized communities.

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Ms. JACKSON LEE. Thank you for your testimony and thank you for the time in which you pleted your testimony and how it's a pleasure for Dr. Neil Harris, if you would give your testimony at this time.

TESTIMONY OF KATHARINE NEILL HARRIS

Ms. HARRIS. Good morning.

I would like to thank Chair Nadler, Subcommittee Chair Sheila Jackson Lee, Ranking Chair Andy Biggs, and Subcommittee Vice-Chair Cori Bush and all Members of the Committee for this opportunity to testify for this hearing today.

My name is Katharine Neill Harris and I am the Alfred C. Glassell III Fellow in Drug Policy at Rice University's Baker Institute for Public Policy.

I want to start by clarifying that the war on drugs is, first and foremost, a war on people. Four hundred and fifty thousand people are incarcerated for nonviolent drug offenses on any given day.

Black people are overrepresented in every aspect of the drug war, despite using and selling drugs at similar rates as White people. Since 2013, the presence of fentanyl in the illicit drug supply has intensified the overdose epidemic.

It is overly simplistic to assume that opioids alone explain the current crisis. Instead, this epidemic is a sign of a more persistent drug use problem, one that federal policy has not only failed to address but has made worse through its harmful approach.

We are now at an inflection point. The tragedies of the overdose crisis have forced a reckoning with tough on drugs thinking, albeit one made possible only because the epidemic's early victims were mostly white.

Still, any departure from the drug war mentality is a welcome development. Support is building for reforms that are centered on racial justice and harm reduction.

Bad policies are hard to dismantle. Drug bans continue to play a central role demonstrating a failure to learn from the drug war's mistakes and a misunderstanding of the root of the current overdose epidemic.

While recent reforms have reduced mandatory minimums for some drug offenses, this problematic sentencing structure continues.

I will now briefly discuss each of these policies. Given the overdose-related risks of fentanyl and its analogs, the urge to institute broad bans and harsh punishments is understandable, but it is also misguided.

DEA argues that its emergency class-wide ban on all fentanyl-related substances is critical to aiding prosecution of people selling these drugs. An analysis by the U.S. Sentencing Commission found no evidence that the ban was needed for these prosecutions, and more importantly, the class-wide ban doesn't work.

Fentanyl-related overdoses continue to rise even if those involving other opioids have levelled off or declined. Recent analysis also shows that law enforcement seizures of fentanyl are actually associated with an increase in overdose deaths.

The ease of distribution of fentanyl and its analogs make any efforts to diminish supply an uphill battle, and in the unlikely event that federal authorities do make a significant dent in the fentanyl supply, markets will adapt by finding an equally or more lethal drug alternative.

We know this from experience. Government efforts to crack down on the supply of prescription opioids in the early 2000s led to the spikes in heroin and fentanyl deaths that we see today.

So, while it might seem like the right thing to do, a class-wide fentanyl ban is not benign. It makes illicit drug use more dangerous to the person using.

This kind of ban also expands the reach of an agency whose mission is to make drug arrests regardless of the harms and ineffectiveness of this approach.

DEA tactics widen the net of people who encounter the justice system and are arrested, convicted, sentenced, and continuously monitored by it. Like drug bans, mandatory minimum sentences have not reduced drug supply, demand, or deaths. They do not work.

Supporters of these sentences claim that they target drug sellers, not drug users. But there's often no clear distinction between these groups, and many people who sell drugs have substance use disorders.

Also, the amounts of drugs that trigger mandatory penalties are a poor indicator of a person's role in a drug-selling operation, and to this point, most people charged with drug trafficking offenses are at the bottom of the distribution chain. Any vacancies created by these arrests are quickly filled and drugs remain available.

Law enforcement has wide discretion to decide who to pursue with mandatory minimums. This increases the likelihood that people who have substance use disorders or who are Members of mi-

nority communities already subject to government surveillance will become targets for harmful interventions.

Mandatory minimums impose long prison sentences and are disproportionately levied against people of color. We don't need more data about how these policies are harmful and ineffective.

We need action, and there are several immediate steps that Congress can take to promote less harmful, more effective policy.

First, Congress should not extend the class-wide ban on fentanyl analogues. It should repeal mandatory minimum sentences. It should remove financial incentives for law enforcement to pursue drug offenses, and it should expand access to medication-assisted treatment and fund interventions that reduce the harms of drug use, not just for opioids.

It should also remove cannabis from Schedule I and implement measures to alleviate the damages of prohibition such as those included in the original MORE Act.

My time is up so I will end here but I look forward your questions and thank you.

[The statement of Ms. Harris follows:]

STATEMENT OF KATHARINE NEILL HARRIS

Members of the Committee:

Thank you for the opportunity to submit testimony regarding federal policies for controlled substances. On behalf of the drug policy program at Rice University's Baker Institute for Public Policy, this statement is submitted for the record for the hearing on "Controlled Substances: Federal Policies and Enforcement" on March 11, 2021. The following section provides a brief overview of current trends in drug use and drug policy. This is followed by a discussion of two specific policies, the class-wide fentanyl ban and mandatory minimum sentences. This testimony concludes with policy recommendations for Congress.

Introduction

The 40-year War on Drugs is a policy failure. It is unable to stop the steady flow of drugs into communities across the U.S.; it ignores the complex causes of drug use and fails to provide effective treatment for addiction; it contributes to mass incarceration and violence on our Southern border; it is exceedingly expensive; and it inflicts immeasurable harm on people who use drugs and on minority communities writ large.[1] The overdose crisis, which has occurred alongside the drug war for the last two decades, is the clearest indictment so far of the failure of prohibition to curb drug use. COVID–19 has worsened the overdose epidemic, and 2020 was another record-breaking year for drug-related deaths.[2]

The War on Drugs is first and foremost a war on people. More people are arrested for drug possession than for any other offense in the U.S. Of more than 1.5 million drug arrests in 2019, about 90% were for possession. Roughly 450,000 people are incarcerated for nonviolent drug offenses on any given day. Nearly half (46%) of the federal prison population consists of people convicted of drug offenses. National survey data consistently show that Black people account for about 12% of people who use drugs, proportionate to their population size, but they make up 29% of drug arrests. 40-three percent of people in federal prison for drug offenses are Black and approximately 60% of people in State prisons for drug offenses are people of color.[3] The Federal Government has undeniably led the charge in the War on Drugs; harsh

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[1] *See* William Martin and Katharine Neill Harris, 2021, Drug policy priority issues for the Biden Administration, Issue Brief, Rice University's Baker Institute for Public Policy, *https://www.bakerinstitute.org/research/drug-policy-priority-issues-biden-Administration/*.

[2] Joan Stephenson, 2021, CDC warns of surge in drug overdose deaths during COVID–19, *JAMA Network*, January 5, *https://jamanetwork.com/channels/health-forum/fullarticle/2774898*.

[3] E. Ann Carson, 2020, *Prisoners in 2019*, U.S. Department of Justice, Bureau of Justice Statistics, *https://www.bjs.gov/content/pub/pdf/p19.pdf*.

policies at the federal level have contributed to punitive, ineffective, and unequal drug policy at all levels of government.[4]

Arrest and incarceration statistics show only one facet of the harms the War on Drugs has caused. It has infiltrated nearly every aspect of the lives it entangles. Involvement in the criminal justice system increases the likelihood of future law enforcement encounters and negatively impacts multiple areas of one's life, including education and employment prospects, parental rights, immigration status, and access to housing and health care.

Children whose parents have been arrested and incarcerated for drug offenses incur greater risk for these same negative outcomes in their adolescence and adulthood.

Increasingly, public health experts are recognizing the micro- and macro-level adverse physical and mental health effects caused by encounters with the justice system.[5]

Drug use can also cause harm, and since 2013, the presence of fentanyl in the illicit drug supply has exacerbated the overdose epidemic. The number of overdoses involving synthetic opioids other than methadone, a category dominated by fentanyl, doubled from 2015 to 2016.[6] It is overly simplistic, however, to assume that opioids alone explain the current overdose crisis. Analysis of overdose fatalities over time suggests that such deaths have been increasing exponentially as far back as 1979.[7] Overdoses involving cocaine and methamphetamine have been increasing since 2010, and the majority of overdose deaths involve two or more drugs.[8] Taken together, these trends suggest that the recent sharp increases in overdoses may be a particularly intense manifestation of a more persistent substance use problem, one that U.S. drug policy has done little to address.[9]

Despite this grim overview, there is hope that we are moving toward a more evidence- based approach. The tragedies of the overdose epidemic have forced a reckoning with tough-on-drugs thinking, albeit one made possible only because the epidemic's early victims were predominantly White.[10] Still, any departure from the drug-war mentality is a welcome development. We now find ourselves at an inflection point, where demands for reforms centered on racial justice and harm reduction are up against entrenched prohibitionist policies.

Recent reforms such as the First Step Act and federal funding for expanded access to medication-assisted treatment for opioid use disorder are important steps toward developing more evidence-based drug policy. Other trends, however, are concerning. Drug bans, such as those for fentanyl analogues, continue to play a central role in U.S. drug policy, demonstrating a failure to internalize the lessons of past drug war battles and a misunderstanding of the roots of the current overdose epidemic. Furthermore, while the First Step Act reduced mandatory minimum sentences for people convicted of certain drug offenses, this problematic sentencing structure continues. The next sections address each of these policies.

Limitations of Drug-Specific Measures

Given the overdose-related risks of fentanyl and its analogues, the urge to ban these substances and harshly punish anyone who sells them is understandable, but it is also misguided.

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[4] For example, when Congress passed the Anti-Drug Abuse Acts of 1986 and 1988, ratcheting up penalties for crack cocaine, states followed suit. After Congress passed the Fair Sentencing Act in 2010, raising the amount of crack that triggers the mandatory sentences and thereby reducing the sentencing disparity for crack and cocaine from a ratio of 100 to 1 to 18 to 1, many states did the same.

[5] For a more detailed discussion of the health impacts of carceral systems, *see* the January 2020 special issue of American Journal of Public Health, *https://ajph.aphapublications.org/toc/ajph/110/S1*.

[6] National Center for Health Statistics, Data Brief 294, Drug overdose deaths in the United States, 1999–2016.

[7] Hawre Jalal *et al.*, 2018, Changing dynamics of the drug overdose epidemic in the United States from 1979 through 2016, *Science*, September 21, *https://science.sciencemag.org/content/361/6408/eaau1184*.

[8] Holly Hedegaard *et al.*, 2018, Drugs most frequently involved in drug overdose deaths: United States, 2011- 2016, *National Vital Statistics Report*, 67 (9), December 12..

[9] Katharine Neill Harris, 2018, The drug overdose epidemic: not just about opioids, Issue Brief, Rice University's Baker Institute for Public Policy, *https://www.bakerinstitute.org/research/overdose-epidemic/*

[10] William Martin and Katharine Neill Harris, 2016, Drugs by the Numbers, Issue Brief, Rice University's Baker Institute for Public Policy, *https://www.bakerinstitute.org/research/drugs-by-numbers/*.

DEA argues that its emergency class-wide ban on all fentanyl-related substances, authorized by Congress in 2018 and set to expire on May 6, 2021, is critical to aiding prosecution of people selling fentanyl who try to skirt federal prohibition by making small tweaks to the drug's chemical structure. But it is not clear that this ban and the additional authority it grants to DEA are actually necessary. An analysis by the U.S. Sentencing Commission found that in fiscal year (FY) 2019 only two cases regarding fentanyl analogues involved substances not already listed in the Controlled Substances Act, and in neither case did the courts appear to rely on DEA's 2018 emergency scheduling order to issue rulings.[11]

Law enforcement agencies often point to the number of drug seizures and prosecutions as indicators of prohibition's importance and effectiveness. By this logic, prosecution of fentanyl trafficking is working when more cases of fentanyl trafficking are being prosecuted. This rationale is used to justify ever-increasing resources and authority to law enforcement for drug-related interventions, without providing evidence of the efficacy of such policies for reducing drug supply or demand. A 2018 GAO report found that federal law enforcement agencies lacked metrics for assessing the effectiveness of their efforts, concluding that "without specific outcome-oriented performance measures, federal agencies will not be able to truly assess whether their respective investments and efforts are helping them to limit the availability of and better respond to the synthetic opioid threat."[12] If we evaluate fentanyl-related law enforcement efforts using fentanyl-related overdoses as a metric, they are hardly a success; these overdoses continue to increase even as overdoses involving prescription opioids and heroin have leveled off or slightly declined.[13] Recent empirical research has also found that law enforcement seizures of fentanyl are associated with an increase in overdose deaths.[14]

The ease and diversity of distribution for fentanyl and its analogues make any efforts to diminish its supply an uphill battle. In the unlikely event that federal authorities do make significant dents in fentanyl access and supply, people involved in manufacturing and trafficking will adapt by finding a drug alternative that is just as lethal, if not more so. To confirm the high likelihood of this scenario, we need look no further than our current predicament. The spike in overdose deaths, first from heroin in 2010 and then from fentanyl in 2013, are a direct consequence of prohibition generally and can be tied specifically to government efforts to reduce the supply of prescription opioids in the early 2000s.[15]

Extending DEA authority to issue class-wide fentanyl bans, then, is not benign. Not only might such bans have the unintended consequence of further increasing the risks related to illicit opioid use, but this practice also increases the authority of an agency whose mission is the pursuit of drug arrests without regard for the evidence of the harms and ineffectiveness of this approach. Zealous pursuit of drug offenses, along with policies that incentivize this behavior such as civil asset forfeiture laws, widens the net of people who encounter the justice system and are subsequently arrested, convicted, sentenced, and continuously monitored by it.

There is also abundant evidence that aggressive law enforcement tactics are used disproportionately against minorities. One particularly egregious example is DEA's reverse sting operations, in which the agency invents nonexistent drug stash houses, purported to have drugs and money, in order to tempt individuals to rob them. DEA then arrests these individuals for crimes related to the attempted robbery. Between 2009 and 2019, all but two of 179 people arrested in DEA reverse sting operations in New York City were Black or Latino. Analysis of data from anti-drug operations using fake stash houses in other major cities show that stark racial disparities are a common feature of this practice.[16]

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[11] Kristin M. Tennyson *et al*., 2021, *Fentanyl and fentanyl analogues*, U.S. Sentencing Commission, January, *https://bit.ly/3rrZZ9A*.

[12] Government Accountability Office, 2018, *While greater attention given to combating synthetic opioids, agencies need to better assess their efforts*, *https://www.gao.gov/assets/gao-18-205.pdf*.

[13] Centers for Disease Control and Prevention, 2021, Opioid data analysis and resources, *https://www.cdc.gov/drugoverdose/data/analysis.html*.

[14] Jon E. Zibbell, *et al.*, 2019, Association of law enforcement seizures of heroin, fentanyl, and carfentanil with opioid overdose deaths in Ohio, 2014–2017, *JAMA Network*, November 8, *https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2754249*.

[15] Neill Harris, The drug overdose epidemic, note 9.

[16] Shayna Jacobs, 2019, 10 years. 179 arrests. No White defendants. DEA tactics face scrutiny in New York. *The Washington Post*, December 14, *https://wapo.st/3t2BYX1*.

The Futility and Harms of Mandatory Minimums

Like other federal drug policies, mandatory minimum sentences have not been accountable to performance measures. Steady trends in drug availability and use, and increases in overdoses, indicate they have not curbed drug supply or demand. They have, however, been remarkably successful at imposing long prison sentences. In FY 2016 individuals convicted of drug offenses carrying mandatory minimum penalties received an average sentence of 94 months.[17] These laws have been especially efficient at incarcerating Black people. Nearly 65% of Black people convicted of offenses carrying mandatory minimums received the mandatory minimum sentence compared to 51% of White people convicted of such offenses in FY 2016, a disparity that is actually an improvement since FY 2010, when the gap in mandatory minimum sentences across racial groups was significantly higher.[18]

A general Rule of thumb for effective deterrence is that the swiftness and certainty of punishment are more important than severity.[19] Mandatory minimum sentences do the reverse, levying severe punishments that are highly uncertain and unevenly enforced. Furthermore, while mandatory minimums may be meant to focus on "drug traffickers" rather than "drug users," these distinctions often are not possible. Many people who use drugs also sell them and an analysis using data from the National Survey on Drug Use and Health found that 43% of people who said they sold drugs in the previous year also met criteria for a substance use disorder.[20]

The amounts of drugs that trigger mandatory minimum penalties are also a poor indicator of a person's role in a drug selling operation.[21] The arbitrariness of mandatory minimum trigger amounts and the wide discretion law enforcement has over how to determine that a person is selling drugs, increase the ease of prosecuting people for drug sales and the likelihood that individuals who have substance use disorders or who are Members of minority communities already subject to government surveillance will become ensnared in this process.[22] The mandatory minimum sentence of five years for anyone convicted of possession of the relatively low amount of five grams of crack cocaine, established by the Anti-Drug Abuse Act of 1986 and enhanced by legislation of the same name two years later, is a prime example of uninformed policymaking with disastrous consequences that disproportionately affect Black communities.[23]

Despite ample evidence that mandatory minimum penalties are unrelated to drug supply, demand, and overdose deaths, support for them lingers, and they are routinely imposed, despite increased deviation in recent years. In FY 2019, more than 50% of people convicted of fentanyl and fentanyl analogue offenses received mandatory minimums and 66% of people convicted of other drug offenses received such penalties. Forty-five percent of people convicted of drug offenses that year (excluding fentanyl and analogues) had little to no prior criminal history, calling into question the narrative that the people convicted under these laws are long-term "career criminals."[24]

The data also contradict law enforcement claims that long sentences are essential to keeping "violent traffickers" off the street. Sixty-seven percent of people charged with offenses relating to drug trafficking for fentanyl and its analogues in FY 2019 were at the level of a street dealer or below.[25] Any vacancies in these positions in an organized drug selling operation will be quickly filled. While harsh penalties and zealous enforcement are unable to eradicate drugs or people who sell them, they may disrupt street-level supply just enough to increase the risks associated with

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[17] U.S. Sentencing Commission, 2018, *Federal drug mandatory minimum penalties*, Report-at-a-glance, p.1, *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/RG-drug-mm.pdf*.

[18] *Id.* In FY 2010, 59.5% of Black people eligible for mandatory minimum drug sentences received them, compared to 39.3% of White people.

[19] National Institute of Justice, 2016, *Five things about deterrence*, U.S. Department of Justice *https://www.ojp.gov/pdffiles1/nij/247350.pdf*.

[20] Evan Stanforth, *et al.*, 2016, Correlates of engaging in drug distribution in a national sample, *Psychol. Addict. Behav.*, 30(1), *https://pubmed.ncbi.nlm.nih.gov/26502336/*.

[21] Lindsey Lawson Battaglia, 2015, Will the U.S. Senate finally reform harsh mandatory minimum sentences for drugs? Drug Policy Alliance, March 15, *https://bit.ly/3t1fvts*.

[22] Drug Policy Alliance, 2019, *Rethinking the "drug dealer," https://bit.ly/3bvQPna*.

[23] The mandatory minimum trigger amount for powder cocaine, more commonly associated with White drug users, remained unchanged, at 500 grams. For fuller discussion of race and the drug war see Doris Marie Provine, 2011, Race and inequality in the War on Drugs, *Ann. Rev. Law Soc. Sci.*, 7, 41–60.

[24] U.S. Sentencing Commission, *see* note 11.

[25] *Id.*

drug use, since removal of a trusted source of drugs will force people who use drugs to turn to unfamiliar sources for their supply.[26]

Policy Recommendations

I. Enact Reforms That Reduce Law Enforcement Interventions and Other Punitive Measures Towards People Who Use Drugs

National drug law reform is essential for reducing the federal prison population and for providing states with a blueprint for effective policy change. The most comprehensive measure Congress could take would be to decriminalize possession of all drugs for personal use. This would effectively remove penalties for drug use and possession and free up resources to devote to more productive initiatives that reduce drug-related harms.

Given the political hurdles that may delay this proposal, Congress can take several more immediate steps to reduce harmful and ineffective drug policies:

1. Repeal or significantly reduce mandatory minimum sentences for drug offenses and repeal the crack/powder cocaine sentencing disparity. Restore judicial discretion in sentencing decisions and consider making factors other than drug quantity the primary metrics in sentencing decisions.[27]
2. Restructure grants to law enforcement agencies so that funds are not based on arrest volume, but instead incentivize development of arrest alternatives, such as pre-arrest diversion programs like LEAD and crisis intervention response teams.[28]
3. Bar discrimination and denial of benefits in areas including but not limited to employment, healthcare, housing, immigration, and education based on prior convictions for low-level drug possession. Amend the Drug-Free Workplace Act so that it applies only to people whose work involves hazards to physical safety.
4. Amend or repeal provisions of the Child Abuse Prevention Treatment Act and the Adoption and Safe Families Act that require and incentivize states to remove children from their homes and terminate parental rights on the basis of substance use alone. Redirect funds to community-based treatment and family services.[29]
5. Improve nationwide data collection on race and ethnicity of people involved in stops, arrests, and use of force incidents related to drug use and possession.

II. Facilitate Expansion of Harm Reduction and Evidence-Based Treatment Services

National survey data consistently show that not all drug use is abuse, and that most people who get into trouble with any substance recover from it, many on their own without treatment.[30] The recent preference for treatment over incarceration for people who use drugs is encouraging, but not all people arrested for drug offenses need treatment; assuming they do or mandating participation wastes scarce re-

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[26] Blythe Rhodes, *et al.*, 2019, Urban, individuals of color are impacted by fentanyl-contaminated heroin, *International Journal of Drug Policy*, 73, *https://www.sciencedirect.com/science/article/abs/pii/S0955395919301860*; Jennifer J. Carroll, *et al.*, 2020, The protective effect of trusted dealers against opioid overdose in the U.S., *International Journal of Drug Policy, https://pubmed.ncbi.nlm.nih.gov/32143185/*; *Also see* DPA, note 22.

[27] Ram Subramanian *et al.*, 2020, A federal agenda for criminal justice reform, The Brennan Center for Justice, December 9, *https://bit.ly/2OgeAXl*; Criminal Justice Policy Foundation, Mandatory minimums and sentencing reform, *https://www.cjpf.org/mandatory-minimums*.

[28] For discussion of pre-arrest diversion and the need for federal funding, see Jay Jenkins and Katharine Neill Harris, "Leading the way to sensible policy on drug use," *The Houston Chronicle*, Aug. 19, *https://bit.ly/3t4qTVC*. For discussion on alternative models of policing, see Stuart Butler and Nehath Sheriff, 2020, *Innovative solutions to address the mental health crisis: Shifting away from police as first responders*, Brookings Institution, November 23, *https://www.brookings.edu/research/innovative-solutions-to-address-the-mental-health-crisis-shifting-away-from-police-as-first-responders/*.

[29] For a comprehensive review of the relationship between the drug war and the foster care system, see Lisa Sangoi, 2020, *How the foster system has become ground zero for the U.S. drug war*, Movement for Family Power, *https://www.movementforfamilypower.org/ground-zero*.

[30] Substance dependence recovery rates: With and without treatment, 2016, *The Clean Slate Addiction Site*, *https://bit.ly/3ceoIrz*.

sources and threatens to widen the net of people under government surveillance for using drugs.

For people who do have substance use disorders, resources must be available to reduce use-related harms. The Federal Government can take several measures to facilitate evidence-based practices:

1. Remove the federal funding ban on syringe service programs and authorize localities to establish safe consumption sites.[31]
2. Encourage states and localities to provide comprehensive harm reduction services that include supportive housing, safe consumption sites, and syringe and drug testing services by providing grants for these purposes.[32]
3. Rather than focus reduction efforts exclusively on opioids, authorize funding to treat substance use more broadly, including harm reduction services for people who use alcohol and stimulants.[33]
4. Make permanent the lower barriers to medication-assisted treatment (MAT) access that are in place temporarily due to the COVID–19 pandemic.[34]
5. Provide funding for MAT to State prisons and local jails to include all three FDA-approved medications.[35]
6. Authorize pilot programs for heroin-assisted treatment.[36]
7. Enforce parity laws requiring insurers to provide equal coverage for mental health and substance use disorder treatment.

III. Remove Cannabis From Schedule I of the Controlled Substance Act and Implement Measures To Alleviate the Damages of Cannabis Prohibition

Even though the majority of Americans now live in a State where cannabis is legal for some purposes, it remains a Schedule I substance in the Controlled Substances Act, and DEA continues to insist that it has "a high potential for abuse" and "no currently accepted medical use in treatment in the United States." The first assertion is exaggerated; the second is simply false. Removing cannabis from Sched-

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[31] For more information on syringe service programs, *see* William Martin, 2017, *Syringe Exchange: Sound Science, Proven Policy*, Baker Institute for Public Policy, Issue Brief 03.09.17, *https://www.bakerinstitute.org/media/files/files/3f4e6675/BI-Brief-030917-DRUG_SyringeExch.pdf*.

[32] Housing is a key component of curbing harmful drug use; in November 2020 Oregon voters approved a measure that will use tax dollars from legal cannabis sales to fund comprehensive treatment and harm reduction services, including supportive housing, see Oregon Measure 110, Estimate of Financial Impact, *https://bit.ly/2WcUSvP*. British Columbia, which opened the first safe consumption site in North American, has started to offer residents safer alternatives to street drugs to help reduce overdoses, *see https://www.theguardian.com/world/2020/sep/16/british-columbia-opioids-safer-supply-drugs-canada*. For information on efficacy of safe consumption sites, *see* Jennifer Ng *et al.*, 2017, "Does evidence support supervised injection sites?" *Can Fam Physician, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5685449/*. For information on efficacy of drug testing services, *see* Nicholas Peiper, "Fentanyl test strips as overdose prevention strategy," *International Journal of Drug Policy, https://www.sciencedirect.com/science/article/pii/S0955395918302135*.

[33] Substance Abuse and Mental Health Services Administration, 2016, *State targeted response to the opioid crisis grants*, December 14, *https://www.samhsa.gov/grants/grant-announcements/ti-17-014*; Puja Seth *et al.*, 2018, Overdose deaths involving opioids, cocaine, and psychostimulants—United States, 2015–2016, *Morbidity and Mortality Weekly Report* 67(12), 349–359, *https://www.cdc.gov/mmwr/volumes/67/wr/mm6712a1.htm*.

[34] DEA and SAMHSA relaxed rules regulating prescribing methadone and buprenorphine in response to the COVID–19 pandemic; these changes have the added benefit of increasing treatment access for people who live in rural locations or are without transportation. *See https://www.samhsa.gov/sites/default/files/faqs-for-oud-prescribing-and-dispensing.pdf*.

[35] The Department of Justice funds MAT for prisons, but there is a strong preference for the opioid antagonist Vivitrol over methadone and buprenorphine, the other two FDA-approved medications to treat OUD. Best practices recommend that all three be made available to fit patients' individualized needs. Rhode Island was the first State to offer all three MATs in its correctional system; for an evaluation of that program see Traci Green *et al.*, 2018, "Post-incarceration fatal overdoses after implementing medications for addiction treatment in a statewide correctional system," *JAMA Psychiatry, https://pubmed.ncbi.nlm.nih.gov/29450443/*.

[36] Several high-quality studies have shown that heroin-assisted treatment for chronic opioid uses who do not respond well to other forms of MAT can result in higher rates of treatment retention, reduced spread of blood borne viruses, reduced criminal activity, and lower risk of incarceration. *See* M. Ferri *et al.*, 2011, Heroin maintenance for chronic heroin-dependent individuals, *Cochrane Database of Systematic Reviews, https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD003410.pub4/full* and Jens Reimer *et al.*, 2011, Physical and mental health in severe opioid-dependent patients within a randomized controlled maintenance treatment trial, *Addiction, https://pubmed.ncbi.nlm.nih.gov/21489005/*.

ule I is necessary both to facilitate sorely needed medical research and to decriminalize cannabis possession.

The Federal Government has allowed State experimentation with cannabis policy reform, and many states have now decriminalized possession or legalized sales. These efforts often do not consider racial equity. Nationally, Black people are still 3.64 times more likely to be arrested for possession, a disparity that has remained constant since 2010 despite several states' loosening restrictions since then.[37] There were over 500,000 arrests for cannabis in 2019, mostly for possession, indicating that the war on marijuana continues. Burgeoning State cannabis industries are dominated by White men, excluding minorities from the benefits of legalization.[38]

Cannabis reform ultimately requires national leadership. The Federal Government is the only entity that can remove cannabis from the list of Schedule I controlled substances, allow more scientific research, and give banks legal cover to provide cannabis-related business loans. Measures such as those contained in the MORE Act, including establishing a process for expungement of past cannabis convictions, prohibiting the denial of public benefits and immigration protections on the basis of cannabis-related activity, establishing grant programs to fund services and assistance in communities impacted by the drug war, and improving data collection on the cannabis industry and enforcement of current cannabis laws, are all critical to improving racial and social equity.[39] Congressional action on these issues is important for federal policy reform, and it will also have a powerful impact on state-level policy decisions.

Concluding Comments

One of the many collateral consequences of the War on Drugs is that a large segment of the American public distrusts the intent of U.S. drug policy and the information on drug use that the government provides. In this way the government's drug war has likely impeded its own efforts to reduce demand for drugs through education and prevention programs. Substantive policy reforms like those discussed above thus are crucial to restoring public faith in government and to developing long-term strategies to reduce drug demand.

Policies intended to reduce problematic patterns of drug use must address systemic issues underlying these problems, such as the loss of jobs that provide a livable income, the lack of adequate health care coverage for all ailments and for mental health in particular, and the increasing sense of isolation from community and civic life felt by so many people.[40]

The COVID–19 pandemic adds another layer of complexity to drug-related problems and societal ills by reducing access to drug treatment and intensifying the conditions which contribute to drug addiction—increased unemployment, strained health-delivery systems, limited support services, intensified distrust of government, and frayed social connections. The negative effects of these problems, felt most acutely at society's margins, significantly impacts public health and quality of life for all Americans.

Government policies cannot solve all of the problems that may drive a person's desire to escape an unpleasant reality through drug use, but they can improve current conditions. Doing so will require increasing social and economic opportunities that make heavy drug use less appealing. This involves a significant investment, but one that is necessary to reduce drug-related deaths and addiction in the future.

Ms. JACKSON LEE. Thank you very much, Dr. Neill Harris, for your testimony.

Now we will yield to Mr. Maltz for five minutes.

TESTIMONY OF DEREK S. MALTZ

Mr. MALTZ. Chair Nadler, Chair Jackson Lee, Ranking Members Biggs and Jordan, thank you very much for having me here today to speak to you on this ongoing drug crisis in America.

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[37] Disparities have increased in 31 states between 2010 and 2018. ACLU.

[38] Katharine Neill Harris and William Martin, 2021, Persistent inequities in cannabis policy, *Judges' Journal, https://www.bakerinstitute.org/research/persistent-inequities-cannabis-policy/*.

[39] *https://www.congress.gov/bill/116th-congress/house-bill/3884*.

[40] Michael J. Zoorob and Jason L. Salemi, 2017, "Bowling alone, dying together: The role of social capital in mitigating the drug overdose epidemic in the United States," *Drug and Alcohol Dependence* 173, (1), 1–9, *https://www.ncbi.nlm.nih.gov/pubmed/28182980*.

I was fortunate to be the agent in charge of DEA's Special Operations Division for 10 years. I retired in 2014. The operation had representatives from 30 agencies. We worked very hard to synchronize the efforts to go after transnational criminals around the world.

Prior to that, I was the chief of the country's oldest and largest drug task force in New York City. I had the honor to work with the most dedicated American heroes who sacrificed daily to keep Americans safe.

As a DEA special agent for 28 years, I was paid to enforce the laws of the country enacted by Congress and to protect Americans. I am not here representing DEA.

I'm a private citizen who cares deeply about American people, the public safety, and national security of the country. I'm here to share information about the growing drug crisis and how it's impacting communities all over the country.

After my DEA career, I continued to engage with law enforcement daily to stay current on the trends. I've always been a huge advocate of working together as a team and applying a true unity of effort. However, right now, we need more of a whole of government approach, or rather, a whole of American approach, as drug prices impacts all citizens and all communities.

Too many young Americans are dying from this poison. According to the recent data from CDC, in a 12-month period ending July of 2020, 83,000 Americans died from drug overdoses. That's 227 a day.

This represents the largest number of drug overdoses ever. I lost my brother, Michael, in the U.S. Air Force pararescue during Operation Enduring Freedom. So, I know what it's like to bury a loved one.

However, there's nothing sadder than when you watch family Members of these kids that have promising futures. We cannot expect to end the drug crisis with law enforcement alone. We need robust education, treatment, rehabilitation, combined with law enforcement to curtail this emerging crisis.

Addicted people do need help. However, we cannot treat somebody in the morgue that already died from fentanyl poisoning. We need smart Americans from private sector in many industries to help provide solutions. We cannot sit back and watch these precious lives be lost.

As law enforcement works to shut down the chemicals flowing from China into Mexico, and billions of dollars to the ruthless greedy transnational crime networks in Mexico, we need addiction specialists, teachers, medical professionals, mental health professionals, and others to step up with solutions.

There must be a true team coordinated effort with Congress and all these great Americans that care about the country. The killing of Americans at record levels must stop. Government officials leading this effort must be held accountable for results. Not just papers and statistics but results.

These American transnational criminal organizations are not just engaging in drug trafficking. They're involved in arms trafficking, human smuggling, extortion, kidnapping, child molesting, child exploitation, and other crimes to maximize profit.

They use the latest and greatest technology, taking advantage of our antiquated laws and weaknesses. Hezbollah terrorists are working with the Mexican cartels, moving millions and millions of dollars around the world and tons of cocaine.

What keeps me up at night, though, is listening to the families who lost their loved ones from fentanyl poisoning. Many of these citizens took a pill and had no idea the pill contained pure fentanyl, and it came from labs in Mexico or chemical companies in China.

The Chinese criminals have stepped up their game and they're big-time involved with the drug business and now they're involved with taking over the money-laundering services business for the cartels. They also provide the dangerous chemicals and start to dominate in other areas of the drug trade.

Without the money and chemicals, the cartels can't produce the deadly drugs. There's no quality control of these chemicals in the pills and remember, one kilogram—2.2 pounds—can kill 500,000 people, according to the experts.

To be clear, counterfeit pills with fentanyl and fentanyl mixed with other drugs is what's causing the alarming crisis right now with drugs.

DEA Phoenix seized 6 million Mexi-oxy pills last year, counterfeit pills with fentanyl. That means that DEA and their partners potentially saved over a million people's lives because those pills kill instantly.

As we sit here today, we're dealing with a full-blown national security and public health emergency as well as a huge humanitarian crisis on the border. Our brave men and women at CBP are transitioning from border to security to migrant care. That's no good.

The Mexican transnational criminal organizations are taking full advantage of that and they're flooding the zone. They're flooding the country with drugs and people. They can easily send special agent aliens into the country with dangerous drugs as they import guns and cash into Mexico.

We need Congress to support law enforcement, provide the tools and resources to battle these dangerous adversaries and very complex criminals.

The country is very vulnerable if the good guys don't have the tools, and right now they're losing the tools in their toolbox.

Thank you for the opportunity to appear today on this important topic, and I'm happy to answer any questions.

Thank you.

[The statement of Mr. Maltz follows:]

STATEMENT OF DEREK S. MALTZ

Introduction

Chair Jerrold Nadler, Ranking Member Jim Jordan, Chair Sheila Jackson Lee, Ranking Member Andy Biggs and distinguished Members of the committee, I would like to thank you for this opportunity to speak with you today about America's devastating drug epidemic and impact to all citizens. I am grateful for the opportunity to share my experience and thoughts as America faces complex challenges and an unprecedented drug crisis. I had a long rewarding 28-year career as a Special Agent in the Drug Enforcement Administration (DEA) enforcing the Federal Controlled Substances Act, title 21 United States Code. I retired from the DEA in July 2014

but remain actively involved in the private sector supporting law enforcement agencies around the world as they aggressively target Transnational Criminal Organizations (TCO) causing death and destruction in communities throughout the country.

During the last 10 years of my career, I was the Agent in Charge of the DEA's Special Operations Division (SOD) in Northern Virginia. In that capacity, I ran the SOD operational coordination center with 30 participating agencies, to include representatives from Canada, Australia and the United Kingdom. SOD's primary mission is to support and synchronize the investigative efforts of federal, state, local and international law enforcement agencies. Since the Mexican cartels are one of the biggest TCO threats to the United States, SOD focused substantial resources on the Mexican TCO's. SOD was instrumental in supporting the Mexican government and the U.S. agencies to capture the leader of the Sinaloa cartel, El Chapo Guzman, on two occasions, and coordinating the worldwide investigations against the cartel. (CBS 60 Minutes, 2018). SOD also has a long history of coordinating the efforts of agencies around the world disrupting and dismantling major criminal networks.

Unfortunately, I watched the threat of the Mexican TCO's grow over the years as they took control of the importation and distribution of heroin, cocaine, methamphetamines, marijuana and now fentanyl. I remain committed to work with Congress, my colleagues in the government agencies and fellow citizens who have lost their loved ones to the drug epidemic to help develop recommendations and solutions to build more effective approaches to eliminate the crisis. Too many Americans are dying from drug overdoses and citizens all over the United States are impacted by the Mexican TCO's. It is time to work together using all the expertise to save lives. Law enforcement has the important responsibility to enforce the laws of America to keep our citizens safe and needs the full support of congress.

According to the recent provisional overdose data published by the Centers for Disease Control and Prevention's (CDC) National Center for Health Statistics (NCHS) reflects that approximately 83,000 drug overdose deaths occurred in the United States in the 12-months ending in July 2020 which represents a worsening of the drug overdose epidemic in the United States and is the largest number of drug overdoses for a 12-month period ever recorded. These disturbing numbers represent a significant increase from 2019 with over 70,000 people who died from overdoses. (Network, 2020)

Over the last few years, I participated in the production of several films and media segments to help educate the public and bring needed awareness to the dangerous and evolving drug crisis. As a patriotic American who lost his brother Michael, fighting for America during Operation Enduring Freedom in the U.S. Air Force, I am familiar with the pain and suffering of losing a loved one. However, nothing is more difficult in life than losing a child and I remain committed to this fight. I will continue to engage with families who lost children to this crisis as well as participate in national news media to push the important trends and messages to the public.

In addition to the troubling news on the drug overdoses, there are also dangerous connections between the criminal activity of the Mexican TCO's and terrorist groups like Hezbollah. The threats posed by the TCO's is global and is growing as they make billions of dollars. The topic of narco-terrorism has been a priority of mine for many years, and the United States Government must use all tools of national power to combat and decimate these complex threats.

As the former Special Agent in Charge of SOD in Virginia, the Chief of the New York Drug Enforcement Task Force in New York City and DEA Special Agent working investigations around the globe, I had the privilege of collaborating with numerous local, state, federal and international law enforcement agencies. I have witnessed the incredible results and positive impact to communities when law enforcement works together in a professional manner enforcing the controlled substances Act of the United States.

To be clear, the drug crisis can't be solved with law enforcement alone. This complex and emerging problem requires more than a "whole of government approach", but rather a "whole of America approach." The U.S. needs more focus and resources on drug education, treatment and rehabilitation in addition to law enforcement. This is an unprecedented public health, national security and community safety matter that also has huge mental health ramifications for the addicted as well as their families. There are many great American patriots working in the medical, education, addiction, science, technology, financial, and other private sector industries that can help develop comprehensive strategies and plans to deal with this matter. The *status quo* is an unacceptable option as too many lives are on the line.

Overview

Over the last 34 years, I have been honored to be an active participant of the DEA and now in the private sector to work with some of the best and brightest investigators around the globe. I have always been committed to DEA's mission focusing enforcement efforts on the entire criminal organization. I remain very concerned that our collective efforts have some significant challenges as the Mexican TCO's have expanded their product line and have formed a lethal partnership with Chinese organized crime networks. They use the latest and greatest technology and innovation as well take advantage of antiquated laws and policies in the U.S. to thwart law enforcement efforts. Sadly, this has resulted in increased violence and more overdose deaths.

Based on the current opioid epidemic, drug crisis and the related death and destruction caused by the Mexican TCO's, I am pleased to be here today to discuss the growing threats in the United States related to the Mexican TCO's, their illicit drug trade and the ongoing southwest border crisis. The Mexican groups are a tremendous threat to public health, safety and national security. In my view based on experience, the Mexican cartel syndicates are one of the greatest criminal threats to America. I'm thankful for the brave men and women of law enforcement who continue to dedicate themselves to fighting these very dangerous threats.

The DEA released its 2020 National Drug Threat Assessment (NDTA) and highlighted several drug trends and critical information to the public. Christopher Evans, Acting DEA Administrator said, "this year's report shows the harsh reality of drug threats facing communities across the United States." He went on further to say, "While the COVID–19 pandemic plagues this nation, so, too, do transnational criminal organizations and violent street gangs, adjusting to pandemic restrictions to flood our communities with dangerous drugs. DEA and our local, State and federal partners continue to adapt to the ever changing landscape, remained focused on current threats and looking to the horizon for emerging threats. We will always defend the American people against illicit substances that ruin lives, devastate families and destroy communities. (Drug Enforcement Administration, 2021)

The DEA listed the following significant findings from in their annual NDTA report:

- Mexican Transnational Criminal Organizations (TCOs) remain the greatest criminal drug threat in the United States.
- Illicit fentanyl is one of the primary drugs fueling the epidemic of overdose deaths in the United States, while heroin and prescription opioids remain significant challenges to public health and law enforcement.
- Mexican cartels are increasingly responsible for producing and supplying fentanyl to the U.S. market. China remains a key source of supply for the precursor chemicals that Mexican cartels use to produce the large amounts of fentanyl they are smuggling into the United States.
- Drug-poisoning deaths and seizures involving methamphetamine have risen sharply as Mexican TCOs increase the drug's availability and expand the domestic market.

The Mexican cartels and the dangerous drugs impact the safety and security of all Americans. Despite the overwhelming issues related to the drug crisis, DEA along with many other law enforcement partners, remain engaged and will continue to enforce the controlled substance act. Those who push the poisonous drugs to the communities of America and violate the laws of this great Nation will be held accountable. During Project Python and Operation Crystal Shield, DEA working closely with their partners, produced substantial results as highlighted in the assessment for 2020 with the seizure of 28,000 pounds of methamphetamines, millions of counterfeit pills containing fentanyl and hundreds of firearms. They also arrested over 2600 targets for violating the laws.

Law enforcement agencies have also worked together on several substantial drug seizures that highlights the dangerous trends in America. During fiscal year 2020, U.S. Customs and Border Protection, (CBP), Office of Field Operations and Border Patrol, reported the total drug seizures (U.S. Customs and Border Protection, 2020):

- Cocaine: 62,005 lbs.
- Heroin: 5,768 lbs.
- Marijuana: 582,413 lbs.
- Methamphetamine: 177,696 lbs.
- Fentanyl: 4776 lbs.

In October 2020, DEA Acting Administrator Timothy J. Shea and Los Angeles Field Division Special Agent in Charge Bill Bodner announced the seizure of 893 pounds of cocaine, 13 pounds of heroin, and 2,224 pounds of crystal methamphet-

amine, which is the largest domestic seizure of crystal methamphetamine in DEA history. (Drug Enforcement Administration, 2020)

Also, in October 2020, U.S. Customs and Border Protection officers at the Otay Mesa commercial facility Friday seized more than 3,100 pounds of methamphetamine, fentanyl powder, fentanyl pills and heroin as part of the second largest methamphetamine bust along the southwest border in the history of the agency, based on information developed by DEA, working jointly with HSI. (U.S. Customs and Border Protection, 2020)

In January 2021, DEA Dallas Division reported the largest seizure of methamphetamine and heroin in the division's history. DEA working with partners seized 1,950 pounds of methamphetamine valued at $45 million during a traffic stop involving a refrigerated tractor- trailer in Denton County on Oct. 8, 2020. The drugs were contained inside a secret compartment of the truck. The enormous seizure was split into 633 packages, and DEA determined the drugs would have been repackaged for distribution in Texas, Chicago, St. Louis and Atlanta. (Jimenez, 2021)

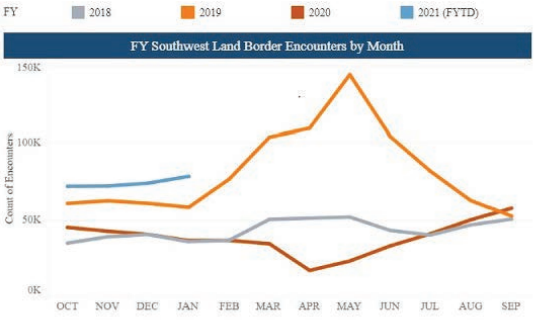
These tremendous law enforcement successes highlight the magnitude of the growing crisis involving the Mexican TCO's as the agencies are making record level seizures of these dangerous drugs in America. The Mexican TCO's are producing record amounts of drugs as they have a vast supply of pre-cursor chemicals coming into Mexico from China. This dangerous trend involving pre-cursor chemicals can be further understood when you look at the 2007 seizure of $207 million, U.S currency, in Mexico City, Mexico from a Chinese national who owned a pharmaceutical wholesale business based in Mexico and was importing massive methamphetamine pre-cursor chemicals. "With the arrest of Zhenli Ye Gon, we've apprehended not only the man behind the money, but the man behind the meth. He may never have touched the drugs, but he made it all possible, facilitating the massive meth trade by brokering chemicals to kingpins," said DEA Administrator Karen P. Tandy. (Drug Enforcement Administration, 2007)

Mexican drug cartels dominate the drug business in the United Sates and are operating in over 50 countries around the world and most cities in the United States. They operate like a fortune 500 company in many ways but employ devastating violence as well. They have major hubs in Southern California, Arizona, Chicago, Texas, New York and Atlanta. The cartels have expanded business around the U.S. as they developed a huge customer market with their high purity products that are killing Americans at an unprecedented level. As an example, Franklin County, Ohio coroner Doctor Anahi Ortiz reported that fatal overdoses jumped 73% in the first half of 2020, with 437 deaths. She further reported that 85% of overdoses involved fentanyl alone or combined with other drugs and that methamphetamine related fatalities increased in 2020. (Holm, 2020)

In my view, the major cartels that seem to have the most substantial impact in America are the Sinaloa and the Jalisco New Generation Cartel. Even though Chapo Guzman was convicted on all counts after outstanding law enforcement and prosecution efforts, and will spend his life in U.S. prison, the Sinaloa and Jalisco cartels remain a huge threat and seem to be growing daily as many migrants are walking across the porous border establishing business with the cartels in U.S. cities.

The TCO's are taking full advantage of the antiquated U.S. laws and latest technology. They also take advantage of the vulnerabilities at the border as the brave CBP officials unfortunately must transition their responsibilities from a border security role to migrant care due to the massive influx of migrants. The TCO's recognize the lack of CBP manpower to patrol areas of the border so they capitalize and move drugs north into the U.S. and money and weapons south into Mexico.

When you review the CBP's fiscal year southwest land border encounters by month, you can see the very disturbing trend. In fiscal year 2021, there is a growing amount of encounters every month. There is an indication from CBP that in February 2021, the number of encounters is around 101,535. When you further compare the first 4 months of the fiscal years 2019, 242,361 encounters, and 2021, 296,259, there was a 22% increase. (U.S. Customs and Border Protection, 2021)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,922	72,091	73,923	78,323									**296,259**
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	**458,088**
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	**977,509**
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	**521,090**

Due to the increasing threats around America, the Department of Justice (DOJ) previously initiated multi-agency task force groups focusing on the top TCO threats to America. The Sinaloa Cartel, the Cartel Jalisco New Generation, Lebanese Hezbollah, MS–13 and Clan del Golfo were designated as the most significant crime threats to the United States. The Attorney General's TOC Task Force is composed of experienced prosecutors and investigators. DOJ formed subcommittees for each of the target groups and has had several successes. (Department of Justice, October)

Most recently, the DOJ led task force had an unprecedented success charging 14 of the world's highest-ranking MS–13 leaders who directed MS–13's violence and criminal activity around the world for almost two decades. This exceptional effort is an example of what can be accomplished when law enforcement and prosecutors work side by side to protect the America public. The groundbreaking indictment charges the defendants with conspiracy to provide and conceal material support to terrorists, conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to finance terrorism and narco-terrorism conspiracy in connection with the defendants' leadership of the transnational criminal organization over the past two decades from El Salvador, the United States, Mexico and elsewhere. Keep in mind the motto of MS–13 is "Kill, Rape, Control" (Department of Justice, 2021)

The current opioid crisis has a disturbing history, and the Washington Post did several outstanding investigative reports documenting the evolving opioid crisis in America as the "Big Pharma" industry distributed 100 billion opioids into America from 2006–2014. The Washington Post reporters analyzed the information from a data analytics company working on behalf of the plaintiff's lawyers in a massive lawsuit against the opioid industry. "In excess of 100 billion pills is simply jaw-dropping," said a lawyer for the plaintiffs from Pensacola, FL. "The data demonstrates that every community in the country has been negatively impacted." The data released traces the path of pills from manufacturers and distributors to pharmacies across the country. (Steven Rich, 2020)

Unfortunately, as many Americans got addicted to the powerful pharmaceutical opioids, the Mexican TCO's took advantage of this greater business opportunity with a larger customer base throughout America. The Mexican TCO's first started to distribute very high-quality White heroin to areas of America with significant opioid addiction issues. Building on their opportunities to make huge amounts of money, the Mexican TCO's then engaged with companies in China to acquire very pure fentanyl and pre-cursor chemicals to make fentanyl in large scale operations in Mexico. The Mexican TCO's realized the tremendous demand in America and started to produce counterfeit oxycontin pills like "Mexi 30 blue pills" containing fentanyl. At first, the cartels would buy kilogram quantities of fentanyl for around $3–5000 which would yield profits up to $1.5–2 million per kilogram. As a result of this "Perfect Storm" of addiction and the Mexican TCO's, America now has a very complex crisis with multiple facets to deal with.

Another important factor with the Mexican TCO's impacting America's national security is the level of violence they engage in daily. Murders in Mexico edged up to a new record high in the first half of 2020. Mexico has seen increased gang violence for many years, with successive governments failing to tackle the problem. According to the latest data available, more than 34,600 murders were registered last year, a record. (Reuters, 2020)

The murder rates in Mexico are very misleading due to the number of disappearances every year.

There are disappearances at record numbers in Mexico as the ruthless cartels employ criminals like the "Stew Maker." (Ley, 2017). Based on the unprecedented violence, deaths to Americans and criminal activities, a sound case can be made to designate the Mexican cartels as foreign terrorist organizations pursuant to the U.S Department of State criteria. The Mexican cartels have left a trail of blood using intimidation and terrorist acts of ruthless violence. The cartels engage in beheadings, car bombings, dissolving humans in acid, mass murders, torture, bombings and political assassinations. Their actions are consistent with the behaviors of traditional terrorists and they have infiltrated the highest levels of the Mexican government with bribes and corruption. Despite these trends, people refer to the Mexican cartels as only transnational organized criminals even though they operate like terrorists and wreak havoc all over their country, United States and Canada.

The cartels routinely conduct beheadings, in which corpses and heads are hung on public display. They are known for kidnapping, torturing and dismembering their targets. They conduct killings of innocent people and cartel rivals for satanic sacrifices. Innocent women and children are not impervious to cartel violence, as they kill have killed indiscriminately to scare the general population into submission and subservience.

Similar to terrorists' organizations like ISIL and Al Qaeda, Mexican drug cartels also utilize social media sites to install fear into the general public by posting videos, and photographs of individuals being decapitated and tortured. (Hastings, 2013) They have also routinely killed politicians who oppose cartel violence or who publicly announced their dissent.

The United States Government currently mistakenly views the Mexican drug cartels as only TCO organizations and its current strategy and policies are insufficient to end the Mexican drug cartels chaos and deaths to Americans. Look at the massive amounts of overdoses and addiction to cocaine, methamphetamines and heroin by our citizens. The production is on the rise and the supply of these poisonous drugs are vast. The United States must accept and come to the realization that the cartels are terrorist organizations. The government leaders must also understand the culture and mindset of the cartels.

The Mexican drug cartel ideology is influenced by their culture and religious beliefs which provide moral justification for their actions. Some Mexican drug cartels have utilized techniques which focus on mind manipulation and behavioral modification commonly utilized by organizations such as Al-Qaeda. As an example, The La Familia Cartel's indoctrination process is described as a 6–8-week program which incorporates texts and videos to assist with brainwashing, periodic vows of silence and days without talking to enhance spiritual concentration, solidarity and loyalty to the Cartels leadership.

Another aspect of indoctrination utilized by the Mexican drug cartels, consist of enlisting young recruits into training camps where they are under the guidance and tutelage of hit men or "Sicario's." Child soldiers are desensitized through vigorous training in which recruits are taught and ordered to kill and dismember their victim, while conduct kidnappings, assassinations and carry out car bombings. The operatives are taught how to utilize and operate both basic and advanced weapon systems and devices such as assault weapons, pistols and at times even explosives. Upon the completion of training, recruits are sent on domestic and international missions to establish cells of Sicario's where they are subsequently called upon to carry out acts of violence on behalf of the cartels. (Most, 2015)

The Mexican cartels are not typical crime groups as they conduct acts of terrorism not solely in furtherance of drug trafficking but for the purpose of instilling fear in the public and influencing the policy of government. They are responsible for utilizing terror tactics to silence, torture and kill civilians, government officials and advocacy groups such as Catholic priests, who publicly speak out against the violence inflicted by the Mexican drug cartels. The Mexican cartels have become Mexico's insurgency's and have utilized terror tactics. They have corrupted and radicalized religion to undermine the Mexican government and the Rule of law. The Mexican drug cartels have recruited hundreds of trained law enforcement and military personnel who now carry out executions and assassinations on behalf of the cartels. Paramilitary organizations such as the Los Zetas Cartel, who were previously

trained by the U.S. military and have become one the most feared and violent terrorist organizations society has ever seen.

The cartels are fearless and operate with a sense of impunity. For example, in May 2015, the Jalisco Nuevo Generacion cartel (CJNG), blocked more than 30 roads with smoldering tankers, set ATMs and banks on fire then proceeded to shoot down a military helicopter with a rocket propelled grenade (RPG); killing several Mexican military soldiers. (Córdoba, 2015)

In 2011, Immigration and Customs Enforcement (ICE) Special Agent's Jaime Zapata and Victor Avila were traveling in a bullet proof vehicle containing Diplomatic license plates on Highway 57 in San Luis Potosi, MX, when a group of armed men from the Los Zetas Cartel forced their vehicle to the side of the road. After identifying themselves as U.S. Diplomats and refusing to exit the vehicle, the group of armed men forcibly opened the vehicle door and opened fire into the vehicle killing SA Zapata and wounding SA Avila. (Hsu, 2017)

The Mexican drug cartels have proven that they will kill discriminately and indiscriminately in order to expand and their influence throughout the country. In May of 2011, representatives from the Department of Homeland Security (DHS) and the Department of Justice (DOJ) declined a proposal by several U.S. Congressmen including U.S. Rep Michael McCaul, to classify several Mexican drug cartels as terrorist organizations. (McCaul Seeks to Classify Mexican Drug Cartels as Terrorists, 2011)

They stated the mechanisms and laws already in place in the U.S. to deal with drug trafficking are enough and the proposed terrorist classification wouldn't be unnecessary. The U.S. and Mexico efforts and strategy against the Mexican drug cartels have been proven to be ineffective in its ability to curtail and significantly reduce the level of drug trafficking and violence inflicted by the cartels. Look at the statistics alone. The purpose of reclassifying Mexican drug cartels as terrorist organizations is to not only address the problem of drug trafficking, but to ultimately confront the level violence and terror carried out by the cartels.

A designation would also provide the U.S. government with additional options when combating the Mexican TCO's that would not be limited to the capabilities of law enforcement. Instead, it would help bridge the gap between the law enforcement, military and intelligence community, thus providing more resources and capabilities to combat the Mexican drug cartels. The cartels utilize and have been found to be in possession of weapons such as assault rifles, pistols, grenades, RPG rocket launchers, claymore anti-personnel mines and man portable air defense systems (MANPADS). (Bunker, 2016)

The Mexican cartels have taken control of Mexico through active means of terrorism. They have consistently killed Mexico mayors who have opposed the illegal activities and violence inflicted by the cartels. They have corrupted thousands of government officials, police officers and military personal through financial means or through intimidation by means of death to them and their loved ones. They have also posed a threat to Mexico's oil infrastructure. Siphoning incidents on pipeline networks have become the norm and drug cartels have continuously threatened to kidnap and extort employees involved in oil operations. (Woody, 2018)

During "Project Cassandra", SOD's focused attack on major drug cartels and Hezbollah's role in a very large-scale terror finance operation. Hezbollah was identified as a top threat by the DOJ led inter-agency group pursuant to the President's TCO strategy. SOD's Counter Narco Terrorism Operations Center (CNTOC), initiated a project with multiple agencies to investigate the connectivity between Hezbollah and the drug cartels.

As the Director of SOD for several years, I witnessed unprecedented results as the CNTOC Task Force and exposed elements of the terrorist group Hezbollah, who were being funded by worldwide cocaine sales. During 2008, the U.S. cooperative investigation with Colombia culminated with over 130 arrests, to include many of the senior-level operatives, and $23 million was seized. (ROTELL, 2008) This case identified the scope and the alliance between South American drug traffickers to money laundering operations in Hong Kong, Central America, Mexico, Africa and Canada, and a connection to several Lebanese criminals associated with a global organized crime network.

Based on the substantial information developed during this phase of Cassandra and very alarming and emerging trends exposed, CNTOC with representatives from numerous agencies, spearheaded a focused investigation with the field offices on the Middle Eastern money launderers working with the drug traffickers who were shipping multi-ton quantities of cocaine into West Africa for distribution around the world. During this initiative, DEA identified the leader of this sophisticated network who coordinated multi-ton shipments of cocaine from Colombia to Los Zeta's Mexican drug cartel and was laundering hundreds of millions of dollars in drug proceeds

back to Colombia. The main operative also established a very sophisticated network in West Africa to move currency via couriers back to Lebanon.

In February 2011, The Department of Treasury with DEA announced the identification of the Lebanese Canadian Bank (LCB) as a financial institution of primary money-laundering concern under section 311 of the USA Patriot Act. This was the first time ever the 311 Action was used in a drug case. The organized crime network was moving large shipments of drugs from South America, Central America and Mexico to Europe and the Middle East via West Africa and laundering hundreds of millions of dollars to accounts held at LCB as well as through trade base money-laundering involving consumer goods throughout the world, including used car dealerships in the U.S. LCB was helping Hezbollah through the Joumaa network. (U.S. Treasury, 2011)

Subsequently in December 2011, there was a complaint filed in the Southern District of New York exposing this Lebanese money-laundering scheme which investigators documented over $300 million into United States for the purchase and shipment of used cars to West Africa. The complaint alleged that the assets of LCB, Hassan Ayash Exchange and Elissa Holding, along with the assets of approximately 30 U.S. car buyers and a U.S. shipping company and related entities that facilitate the scheme, are forfeitable as the proceeds of violations of the International Emergency Economic Powers Act (IEEPA).

Through this investigation, the task force of agencies exposed the LCB as money-laundering for Hezbollah through a very aggressive financial attack against the network. The federal complaint was seeking penalties totaling $483 million. During the December 2011, the Eastern District of Virginia announced the indictment of Ayman Joumaa for coordinating the shipment of tens of thousands of kilograms of cocaine from Colombia to Los Zetas Drug Cartel for distribution into the United States over an eight-year period. Joumaa was also charged with laundering millions of dollars in drug proceeds for the organization. It was estimated that the terror scheme was moving $200 million per month. Joumaa's organization was further exposed through the OFAC sanction. (U.S. Charges Alleged Lebanese Drug Kingpin with Laundering Drug Proceeds for Mexican and Colombian Drug Cartels, 2011)

In August 2012, the Southern District of New York (SDNY) filed a 981K action against five corresponding banks in the United States that were doing business with Banque Labano Francais. This Lebanese bank received $150 million from the Lebanese Canadian bank after they were exposed with their international money-laundering business. As a result of this very successful 981K action, the United States settled a civil forfeiture action against the Lebanese Canadian bank and the settlement required LCB to forfeit $102 million to the United States. This was an unprecedented action targeting Hezbollah and their worldwide illicit activities. The settlement also identified to the world that international money-launderers for terrorists and narco-traffickers will face serious consequences even when the activity is outside the U.S. (Justice, 2012) (York, 2013). (Manhattan U.S. Attorney Announces $102 Million Settlement of Civil Forfeiture and Money Laundering Claims Against Lebanese Canadian Bank, 2013)

The DEA continues to investigate the dangerous nexus between terrorist groups and the Mexican TCO's. Project Cassandra has resulted in numerous other U.S. government high level arrests, seizures, extraditions, prosecutions and U.S. Treasury actions.

Conclusion

Mexican TCO's currently operate throughout the U.S. and are the primary cause for the heroin/fentanyl/opioid and methamphetamine crisis we are combating today. The country is inundated with crime, drugs and violence fueled by the Mexican TCO's. The TCO's are taking advantage of the massive addiction and the demand for opioids and methamphetamines all over the United States.

Terrorists will continue to tap into the incredible amounts of money generated from drug trafficking and many other criminal activities such as human trafficking, counterfeiting, weapons sales and sex trafficking so it's imperative that our hard-working law enforcement and other U.S. government personnel get the resources and support to enforce the laws and keep Americans safe. We need the leadership of the Attorney General, the Secretary of the Department of Homeland Security (DHS), Executives from the Department of Defense (DOD) and the Intelligence Community (IC) to unite and battle these growing adversaries. We also need to work closely with our State and local counterparts who are under resourced trying to deal with this crisis on the front lines. We must also stop the unfair treatment of law enforcement professionals around America. The vast majority of law enforcement personnel wake up in the morning and go to work with the goal to protect

all citizens. They respond to "911" calls and proactively investigate TCO's, gangs and criminal networks trying to keep the public safe from these growing threats. There is going to be "bad apples" in all professions, but it's unfair to paint any profession with a "broad brush" based on the actions of a few. We need to unite our agencies and thank them for their dedicated service as the complexity of the threats continues to grow.

The threats to this great country are moving at lightning speed and we need a sense of urgency at this point. Chinese organized crime and the Mexican TCO's have formed a bond that's growing daily. In DEA testimony of DEA's Chief of Operations, it's clear that fentanyl has emerged as a tremendous threat to America with the influence of the Chinese and cartels. (DEA, 2019)

Under U.S. federal law, fentanyl is a Schedule II controlled substance, which is lawfully produced and distributed in the United States by manufacturers of prescription drugs approved by the Food and Drug Administration (FDA) and is widely used in medicine. It is an extremely potent analgesic, used for anesthesia and for pain control in people with serious pain problems; in such pain control cases, it is generally indicated only for use in people who have a high opioid tolerance. Illicit fentanyl, fentanyl-related substances, and their immediate precursors are often produced in China. From China, these substances are shipped primarily through express consignment carriers or international mail directly to the United States, or, alternatively, to TCOs in Mexico, Canada, and the Caribbean. Once in the Western Hemisphere, fentanyl and fentanyl- related substances are prepared for mixing into the heroin supply, other non-opioid drugs, or pressed into a tablet form, and then moved into the illicit U.S. market, where demand for prescription opioids and heroin remain at epidemic proportions. In some instances, drug trafficking organizations have industrial pill presses shipped directly into the United States from China, which allows them to press fentanyl pills domestically. Mexican TCOs have seized upon this business opportunity because of the profit potential of synthetic opioids and have invested in growing their share of this market. Because of its low dosage range and potency, one kilogram of fentanyl purchased in China for $3,000–$5,000 can generate upwards of $1.5 million in revenue on the illicit market. Such is the potency of fentanyl, that consumption of as little as 2 milligrams of fentanyl can result in a fatal overdose, meaning that a kilogram of fentanyl has the potential of causing lethal overdoses of 500,000 people." (Unprecedented Migration at the U.S. Southern Border: 2019)

It's evident that the TCO groups like the Mexican cartels are moving extremely fast while our investigators and assets are getting "stuck in the mud" of politics, bureaucracy and antiquated laws. In my view, fentanyl is a chemical weapon and the narco-terrorist Mexican TCO's are destroying our country. We need to step up the game with a sense of urgency. Law enforcement will continue to do their best in enforcing the laws, but America needs congress to further engage on these growing issues. The death rates are spiking and impacting republicans, democrats and independents. We must come together and develop updated strategies to combat these threats.

Thank you for the opportunity to speak on these important topics impacting our national security and public safety.

(Chart made by Derek Maltz to depict the complexity of crime in America)

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Ms. JACKSON LEE. The gentleman's time has expired.

I now recognize, and thank you for your testimony, Ms. Austin-Hillery, recognized for five minutes.

TESTIMONY OF NICOLE M. AUSTIN-HILLERY

Ms. AUSTIN-HILLERY. Ms. Jackson Lee.

Madam Chairwoman, are you able to hear me?

Ms. JACKSON LEE. Yes, I can. Thank you.

Ms. AUSTIN-HILLERY. Thank you so much, Madam Chair Jackson Lee. I appreciate the opportunity that you, Chair Nadler, and Ranking Member Biggs have provided to me this morning to talk with you about this very important issue.

In 2016, Human Rights Watch and the American Civil Liberties Union issued a joint report entitled, "Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States."

Our research found that at the time, every 25 seconds in the United States someone is arrested for the simple Act of possessing drugs for their personal use. The numbers have only worsened in recent years.

We are way overdue for identifying and implementing more sound, effective, and rights-respecting policies to address this problem. To do so, we have to have honest, direct, and fact-based dis-

cussions on exactly what the cost of these policies has been and equally honest discussion about what real reform looks like.

First, we need to discuss racial disparities. Communities of color and low-income people are disproportionately impacted by drug arrests and the unintended consequences of those arrests.

The criminalization of drug possession has served as an excuse over the last several decades for authorities to significantly increase the presence of police in these communities and enforce laws on simple drug possession in racially discriminatory ways.

Second, it is imperative that we look at the collateral consequences resulting from our current drug policies. A drug conviction keeps many people from getting a job, renting a home, and accessing benefits and other programs they may need to support themselves and their families.

Federal law allows states to knock people out of welfare assistance and public housing for years, and sometimes even for life, based on a drug conviction.

People convicted of a simple drug possession may no longer qualify for educational student loans. They may lose their driver's license. They may be banned from juries and may face deportation if they are not U.S. citizens, and in many instances, some will lose the precious right to vote.

These limitations amount to nothing more than labelling these individuals as second-class citizens. Laws criminalizing the possession of drugs for personal use are inconsistent with the respect for human autonomy and has yielded few, if any, benefits.

Criminalization, simply put, is not an effective public safety policy. It is counterproductive to public health strategies and often people recycle in and out of jails or prisons with little to no access to voluntary treatment.

Several countries, like Portugal, are experimenting with models of decriminalization. Several states in the U.S. are examining the same, with Oregon being the most prominent, having recently passed a ballot measure banning arrest for low-level drug possession.

The work of nations like Portugal and states like Oregon can serve as a template for what is possible in the United States.

Now, let me be clear in saying this. Ending the criminalization of simple drug possession does not mean turning a blind eye to the misery that substance use disorder can cause in the lives of individuals and their families.

On the contrary, it requires a more direct focus on effective measures to reduce the harms associated with problematic drug use. Congress has this opportunity today. Criminal law does not achieve these important ends but, rather, causes additional harm and loss. The war on drugs was a flawed program and it simply didn't work. Federal implementation of mandatory minimums along with harsh sentencing guidelines has severely lengthened sentences and contributed to an over 500 percent increase in the current prison population since 1980.

Congress now has the means and the tools at its disposal to ensure that criminal laws permit judges to impose proportionate sentences, ensure a class-wide ban on fentanyl-related substances,

pass the Justice Safety Valve Act of 2019, pass the Mandatory Minimum Reform Act of 2020.

Avoid delay in passing legislation making sentencing reforms from the First Steps Act of 2018 retroactive. Pass the Second Look Act and the MORE Act.

Congress can make transformative changes to drug policies, finally providing equitable, compassionate, sound solution to addressing these numerous concerns. That is what real reform looks like.

Thank you.

[The statement of Ms. Austin-Hillery follows:]

STATEMENT OF NICOLE M. AUSTIN-HILLERY

On behalf of Human Rights Watch, I wish to thank Chair Nadler, Subcommittee Chair, Sheila Jackson Lee, Ranking Chair, Andy Biggs, Subcommittee Vice-Chair, Cori Bush and all Members of the U.S. House Committee on the Judiciary's Subcommittee on Crime, Terrorism and Homeland Security, for the opportunity and privilege to submit this statement for its hearing to address Controlled Substances: Federal Policies and Enforcement. My name is Nicole Austin-Hillery and I am the Executive Director of the U.S. Program at Human Rights Watch. Human Rights Watch is an international organization with staff in more than 40 countries which works to defend the rights of people worldwide. We investigate abuses, expose the facts related to those abuses and pressure those with power to respect rights and secure justice.

I have worked as both a civil and human rights attorney and advocate on criminal justice issues for over a decade, including the interconnected issues of reform, drug policy and racial justice as they relate to the criminal justice system. I have served in leadership roles in national organizations where I oversaw work focused on how to improve our justice system to provide fair and racially equitable policies regarding drug enforcement and treatment. I am honored to have this opportunity to address the Committee regarding ways to effectively, and fairly, approach drug policy in the United States.

Reforming and Creating Sensible Drug Policy

In 2016, Human Rights Watch and the American Civil Liberties Union (ACLU) issued a joint report entitled "Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States." Our research found that, at the time, every 25 seconds in the United States, someone is arrested for the simple Act of possessing drugs for their personal use.[1] The numbers have only worsened in recent years.[2] Then and now, police in the United States make far more arrests for simple drug possession than for any other crime.[3] More than one of every seven arrests by State law enforcement is for simple drug possession.[4] [5] Each day, tens of thousands more are convicted for that possession, cycle through jails and prisons, and spend extended periods on probation and parole, often burdened with crippling debt from

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[1] Human Rights Watch and the American Civil Liberties Union, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States* (New York: Human Rights Watch, 2016), *https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states* 2016, p. 2.

[2] In 2019, there were 1.35 million arrests for drug possession in the U.S., up from 1.25 million in 2015, the number upon which Human Rights Watch relied in its Every 25 Seconds report. *See* U.S. Department of Justice, Criminal Justice Information Services Division, Federal Bureau of Investigation, 2019, Table 29 *https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested* and "Persons Arrested" data showing that 86.7 percent of arrests for "drug abuse violations" in 2019 were for possession *https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested* (accessed March 9, 2021); *see also* Human Rights Watch, *Every 25 Seconds*, p. 37.

[3] United States Department of Justice, Federal Bureau of Investigation, "Crime in the United States, 2019," September 28, 2020, *https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-crime-statistics* (accessed March 8, 2021).

[4] United States Department of Justice, Federal Bureau of Investigation, "Crime in the United States, 2019," September 28, 2020, *https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2019-crime-statistics* (accessed March 8, 2021).

[5] Human Rights Watch, *Every 25 Seconds*, p. 2.

court-imposed fees and fines.[6] Drug possession arrests remain significant contributors to mass incarceration in the United States.

The cost of these arrests and incarcerations, however, extend far beyond individual experiences in the formal criminal justice system. The cost to the incarcerated individuals, their families, and communities, is devastating.[7] A criminal record locks these individuals out of jobs, housing, education, welfare assistance, voting and much more. It also subjects them to discrimination and stigma.[8] What these numbers tell us is that there is a human cost to criminalizing personal drug use and possession in the United States.[9] Criminalizing simple drug possession has caused dramatic and unnecessary harms around the country, both for individuals and for communities that are subject to discriminatory enforcement.[10] There are injustices and corresponding harms at every stage of the criminal process, harms that are all the more apparent when, as often happens, police, prosecutors, or judges respond to drug use as aggressively as the law allows.[11]

Families, friends, and neighbors understandably want government to take actions to prevent the potential harms of substance use disorder.[12] Yet, the model that has been used for far too long in the U.S. does little to help people whose drug use has become problematic.[13] Voluntary treatment for those who need and want it is often unavailable, and criminalization tends to drive people who use drugs underground, making it less likely they will access care and more likely they will engage in unsafe practices that make them vulnerable to disease and overdose.[14] Indeed, the last decade has seen a dramatic rise in overdose deaths, hitting over 81,000—the highest number ever recorded by the Centers for Disease Control and Prevention—in the year that ended in 2020, despite widespread criminalization of simple drug possession.[15]

Governments and communities have a legitimate interest in preventing problematic substance use.[16] The criminal legal system is not the solution to this problem and has led to dramatically harmful consequences. The criminalization of drug possession for personal use is also inherently problematic because it represents a restriction on individual rights that is neither necessary nor proportionate to the goals it seeks to accomplish.[17] It punishes an activity that does not directly harm others.[18]

More broadly, the "war on drugs" has contributed significantly to the problem of mass incarceration in the United States. In addition to the vast numbers of people arrested for simple drug possession, many other people end up behind bars and serving extremely harsh sentences, often for low-level drug sales, crimes generally committed to support drug use or to alleviate poverty. Nearly one in five people in State prisons and jails are there for drug offenses.[19]

After decades of "tough on crime" policies, there is growing recognition in the U.S. that governments need to undertake meaningful criminal justice reform and that the "war on drugs" has failed.[20] There has been a national effort to take on parts of the problem—addressing police abuse, long sentences, and reclassification of certain drugs.[21] Each of these steps is critical and I will address some of them further herein. However, these steps are simply not enough—it is time to have a real, honest and critical discussion about the criminalization of drug use and what steps

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[6] Human Rights Watch, *Every 25 Seconds*, p. 2.
[7] *Ibid.*, p. 2.
[8] *Ibid.*, p. 2.
[9] *Ibid.*, p. 2.
[10] *Ibid.*, p. 2.
[11] *Ibid.*, p. 2.
[12] *Ibid.*, p. 2.
[13] *Ibid.*, p. 3.
[14] *Ibid.*, p .3.
[15] United States Centers for Disease Control and Prevention, "Overdose Deaths Accelerating During COVID–19": "Expanded Prevention Efforts Needed," CDC press release, December 17, 2020, *https://www.cdc.gov/media/releases/2020/p1218-overdose-deaths-covid-19.html* (accessed March 9, 2021).
[16] Human Rights Watch, *Every 25 Seconds*, p. 3.
[17] *Ibid.*, p. 3.
[18] *Ibid.*, p. 3.
[19] The American criminal justice system holds almost 2.3 million people in 1,833 State prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, State psychiatric hospitals, and prisons in U.S. territories." Prison Policy Initiative, "Mass Incarceration: The Whole Pie 2020," March 24, 2020, *https://www.prisonpolicy.org/reports/pie2020.html* (accessed March 9, 2021), p. 1.
[20] Human Rights Watch, *Every 25 Seconds*, p. 4.
[21] *Ibid.*, p. 4.

must be taken to rethink reform.[22] What is needed, particularly in this historic moment where we have come face to face with issues of racial and economic disparities, is a comprehensive approach to ending the failed policies of the war on drugs and addressing the economic, social, and health needs of communities, disproportionately impacted by them, largely Black and brown.

Racial Disparities in Drug Arrests and Sentencing

Communities of color and low-income people are disproportionately impacted by drug arrests and the unintended consequences of those arrests.[23] The criminalization of drug possession has served as an excuse over the last several decades for authorities to significantly increase the presence of police in these communities and enforce laws on simple drug possession in racially discriminatory ways.[24]

Data analyzed by Human Rights Watch shows that, over the course of their lives, White people are more likely than Black people to use illicit drugs in general, as well as marijuana, cocaine, heroin, methamphetamines, and prescription drugs (for non-medical purposes) specifically.[25] Data has consistently shown that Black and White adults use illicit drugs and marijuana at similar rates.[26] Yet, in the U.S., Black adults are three times as likely as White adults to be arrested for simple drug possession.[27] Human Rights Watch also found stark racial disparities in arrest rates for drug possession even in the same State or city.[28] In Manhattan, for example, we found that Black people were eleven times as likely as White people to be arrested for simple drug possession.[29] The sheer magnitude of drug possession arrests means that they are a defining feature of the way certain communities experience and interact with police in the United States.[30]

More broadly, because Black communities have been the principal targets in the "war on drugs," the burden of drug arrests and incarceration falls disproportionately on Black people, their families, and neighborhoods.[31] It is actually more than just the burden of drug arrests. It is the burden of increased police presence and surveillance which equals not just more drug arrests but more arrests in total, in addition to the other non-quantifiable damage that comes from living under police scrutiny.

Racial disparities in drug arrests reflect a history of complex political, criminal justice, and socio-economic dynamics, each individually and cumulatively affected by racial concerns and tensions.[32] A fresh and evidence-based rethinking of the drug war paradigm that includes moving away from criminalization of simple drug possession is needed.[33] Any solutions should also include a focus on communities and the needs identified by community Members themselves and not simply those identified by politicians and outside stakeholders.

The Collateral Consequences of Drug Convictions

The impact of a drug conviction can, and often does, impact multiple facets of an individual's life beyond the experience of incarceration. In addition to excessive sentences, including lengthy probation terms, frequently with onerous conditions,[34] there is massive criminal justice debt and restrictions that impact one's ability to function within their families and communities. The costs of these arrests and incarcerations extend far beyond individual experiences in the formal criminal justice system. The cost to those incarcerated, their families and communities, is dev-

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[22] *Ibid.*, p. 4.

[23] Human Rights Watch, Decades of Disparity: Drug Arrests and Race in the United States (New York: Human Rights Watch, 2009), *https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states*, pp. 1–2.

[24] Human Rights Watch, *Every 25 Seconds*, p. 4.

[25] *Ibid.*, p. 5.

[26] United States Centers for Disease Control and Prevention, National Center for Health Statistics, "Use of selected substances in the past month among persons aged 12 years and over, by age, sex, and race and Hispanic origin: United States, selected years 2002–2018," *https://www.cdc.gov/nchs/data/hus/2019/020-508.pdf* (accessed March 8, 2021).

[27] Drug Policy Alliance, "2020 Annual Report," February 17, 2021, *https://drugpolicy.org/resource/drug-policy-alliance-annual-report* (accessed March 9, 2021), p. 11.

[28] Human Rights Watch, *Every 25 Seconds*, p. 5.

[29] *Ibid.*, p. 47.

[30] *Ibid.*, p. 5.

[31] Human Rights Watch, *Decades of Disparity*, p. 1.

[32] *Ibid.*, p. 1.

[33] *Ibid.*, p. 1.

[34] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (New York: Human Rights Watch, 2020), *https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states*.

astating.[35] Criminalizing simple drug possession has caused dramatic and unnecessary harms around the country, both for individuals and for communities that are subject to discriminatory enforcement.[36]

A drug conviction also keeps many people from getting a job, renting a home, and accessing benefits and other programs they may need to support themselves and their families. Federal law allows states to lock people out of welfare assistance and public housing for years and sometimes even for life based on a drug conviction.[37] People convicted of simple drug possession may no longer qualify for educational loans; they may be forced to rely on public transport because their driver's license is automatically suspended; they may be banned from juries and they may face deportation if they are not U.S. citizens, no matter how long they have lived in the U.S. or how many family Members live in the country.[38] In addition, they bear the stigma associated with the labels of "drug" offender" the State has stamped on them, subjecting them to private discrimination in their daily interactions with landlords, employers, and peers.[39]

In 2021, the Nation experienced a national election with record-breaking numbers of voters engaged in the electoral process, yet "5.2 million Americans were forbidden to vote because of felony disenfranchisement, or laws restricting voting rights for those convicted of felony-level crimes."[40] Many of these individuals have a drug conviction that prevents them from enjoying full civic participation. These limitations amount to individuals taking on the moniker of "second class citizens."

Decriminalization as a Policy Solution

Laws criminalizing the possession of drugs for personal use are inconsistent with respect for human autonomy, which is at the heart of the right to privacy, and contravene the human rights principle of proportionality in punishment.[41] In practice, criminalizing drug use also violates the right to health of those who use drugs.[42] The harms experienced by people who use drugs, and their families and broader communities, as a result of the enforcement of these laws, may constitute additional, separate human rights violations.[43]

At the time of the Human Rights Watch/ACLU report in 2016, all U.S. states and the Federal Government criminalized possession of certain categories of drugs for personal use.[44] Last year, Oregon took an important step, with a majority of voters approving a ballot initiative that shifts the State away from criminalization and toward a health-centered approach to drug use, investing in voluntary treatment, services, and support for people who are struggling with problematic drug use. Nonetheless, other states across the country criminalize drug possession and enforce those laws with high numbers of arrests—as of 2019, more than 86 percent of drug arrests were for simple possession.[45]

Criminalization has yielded few, if any, benefits.[46] Criminalizing drugs is not an effective public safety policy. Human Rights Watch is not aware of any empirical evidence that low-level drug possession defendants would otherwise go on to commit violent crimes.[47]

Criminalization is also a counterproductive public health strategy.[48] Rates of drug use across drug types in the U.S. have not decreased over the past decades, despite widespread criminalization.[49] For people who struggle with substance use disorder, criminalization often means cycling in and out of jail or prison, with little to no ac-

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[35] Human Rights Watch, *Every 25 Seconds*, p. 2.
[36] Human Rights Watch, *Every 25 Seconds*, p. 2.
[37] *Ibid*., p. 11.
[38] *Ibid.*, p. 11.
[39] *Ibid.*, p. 11–12.
[40] The Sentencing Project, "Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction," October 30, 2020, *https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/* (accessed March 9, 2021), p. 1.
[41] Human Rights Watch, *Revoked*, p. 12.
[42] *Ibid.*, p. 12.
[43] *Ibid.*, p. 12.
[44] Human Rights Watch, *Every 25 Seconds*, p. 4.
[45] *Ibid.*, p. 12; Susan Stellin, "Is the 'War on Drugs' Over? Arrest Statistics Say No," *New York Times*, November 5, 2019, *https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html* (accessed March 9, 2021).
[46] Human Rights Watch, *Revoked*, p. 12.
[47] *Ibid.*, p. 12.
[48] *Ibid.*, p. 12.
[49] Human Rights Watch, *Every 25 Seconds*, p. 3.

cess to voluntary treatment.[50] Criminalization undermines the right to health, as fear of law enforcement can drive people who use drugs underground, deterring them from accessing health services and emergency medicine and leading to illness and sometimes fatal overdose.[51]

It is time to rethink the criminalization paradigm. Although the amount cannot be quantified, the enormous resources spent to identify, arrest, prosecute, sentence, incarcerate, and supervise people whose only offense has been possession of drugs is hardly money well spent, and it has caused far more harm than good.[52] Fortunately, there are alternatives to criminalization.[53] Other countries—and now some states in the U.S. (in particular, Oregon) are experimenting with models of decriminalization that the U.S. can examine to help chart a path forward.[54] [55]

Ending the criminalization of simple drug possession does not mean turning a blind eye to the misery that substance use disorder can cause in the lives of those who struggle with it and their families.[56] On the contrary, it requires a more direct focus on effective measures to reduce the harms associated with problematic drug use, and providing voluntary access to treatment and support for those who struggle with it.[57] Ultimately, the criminal law does not achieve these important ends, and causes additional harm and loss instead.[58]

Ending Excessive Sentences

Almost 30 years of harsh sentencing laws have left the U.S. with over 2.2 million people behind bars.[59] In the 1980s State and federal legislators began to adopt "tough on crime" laws in response to rising crime rates, racial tensions, the emergence of crack cocaine, supposed threats to "traditional values" from counterculture movements, and fears of perceived increases in the numbers of immigrant and youth offenders.[60] These attitudes were a follow-up to the Nixon Administration's push to wage a war against Black people—a plan that was well-known and documented.[61] Specifically, for most of the past century,[62] Congress and State legislatures simultaneously adopted harsher sentencing laws, including mandatory minimums and habitual offender statutes.[63]

The plan was flawed. The Nation should not have experienced a "war on drugs"—drug use is a personal choice and the "war" was started as a political tool with racist intentions. It was an abject failure of a policy that violated human rights at its onset.

Specifically, at the federal level, the implementation of mandatory minimums, along with harsh sentencing guidelines, has severely lengthened federal prison sentences and contributed to an over 500 percent increase in the current prison population since 1980.[64] While the First Step Act, signed into law by the previous Administration in 2018, took some steps to address the issue of over-incarceration, bolder and larger steps are needed.

Lawmakers should ensure that criminal laws permit judges to impose proportionate sentences, that consider individualized circumstances and allow appropriate leniency.[65] Reforming or eliminating mandatory minimum sentences is a rec-

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[50] *Ibid.*, p. 12.
[51] *Ibid.*, p. 12.
[52] *Ibid.*, p. 12.
[53] *Ibid.*, p. 13.
[54] *Ibid.*, p. 13.
[55] Drug Policy Alliance, "2020 Annual Report," February 17, 2021, *https://drugpolicy.org/resource/drug-policy-alliance-annual-report* (accessed March 9, 2021), pp. 10–13.
[56] Human Rights Watch, *Every 25 Seconds*, p. 13.
[57] Human Rights Watch, *Every 25 Seconds*, p. 13.
[58] *Ibid.*, p. 13.
[59] Human Rights Watch, *Nation Behind Bars: A Human Rights Solution* (New York: Human Rights Watch, 2014), *https://www.hrw.org/news/2014/05/06/us-nation-behind-bars#:~:text=The%2036%2Dpage%20report%2C%20%E2%80%9C,highest%20report%20rate%20of%20incarceration*, p. 3.
[60] *Ibid.*, p. 5.
[61] Tom LoBianco, "Report: Aide says Nixon's war on drugs targeted blacks, hippies," *CNN*, March 24, 2016, *https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html* (accessed March 9, 2021).
[62] Drug Policy Alliance, "Dismantling the Federal Drug War: A Comprehensive Drug Decriminalization Framework," July 29, 2020, *https://drugpolicy.org/resource/dismantling-federal-drug-war-comprehensive-drug-decriminalization-framework-drug-policy* (accessed March 9, 2021), p. 1.
[63] Human Rights Watch, *Nation Behind Bars*, p. 1.
[64] Human Rights Watch, *Revoked*, p. 132.
[65] Human Rights Watch, *Nation Behind Bars*, p. 8.

ommendation that has been on the table and supported by criminal justice reform advocates for years, but we have yet to achieve this goal. These sentences are "criminal penalties that limit judicial discretion and require judges to impose a specified minimum term of imprisonment upon conviction."[66] Nearly two-thirds of all federal drug sentences are subject to mandatory minimums.[67] The prospective sentencing reforms incorporated in the First Step Act, including reduced sentencing enhancements for prior drug offenses, clarification that the 25-year mandatory minimum for certain firearm offenses is reserved for true recidivists, and expanded safety valve relief for certain nonviolent drug offenses, will help to limit excessive sentences in the future.

Unfortunately, these changes are not retroactive, and it is estimated at least four thousand people in federal prison today serving sentences under now-reformed statutes will not benefit, including many people who will die in prison without retroactivity.[68]

Recommendations for Reform

Congress has an opportunity to make transformative changes to drug policies that finally provide an equitable, compassionate, and sound solution to addressing the numerous concerns laid out in this testimony. This is a moment to recognize and address the harms that harsh, disparate policies that have focused more on punishment than supporting healthy individuals, families and communities have had on the people, particularly those who are Black and low-income.

Congress should follow in Oregon's footsteps by prioritizing an effort to end the criminalization of possession of drugs for personal use, and shift resources from the policing of drug use toward access to evidence-based treatment and other voluntary supports for people who struggle with substance use disorder.

Additional legislative proposals that can contribute to reducing the excessive punishment brought on by the "war on drugs," which Congress should undertake and pass, include:

- The Justice Safety Valve Act of 2019 which would allow courts to impose a sentence below a mandatory minimum if the court finds that it is necessary to do so to impose a sentence that is not greater than necessary to comply with the statutory purpose of sentencing laid out in 18 U.S.C. 3553(a).[69]
- The Mandatory Minimum Reform Act of 2020 would eliminate mandatory minimum sentences for drug offenses.[70]
- Include in any sentencing reform legislation provisions that ensure the new law will be applied retroactively to individuals who have already been sentenced.[71]
- Avoid delay in passing legislation making the sentencing reforms enacted in the First Step Act of 2018 retroactive.[72]
- The Second Look Act would allow any individual who has served at least 10 years in federal prison to petition a court to take a "second look" at their sentence before a judge and determine whether they are eligible for a sentence reduction or release.[73]
- The MORE Act removes marijuana from the Controlled Substances Act and begins to repair the harm marijuana prohibition has caused to millions of people, particularly people of color, by establishing a fund for social equity programs to reinvest in affected communities. It also creates a process by which people with federal marijuana convictions can have their records for these convictions expunged, in some cases automatically, or can be resentenced.[74]

Thank you for the opportunity to submit this testimony.

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[66] The Justice Roundtable, "Transformative Justice: Recommendations for the New Administration and 117th Congress," November 2020, *https://justiceroundtable.org/wp-content/uploads/2020/11/Transformative-Justice.pdf* (accessed March 9, 2021), p. 44.
[67] *Ibid.*, p. 44.
[68] *Ibid.*, p. 46.
[69] *Ibid.*, p. 44.
[70] *Ibid.*, p. 45.
[71] *Ibid.*, p. 46.
[72] The Justice Roundtable, "Transformative Justice," p. 45.
[73] *Ibid*., p. 45.
[74] "US: House Votes to End Marijuana Prohibition," Human Rights Watch News release, December 4, 2020, *https://www.hrw.org/news/2020/12/04/us-house-votes-end-marijuana-prohibition*.

Ms. JACKSON LEE. Thank you so very much, Ms. Austin-Hillery, for that testimony and, as well, thank you for the divergent but also seemingly consistent view of all of our witnesses.

Certainly, we do not take lightly the dangers of drug use or the dangers of cartels or large organizations. We know that we can, in essence, walk and chew gum at the same time and try to deal head-on with this horrible rage of addiction and the plague of major cartels and criminal activities. We can do that in the right way. So, we thank you very much.

The time is now for questions and we will now proceed under the five-minute Rule with questions. I'll begin by recognizing myself for five minutes.

The answers of the witnesses are so very important, but we ask that they are succinct so that we can get as much on the record of your vital information as we possibly can.

Quickly, decades of unequal enforcement of drug laws against Black and brown communities have resulted from—resulted in long-term damage to families, economic opportunity, mental health, wellbeing, and overall quality of life.

Certainly, Dr. Henderson, as you've indicated, it has impacted communities of color. We have been under served in healthcare and other aspects of treating that disease and addiction.

Last Congress, Chair Nadler and I worked to pass the MORE Act. Isn't it true that we need this—these kinds of reforms to bring more economic opportunities to communities most adversely impacted by the war on drugs, and as well, the ending of mandatory minimums and a different construct? Can you answer that question, please, Dr. Henderson?

Mr. HENDERSON. Yes, it is true that we need more policies in that direction because we understand that a significant majority of individuals who are caught in this trap are doing it because they don't have economic opportunity in many of their communities.

Ms. JACKSON LEE. At the federal level, what drug policy priorities do you recommend that are evidence-based and data-driven?

What can we do to reduce these historic racial disparities that come about and generate mass incarceration with individuals, even from being prosecuted in the '80s still incarcerated at this time?

Dr. Henderson?

Mr. HENDERSON. Well, we can start with decriminalizing marijuana. We understand the significant impact of that.

We can start with also, the whole notion behind federal drug legislation in terms of the way we schedule these drugs. We understand the impact of the schedulization in many of these communities.

More importantly, we need to reframe our thinking around the drug problem and remove the drug situation from the criminal justice system and directly place it into the public health arena.

Ms. JACKSON LEE. Thank you very much.

Ms. Austin-Hillery, thank you for indicating that we do not have to ignore the vileness of drug use or drug sales. We can prosecute as well as save lives.

So, my comment to you or question is, isn't it true that these penalties, mandatory minimums that are unjust and unfair, have a disparate outcome for Black and brown communities? Please tell

me your views on mandatory minimum sentences and how they can be counterproductive.

Ms. AUSTIN-HILLERY. Thank you very much, Madam Chairwoman.

They are absolutely counterproductive because they have a disparate impact on not only Black and brown communities but on poor communities. To ensure that we have equity across the board, we have to look at all of the different factors that go into how we apply our laws.

If there is not a direct outcome that relates to the crime committed but that, rather, puts a burden on certain communities over others based on nothing more than racial intent and racial animus, then we have to do away with those laws.

Mandatory minimums have done just that. Mandatory minimums have ensured that we have more Black and brown people in jails despite the fact that, based on research, Black and brown people do not use drugs at a higher level than white.

Ms. JACKSON LEE. Thank you for that.

Ms. AUSTIN-HILLERY. So, we have to make that change.

Ms. JACKSON LEE. Let me also ask you, last year, Congress passed a bill to temporarily extend the DEA's authority for scheduling fentanyl—related substances. We heard from a coalition of advocates opposed to the bill including Human Rights Watch.

What's your view on this issue now?

Ms. AUSTIN-HILLERY. As I said in my testimony, Madam Chairwoman, we absolutely have to make that change. The letter that we sent to Congress, which we are happy to submit for the record, spells it out very clearly.

This is not only something that Human Rights Watch believes, but it is what so many of our coalition partners believe. We must put a ban when it comes to fentanyl, and we can't go forward with real reform if we don't do that.

Ms. JACKSON LEE. Thank you so very much.

Dr. Neill Harris, welcome again.

Thirty-six states, the District of Columbia, and others have adopted laws allowing legal access to cannabis. Fifteen states have adopted laws legalizing cannabis for adult recreational use.

Nonetheless, marijuana continues to be a key driver of mass incarceration. Why do you think it's important to remove cannabis from Schedule I of the Controlled Substances? Why is this action so important?

How can Congress support these data-driven effective programs like the Law Enforcement Assisted Diversion program and how do these programs successfully demonstrate an alternate pathway for treatment of individuals struggling with substance abuse?

I've combined two questions—two aspects of the questions. The time is short, but I would appreciate if you'd be able to answer.

Dr. Neill Harris?

Ms. HARRIS. Yes, thank you, Madam Chairwoman.

It's very important to decriminalize marijuana for a few reasons. One is that it will send a message to other states that this is an important act. I believe that some states are waiting to see federal action before they go to decriminalize themselves.

Second, we know that even though legalization is spreading across the country, racial disparities in arrests continue. Black people remain over three times as likely to be arrested for marijuana possession nationally, even though we have seen this large move for reform.

The MORE Act that has been brought up in this hearing is a perfect example of legislation that also targets the racial inequities that we have seen from the drug war by reinvesting in communities.

Programs like Law Enforcement Assisted Diversion we see work because what they do is that they catch somebody before arrests, and they put them in contact with treatment and with social services that can help with that problem and they bypass the entire criminal justice system so that person does not become ensnared in that system.

Ms. JACKSON LEE. Thank you so very much. Appreciate your answer. I know my time has expired.

I now recognize the Ranking Member for his questions for five minutes, Mr. Biggs.

Mr. BIGGS. Thank you, Madam Chair.

Mr. Maltz, I'm sure you've seen recent news stories about the growing crisis at the southern border, and you touched on it in your opening statement.

My question for you is what impact does this surge of illegal border crossers at the border have on DEA, CBP, and other federal agencies' ability to conduct enforcement operations to deter and interdict drug trafficking?

Mr. MALTZ. Well, right now we have a situation where CBP has gone from border security and protecting Americans to migrant care workers. That's unacceptable because we have families all over this country, and I do this every day—I get pictures from families of their children that are dying from fentanyl. They have record level seizures of fentanyl.

As an example, in February so far this year, there's over 4,000 pounds of fentanyl been seized. One kilogram of fentanyl kills 500,000 people.

So, we have a crisis. We have radical open border policies that will not work when it comes to national security and public health, and we have to deal with this.

One thing I will say was an observation I made today, that walls and fences must work because it took me an hour and 15 minutes to walk from the garage to get here. So, walls should be put up on the border and we need to keep the migrants going through a legal process.

Mr. BIGGS. So one of the things, Mr. Maltz, that you talked about flooding the zone, and a lot of people don't understand what flooding the zone is in border crossing, and we're talking between ports of entry.

Express to us what flooding the zone means and how it facilitates criminal cartels using now vacated areas to smuggle in dangerous drugs.

Mr. MALTZ. So flooding zone is, basically, a way that these business operations can make lots of money. They're charging the mi-

grants thousands of dollars. If it's a special interest alien from certain parts of the world it may be $9,000.

So, they're making money on the migrants coming up. They gather the migrants together. They watch where the Border Patrol is. They blitz the Border Patrol agents, so they're totally focused on the migrants, and then they send their drugs and the people, many times special interest aliens, through these open areas.

Then on top of that, the cash and the guns come southbound. So, they take advantage of the vulnerability. That's what criminal networks do. They take advantage of weaknesses, and that's a weakness in our country at the border.

Mr. BIGGS. So federal agencies put out press releases several times a week touting drug seizures, like what you see behind me. This is from Phoenix and Yuma.

Can you estimate what percentage of drugs people and other contraband crossing our border are interdicted by a federal agency?

Mr. MALTZ. Look, I'm no expert on border interdiction statistics, but I've heard for many, many years in the DEA, 10 percent is seized, right.

So, if you look at just an example, in January there were 1,950 pounds of meth in Dallas, 2,500 pounds in El Paso in December, another 1,900 pounds was seized in Texas.

In Los Angeles, they had record seizures of meth, 2,000 pounds, another 3,000 in San Diego. Lots of meth, fentanyl, cocaine, and marijuana are getting in there.

The thing that concerns me the most are the counterfeit pills that are disguised as what they call Mexi-oxy 30s. They're the blue pills that the kids are taking, and they have no idea it's poison. It's pure fentanyl in many cases.

There's no quality control. They don't have chemists that sit there like FDA and regulate the amount of fentanyl. They're just trying to make as much money as they can, and it's killing Americans at record levels.

Mr. BIGGS. Mr. Maltz, as we get toward the end of your testimony or my opportunity to ask you questions, you talk to the parents of the victims of overdose and drug use on a regular basis, daily?

Mr. MALTZ. Right, and that's why I'm here, by the way. My passion is for the American people and public safety. I'm not here getting paid. I have no agenda.

This is Joseph Dean from Connecticut, 23-year-old. The mother had to put up billboards in Connecticut to get the attention about how bad this crisis is, the murders with fentanyl.

These are all the pictures I get from families every day on Facebook. I don't look at the race in the background of these people. I'll take any photo that they send to get the word out there. These kids are dead and they're not going to come back. They don't have a future, because it is poisonous chemical coming from labs in Mexico.

Mr. BIGGS. Madam Chair, I'd request without objection that his three visual aids be admitted into the record.

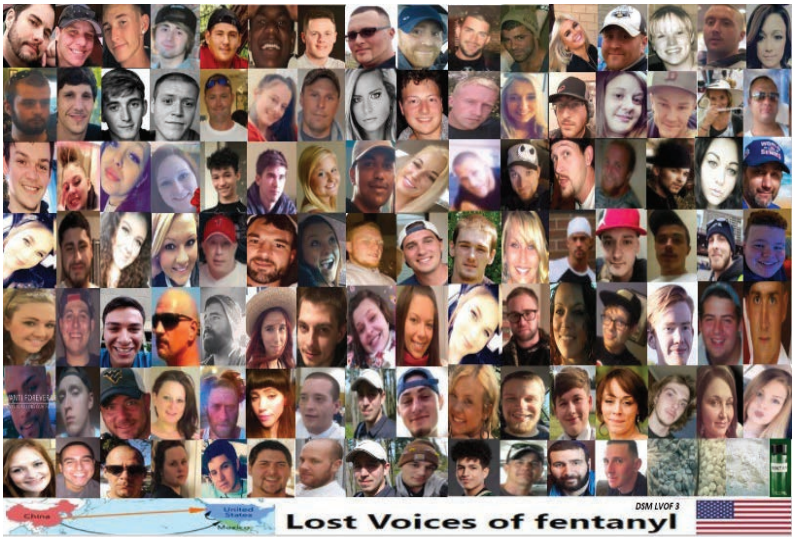
Ms. JACKSON LEE. Without objection, so ordered.

[Mr. Maltz for the record]

MR. MALTZ FOR THE RECORD


China
United States
Mexico
Lost Voices of fentanyl
DSM LVOF1


GROUND ZERO
FOR
OPIOID EPIDEMIC
DSM LVOF2
Lost Voices of fentanyl


China
United States
Mexico
DSM LVOF 3
Lost Voices of fentanyl

Mr. BIGGS. Thank you.

With that, I thank you, Mr. Maltz.

Thank you, Madam Chair, and I'll yield back.

Mr. MALTZ. Thank you.

Ms. JACKSON LEE. Thank you so very much. The gentleman yields back.

The gentleman from New York is recognized, chairman of the committee, for five minutes.

Chair NADLER. Thank you, Madam Chair.

Dr. Austin-Hillery, I just want to clarify. The letter to us you quote—you cited concerning the class-wide ban on fentanyl analogs opposes the extension of DEA's order.

Isn't that the position in the letter?

Ms. AUSTIN-HILLERY. Yes, it is, Mr. Chair.

Chair NADLER. Okay, thank you.

Dr. Neill Harris, please tell us more about your views on the class-wide ban.

Ms. HARRIS. Yes, thank you, Mr. Chair.

I would like to briefly respond to the point about the border and the drugs that are coming across the border and just remind everyone that the reason that we have so many drugs coming into this country is a direct result of prohibitionist policies, and the fact that 90 percent of drugs remain unseized goes to show the ineffectiveness and the fact that people are still getting access to these drugs.

Chair NADLER. Thank you.

Ms. HARRIS. The problem with the class—

Chair NADLER. Go ahead.

Ms. HARRIS. With respect to the class-wide ban, I was just going to reiterate that the bans themselves, when you ban a certain substance people, chemists, traffickers, people selling, people using will find alternatives.

That's how we got to the point where people—where fentanyl is so prevalent in the heroin supply, because heroin was prohibited. So, people found a different way to get something smaller and more lethal to supply the demand that exists in this country.

We have to focus on reducing the demand. If we focus on the supply, we will continue to see more deadly alternatives come to this country and continue to contribute to the overdose epidemic.

Chair NADLER. Thank you.

In 2018, the New York Times reported that in New York City, Black people were arrested on lower-level marijuana charges at eight times the rate of White non-Latino people over the past three years.

In Manhattan alone, Black people were arrested at 15 times the rate of White people. As you know, I am the author of the MORE Act, a bill that would eliminate marijuana from the list of federally—controlled substances.

Could you describe, please, why this is the right policy and why it's necessary to help communities most adversely affected by the war on drugs?

Ms. HARRIS. The MORE Act is essential because what we have seen so far with decriminalization and legalization throughout the country is that the racial inequities continue. Even in states that have legalized, you continue to see racial disparities in arrest rates.

The MORE Act is essential because not only does it decriminalize, which sends a strong message to states, but it also lays a blueprint for how to redress the harms of the drug war through actions such as barring discrimination for public benefits and social assistance, and all of those important components. It bars discrimination against people who have been convicted of marijuana-related offenses.

It also lays out a process for expungement for past convictions and it also provides opportunities for people of color to get involved in the marijuana industry. What we have seen in states that have legalized is that that industry is dominated by White men, and so the communities most hurt, most impacted by the war on drugs have been unable to benefit from legalization. The MORE Act is critical to enforcing that and to seeing that progress.

Chair NADLER. Thank you.

Ms. Austin-Hillery, reverse sting operations are a technique in which the DEA and other law enforcement agencies approach people and induce them to rob fictional drug stash houses.

The use of reverse stings in the Southern District of New York reveals a troubling pattern across the country. The operations overwhelmingly target people of color and lead to mandatory minimum sentences or other significant penalties for fictional crimes that do not reduce the flow of drugs.

In federal drug cases, how do law enforcement practices and policies violate basic principles of equal justice, and what reforms are needed to address the racial disparities in drug cases and investigations?

Ms. AUSTIN-HILLERY. Mr. Chair, we need to make certain that what other mechanisms are used by law enforcement that they are not pretextual and that they serve the actual purpose for which they were intended.

When we have law enforcement create mechanisms that simply put up falsehoods and that target certain communities, even when statistical data and the evidence before us doesn't show those communities are the predominant actors in creating the harm that they seek to end, then we have a problem.

We at Human Rights Watch want to make sure that whatever policies and mechanisms are put in place are based on real data and real research and not based on any kind of political wants and desires and needs to increase numbers so that law enforcement can look like they're doing their job.

Their job is to protect communities and keep them safe, and frankly, what we'd really like to see is more funding go to ensuring that people are healthy and safe and get the kind of support that they need to care for themselves and their families so that these issues will become less prominent and there will be a lesser need for law enforcement interaction.

Chair NADLER. Thank you. My time has expired.

Ms. JACKSON LEE. The gentlelady's time has expired.

The gentleman's time has expired. It is at this time that I'm going to call for a recess for Members to be able to vote.

Witnesses, if you can turn off your mics at this time and we will call you to order after the vote on the floor of the House.

Thank you so very much. The Committee now stands in recess.

[Recess.]

Ms. JACKSON LEE. I now call back to order the Crime Subcommittee hearing, House Judiciary Committee, Controlled Substances, Federal Policies, and Enforcement hearing today on Thursday, March 11, 2021.

As we left for a vote and let me thank the Members for their cooperation and hope everybody voted twice, legally, of course, for the two votes that remain.

So it's my pleasure to now yield to the gentleman from Ohio, the distinguished gentleman from Ohio, Mr. Chabot, for five minutes.

Mr. CHABOT. Thank you very much, Madam Chair.

Mr. Maltz, I want to begin by thanking you for your years of service at the DEA, the Drug Enforcement Administration, for everything that you and your men and women there did to protect the American public and save lives. So thank you very much for that.

My first question, I believe it was posited by the other side a while back that, essentially, if we legalized or decriminalized drugs we'd probably have less of that coming in at our southern border.

Yet, there are quite a few states now that have legalized marijuana and the amounts coming in at the southern border has continued to be on the rise.

So, is that your understanding?

Mr. MALTZ. Yes, of course. It's not just coming in from the southern border. Chinese nationals are buying real estate all over America and they're making these unbelievable marijuana's grow houses in beautiful communities and they're selling very high pure THC marijuana to people all over America, right now as we sit here today.

Mr. CHABOT. Thank you very much.

My next question, would you agree that drug trafficking goes hand-in-hand with human trafficking, that we have a real crisis at our southern border when we turn detention centers into reception centers now and when we, basically, say come on in?

People are coming in. They're listening and they think they can stay. You mentioned it took you an hour and 15 minutes, I think it was, to get beyond the walls and barbed wire that we have around this facility now here in Congress.

Yet, construction on the wall at our southern border has been stopped, ceased, terminated, at least during this Administration.

Again, going back to my original question, does drug trafficking and human trafficking go hand-in-hand?

Mr. MALTZ. Yes. I mean, the Mexican cartels are transnational criminal organizations. They're in the business to make money. They're charging these poor migrants thousands of dollars to be escorted up to the border. They're using them.

They're tagging them now. They're putting wristbands on them so they can keep track of the money owed so if they don't pay the money, their families or they die.

So, you also had that incident in January where—it's a 2,000-mile journey from Guatemala. There were 19 migrants murdered and burned to a crisp because they didn't pay their taxes to the cartels.

So, it's a very, very dangerous situation. It is a huge humanitarian crisis and it's really, really sad.

Mr. CHABOT. Thank you very much.

I read your statement before you came, and you only get five minutes so you don't have a chance to get all of that in there.

So one of the things you mentioned in there that I thought was worth bringing up here is the sicarios, which a lot of people may not necessarily be familiar with the term, but essentially, drug thugs, hit men, muscle, that are training young impressionable drug dealers who get across our border, come here, and are setting up shop in cities across the country, and the propensity for violence that these people are equipped with and willing to do, could you discuss that?

Mr. MALTZ. Yeah. I mean, the Mexican cartels are hiring former military and police officers, and obviously, the corruption is through the roof in Mexico. So, they're paying these people a lot more than they would get paid in the police jobs or military.

Then they get trained in professional facilities. They have indoor ranges. They have plenty of ammunition. They recruit kids, these young kids that just want to make some money, and they go out and start killing people.

It's very dangerous because they don't just kill people with guns. They chop people up. They hang people's heads from bridges and fence posts. They sent heads in coolers with blood to people to intimidate. They tie notes over people. There was one famous case where they roll heads on the dance floor.

Then they are way into the country and there is some violence in our country. It is spillover violence in the country, depending on how you define that word. Some people define the word as deliberate attacks against U.S. people. I don't see too much of that.

I see cartel violence at levels we have never seen, I could talk all day about the stuff I witnessed when I was the head of the SOD operation.

Mr. CHABOT. Before I run out of time here, you had mentioned when you were testifying before that you're losing the tools in your toolbox. Could you tell us what you mean by that?

Mr. MALTZ. Oh, absolutely. One of the best techniques that law enforcement has is infiltrating communications pursuant to federal court orders. Very lengthy process. You don't just flip a switch and listen to somebody's phone.

Unfortunately, because our laws are so outdated, the bad guys are using advanced encryption technology and we can't infiltrate the communications. We have communications going on every day of the week in advanced communications, encrypted apps, and if we have a court order, if we have the probable cause and the judge signs the order, we can't get the content.

That's a problem, and that's a problem for every American. It's not a problem just for DEA. It's a problem for everyone in this room because child molesters, robbers, murderers, rapists, they're all using these apps. So, law enforcement can't track these criminals. They're predators in the community. So, it's a big problem, yes.

Mr. CHABOT. Thank you very much. My time has expired, Madam Chair.

Ms. JACKSON LEE. The gentleman's time has expired.

Ms. Bass?

[No response.]

Ms. JACKSON LEE. I recognize Ms. Demings for five minutes.

Ms. DEMINGS. Thank you so much, Madam Chair. I'd also like to thank all of our witnesses for your time and your testimony.

It is extremely important that we have this discussion, this hearing, and also hear your expertise and perspective.

I want to begin my comments with this. I've witnessed the devastating effects of drugs in communities, devastating effects on families, individuals, and those communities.

I want to quote former Police Chief David Brown when he was with Dallas. He said this: "Every societal failure we put on the cops or the criminal justice system to solve. Not enough mental health funding? Give it to the police. Not enough drug addiction treatment funding? Let the police handle it."

We say in Orange County, Florida, that the Orange County Jail is the biggest mental health treatment facility and the biggest drug treatment facility in the region. Some families actually feel like were it not for those institutions, and this is really sad, that their loved one would not get any help at all.

Chief Brown went on to say, "Schools fail? Call the police. Let them handle it." He said, "This is too much to ask."

What I believe, based on my experience as a 27-year law enforcement officer is that the criminal justice system is left to solve problems that government has failed to address.

I believe those quality of life issues—education, housing, poverty, economics, wages—are directly tied to our criminal justice system.

Dr. Henderson, I'd like to begin with you. If you could please talk about what you believe is the nexus between the failures of our criminal justice system and those quality of life issues in communities that we care about—I care about all of them—like poverty.

Mr. HENDERSON. Thank you so much for taking that position. I, myself, spent a number of years working as a probation officer and that's where I learned the "do no harm" approach.

When you look at the war on drugs and you think about every 25 seconds someone being arrested for drug possession, when you think about the families that are directly impacted, we know all the stats. We know that.

What we don't really think a lot about are the residual impacts of this reality in these communities that have decimated many Americans.

Since 1971, the war on drugs has been estimated to cost this country over a trillion dollars. When you now look at the current opioid epidemic and the approach that we're taking in that space, when you think about the impact of interventions, when you think about how many jurisdictions are now reducing fatalities because they are made naloxone available across many of these communities in trying to reduce and respond to opioid overdoses, in states like New York when you look at syringe access programs, when you think about the over 60 international cities that now operate supervised injection facilities, when you think about the number of American cities that are working to implement approaches that are going to focus on harm reduction, when you think about the num-

ber of drug courts that we now have in this country to move us in the right direction, I think that we understand the harm, and now it's about time for us to begin to reverse that so that we can reacclimate and rebuild these families that have been torn apart over the last 50 years.

Ms. DEMINGS. Dr. Henderson, could you or any witness comment on some of the alternative programs to incarceration like the LEAD program? If you could just comment. You mentioned drug courts, but if you could comment on the effectiveness of some of those other programs.

Mr. HENDERSON. Yes, I will. I'll do that. I think the LEAD program, it allows officers to divert individuals to treatment and social services, which is where they should be because we know now addiction is a disease, particularly when you're talking about low-level drug arrests.

The model that was pioneered in Seattle, it's yielded significantly positive results. Individuals who have been diverted to these programs are found to be almost 60 percent less likely to be rearrested when you compare them to individuals who went through traditional criminal justice programming.

So, we know that works. The challenge that we have is getting people to begin to adopt the alternative philosophy to social controls.

Ms. DEMINGS. Thank you so much, Madam Chair. I yield back.

Ms. JACKSON LEE. The gentlelady's time has expired.

I recognize the gentleman from Texas, Mr. Gohmert, for five minutes.

Mr. GOHMERT. Thank you, Madam Chair.

Mr. Maltz, you were talking about the horrendous corruption in Mexico. I know you were with the DEA for a long time. Have you ever travelled to Mexico?

Mr. MALTZ. Yes, sir.

Mr. GOHMERT. They've got hard-working people there, right?

Mr. MALTZ. Absolutely.

Mr. GOHMERT. Of course, I think it's wonderful when the majority of the people have a faith in God, which is what I find in Hispanics and Central Americans, and also they have a love of family.

It seems that the number-one problem that's keeping Mexico, Central America, from being some of the most vibrant economies in the world, one thing and you touched on it, the massive amount of corruption.

Are you aware of corruption from any source in Mexico besides the drug cartels?

Mr. MALTZ. I mean, I'm aware of the massive corruption up to the top in the Mexican government. The DEA actually recently had a major success with the arrest of the former Defense Secretary, Cienfuegos. They indicted him in the Eastern District of New York, and he was running the country's army. Okay. Also, Genaro Garcia—

Mr. GOHMERT. Literally running the country—Mexico's army?

Mr. MALTZ. He was running the army but working with the cartels, and Genaro Garcia Luna was running their public safety. He was arrested and is in jail in America.

So, the corruption is off the charts in with the cartels. If you paid attention to the "Chapo" Guzman trial in New York, there were allegations of the bribes they were making, even to the former President of Mexico. Okay.

So, yeah, it's off the charts and they get all the money from America, and the money doesn't go to the people. It goes to the corrupt politicians.

Mr. GOHMERT. Yeah. Well, and you mentioned about people, and I've spent lots of nights on the border—days, but also all night many times, and I've been there as they go through the Border Patrol and they have their checklist.

A lot of times they'll add questions like, how much did you pay, and the money all ends up going to the cartels. They sometimes pay coyotes or gang Members to get them across. Most of the time, they'll say, $5,000, $6,000, $7,000, or $8,000. When the Border Patrolman says, you don't have that kind of money, well, I'm going to be able to pay it when I get where I'm going.

I've seen them, people standing in line waiting to be asked their in-processing questions, and they're passing addresses. Oh, I like yours better, and they're switching addresses. They apparently are given addresses where they're supposed to go to sell drugs or be involved in sex trafficking, whatever, and they're given the location of the city and place they're supposed to go.

You've seen that, I'm sure.

Mr. MALTZ. Right, and that's what I was talking about before. The most recent is the wristbands. They're giving them wristbands, and they're finding wristbands, which is actually tracking them as commodities, and if they don't pay their families are in danger and they're in danger when they come back one day or if they're even in the U.S. they're in danger.

Mr. GOHMERT. Well, I have read estimates like $80 billion just on drug trafficking that the cartels bring in now that they've been in human trafficking for a while. It's amazing. What a business model. Your employees pay you to be indentured servants for the future.

What would happen if we completely secured—not closed but secured our southern border? What would happen to the cartels in Mexico?

Mr. MALTZ. Well, the cartels are very innovative. They would figure out ways to get their supply to the unbelievable demand we have in America. It would cause a lot of stress for them at the border. They would start using different methods, tunnels, and they'd use container ships.

Mr. GOHMERT. Yeah, but we have got technology now, if we would use it—not just the microphones underground, like the old days in West Berlin, but we have some really good methods of detecting tunnels.

Mr. MALTZ. Absolutely.

Mr. GOHMERT. There's technology that we have now we didn't used to have. Wouldn't you surely agree that if we completely secured the border, including a very strong program just to find out tunnels, it would minimize the amount of money that's pouring into the drug cartels and severely limit the corruption there?

Mr. MALTZ. Absolutely. They need the people here to run their operations in almost every city in America. This is not just the big cities, New York and Chicago and Los Angeles. This is cities all throughout America.

So, they need the people. So, the people here, they have trusted confidants to work as leaders of their cartel in our different cities. So, the people are so important, and that's what they're doing. They're taking advantage of the wide-open void.

Ms. JACKSON LEE. The gentleman's time has expired.

Mr. GOHMERT. Thank you for allowing me the extra 27 seconds. I know it wasn't 56 like yours but thank you.

Ms. JACKSON LEE. Thank you so very much to the gentleman from Texas for his comments.

Let the record reflect that the bulk of those who are crossing the border over the years and decades have not come for drug activities, but have come out of desperation in fleeing persecution that they are experiencing.

Mr. GOHMERT. I would object to that.

Ms. JACKSON LEE. I thank the gentleman for his testimony.

Let me now yield 5 minutes to the gentlelady from Georgia, Ms. McBath.

Ms. MCBATH. Thank you, Madam Chair.

Thank you to our witnesses today. Thank you so much for coming before us to discuss how we can really keep our communities safe.

I also want to thank the many researchers at the Centers for Disease Control and Prevention, and that is, in and also near my district. Their research is very critical to making sure that we are making informed public health decisions.

Unfortunately, as we have mentioned, the CDC research shows that the opioid deaths have accelerated under the COVID–19 pandemic, which really compounds the tragedies that we are facing now. I know that we have got to do more to save lives from drug addiction and overdoses, using the tools of public health and improvements to our justice system. So, I am pleased that we are having this discussion today because it is vitally critical.

Ms. Austin-Hillery, in your testimony you mentioned the impact of the increased incarceration of people for drug-related offenses on their family Members. What family resources should be made available right now? Are there any friendly family-oriented resources that need to be used for more support?

Ms. AUSTIN-HILLERY. Thank you, Congresswoman, for that question. The answer is a resounding yes. At Human Rights Watch, our research takes us into communities where people are directly impacted. We don't just sit behind our desks and pull up research on the computer or go to a library. We go to communities and talk to the people about what they want.

What we find from those communities is this: The families say they want resources, not to figure out how to continue tangling with law enforcement. They want resources that help them get better educational opportunities, better and cleaner housing, clean water, more infrastructure, and more jobs.

So, if we can focus on resources, on providing those kinds of supports to families, that will have a trickle-down effect and will en-

sure that we will have less entanglements and less interactions between communities and law enforcement that are negative. This is what the people are telling us they want, and we need to hear them and heed to their desires and to their needs, and not use our own erudite, and sometimes very, what I want to say, thinking that doesn't hit the point and that doesn't meet their needs. We need to be talking to them and giving them the services that they tell us on a daily basis that they need. That is how we can support those families.

Ms. MCBATH. Thank you very much. We should always be listening to our constituents.

So, Dr. Neill Harris, your testimony mentioned several programs that you think can help improve how law enforcement interacts with those who have substance abuse programs, programs like the Law Enforcement Assisted Diversion, or LEAD, as you call it. LEAD is the pre-arrest program, am I correct? I believe that there are also other kinds of programs within the justice system as well, such as the Veterans Treatment Courts that focus on getting veterans the treatment that they need and finding better ways to rebuild accountability. So, do you think that Veterans Treatment Courts can have some of the same effects as programs as LEAD do, and I guess help to reduce inappropriate incarcerations?

Ms. NEILL HARRIS. Thank you for that question.

I would say that I do think that there is potential for treatment courts such as veterans' courts and diversion courts to help people and connect them with different services. I would still suggest and recommend, however, that our primary diversions occur pre-arrest, because once someone gets involved with the court process, then that means that they are still entangled with the legal system in different ways. For people who have resources already, it is easier to comply with the requirements of those specialty courts. For those who do not have those resources, it is harder.

So, I absolutely think that we need to be connecting people with services, whether it is veterans, other people with mental illness, people with substance use disorders. I would strongly urge that we do that prior to the arrest. The LEAD program is a good example of that because law enforcement can, essentially, hand off people to social workers and behavioral counselors who can, then, connect people with the services that they need.

Ms. MCBATH. Thank you.

Ms. Austin-Hillery, do you think that programs like these might help our justice system produce more equitable and just outcomes?

Ms. AUSTIN-HILLERY. Absolutely. That really is the goal. One of the problems that we are facing as we talk about these drug problems is that there is a lack of equity, that we have disparate impact that seems at times to be immovable. We have to ensure that we have equity, justice, and fairness. These kinds of programs, as well as many others that we would be happy at Human Rights Watch to talk to you about beyond this hearing, are ones that we should be focusing our time and attention and resources on.

Ms. MCBATH. Thank you. I think I am just about out of time.

Ms. JACKSON LEE. Thank you. Thank you.

We now want to recognize the gentleman from Florida, Mr. Steube, for 5 minutes.

Mr. STEUBE. Thank you, Madam Chair.

Walls work; fences work. If walls and fences and razor wire didn't work, then why did Speaker Pelosi erect fencing, razor wire, deploy National Guard troops around the Capitol? Yet, President Biden is doing the complete opposite on the border, and it is literally killing Americans—literally.

I have the honor of representing Florida in the 17th District of Florida. Florida alone had 5,268 overdoses just in 2019. Thirty-five people died of an overdose in Florida every single day in 2019. Opioid deaths more than tripled in Florida between 2000 and 2016, according to a State government report, and central Florida drug overdose deaths were up as much 70 percent during the COVID–19 pandemic.

The amount of fentanyl that has been seized on the border in just the first five months of 2021 is 4,552 pounds of fentanyl, which will kill hundreds of thousands of Americans. All last year in 2020 at the southwest border, 4,544 pounds of fentanyl were seized. So, in the first five months of this year we have seized more fentanyl at the border than the entire year last year in 2020. It is continuing and continuing to kill Americans and to kill Floridians.

Now I don't understand—the first witness talked about racism and White supremacy, and fentanyl doesn't know what color you are. In fact, just in Florida, there is 13th times more whites that have died than African Americans in the State of Florida. I personally don't think that it matters what color you are. We should be strong and hard on people who are killing Americans and dealing in dangerous drugs on our streets. Regardless of the color they are, they should go to prison, and like reforms that we have made in Florida, if you are dealing in opioids and fentanyl, and people die as a result of you dealing, you should go to prison for life. Those are a lot of changes that we made in Florida when I was in the State legislature.

Mr. Maltz, with those facts and numbers in mind, what are some immediate actions that the federal law enforcement can take to address this problem at the Mexican border?

Mr. MALTZ. Well, first, you have to secure the border. You can't allow these people coming in that are carrying these dangerous Fentanyl pills that are killing kids immediately.

I agree with your point 100 percent. The charts that I have with these family Members here, it is red, white, and blue. It is not red against blue. It has nothing to do with race or color. It has to do with just these Mexican terrorist criminal organizations that want to make billions of dollars.

There is a reason Chapo Guzman was on Forbes' Most Richest People in the World. They make a lot of money. They take advantage. They destroy families. They destroy communities.

So, we could definitely shut the border. We also have to get together with the different professionals, the mental health professionals, addiction specialists. We must have accountability on these programs. We can't just throw money at the programs and then say it is going to go away. It will only go away with strong leaders, and we have to hold people accountable.

So that is something we could do. We have to get full cooperation between all of our agencies. We must have the focus on the people

that are dying, not getting a job when you leave government or getting a job in private industry. It has to be about saving lives.

Mr. STEUBE. In your written testimony, you went into detail about the barbaric tactics used by the Mexican drug cartels—beheadings and torture displayed on social media, indoctrination camps to desensitize new recruits, including child soldiers, taking over huge areas of land while destroying roads and buildings with impunity, creating their own pseudo-religious teachings to brainwash Members. You even compared them to al-Qaeda.

From a law enforcement perspective, how important is it that these individuals are not allowed to cross from Mexico into the United States?

Mr. MALTZ. First, I was one of the advocates of declaring the Mexican cartels as terrorists because they are terrorists the way they are killing, the way they are destroying families. They are taking advantage of society.

In regards to the cartel's violence, what about the Stew Maker, dropping people in acid. So that the murder statistics in Mexico is very misleading. There are so many people that have disappeared because they drop them in acid.

The violence is off the charts, and these people are narco-terrorists. That is what they are, and they need to be dealt with accordingly.

Mr. STEUBE. The current Biden policies at the border doing a good job of making sure that U.S. or that Mexican drug lords don't get across the border?

Mr. MALTZ. Absolutely not. I mean, when you tell the world that coming to America everything is free, meanwhile our schools are closed and families are destroyed because businesses have been closed, it is not fair to the hardworking American people.

I have to say, this is a message to the world. That is why they are lining up in record numbers. It is common sense. You don't have to be an expert.

Ms. JACKSON LEE. The gentleman's time is expired.

Mr. STEUBE. Thanks for being here today.

Mr. MALTZ. Thank you.

Ms. JACKSON LEE. Let me take this moment to introduce an article in the record, "Fact-checking Trump officials: Most drugs enter U.S. through legal ports of entry, not vast open border." In particular, according to U.S. Customs and Border Protection, statistics show 90 percent of heroin seized along the border, 88 percent of cocaine, and 87 percent of methamphetamine, and 80 percent of Fentanyl, in the first 11 months of 2018 fiscal year was caught trying to be smuggled in at legal crossing points.

I ask unanimous consent to place that in the record, and I respond to myself. So, ordered.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

Fact-checking Trump officials: Most drugs enter US through legal ports of entry, not vast, open border

Alan Gomez
USA TODAY

0:29
2:36

In their ongoing push for $5.7 billion to expand the border wall, Trump administration officials have repeatedly pointed to the flow of drugs across the southern border as proof that such a wall is needed.

President Donald Trump has used that line. White House press secretary Sarah Sanders has, too.

But an analysis of data from the southern border indicates that the vast majority of narcotics enters through U.S. ports of entry, not the wide swaths of border in between where additional barriers could be erected.

According to U.S. Customs and Border Protection statistics, 90 percent of heroin seized along the border, 88 percent of cocaine, 87 percent of methamphetamine, and 80 percent of fentanyl in the first 11 months of the 2018 fiscal year was caught trying to be smuggled in at legal crossing points.

While those numbers deal only with drugs that are caught, border experts say the data accurately reflect the way drug cartels successfully smuggle narcotics into the country.

Vice President Mike Pence: Democrats refuse to compromise on border wall funding to end the shutdown

Gil Kerlikowske, who headed CBP and the Office of National Drug Control Policy under President Barack Obama, said intelligence received from arrested smugglers and law enforcement partners in Mexico indicate that cartels

clearly prefer moving high-profit narcotics through the busy ports of entry because their chances of success are better there.

He used the example of the San Ysidro Port of Entry in southern California, the busiest port with 100,000 people crossing through each day. Port officials recently completed a multi-year, $750 million upgrade to add more Customs officers and inspection technology, but Kerlikowske said the sheer volume of traffic means smugglers' odds are still better going through there than other parts of the border.

"Regardless of the number of drug dogs and technology and intelligence, the potential of smuggling the drugs in through a port of entry is far greater. Your ability to be captured coming across between a port of entry is much greater," said Kerlikowske, now a professor of practice in criminology and criminal justice at Northeastern University. "It's very clear that (drugs) come through the ports."

The flow of illegal drugs into the U.S. has become a central part of the Trump administration's argument that more barriers are needed along the 2,000-mile southern border. Trump's insistence on $5.7 billion for funding led to the ongoing, partial government shutdown, already the longest in U.S. history at 25 days.

Democrats have rejected Trump's request, instead preferring to invest more heavily in ports of entry. The Democratic-led House of Representatives passed a spending bill Jan. 3 that includes $8 million to hire 328 new Customs officers and $225 million to purchase equipment used to screen trucks and vehicles for contraband.

While Trump officials usually mention that 90 percent of the narcotics that enter the U.S. comes across the southern border, they have usually left out the way in which those drugs cross. Vice President Mike Pence was the first to acknowledge in an op-ed column published in USA TODAY on Tuesday that those drugs "primarily" enter the country through ports of entry.

Trump has argued the exact opposite, saying before a trip to McAllen, Texas, last week that most drugs enter between "portals" along the border, not through those "portals."

That is wrong.

Perhaps the best authority on how drugs are smuggled into the U.S. is Joaquin "El Chapo" Guzman, the Mexican drug lord arrested by Mexican officials in 2016 and later extradited to the U.S.

During his ongoing trial in New York, several of his cartel members have testified that they mostly pushed drugs through U.S. ports of entry, stashing bricks of narcotics in cars, trucks and trains, according to CNN. None of El Chapo's associates has testified that they moved drugs through the open border regions in between those ports.

USA TODAY's Pulitzer-winning report Interactive: Explore the Wall yourself A 2,000-mile journey along the border Migrants: The wall won't stop them Deadly deserts: Some make it, some die

Recent headlines also highlight the fact that drug cartels have many ways of getting around – or over, or under – any proposed border wall.

In the past month, Mexican authorities have discovered three tunnels that were used for drug smuggling that crossed under the border wall into Arizona. That has long been a common smuggling route used by smugglers.

In December, Border Patrol agents arrested two men after an ultralight aircraft flew over the border wall in California and dropped $1.4 million worth of methamphetamine and a getaway bicycle. And last year, a man was sentenced to 12 years in prison after he was caught picking up a package with 13 pounds of methamphetamine that had been dropped by a drone that flew over the border wall near San Diego. Border Patrol officials say such airborne smuggling attempts are only expected to increase as drone technology improves.

Smugglers also rely on the U.S. Postal Service to smuggle their highest-profit drugs into the country. A September report from the Postal Service's Inspector General found that drug shipments have been on a steady rise in recent years, with over 40,000 pounds of drugs seized in the mail in 2017.

The report concedes that postal inspectors identify only a fraction of the drugs entering through the U.S. mail. It found 104 drug trafficking websites on the dark web that identified their shipment methods, and 92 percent indicated they used the U.S. Postal Service.

The ability of smugglers to take advantage of the U.S. Postal Service has become so acute that it prompted a special agent in November to say: "Postal employees are paid to deliver mail, not drugs."

Ms. JACKSON LEE. Let me now call upon Ms. Dean of Pennsylvania for 5 minutes.

Ms. DEAN. Thank you, Madam Chair, and thank you for convening this Subcommittee hearing on these important issues. What I am taking away is maybe there is one thing that everybody across the dais here can agree on, and that is that addiction is a disease. It is a deadly disease.

With that in mind, I want to just start first with Ms. Austin-Hillery. Analysis by your group, the Human Rights Watch, as well as by many others, has shown that despite equal rates of drug abuse, black, brown, and poor Americans, as you point out, are more likely than White Americans to get arrested.

I have to admit to you I know a little something about this. My middle son is 8 years 4 months in long-term recovery from opioid addiction. Yet while he was in active addition, he is White and he was quite young, and I think his driver's license revealed that he was of at least middle class means.

My son never was arrested. He has no criminal record. So, while addiction didn't spare him, White privilege and socioeconomic status spared him from the cruelties and the injustices of our criminal justice system.

Can you provide us with more detail into what the Human Rights Watch has learned about racial and economic disparities in the War on Drugs?

Ms. AUSTIN-HILLERY. Thank you for that question, Congresswoman. I will give you an example to help underscore the point I would like to make. We have spent several years in Tulsa, Oklahoma. While we were in Tulsa, we were there to do research around policing in communities and to learn more about how police and communities relate. What brought us there was the death of Terence Crutcher, an African American man, at the hands of a White police officer.

We learned so much more, and what we learned from those community Members is this. They experienced specific targeting by police. We did not only talk to community Members, we talked to individuals, all stakeholders, with respect to an issue. We talked to the police officers. We talked to the police chief.

What we understood was that Members of the Black community there felt that they were being specifically targeted in ways that their White counterparts in wealthier parts of the town were not being targeted. That is what we mean when we talk about systemic racism.

That is why Mr. Henderson, in his testimony earlier, talked about White supremacy and racism. We have to start telling the truth, and that is that racism underlines many of the policy decisions that we put forth. We have to learn and understand how we take that out of policymaking and focus on the end goal, which is protecting people and communities.

Until we do that, Congresswoman, we will continue to see these kinds of disparities. We will continue to see these harms from systemic racism, and we will continue to see this kind of targeting. That is why the experience your son had is far different than so many of the people we represent and the people that we talked to in Tulsa communities.

Ms. DEAN. We are so keenly aware of it. We know that had he been caught up in the criminal justice system, he would be far behind in his career. He would be far behind in and may have lost his right to vote and other precious things.

If I could go quickly to Dr. Neill Harris. With the American Rescue Plan, Congress just passed the most significant child poverty reduction policy in a generation. I am excited to have been a part of it. Your testimony mentions that the latest research shows children with parents caught up in the criminal justice and carceral cycle are at greater risk of negative outcomes in adolescents in child and adulthood. Can you speak to that a little more?

Ms. NEILL HARRIS. Yes. Thank you for that question. When children have parents who come into the criminal justice system and become incarcerated, that disrupts their home life. It creates uncertainty for them, and it disrupts every routine that they might have that might be able to provide stability for them. It can interfere with their schooling. It can interfere with their mental health. It can interfere with their physical health. It literally impacts every aspect of their life.

If they have to go into the foster care system, then they have to deal with that system and the disruptions that it causes. I know here in Texas, we have a lot of problems with our foster care system that negatively impact a child's life as well.

So, it is literally setting them up at the most precious part of their lives when their brains are still developing with all of these additional stressful factors to deal with that impede their development. Later down the line, then, it becomes more difficult for them to excel with education and employment opportunities, which creates a cycle where they can encounter issues with mental health.

Ms. JACKSON LEE. The gentlelady's time is expired.

Ms. DEAN. Thank you very much. I yield back. Thank you, Madam Chair.

Ms. JACKSON LEE. Thank you very much.

Let me now call on the gentleman from Wisconsin for 5 minutes, Mr. Tiffany.

Mr. TIFFANY. Thank you, Madam Chair.

Mr. Maltz, thank you for being here, and thank you for serving our country for so many years and still today. I think the humanitarian crisis that is going on at the border is well documented here in this hearing, and the flooding of our streets with drugs, the imported violence as a result of the Mexican drug cartels.

As we watched the Biden-created crisis at our southern border, the number of drugs that will be flooding through our borders is alarming. As you know, the drugs don't cross over by themselves.

The effects aren't only limited to our southwestern border states but are as far-reaching as my home State of Wisconsin. It costs Wisconsin's taxpayers over $10 billion a year to fund health care, emergency care, and other resources for the victims of this crisis.

The highest overdose rates are in economically distressed areas that have experienced high rates of unemployment. These areas seem to have a steady supply of Fentanyl and heroin, like coming from our southern border. Yet, the latest statistics from immigration and customs enforcement indicate an almost 66 percent drop in arrests at the border in February compared to December of

2020. I assure you that this drastic drop isn't because less immigrants are coming across the border.

Mr. Maltz, you have noted that the cartels have formed a partnership with Chinese organized crime networks and that they pose a significant threat to public safety, public health safety, and national security, and that they use sophisticated technology and take advantage of antiquated laws and policies in the U.S.

First question for you. Some say interdiction at the border makes no difference, that the drugs will keep coming into our country even if interdiction goes away, or even if interdiction is improved. Do you agree with that?

Mr. MALTZ. Absolutely not. Interdiction saves lives every day.

Mr. TIFFANY. What laws or policies need updating? So, I have done a pretty good job of drawing that nexus of this is not just the Mexican cartels, there is a Chinese government that is involved also. What laws or policies do you think need to be updated for us to be more effective?

Mr. MALTZ. Well, first, it is about the terrorists as well. Like Hezbollah is one of the world's most capable terrorist organizations, and we had Project Cassandra where they were moving used cars out of American to support Hezbollah to fight and to carry out their agenda.

So, in this country, we have to first recognize that this is not just, you know, drugs on the streets. It is about a global network of transnational criminals that want to destroy the country. It is a much bigger problem. We have to realize, like in the Chinese scenario, the chemicals are just coming in ton quantities into Mexico. That is why we are seeing the huge amounts of methamphetamine. They produce like seven tons of meth every 3 days.

When I was a young agent, if you seized a kilo of meth, that was a huge case. Now, we are seizing 2–3,000 pounds of meth. So, the business operation is booming, the demand is booming, but it is all of these other countries that are making money and these groups are making money on the problem.

Mr. TIFFANY. Thank you. So, I would just like to share with the committee, in Wisconsin we had—when I was in the State legislature, I served for nearly 10 years. We created something called the HOPE agenda, and it was really groundbreaking in our—in the country. A number of other states have taken a look at what we did, and we did things like create drug courts, expand drug courts, get assistance to help those with addiction.

We spent an enormous amount of time and money to create that agenda, do it in a smart way, to be able to help people with this problem. We heard from local sheriffs regularly about the drugs that were being pumped up from the southern border as well as the human trafficking that was going on in their communities. They were emphasizing that to us regularly, and we tried to implement policies to help fight back on that.

So I guess, in conclusion, I would just say here, Madam Chair, it is so disappointing that the President—the first thing he did was cancel a pipeline that works for America, but then he enables a pipeline for drugs to the rest of America that is going to kill Americans, that he won't put a stop to that pipeline flowing from our southern border.

I yield back.

Ms. JACKSON LEE. I thank the gentleman for his testimony and remind him of the article submitted that most of the drugs are coming in through the legal entries. I thank the gentleman again for his testimony.

Let me yield to the Congresswoman from the great State of Pennsylvania, Ms. Scanlon, for 5 minutes.

Ms. SCANLON. Thank you, Madam Chairwoman, for having this important hearing.

I want to look at a particular aspect of this issue that doesn't get enough attention, and that would be civil forfeiture. In my prior career, I had some experience with this as the program I worked with brought—started to represent folks who were subject to civil forfeiture.

It is a program that is designed to deal with the War on Drugs, but it has a perverse financial incentive to have law enforcement target people to get their assets. Let me just give an example of one of the cases we dealt with in Pennsylvania.

We represented a widow, a woman whose son was arrested for selling a small amount of pot at the house that they shared while his mom, who owed the house, was in and out of the hospital. So, he was arrested and the police moved to seize her $54,000 home and her 15-year-old minivan. So, because it is civil forfeiture, this person, this woman who had been in the hospital, and did not participate in any criminal activity, was forced to defend possession of her home and her car.

So, Ms. Austin-Hillery, when a State or the Federal Government accuses someone of a crime, the defendant has a right to counsel at no cost, if they can't afford them. This is not true in civil forfeiture cases. If my law firm hadn't stepped up to represent this woman, she would have been, like so many of the people in our community who got swept up in this sort of dragnet, and she wouldn't have been represented and could very likely have lost her house and her van.

Can you speak to how the lack of representation impacts these cases and really risks the incentives for enforcement?

Ms. AUSTIN-HILLERY. Yes. Thank you, Congresswoman Scanlon. In an earlier part of my career, I worked on a concept that I actually hope our DOJ and maybe even Congress will take up again, and that is the creation of what we call Civil Gideon. We know that, as you just stated, individuals have the right to counsel when it comes to criminal cases. In examples just like you pointed out, when we are dealing with civil asset forfeiture, many people without the means are left unattended and alone to try to deal with this.

We know there is an economic and racial disparity with respect to that. People who are in lower economic communities, people often in Black and brown communities who don't have the same economic resources, cannot afford counsel to fight back with respect to these cases, and that is what they need. They need someone to fight back for them.

So, we really need to look at what kinds of means and mechanisms can we put in place to give them that kind of protection. Civil Gideon is a way to do that.

Aside from that, because that's a dream of mine, aside from that, there are things we can do right now, and that is clean up civil asset forfeiture and this process and how it is implemented. We should not be incentivizing law enforcement officers to make decisions based on whether it can provide them with more economic gain and more economic opportunity.

We should only have systems and mechanisms in place that focus on how they can do their jobs in the best way possible, how they can treat communities fairly and equitably, and that is the bottom line. There should be no incentive for them to make additional monies off these crimes. That is where we have to start, and hopefully at some point we can also have a good discussion about Civil Gideon.

Ms. SCANLON. You are speaking to my heart there. One of the things that was particularly troubling about how civil forfeiture was being enforced in our region was that folks like our client, the widow with limited means, were the folks who were being targeted. At the same time, we were not seeing the kid out in the suburbs who had done a pot deal on the side, had his family's $100,000 or $200,000 home seized.

So, from your research or your work, has civil forfeiture proven effective at reducing harm or drug use? Or has it been quite a bit harmful impact on the same Black and brown communities that were disproportionately harmed by other flawed approaches?

Ms. AUSTIN-HILLERY. There has been a lot of research done, and there are many organizations beyond Human Rights Watch that have been focusing on this, and so we need to look at the full body of work. Certainly, we have seen that this is targeted activity and that, yes, it has a disparate impact on these communities.

Just like the stories that you have talked about, the Leadership Conference on Civil and Human Rights has done a great deal of work on this. They are coalition partners of ours, and we know that they have been focused on how we can cut down on this disparate impact. Again, this is about the larger discussion of systemic racism and what kinds of choices we are making and we are making choices based on race and economics.

Ms. JACKSON LEE. The gentlelady's time is expired. Thank you.

Ms. SCANLON. Thank you. I would appreciate if—I saw Dr. Henderson nodding his head there. If he is able to respond offline, I would appreciate that. I yield back.

Ms. JACKSON LEE. I thank the Congresswoman for her indulgence, and I hope that Dr. Henderson will respond accordingly at a later time.

Now, Mr. Gohmert, I believe the gentleman is not present in the room. You are reserving? Thank you so very much.

It is now time to yield to the gentlelady from Missouri for 5 minutes, Ms. Bush, our vice-chair.

Ms. BUSH. Yes. St. Louis and I thank you, Madam Chairwoman, again for convening this hearing. The vicious and carceral drug war that has prioritized punishment over treatment, violence over healing, and trauma over dignity has influenced all our lives.

Brought up in St. Louis, I saw the crack cocaine epidemic rob my community of so many lives, and I am not talking about what I heard or read. I am not talking about what I watched on television.

I am talking about the people who I was around all the time, people who I knew and was in community with, loved ones, I saw picked off and put into a system that was this revolving door.

I lived through a malicious marijuana war that saw Black people arrested for possession at three times the rate of their White counterparts, even though usage rates are similar. As a nurse, I have watched Black families criminalized for heroin use while White families are treated for opioid use.

Now, as a congresswoman, I am also seeing the pattern repeat itself with Fentanyl as the DEA presses for an expanded classification that would criminalize possession and use. This punitive approach creates more pain, increases substance use, and leaves millions of people to live in shame and isolation as they battle drug use with limited support and healing.

If you don't know it, go into the communities and start sitting with people and really hearing their stories and finding out their struggles. Sometimes you have got to do the deep work.

This is an issue that affects all communities, from my neighborhood in St. Louis to the edge of Lake Erie in Ohio. Somehow, we have criticized science and compassion in favor of trauma and punishment, all the while leaving people to fend for themselves.

Dr. Harris, why is national drug policy reform essential for reducing the federal prison population and for providing states with a blueprint for effective policy change?

Ms. NEILL HARRIS. Thank you for your question and for your passion on this issue. Federal reform is essential for states to follow suit. We saw this in the 1980s when the Federal Government ratcheted up penalties for cocaine, for crack, and the disparities it created for crack and cocaine, you saw the states follow suit.

So, we know that the states will do what we see the Federal Government do on these issues. If the Federal Government takes leadership, we will see more responsible policy at the State level.

We also know that punishment does not work. We have been talking a lot about mandatory minimums here. Mandatory minimums levy very severe sentences, but they do not deter people from using drugs. The very nature of addiction suggests that people are going to use drugs regardless of what the consequences are, and so that approach will not work.

We have been talking a lot about the demand for drugs and the cartels. Absolutely, cartels are dangerous—can be dangerous organizations and very profitable. That is because of the demand for drugs that we have in the United States, and we have not addressed that demand. We have 40 years to show that we have not addressed that demand, and it is time to try something else instead of continuing the same failed policies.

Ms. BUSH. Thank you. Because our jails were not originally purposed to be treatment centers and yet our jails have become the largest mental health institutions in America. This is sickening. People with a history of substance use are being sent to jails, and have been for a long time, that are in no way equipped to treat their trauma or addiction.

This is a public health crisis. Too often drug offenses are borne out of poverty. If we don't want to actually address poverty, then this is the situation. This system allows those with wealth to more

easily escape the trauma of police raids, civil asset forfeiture, and mandatory minimums, which you all have been talking about, because they can afford those top-notch treatments while the rest of the country is left to hurt in silence.

So, Ms. Hillery, what is your main concern about mandatory minimum sentencing for drug offenses and its devastating collateral impact on people's lives? Then, when you answer that, is there any reason that these types of crimes should be treated differently than other offenses?

Ms. AUSTIN-HILLERY. Quickly, Congresswoman, thank you. My main concern is that mandatory minimums are excessive. It is like using a sledgehammer to put a small tack into a wall. It is too much, and it doesn't really do the job. That is number one.

Number two, we need to look at each instance of crime, each type of abuse, each type of circumstance separately. We cannot use one method and say this is going to solve all our problems. There is not a panacea for how we address these issues, and that is what we have been talking about today.

We need to be particularized. We need to use real evidence and real data.

Ms. BUSH. Thank you so much, and I yield back.

Ms. JACKSON LEE. Thank you so very much.

The colleague on the other side continues to reserve, and it is my privilege now to call upon Mr. Cicilline for 5 minutes.

Mr. CICILLINE. Thank you, Chairwoman Jackson Lee, and to Chair Nadler, for organizing this hearing today. Thank you to our witnesses for sharing their expertise on how to improve drug policy and work toward addressing the decades of failed drug policy in this country.

The War on Drugs we know has led to the overcriminalization of Americans, with communities of color experiencing oversurveillance leading to increased arrests and disproportionately harsh sentences.

Last week the House passed the George Floyd Justice in Policing Act, which takes a major step to holding police officers accountable for misconduct. Equally important is Congress' responsibility to examine how drug laws contribute to increased law enforcement interventions, unnecessary incarcerations, when public health alternatives are often much more appropriate.

So, my first question is to Ms. Austin-Hillery. In your written testimony, you recommend that Congress shift resources from the policing of drug use toward access to evidence-based treatment and other voluntary supports for people who struggle with substance abuse disorder. Can you elaborate and really discuss the importance of the need to take a public health approach to addressing drug abuse as opposed to the approach that we have taken in the War on Drugs?

Ms. AUSTIN-HILLERY. Yes. Thank you, Congressman, for that question. We know from the research that we have done at Human Rights Watch—and not only do we have the program that I oversee, the U.S. program, we also have experts in-house who deal with health issues and we know that individuals have issues around their medical care, around their physical being, addressed by medical experts.

If you have an individual, for instance—and I spent time—as I said, Human Rights Watch, we go to the communities. I spent time in Florida in a van going around with one of the community groups that goes around the community and deals with individuals who are dealing with drug issues.

What I am seeing is that those people are saying to us that they are helped when they have doctors and nurses who are in their communities. They say they are not helped when they are picked up by police officers, when they are taken to court, where they can't afford bail, where they can't afford lawyers. All those things are a whole other host of questions and issues.

What they are saying is they are most helped and that their opportunity for healing and for taking better care of themselves and their families is through better access to health care and to the medical community.

So, again, we must give people the best opportunity to heal and to move themselves into a better situation. That is not through criminalization. That is through health care, and the medical science backs this up and supports this. So, let's start having real conversations about how we put dollars there instead of dollars into furthering law enforcement's ability to target these communities and these individuals.

Mr. CICILLINE. Thank you.

Dr. Neill Harris, as we all know, America's opioid crisis is far from resolved. According to the American Medical Association, over 40 states have reported an increase in opioid overdoses since the beginning of the pandemic. In my home State of Rhode Island, opioid overdose remains the leading cause of accidental death.

Every day we are at risk of losing more and more people to overdoses, with recent numbers showing that Black and Hispanic Rhode Islanders are disproportionately experiencing overdose-related deaths.

Through various research trials, evidence has shown that medication-assisted treatment is an effective treatment for opioid addiction, and we have some great leadership in Rhode Island from the medical community that has been really leading this effort, particularly at Brown University.

So, my question is, do you think that these programs should receive more federal support? Are there other programs that also should be available? What are the most efficacious ways to provide the kind of treatment that will have a meaningful impact on this problem?

Ms. NEILL HARRIS. Absolutely. Thank you for that question. I like this in terms of short-term and long-term solutions. When we talk about reducing overdoses, we are talking about the short-term solutions to provide treatment and immediate intervention.

Rhode Island has done a great job at increasing access for medication-assisted treatment, especially for people that are in the criminal justice system. I would like to see federal funding go to expanding the access to medication-assisted treatment within correctional systems in all states, and not just for Vivitrol, which tends to be preferred because it is an opioid antagonist, but also for methadone and Suboxone because people need the option that works best for them.

The other thing that the Federal Government can do, in addition to expanding access to needle exchange programs and authorizing safe consumption sites, is to expand access to drug testing services.

Mr. Maltz had mentioned the problem of counterfeit pills. Absolutely, when people unknowingly take pills that they think are legitimate prescriptions, and they contain Fentanyl in them, that is very dangerous. If we provide people with resources so that they can test those substances and determine whether there is Fentanyl in them, research shows that they will moderate their drug use behaviors and can use in a safer way. So, we need to focus on those harm reduction interventions.

Mr. CICILLINE. Great. Thank you so much.

With that, Madam Chair, I yield back.

Ms. JACKSON LEE. The gentleman's time is expired.

Now I yield 5 minutes to the gentleman from California, Mr. Lieu. Happy to yield now 5 minutes to the gentleman from California as well, Mr. Correa. The gentleman is recognized.

Mr. CORREA. Madam Chair, can you hear me okay?

Ms. JACKSON LEE. I hear you.

Mr. CORREA. Can you hear me okay?

Ms. JACKSON LEE. I hear you very well, sir.

Mr. CORREA. Thank you. Thank you very much for holding this very, very important hearing. I am out of Orange County, California. One of the things I did the last few months was to visit our juvenile hall where I found that most of the young ladies in juvenile hall are there because of prostitution—prostitution related to trying to raise money by selling their souls, their bodies, to pay for drugs.

I also have a good relationship with local police officers, good police officers, and it breaks my heart to know that we are giving them the impossible job of fixing our societal problems of homelessness, drug addiction, and mental health.

When you take a deep breath and you think about the decades—the decades-long War on Drugs—four, maybe five decades of this war, I have a question for each one of our panelists here today. Are we winning the War on Drugs? Ms. Austin-Hillery, yes or no?

Ms. AUSTIN-HILLERY. We are not winning the War on Drugs. The numbers show that the statistics—

Mr. CORREA. Mr. Henderson? Mr. Henderson, yes or no?

Mr. HENDERSON. No. No, we are not.

Mr. CORREA. Mr. Maltz?

Mr. MALTZ. No, we are not. I am sorry. We are making a difference and saving lives.

Mr. CORREA. Thank you.

Ms. Neill Harris, are we winning the War on Drugs?

Ms. NEILL HARRIS. No, we are not.

Mr. CORREA. Yes or no question to each one of our panelists. Through the incarceration of drug addicts, does that help them go straight, yes or no? Does jail straighten out drug addicts? Ms. Austin-Hillery?

Ms. AUSTIN-HILLERY. No.

Mr. CORREA. Mr. Henderson?

Mr. HENDERSON. No.

Mr. CORREA. Mr. Maltz?

Mr. MALTZ. Can't answer that question. It is too vague.

Mr. CORREA. Putting a drug addict in jail, does that straighten him or her out?

Mr. MALTZ. If they have a drug addiction issue, jail is not the answer.

Mr. CORREA. Thank you.

Ms. Neill Harris?

Ms. NEILL HARRIS. No.

Mr. CORREA. Thank you very much.

Ms. Austin-Hillery, should we study what the states are doing, what other nations are doing, when it comes to addressing drug addiction? Treatment instead of rehabilitation and—or I should say treatment and rehabilitation instead of jail. Should we address drug addiction as a medical issue instead of a criminal issue?

Ms. AUSTIN-HILLERY. Absolutely, yes.

Mr. CORREA. Mr. Maltz?

Mr. MALTZ. Drug addiction must be dealt with the professionals.

Mr. CORREA. As a medical issue or as a medical issue? Excuse me. As a medical or a criminal issue?

Mr. MALTZ. Addiction is a medical issue, of course.

Mr. CORREA. Mr. Henderson?

Mr. HENDERSON. Yes, we should.

Mr. CORREA. Ms. Austin-Hillery?

Ms. AUSTIN-HILLERY. Yes, we should. Congressman—

Mr. CORREA. Mr. Maltz? Mr. Maltz, you talked about Mexican cartels and corruption. Is that not corruption fueled by American dollars, dollars from American drug users? Yes or no.

Mr. MALTZ. Well, certainly, there is millions and millions of dollars being generated from the demand here in America, but corruption is a separate issue.

Mr. CORREA. Yes or no, are those dollars—are those dollars fueling corruption around the world?

Mr. MALTZ. Obviously.

Mr. CORREA. Yes or no. Obviously, that is a yes, correct?

Mr. MALTZ. Yes, sir.

Mr. CORREA. Mr. Maltz, if we seal the southern border, will that stop Americans from using illegal drugs?

Mr. MALTZ. It will help.

Mr. CORREA. So, Chinese chemical precursors that don't come in through Mexico, they won't come through Canada?

Mr. MALTZ. They might. Might.

Mr. CORREA. Would you consider the Canadian border secure?

Mr. MALTZ. I don't think it is very secure because all of the resources are going to the southern border now.

Mr. CORREA. So, they are both insecure. Would you consider our Atlantic and Pacific ports secure when it comes to drug trade, Mr. Maltz?

Mr. MALTZ. CBP needs more resources to secure these borders. It is impossible to do it with what you have.

Mr. CORREA. Are they secure, yes or no?

Mr. MALTZ. They are doing a great job. Absolutely.

Mr. CORREA. So, the ports are secure from drug trade.

Mr. MALTZ. Not totally secure, but they are making a lot of seizures.

Mr. CORREA. Yes? Yes or no? Okay. Finally, Mr. Maltz, America is good when it puts its focus on a certain effort. Two decades ago, we essentially sealed off the Caribbean when it came to drug trade. We were pretty good at sealing that up, but—what we ended up doing was really diverting that drug trade inland.

In that process, we essentially destabilized the countries of a whole continent—Mexico and Central America—and yet, the drugs kept flowing. That is why I am saying this drug trade—this drug war, four, five, six decades, has not worked. My question to you, sir, do you think sealing the Mexican border will bring us success when it comes to the drug war?

Mr. MALTZ. One hundred percent it will help. It is not going to solve the problem 100 percent, but it will help for sure.

Ms. JACKSON LEE. The gentleman's time is expired.

Mr. CORREA. So, Americans will stop using drugs once you seal the Mexican border.

Mr. MALTZ. I never said that.

Ms. JACKSON LEE. The gentleman's time has expired.

Mr. CORREA. Thank you, Madam Chair.

Ms. JACKSON LEE. Thank you very much.

Now yielding to the gentleman from Utah for 5 minutes, Mr. Owens.

Mr. OWENS. Well, you have 15 seconds or so to wrap up anything that you were trying to say during that last interaction, or are you okay?

Mr. MALTZ. I mean, obviously, sealing the border is not going to stop the addiction all over America, because it has been out of control for so many years. We didn't put the money into the education, into the treatment, into the rehabilitation. We ignored it. All these poor people got addicted, and the cartels took complete advantage of the addicted population to make billions of dollars.

Securing the border is going to help keep these poisonous drugs out of the country, yes.

Mr. OWENS. Thank you. Thank you so much.

I am glad we are having this conversation. It is a very important issue to me. I grew up in a 1960s segregated community where the progress into the blight middle class was an expectation for us. Our family unit was strong, and drugs simply were not a part of our everyday life.

Over the last few decades since, I witnessed friends, NFL careers lost, families destroyed by drug abuse. It is a fact that the less control we have over our borders the more control Mexican drug cartels have on bringing misery to both my State and the Black community.

Here are a few statistics that are really troubling to me. Fact: Illegal drug use among blacks is 23 percent higher than the general population in whites. *Fact:* Seventy-eight percent of the overdoses in Washington, DC, are African Americans. *Fact:* In DC, opioid overdose deaths among Black men between the ages of 40 to 69 increased 245 percent between 2014 and 2017. *Fact:* In Utah, 473 drug overdose deaths involved opioids in 2018.

With that in mind, Mr. Maltz, the smuggling of drugs along the southern/southwestern border by Mexican cartel is one of the greatest threats to the American dream. What is the most important

thing the Federal Government can do today to stop the flow of drugs into our country?

Mr. MALTZ. Well, for one, they have to talk about the issues with drugs. It is not just over-prescribing. That is, 15, 20 years ago, we never dealt with that as a country. They have to get people help. They have to unite all the smart people in America that have good ideas, but we have to shut down that border and we have to show the American public we care about the families that are being destroyed.

We have to take this seriously. Right now, people just seem to think it is going to go away. It is going to get worse every day. More and more of these kids are going to die. By the way, Fentanyl doesn't care what color you are. It is going to kill you if you snort it, right? If you take Fentanyl, there is a good chance you are going to die. Sadly, most of the kids don't even know what they are taking. The cartels are making billions off this.

Mr. OWENS. Do you have any insight into the drug trafficking path into the inner part of our United States, for states like mine that are not on the border, but are still getting impacted by this process of drugs coming through our borders?

Mr. MALTZ. Well, the Sinaloa Cartel and Jalisco New Generation Cartel are throughout all the American cities, right? They have command and control set up in some of the biggest cities, like in Chicago, Arizona, Los Angeles, New York, and Atlanta. What they are doing is spreading out their command and control.

With the people that are coming over the border, they are setting them up in these different cities, and they basically have the opportunity to push drugs on the streets all over. They are pushing their drugs to gangs, right? The Chapo Guzman case, if you look into that, it was the Sinaloa Cartel providing all of these drugs to the gangs on the west side of Chicago.

So, it goes from the command and control in Mexico right to the command and control in these subcities and right into your city.

Mr. OWENS. So, in other words, ZIP code is not a protection against these drugs coming in our—

Mr. MALTZ. There is no boundary, sir.

Mr. OWENS. Okay. What is the connection between the border security and the prevalence of illegal drugs on urban America, those that are most at risk, those communities that I have just listed are being hit the hardest? What is the connection between our security at the border and that of impacting the communities that we should all be caring about at this point?

Mr. MALTZ. Well, like we have said all day so far, like when the border is open, these people can get in here. They bring the Fentanyl pills, they distribute the pills all over the cities, and people are dying. So, everybody is vulnerable. This is poison in counterfeit pills.

If you take a pill and you think it is a legitimate OxyContin, but it has Fentanyl that was put in it from a lab in Mexico, you are going to die. So, everybody is vulnerable.

Mr. OWENS. Let me just wrap up with this. The greatest thing about our country is access to the American dream, the middle class. I think Americans need to understand this is a way to negate our middle class. We have death, misery, and addiction, and it is

coming through a border where people are taking advantage of our good hearts.

So, at the end of the day, we need to shut the border down. I totally agree. We need to take a look at what the problem is, and we are having another generation being addicted to drugs that they don't need to be, and they should not be, and we should be protecting them.

With that, I yield back.

Ms. JACKSON LEE. The gentleman yields back. His time is expired.

I now recognize the gentleman from California, Mr. Lieu, for 5 minutes. Mr. Lieu is recognized for 5 minutes.

Mr. LIEU. Thank you.

Mr. LIEU. Thank you, Chairwoman Jackson Lee, for holding this important hearing. I want to thank all the panelists for your time and expertise today.

My first question is to Mr. Maltz. I believe in response to a question from Congressman Correa you had stated that if someone is addicted jail time is not the answer. Am I saying that accurately?

Mr. MALTZ. My opinion is if somebody is addicted, they need help from an addiction specialist, a medical specialist, a social worker. Putting them in jail is not going to help the problem.

Mr. LIEU. Thank you. Appreciate that.

So, Ms. Neill Harris, I believe earlier you had stated that about 90 percent of illegal drugs are in fact not stopped or caught or interdicted. Is that correct?

Ms. AUSTIN-HILLERY. Yes. Mr. Maltz had said that about 10 percent are stopped or interdicted, which would mean that 90 percent are not.

Mr. LIEU. So, my view is if we keep doing the same thing over and over again, and expect a different result, that does come close to the definition of insanity. We have been at this War on Drugs for many decades. It does not appear to have gotten better; it actually appears to have gotten worse.

So it seems to me we should now look at other ways to try to reduce people using drugs, particularly if they are addicted because if they are addicted it seems to me that is a medical issue, and what we actually would need is treatment.

So, I would like to ask about opioids. Ms. Neill Harris, I will ask you this. So, it seems like part of the reason there is an opioid epidemic is because people would get prescription opioids because they got into a car injury or some other sort of surgery or something where they wanted to relieve pain, the doctor prescribed it, and then all of a sudden, 2 months later they realize that they are addicted to this.

It is not like they went and sought out to get addicted. Does it make any sense to put those people in a jail?

Ms. NEILL HARRIS. Thank you for that question. No, it does not make sense to put those people in jail. I would like to briefly clarify the distinction between dependence and addiction. It is an important one to make when we are talking about opioids.

If I got surgery and had to take opioids for an extended amount of time, if I had to take them, say, for 10 days straight, my body would become physically dependent on those drugs. It would be dif-

ficult for me for a few days to stop using them. That is a different process than psychological addiction.

What happens when people take these drugs, it doesn't only alleviate physical pain, it also helps them feel better about other things that are wrong in their lives. We have talked a lot here about the root causes of addiction—poverty, inequality, mental health problems, mental illness, physical illness, all of these things.

So, if we really want to address the roots of psychological addiction, for opioids and for all drugs, we really have to invest in addressing those systemic issues that lead to addiction.

Mr. LIEU. Thank you.

Ms. Austin-Hillery, in your statement, you talk about decriminalization. So, I support Chair Nadler's efforts to legalize marijuana. I believe that cannabis is no more dangerous than alcohol, and in many situations, it is actually less dangerous. I think it is just a remarkably stupid use of federal resources to spend even a single penny trying to prosecute and jail people for cannabis use.

However, I do recognize that some opioids are in fact more dangerous than alcohol. I am curious, Ms. Austin-Hillery, what would it look like if we were to decriminalize opioid use?

Ms. AUSTIN-HILLERY. Congressman, thank you for that question. I would point back to an example that I brought up during my oral testimony and that I have also included in my written testimony, which is that there are templates available when we look at countries such as Portugal.

When Portugal applied decriminalization, that didn't mean that there were absolutely no crimes related to drugs any further. That just meant they were smarter about drugs, and they were smarter about making sure that individuals who use drugs for personal use were not then penalized for that.

Personal drug use is an issue that mostly involves that person, and it is about their personal choice, and that is a right. That is how they started to look at that issue.

Now, there are other issues related to drugs in Portugal for which one does get brought into the criminal justice system. Again, they don't treat it with one broad brush. They look at the different drugs. They look at the different outcomes. They look at how communities are impacted, and they make decisions based on those differences. That is what we need to do if we were to look—and we should look—at decriminalizing drugs for personal use here in the United States.

Mr. LIEU. Thank you. I yield back.

Ms. JACKSON LEE. The gentleman's time has expired.

Now, I will call on the gentleman from Tennessee for 5 minutes, Mr. Cohen.

Mr. COHEN. Thank you, Madam Chair. I appreciate your calling this hearing on this important subject. One of the most pressing subjects we can deal with in criminal justice—and Mr. Lieu was right, it is insanity to continue dealing with it in the same way. We have had a failure for years. We fail, we fail, we fail; we need to try something different.

Let me ask the panel a question, and I don't know who the right responder may be. Let me start with Ms. Harris because I liked your 5 minutes. I agreed with everything you said.

I read that Mexico may be decriminalizing or legalizing recreational marijuana. Have you seen that story?

Ms. NEILL HARRIS. Yes, Congressman, I have.

Mr. COHEN. Assuming they do, how is that going to affect the drug situation as far as Mexico, the cartels, and the United States goes? If there is legal medical—recreational marijuana in Mexico, does that take away from the cartel's strength? What happens?

Ms. NEILL HARRIS. I think that legalization in Mexico will reduce the cannabis aspect of their business model. However, the cartels are essentially, like Fortune 500 companies. They are well-run business organizations.

They have been able to capitalize on prohibition that we have in this country and be able to profit immensely off supplying the demands that we have here and have not addressed. So, they have made an immense profit off of that. They have diversified to other sources of revenue, such as human trafficking and the trafficking in other goods besides drugs and besides people.

So, I do think that the issue of the cartel is one that is a complicated issue to address, legalizing cannabis here and in Mexico is one step to addressing. I think that if we decriminalize drugs and remove all of the profit that comes along with supplying the demand of drugs from the cartels, that will also help to put a dent in their businesses and ending the violence that they perpetuate.

Mr. COHEN. Exactly. Okay. Let me ask you this, too. An arrest or conviction for even a minor drug offense in the United States can have life-long consequences to the individual who has been arrested or convicted of that crime. They may not be able to get a job. They may not be able to obtain a loan, a professional license. Maybe they can't get a college scholarship or housing, federal housing, *et cetera*.

Tell me a little more about these collateral consequences and other solutions to address this unfair impact on our criminal justice system.

Ms. NEILL HARRIS. Thank you for that question. You really just explained a lot of those collateral consequences that people had. It really can damage their employment prospects, especially when we treat drug possession as a felony, which, in my State of Texas, we do.

Possession of any number of drugs other than cannabis is a felony charge. It goes on a person's record. It impedes their ability to get a job. It impedes their ability to get assistance with housing, with employment, with education. It can impede their parental rights.

There has been legislation at the federal level to bar discrimination from federal loans for education for past drug convictions. I think that is excellent. I think that we need to work to provide for expungement for people's records to make that process automatic, so that people don't have to navigate through the bureaucracy of the legal system to have that happen.

I also think that all of the reforms that we have been talking about here about reducing mandatory minimums, about reducing drug disparities, all of those need to be retroactive, so that people currently serving sentences for those things can be released for them as well.

Ms. JACKSON LEE. Mr. Cohen, you may be muted. We are not hearing you.

Mr. COHEN. Right. Ms. Austin-Hillery, I have a bill that will allow federal judges to expunge an individual's record if they go 7 years without any kind of offense at all, if they were convicted of drug crimes. Do you think that would be good? How do you feel about collateral consequences for these people?

Ms. AUSTIN-HILLERY. Congressman, I think that would be an excellent piece of legislation. What we need to do is to give people second chances. That is really what we are talking about. When you were addressing the collateral consequences, it is about giving people opportunities.

We should not punish people for the rest of their lives for issues related to drugs. Your bill would do just that. The people who have the hardest time getting second chances are the Black and brown and poor people who are most impacted by these onerous laws. So, yes, I would welcome your legislation.

Mr. COHEN. Unfortunately, my time has expired. So, I yield back my time.

Ms. JACKSON LEE. Thank you very much, Mr. Cohen. Thank you for your testimony.

Let me quickly allow Mr. Biggs for a quick clarifying question and submission of documents in the record.

Mr. BIGGS. Thank you, Madam Chair. I appreciate your courtesy. I won't read all of these because there is 13 of them, but I am going to submit these articles, everything from The Washington Post to The Washington Times, and a host of others, dealing with the topic of the day.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

MR. BIGGS FOR THE RECORD

STATEMENT OF
ALISON SIEGLER, ERICA ZUNKEL, AND JUDITH P. MILLER

Federal Criminal Justice Clinic
University of Chicago Law School

Before the Judiciary Committee of the House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on "Controlled Substances: Federal Policies and Enforcement"

March 11, 2021

Alison Siegler, Clinical Professor of Law & Director of the Federal Criminal Justice Clinic at the University of Chicago Law School
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I. Introduction

In August 2009, Dwayne White—just twenty-two years old—was coming into his own. He had moved in with his girlfriend and was looking forward to their future together. He had a job, and enjoyed spending his spare time with his large family. Little did Dwayne know that his life was about to change forever.[1] On August 10, 2009, after having dinner with his mother, he received a call from Leslie Mayfield, someone he'd always looked up to as older brother and trusted deeply. Leslie—twenty years Dwayne's senior—told Dwayne that he needed him, but did not give Dwayne any details about why. Out of loyalty, Dwayne agreed to come with Leslie. What Leslie failed to tell Dwayne was that they were going to rob a drug stash house. And what even Leslie didn't know was that he was being set up by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

Leslie told Dwayne to follow his lead and that his contact would explain what was happening once they arrived at the meet-up site. Because the undercover ATF agent had never met nor heard of Dwayne before that day, the agent asked if Dwayne knew what was going on.[2] Dwayne, naively not wanting to appear weak in front of the group, said that he did. But in reality, Dwayne did not know the full extent of the plan. In fact, the first time Dwayne heard the words "stash house robbery" was from the undercover agent. Minutes later, the ATF arrested Dwayne, Leslie, and two others for agreeing to participate in the robbery of a fictitious drug stash house that the undercover agent claimed would have twenty-five to thirty-five kilograms of cocaine inside.[3]

Such fictitious "reverse sting" operations have a simple premise: an undercover informant working at the direction of a federal law enforcement agency—such as the ATF or the Drug Enforcement Administration (DEA)—recruits people to commit a lucrative robbery.[4] In the ATF "stash house cases," the ATF creates the crime and choses the target. There is no stash house and there are no drugs—it is all a complete fabrication.[5]

Dwayne was never the target of the operation, was not involved in any of the planning, and only agreed to participate in the robbery minutes before his arrest. Nonetheless, federal prosecutors charged Dwayne's case to the hilt: conspiracy to possess with intent to distribute five kilograms or more of cocaine, which carried a ten-year mandatory minimum penalty; possession of a firearm in furtherance of a drug trafficking crime, which carried a consecutive five-year mandatory minimum penalty; and felon in possession of a firearm.[6] At this juncture, Dwayne was facing a *fifteen-year* mandatory minimum sentence.

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[1] Annie Sweeney & Jason Meisner, *'Stash house' stings have been discredited. Now, the convicted see a chance for redemption*, CHI. TRIB. (Mar. 5, 2021, 1:51 PM), https://www.chicagotribune.com/news/criminal-justice/ct-stash-house-defendants-compassionate-release-20210305-qiwa4codkzabhpsalorsns35ae-story.html.

[2] Complaint at 9–10, United States v. Mayfield, No. 09-CR-687 (N.D. Ill. Aug. 11, 2009), Dkt. 1.

[3] *Id.* at 10.

[4] *See* Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 38 CARDOZO L. REV. 1401, 1446–47 (2013), https://www.readcube.com/articles/10.2139%2Fssrn.2016362.

[5] *Id.*

[6] Indictment at 1–3, 7, United States v. Mayfield, No. 09-CR-687 (N.D. Ill. Sept. 8, 2009), Dkt. 18.

Prosecutors offered him a fifteen-year plea deal. But Dwayne—who had just learned that his girlfriend was pregnant—could not fathom taking a deal that would entail missing his son or daughter's entire childhood; so he chose to go to trial.[7]

After Dwayne turned down the plea and just three months before trial, the government filed a 21 U.S.C. § 851 enhancement based on a prior conviction for simple possession of drugs from when Dwayne was eighteen years old.[8] The enhancement doubled the 21 U.S.C. § 841(b)(1)(a) mandatory minimum from ten years to twenty.

Dwayne was convicted at trial. Even though his case presented many mitigating circumstances, the sentencing judge had no discretion to impose any sentence other than the *twenty-five-year* mandatory minimum. While Dwayne sits in prison with a decade left to go on his sentence, Leslie, the person who recruited him for the offense, was released from prison nearly three years ago after serving a 9.5-year sentence.[9]

Today, prosecutors could not file a § 851 sentencing enhancement against Dwayne because, in the First Step Act of 2018, Congress eliminated simple possession of drugs as an eligible predicate offense. Tragically for Dwayne, Congress did not make this important legal change retroactive. Congress should make all First Step Act relief retroactive. It makes little sense that someone like Dwayne should be serving a twenty-five-year sentence for something that would lead to a fifteen-year sentence today—a sentence that still far outstrips his culpability.[10]

Dwayne's sentence has deeply impacted him and his family. His ten-year-old daughter Diera has only known her father behind bars. Against the odds, Dwayne and Diera have developed an amazing relationship. Dwayne's sister-in-law Lisa Mason "lose[s] the words" when she reflects on Dwayne and Diera's relationship, because it is "so very deep."[11] His family cannot understand why Dwayne remains in prison while Leslie is out. His father wonders, "now [that] Leslie Mayfield has been out for almost three years . . . I wonder, why can't the rest of them be free?"[12]

Since Dwayne was sentenced, the fictitious stash house robbery operation has been widely criticized because it gives the government "'virtually unfettered ability' to guarantee a

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[7] Motion for Compassionate Release at 4, United States v. Mayfield, No. 09-CR-687 (N.D. Ill. Mar. 1, 2021), Dkt. 371.
[8] Information Stating Previous Drug Conviction to Be Relied Upon in Seeking Increased Punishment at 1, United States v. Mayfield, No. 09-CR-687 (N.D. Ill. Feb. 16, 2010), Dkt. 131.
[9] Motion for Compassionate Release, *supra* note 7, at 1.
[10] The same harsh § 851 enhancement likewise applies to run-of-the-mill drug cases that do not involve a fictionalized robbery. In fact, fully one quarter of all individuals charged with a federal drug trafficking offense are eligible for an § 851 enhancement. U.S. SENT'G COMM'N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 21 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf.
[11] *Id.* at 6.
[12] *Id.* at 42.

lengthy sentence for the defendants"[13] and disproportionately targets men of color.[14] In Chicago, the numbers tell a disturbing story: of the ninety-four individuals arrested and charged in connection with the fictitious stash house operation between 2006 and 2013, eight of those charged were white, while twelve were Hispanic and *seventy-four* were Black—like Dwayne.[15]

After equal protection litigation exposed the troubling nature of the operation, federal prosecutors stopped charging these cases in the Northern District of Illinois. In addition, the prosecutors offered plea deals to all forty-three of the stash house defendants with pending cases.[16] In those plea offers, the prosecutors agreed to dismiss all of the mandatory minimum drug charges and all of the mandatory minimum gun charges.

Everyone who was offered the plea deal accepted it, and the overwhelming majority received time-served sentences, serving an average of just three years rather than the fifteen- to twenty-five-year mandatory minimums they had originally been facing.[17] Dwayne's co-defendant, Leslie, successfully challenged his conviction on appeal and was therefore part of the group that received plea deals.[18]

Yet Dwayne could not join the equal protection litigation or take advantage of the plea deal because his conviction was final. Instead, he has been incarcerated for eleven years, and his release date is still a decade away.[19] While in prison, Dwayne has worked hard each day to become a better man, including maintaining a spotless disciplinary record, earning his G.E.D., and completing numerous classes.[20] Dwayne has filed a clemency petition and a motion for compassionate release in an effort to receive relief from his unjust sentence. He is still waiting

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[13] *See* Katharine Tinto, *Fighting the Stash House Sting*, 38 THE CHAMPION 1 (2014) (citation omitted), https://www.nacdl.org/Article/October2014-FightingtheStashHouseSting.

[14] Jason Meisner & Annie Sweeney, *ATF sting operation accused of using racial bias in finding targets, with majority being minorities*, CHI. TRIB. (Mar. 3, 2017, 7:22 AM), https://perma.cc/VE4X-DDQG; Brad Heath, *Investigation: ATF drug stings targeted minorities*, USA TODAY (July 20, 2014, 3:40 PM), https://perma.cc/6WFS-V338.

[15] Report of Dr. Jeffrey Fagan, Ph.D. at 14, United States v. Brown, No. 12-CR-632 (N.D. Ill. 2018), Dkt. 338, Exh. A, https://www.law.uchicago.edu/files/files/report_of_jeffrey_fagan.pdf [https://perma.cc/Y78Q-RZT7].

[16] *See* Transcript from Compassionate Release Hearing at 26:23–27:5, United States v. Conley, No. 11-CR-779 (N.D. Ill. Jan. 6, 2021), Dkt. 799; *see also* Alison Siegler, *Racially Selective Law Enforcement Litigation in Federal Stash House Cases*, 26 THE CIRCUIT RIDER 45, 47 (2019); Jason Meisner, *Under pressure by judges, prosecutors to offer plea deals in controversial drug stash house cases*, CHI. TRIB. (Feb. 21, 2018), https://perma.cc/6VBF-EBCY.

[17] Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 990 & n.6 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1447&context=nulr.

[18] *See* United States v. Mayfield, 771 F.3d 417, 420 (7th Cir. 2014) (en banc) (reversing Mr. Mayfield's conviction because he was erroneously denied an entrapment instruction at trial).

[19] *See* FED. BUREAU OF PRISONS, *Find an Inmate*, bop.gov/inmateloc/ (last visited Jan. 15, 2021) (showing a projected release date of November 29, 2030).

[20] Motion for Compassionate Release, *supra* note 7, at 6–7.

for a response from President Biden and his sentencing judge. One thing is clear: He should not spend another day in prison.

II. The Need for Comprehensive Reform

Harvard scholar Cornel West has said: "There is no doubt that if young white people were incarcerated at the same rates as young black people, the issue would be a national emergency."[21] Today, people of color account for nearly 80% of those convicted of federal crimes.[22] We must recognize that we are, indeed, facing a national emergency. Congress, the House Judiciary Committee, and this Subcommittee on Crime, Terrorism, and Homeland Security have the power and the obligation to address this crisis.

Dwayne's case—and the stash house cases in general—encapsulate and reveal many of the glaring problems with our federal drug laws:

- Mandatory minimum penalties and recidivist enhancements fuel mass incarceration: They are draconian, inflexible, and unjust. They deprive judges of the discretion to make individualized sentencing determinations. They widen the net, overpunishing low-level individuals like Dwayne who have a limited role in the offense. And they allow prosecutors and law enforcement to manipulate and increase statutory *and* guidelines' sentences by influencing the drug quantity—or, as in Dwayne's case—pulling that drug quantity out of thin air.
- Our drug laws create racial disparities, disproportionately impacting men of color.
- Non-retroactive legal reforms unjustly leave many behind bars: While Congress recognized in the First Step Act that that mandatory minimums and recidivist sentencing enhancements like § 851 and 18 U.S.C. § 924(c) authorized sentences that were far too long, Dwayne and others like him continue serving those sentences because the changes are not retroactive. The same was true for people serving longer sentences based on the 100-to-1 crack-powder disparity until Congress made the Fair Sentencing Act of 2010's changes retroactive in the First Step Act. Retroactivity is a necessary component of justice.
- The federal pretrial detention system casts too wide a net and over-detains people of color, especially in drug cases.
- The absence of comprehensive and accessible back-end sentencing relief leaves very limited avenues for someone like Dwayne to be saved from an excessive sentence.
- The trial tax unfairly imposes staggeringly high sentences on people like Dwayne simply because they exercised their constitutional right to trial.

The stash house cases also illustrate numerous other systemic issues related to federal law enforcement and prosecutorial power:

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[21] Cornel West, *Foreword* to MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS x (2d ed. 2012).
[22] BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS 2015-2016, at 8 tbl.5 (2019), https://www.bjs.gov/content/pub/pdf/fjs1516.pdf [hereinafter FEDERAL JUSTICE STATISTICS 2015–16].

- Overbroad prosecutorial discretion in charging, plea-bargaining, and sentencing.
- Racial disparities in law enforcement and prosecution.
- Discovery restrictions that prevent people like Dwayne from obtaining information about potential racial discrimination by law enforcement or prosecutors.
- Restrictions on litigating claims of racial discrimination against law enforcement or prosecutors.
- Restrictions on presenting statistical evidence in criminal cases.
- The absence of publicly available data about the federal and state criminal justice systems, including data about racial disparities.

Beyond the context of Dwayne's case, Congress must rectify other systemic problems related to drug policy, law enforcement, and privacy:

- Do not extend the DEA's temporary ban on all fentanyl analogues.
- Pass the MORE Act to end our country's unfair and unjust over-criminalization of marijuana and the racially disparate consequences that flow from it.
- Reform civil asset forfeiture laws.
- Amend our statutory electronic privacy regime to ensure adequate protection for electronic records and communications in the Internet era.
- Enact open-file discovery and ensure fair trials by requiring prosecutors to disclose exculpatory evidence, misconduct by local police officers, and evidence about confidential sources, and by regulating the use of confidential informants more broadly.

James Baldwin once said, "Any real change implies the breakup of the world as one has always known it."[23] In the federal criminal context, the world as we have known it has been in need of reform for decades. This Congress has an opportunity to break up that world and build something better. In the remainder of our testimony, we address the pressing issues highlighted above and propose legislative reforms.[24]

[23] JAMES BALDWIN, NOBODY KNOWS MY NAME 117 (1961).

[24] The students in our Federal Criminal Justice Clinic made remarkable contributions to this document. In addition to those listed on the cover page, we thank Alessandro Clark-Ansani (University of Chicago Law School Class of '23) and intern Molly Prince Norris (University of Michigan Class of '20).

III. End Fake Stash House Operations and Reduce Racial Disparities in Law Enforcement

A. Reform Recommendations: Summary

- Pass legislation to disincentivize federal law enforcement agencies and U.S. Attorney's Offices from running fake stash house operations and other reverse sting operations. These operations disproportionately target individuals of color. For example, prohibit the government from using mandatory minimums or recidivist sentencing enhancements in reverse sting operations that do not involve any actual drug quantity.
- Expand the statutory remedies for racial discrimination in policing and prosecution to parallel the federal statutory regimes prohibiting employment discrimination, housing discrimination, and the like. Specifically, pass legislation that authorizes defendants to prove racially selective policing or prosecution in a criminal case by showing only "disparate impact," regardless of discriminatory intent. At a minimum, expressly authorize the use of statistical evidence to show racially selective law enforcement. The related prohibitions on proving discrimination via disparate impact and/or statistical evidence are currently an insurmountable barrier to winning a race discrimination claim in a criminal case.
- Order an independent investigation into the ATF's, the DEA's, and all other federal law enforcement agencies' fake stash house and other reverse sting operations. Any investigation should examine, among other things, the race of every confidential informant used in such an operation; the race and criminal history of every individual who was approached or targeted by a confidential informant or law enforcement agent in connection with such operations; the race and criminal history of every individual who agreed to commit the offense—regardless of whether they were ever charged; and the correlation between the race of the confidential informants and the race of the targeted individuals.
- Discovery Reforms:
    - Pass legislation to enact an open-file discovery rule in federal criminal cases. That rule should explicitly direct federal law enforcement agencies and prosecutors to disclose evidence and data that the defense requests to support a claim of racial disparities or discrimination by law enforcement.[25]
    - At a minimum, pass legislation to enable criminal defendants to obtain discovery in support of claims of racial discrimination by law enforcement, akin to the state court rule proposed in Professor Siegler's article, *Discovering Racial Discrimination by the Police*.[26]

B. Expand Statutory Remedies for Racial Discrimination in Policing

Dwayne's case illustrates a particular problem that Congress must address—federal law enforcement agencies and prosecutors widen the net and deepen systemic racial disparities by targeting unsuspecting and financially strapped low-level offenders. Fake stash house stings, and reverse sting operations more generally, exemplify this problem. To enable the defense bar to

[25] *See infra* Part XII.
[26] Siegler & Admussen, *supra* note 17, at 1042–43.

effectively challenge these and future government operations that create racial disparities, Congress should allow defendants to prove racial discrimination in criminal cases via disparate impact. At a minimum, Congress should allow defendants to provide statistics to support claims of intentional discrimination.

Nationwide, federal law enforcement agencies have overwhelmingly targeted people of color to commit these fabricated crimes.[27] In Chicago, from 2011 to 2013, only one individual out of the fifty-seven charged by the ATF in a stash house operation was white.[28] In the past decade of DEA stash house cases in New York, none of the 179 defendants charged were white.[29] In Los Angeles, one ATF agent testified that fifty-five out of sixty stash house defendants indicted were people of color.[30] A 2014 review by *USA Today* of 635 stash house cases nationwide found that "[a]t least 91% of the people [federal] agents have locked up using those [stash house] stings were racial or ethnic minorities."[31] In response to these disparities, we and other defense attorneys across the country have mounted equal protection challenges, alleging racial discrimination by federal law enforcement officers.[32]

However, it is extraordinarily difficult to hold the police accountable for racial discrimination under our current system. The legal standards are so hard to meet that Professor Michelle Alexander predicted that "[t]he racial profiling cases that swept the nation in the 1990s may well be the last wave of litigation challenging racial bias in the criminal justice system that we see for a very long time."[33] In fact, "the Supreme Court has made it virtually impossible to challenge racial bias in the criminal justice system under the Fourteenth Amendment, and it has barred litigation of such claims under federal civil rights laws as well."[34]

Despite the racial disparities in the ATF's fake stash house operations, it is nearly impossible to obtain *discovery* to support claims of racially selective prosecution or racially

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[27] This section of our testimony is drawn in part from Siegler & Admussen, *supra* note 17, at 990–91.
[28] Report of Jeffrey Fagan, Ph.D., *supra* note 15, at 15.
[29] Shayna Jacobs, *10 years. 179 arrests. No white defendants. DEA tactics face scrutiny in New York.*, WASH. POST (Dec. 14, 2019, 8:05 PM), https://www.washingtonpost.com/national-security/10-years-179-arrests-no-white-defendants-dea-tactics-face-scrutiny-in-new-york/2019/12/14/f6462242-12.ce-11ea-bf62-eadd5d11f559_story.html [https://perma.cc/7RA2-Q4XY].
[30] Maura Dolan, *U.S. appeals court expresses concern about sting operations that overwhelmingly target blacks and Latinos*, L.A. TIMES (Oct. 15, 2018, 4:10 PM), https://www.latimes.com/local/lanow/la-me-ln-sting-9th-circuit-20181015-story.html [https://perma.cc/XXE7-RK7F].
[31] Brad Heath, *Investigation: ATF drug stings targeted minorities*, USA TODAY (Apr. 24, 2019, 11:50 AM), http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/ [https://perma.cc/WUA5-8AL8] (identifying 635 stash house defendants nationwide from 2004 to 2014 and finding 579 were people of color).
[32] *See, e.g.*, United States v. Brown, 299 F. Supp. 3d 976, 991–93 (N.D. Ill. 2018) (alleging an ATF reverse-sting stash house operation constituted racially selective law enforcement); United States v. Lopez, 415 F. Supp. 3d 422, 425 (S.D.N.Y. 2019) (alleging a DEA reverse-sting stash house operation constituted racially selective law enforcement).
[33] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 138–39 (2d ed. 2012).
[34] *Id.* at 109.

selective law enforcement in violation of constitutional Equal Protection principles.[35] We and other criminal defense attorneys have launched a recent wave of litigation seeking such discovery regarding federal policing tactics. Three courts of appeals have responded to this litigation by lowering the high bar to obtaining discovery regarding racially selective law enforcement: The Seventh Circuit in our case, *United States v. Davis*;[36] the Third Circuit in *United States v. Washington*;[37] and the Ninth Circuit in *United States v. Sellers*.[38]

Nevertheless, it continues to be extraordinarily difficult for defense attorneys representing indigent clients to secure data and discovery to support claims of racial discrimination by the police. An overarching systemic problem is the lack of publicly available data about state and federal criminal cases, especially data about racial disparities. Even when such data exists, it is often locked in a black box and is extraordinarily difficult—if not downright impossible—for the defense to access. In our Chicago stash house litigation, for example, "it took nine months, hundreds of pages of motions, and a related civil subpoena enforcement action to obtain the kind of racially coded criminal history data needed to" obtain an expert analysis to meet just one portion of the legal standard.[39] Yet even after these herculean efforts to obtain discovery and data, the judge ultimately rejected our evidence as insufficient.

Which points to an additional concern: It appears to be genuinely impossible under current law to prove discrimination claims in criminal cases *on the merits*. In the nearly twenty years "[s]ince the Court established *Armstrong*'s demanding discovery standard, there has not been a single successful [racially] selective prosecution or [racially] selective law enforcement claim on the merits" in a criminal case.[40] In fact, the only successful claim of racial discrimination against a prosecutor in a state or federal criminal case dates back 135 years.[41]

The only way to prove selective enforcement or selective prosecution is to show that the government violated equal protection, and that requires proving "discriminatory intent." Unlike the plaintiff in an employment discrimination case, an individual charged in a criminal case is barred from showing selective enforcement by proving only "disparate impact"—that is, proving discrimination by showing that a given policy or practice had a racially disparate impact on people of color. Moreover, for criminal cases, the Supreme Court in *McCleskey v. Kemp*[42] established a "near insurmountable-barrier" for proving discriminatory intent under Equal Protection.[43] There, the Court famously declined to infer discriminatory purpose from compelling statistical evidence illustrating pervasive racial disparities in Georgia's capital

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[35] Siegler & Admussen, *supra* note 17, at 1008.
[36] 793 F.3d 712, 719–23 (7th Cir. 2015) (en banc).
[37] 869 F.3d 193, 214–21 (3d Cir. 2017).
[38] 906 F.3d 848, 852–56 (9th Cir. 2018).
[39] Siegler & Admussen, *supra* note 17, at 1046; *see also id.* at 1024 (arguing that the "discovery standard . . . should be lowered to allow courts to adjudicate police discrimination claims on the merits").
[40] *Id.* at 1002.
[41] *Id.* at 1002–03.
[42] 481 U.S. 279 (1987).
[43] Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2453–55 (2017), https://www.minnesotalawreview.org/wp-content/uploads/2017/06/Huq.pdf.

punishment scheme. Instead, individuals must present a court with "exceptionally clear proof" of intentional discrimination by a specific prosecutor in a specific case before it.[44]

This rule has since resulted in a near-categorical exclusion of using statistical evidence to establish racial discrimination in criminal cases.[45] This bar, in turn, has prevented criminal defendants from raising claims of racial discrimination for nearly 40 years. As one scholar put it, "*McCleskey*'s burden of proof . . . is generally acknowledged to be impossible to meet."[46]

McCleskey's outdated framework must be jettisoned. It ignores everything we now know about systemic discrimination and unconscious bias. It makes little sense that a person can use statistics to prove racial discrimination on the job but is effectively barred from presenting those same statistics when their liberty and their life are at stake. It is beyond dispute that statistical analyses "can provide evidence of discrimination, including discriminatory intent."[47]

To our knowledge, there has never been a successful racial discrimination claim against a law enforcement agency in a state or federal criminal case. We litigated a four-year racial discrimination challenge against the ATF on behalf of 43 clients charged in stash house cases Chicago, and it ended with a denial of our motion to dismiss for failure to meet the truly insurmountable legal standard.[48] It would be very difficult for a federal public defender with a full caseload to pursue such an extensive litigation project, much less a private attorney who must maintain a law practice. The legal standards therefore virtually guarantee that no indigent criminal defendant will ever be able to successfully dismiss a stash house case—or any other federal criminal case—on race discrimination grounds. Fortunately, our intensive litigation enabled us to extract very favorable plea deals for our clients, and many were sentenced to time served. That freedom came at a price, however; our clients had to agree to abandon their claims of racial discrimination.

It can be even harder for a civil plaintiff to establish racial discrimination by federal law enforcement or prosecutors. The same legal standards in criminal cases that prohibit disparate impact claims and limit the use of statistical evidence also apply in civil cases against federal officials. Worse still, for those seeking civil damages, case law appears to be eliminating even the opportunity argue that federal law enforcement officers or prosecutors have discriminated on

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[44] *McCleskey*, 481 U.S. at 296.
[45] Aziz Huq, *What is Discriminatory Intent?*, 102 CORNELL L. REV. 1211, 1283 (2018), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4765&context=clr. A few states responded to *McCleskey* by passing laws that would permit individuals to utilize statistics in challenging death penalty sentences—the North Carolina Racial Justice Act, repealed in 2011, and the Kentucky Racial Justice Act. *See* Tanya Green, *25 Years After* McCleskey, *Looking Forward to Legislative Fixes of Supreme Court Error*, ACLU (Apr. 22, 2012), https://www.aclu.org/blog/capital-punishment/racial-disparities-and-death-penalty/25-years-after-mccleskey-looking. Members of Congress have introduced similar legislation at least 15 times to date, but none has passed. *Id.*
[46] John M. Powers, *State v. Robinson and the Racial Justice Act: Statistical Evidence of Racial Discrimination in Capital Proceedings*, 29 HARV. J. RACIAL & ETHNIC JUST. 117, 128 (2013).
[47] Siegler & Admussen, *supra* note 17, at 1049.
[48] United States v. Brown, 299 F. Supp. 3d 976, 1010 (N.D. Ill. 2018); *see also* Siegler & Admussen, *supra* note 17, at 1026 ("*Armstrong* is a bad fit for the selective law enforcement context . . . because in practice the similarly situated requirement is impossible to meet.").

the basis of race.[49] As Judge Willett of the Fifth Circuit Court of Appeals recently observed: "[R]edress for a federal officer's unconstitutional acts is either extremely limited or wholly nonexistent, allowing federal officials to operate in something resembling a Constitution-free zone. . . . If you wear a federal badge, you can" violate the Constitution "with little fear of liability."[50] Congress should create a cause of action expressly authorizing money damages for discrimination by federal officers, including law enforcement and prosecutors.

C. Fake Stash House Operations Must End

Numerous judges have spoken out against these federal stash house operations, but there is little they can do because the prosecutors and law enforcement agencies have all the power. In addition to expressing concern about the racial disparities these cases create, courts have criticized the fake stash house operation as a "disreputable tactic,"[51] a "tawdry" and "tired sting operation [that] seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them by [the government agent]."[52] The Ninth Circuit, for example, has accused law enforcement of "trolling for targets" when the confidential informant "provocatively cast his bait in places defined only by economic and social conditions."[53] Judges have even expressed "disgust with the ATF's conduct" in these cases.[54]

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[49] In the 1970s, the Supreme Court recognized an "implied" cause of action for federal equal protection violations. *See* Davis v. Passman, 442 U.S. 228 (1979) (implied cause of action for federal equal protection violation under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). Subsequent Supreme Court precedent, however, explains that "expanding the *Bivens* remedy is now considered a "disfavored" judicial activity. Ziglar v. Abbasi, 137 S. Ct. 1843, 1848 (2017). The courts of appeals have gotten the message: "Virtually everything beyond the specific facts" of *Davis* and its related cases "is a new context . . . . And new context = no *Bivens* claim." Byrd v. Lamb, slip op. No. 20-20217 at *8 (5th Cir. Mar. 9, 2021) (quotation omitted) (Willett, specially concurring). No matter how brutal the facts, there is no federal remedy: "Private citizens who are brutalized—even killed—by rogue federal officers can find little solace in *Bivens*." *Id.* at *7.

[50] *See id.* at *9.

[51] United States v. Kindle, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part), *opinion vacated on reh'g en banc sub nom.* United States v. Mayfield, 771 F.3d 417 (7th Cir. 2014); *see also id.* at 416 (remarking that "[t]he operators of stash houses would *pay* law enforcement to sting potential stash house robbers" because a "sting both eliminates one potential stash house robber (unless the defendant was entrapped) and deters other criminals from joining stash house robberies, since they may turn out to be stings").

[52] United States v. Lewis, 641 F.3d 773, 777 (7th Cir. 2011).

[53] United States v. Black, 733 F.3d 294, 303 (9th Cir. 2013). For further criticism of stash house operations, see Tinto, *supra* note 4, at 1446–51.

[54] United States v. Paxton, No. 13-CR-0103, 2018 WL 4504160, at *2 (N.D. Ill. 2018); *see also* United States v. Hudson, 3 F. Supp. 3d 772, 786 (C.D. Cal. 2014), *rev'd and remanded sub nom.* United States v. Dunlap, 593 F. App'x 619 (9th Cir. 2014) (unpublished) ("Zero. That's the amount of drugs that the Government has taken off the streets as the result of this case and the hundreds of other fake stash-house cases around the country. That's the problem with creating crime: the Government is not making the country any safer or reducing the actual flow of drugs.").

Beyond the racial dimension, fake stash house cases like Dwayne's raise troubling questions about prosecutorial and law enforcement discretion, the trial tax,[55] the restrictive criminal discovery rules, overpunishment, sentencing disparities, and the paucity of back-end relief for people unjustly serving decades-long sentences.

Our litigation provides a window into the government's contention that their drug operations target serious, violent criminals—the "worst of the worst." Nothing could be further from the truth.

- Federal agents target low level offenders: Like many federal drug cases, the stash house operation is perfectly designed to target the *least* culpable offenders. Low-level offenders are the easiest people for a confidential informant to target in the first place. And they also are the most susceptible to the temptations offered by a life-changing but highly risky jackpot: hundreds of thousands of dollars' worth of (imaginary) drugs, guarded by (imaginary) men with guns.[56] Approximately 20% of the 94 defendants in our Chicago cases had *no prior conviction at all* prior to the stash house operation.[57] Over 40% had no prior conviction for a drug or weapons offense.[58] And anywhere from 69% to 82% had no prior convictions for violent offenses, depending on how one defines the term.[59] As one federal court opined: "In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth, it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time for agreeing to participate in them—people who but for the government's scheme might not have ever entered the world of major felonies."[60]

- Federal agents failed to comply with their internal targeting criteria, in a racially disparate manner: The ATF's stash house operation is ostensibly guided by strict targeting guidelines set out in an internal policy manual.[61] Our analysis showed that the ATF rampantly disregarded those criteria, and did so in a racially disparate manner.[62] The only violent home invasion robbery crews the ATF focused on involved primarily *white individuals*; during those operations, the ATF only

[55] *See generally* NAT'L ASS'N OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.
[56] Tinto, *supra* note 4, at 1446–47.
[57] Report of Jeffrey Fagan, Ph.D., *supra* note 15, at 19.
[58] *Id.*
[59] *Id.*
[60] United States v. Black, 750 F.3d 1053, 1057–58 (9th Cir. 2014) (Reinhardt, J., dissenting from denial of rehearing en banc).
[61] Motion to Dismiss for Racially Selective Law Enforcement at 5–11, 43, United States v. Mayfield, No. 15-cr-497 (N.D. Ill. Jan. 6, 2017), Dkt. 55 [hereinafter Motion to Dismiss]. Much of the material on which our Motions to Dismiss relied remains subject to protective order except to the degree it appeared in the Motions to Dismiss. This Testimony accordingly cites directly to an exemplar Motion to Dismiss where the underlying materials are not available.
[62] *See generally id.* at 42–59.

occasionally deviated from their own criteria. But when targeting Black and Hispanic men, the ATF made little effort to meet their internal criteria.[63] These departures from the ATF's criteria led to absurd and racially disparate results. For example, the ATF ostensibly required that two suspects from every group of codefendants were "violent offenders." But in fact, when it came to groups comprised mostly of Black individuals, the ATF targeted people with one or zero violent offenders.[64] In violation of its criteria, the ATF likewise targeted groups where *no one* the ATF knew about before arrest had a past violent conviction—and, again, did so exclusively for Black defendants.[65] And, again in violation of its own criteria, the ATF also targeted groups who couldn't even easily access a firearm—but, again, not for white defendants.[66] In one especially absurd example, the ATF targeted three Black individuals who were able to find "only one barely functional firearm among them—a vintage firearm manufactured sometime between 1904 and 1918, the left grip of which was broken and secured by duct tape."[67]

- Federal agents were invested with enormous discretion that they exercised to target people of color: The stash house operation and other reverse stings are in some ways unique: Agents create a crime and select who will commit it. Without the agents' intervention, there would be no crime at all—not even the imaginary one charged in our cases. If this is what happens when agents are purportedly subject to strict policy guidelines, how can we trust federal law enforcement agencies to self-regulate when the guidelines are broader?

- Despite years of litigation, the defense never received key discovery in our stash house litigation that would have been standard in civil cases: Charges were filed in 2011–2013 for most of the 43 defendants in our cases. We held an evidentiary hearing in 2017. Due to the cramped criminal discovery rules, we never received discovery that would have been utterly unremarkable in a civil case. For example, we were never able to depose an agent or someone knowledgeable about the operation. We likewise never received agent text messages, emails, notes, rough drafts of reports, etc., that could have revealed what agents were thinking and doing in real time. Nor did we receive any internal audits or assessments by the ATF of whether its stash house operations were fulfilling its purposes and whether its agents were complying with its goals.

Many of these issues are addressed in the latest scathing opinion in a fake stash house case, in which U.S. District Court Judge Sharon Johnson Coleman in Chicago granted a

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[63] These variations from internal policy were evidence of discriminatory intent. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977); Nabozny v. Podlesny, 92 F.3d 446, 454–55 (7th Cir. 1996) (reversing dismissal of Equal Protection gender discrimination claim where school administrators departed from a purportedly gender-neutral "policy and practice" when faced with a male victim); *see also, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 547 (1999).
[64] Motion to Dismiss, *supra* note 61 at 48–49.
[65] *Id.* at 51.
[66] *Id.* at 51–52.
[67] *Id.* at 52.

compassionate release motion for Tracy Conley, who was serving a 15-year mandatory minimum sentence.[68] Judge Coleman minces no words in describing the case as arising from "outrageous and disreputable law enforcement tactics, followed by the prosecution's relentless pursuit of the sentence despite the rebuke of these cases across the country."[69]

Judge Coleman continues, "If there ever was a situation where compassionate release was warranted based on the injustice and unfairness of a prosecution and resultant sentence, this is it."[70] She excoriates the government for concocting a drug amount and a scenario in order to set a high mandatory minimum that would apply without regard to a given individual's role or culpability in the offense. Specifically, she says: "[T]he Court's hands were tied by the fake drug amount, namely fifty kilograms of cocaine, that the government arbitrarily decided was in the fake stash house, along with a fictitious guard, who happened to be armed. In short, Conley's sentence was driven by the government's decisions in fabricating a false stash house and not the Court's consideration of what punishment was appropriate under the circumstances."[71]

Judge Coleman further remarks that "adding to the injustice underlying his prosecution and sentence" is the fact that Conley—like Dwayne—was indigent and had a minimal role in the offense, yet received a more severe punishment than his codefendants.[72] She says: "Conley found himself ensnared in the ATF's scheme, not because he sought to rob a stash house or commit a crime, but because he did not have money to purchase gas for his trip home from his legitimate job and happened to run into Adams."[73] The judge emphasizes that, although Conley was one of the "least culpable" of the seven defendants, the prosecution's decision to charge two mandatory minimums forced her to sentence Conley to far more prison time than his codefendants, "who pleaded guilty and received sentences ranging from 46 to 70 months in prison."[74]

And finally, the judge also says that the "grossly disproportionate sentence" was "the result of a 'trial tax,' just because [Conley] maintained his innocence throughout the proceedings and asserted that the false stash house stings were inappropriate."[75] This trial tax or trial penalty pressures defendants to plead guilty and punishes people like Conley who don't. It helps explain why only 2.4% of people charged with federal crimes go to trial, and most of the rest plead guilty.[76] "Mandatory sentencing requirements create a broken process that often requires trading one's innocence for guilt in a bargain for a lesser sentence, and they always exert undue influence on outcomes."[77]

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[68] United States v. Conley, No. 11-CR-0779, 2021 U.S. Dist. LEXIS 40763, at *15 (N.D. Ill. Mar. 4, 2021), Dkt. 800.
[69] *Id.* at *11.
[70] *Id.* at *12.
[71] *Id.* at *10.
[72] *Id.*
[73] *Conley*, 2021 U.S. Dist. LEXIS 40763, at *11.
[74] *Id.* at *10.
[75] *Id.* at *15.
[76] FEDERAL JUSTICE STATISTICS 2015–16, *supra* note 22, at 9 tbl.6.
[77] Bradley R. Haywood & Kelly Haywood, *Virginia failed to repeal mandatory minimums, but there's hope for next year*, WASH. POST (Mar. 2, 2021, 9:39 AM),

IV. Eliminate or Reduce Harsh Federal Mandatory Minimums

A. Reform Recommendations: Summary

- Repeal all federal mandatory minimums.
- Repeal all mandatory minimums in federal drug cases.
- At a minimum, repeal all mandatory minimums in federal drug cases, except for drug kingpins.
- Pass the Smarter Sentencing Act.
- Eliminate the crack-powder disparity and make that change retroactive.
- Pass legislation to expand safety valve provisions to enable judges to sentence low level and/or non-violent individuals below the mandatory minimum. At a minimum, pass legislation making the First Step Act's safety valve expansion fully retroactive.

B. The Problem of Mandatory Minimums

There is widespread agreement across the political spectrum that federal mandatory minimum drug laws are inhumane, racially discriminatory, waste taxpayer money, and deprive judges of sentencing discretion.[78] In the 1970s, then-Congressman George H.W. Bush spoke in favor of repealing mandatory minimum drug laws because it would "result in better justice and more appropriate sentences."[79] Voters have likewise criticized these laws. In a recent study done for the Pew Charitable Trusts, eight in ten voters supported giving judges the flexibility to determine drug sentences based on the individualized facts of a case,[80] and 61% of respondents affirmed that "too many drug criminals [are] taking up too much space in our federal prison system."[81]

The solution is simple: Congress should eliminate all federal mandatory minimums, especially in drug cases. Barring that, Congress should enact meaningful mandatory minimum reform.

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https://www.washingtonpost.com/opinions/2021/03/02/virginia-failed-repeal-mandatory-minimums-theres-hope-next-year/.

[78] This section draws on our own scholarship, as well as our written testimony in support of the Smarter Sentencing Act. *See generally* Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO ST. J. CRIM. L. 283 (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589862; *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Report Before the S. Comm. on the Judiciary*, 113th Cong. 223–239 (Sept. 18, 2013) (written testimony of the University of Chicago Federal Criminal Justice Clinic), https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg88998.pdf [hereinafter *FCJC Senate Written Testimony*].

[79] Molly M. Gill, *Correcting Course: Lessons from the 1970s Repeal of Mandatory Minimums*, 21 FED. SENT'G REP. 55, 55 (2008), https://famm.org/wp-content/uploads/Correcting-Course.pdf.

[80] *Id.*

[81] MELLMAN GROUP & PUBLIC OPINION STRATEGIES, NATIONAL SURVEY KEY FINDINGS – FEDERAL SENTENCING & PRISONS 1 (2016), https://www.pewtrusts.org/~/media/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf.

The original drug mandatory minimums date back to the early twentieth century and were linked to fears about race and crime.[82] The first mandatory minimum was passed in 1914, when Congress set a five-year minimum for manufacturing opium for smoking purposes.[83] The law was influenced by widespread anti-Chinese sentiment. For example, in 1902, the American Pharmaceutical Association's Committee on the Acquirement of the Drug Habit blamed Chinese immigrants for "importing" opium smoking to the United States. The Committee concluded, "If the Chinaman cannot get along without his 'dope,' we can get along without him."[84]

Congress passed the current mandatory minimum laws during the War on Drugs in the 1980s, when fear about crime and drugs was at its apex and concerns about mass incarceration and racial equity were far less prevalent than they are today. Under the 1986 Anti-Drug Abuse Act (the 1986 Act), the majority of federal drug offenses carry harsh mandatory minimum penalties that judges must impose—no matter how compelling the case or mitigating the circumstances—unless the person qualifies for one of a few exceedingly narrow exceptions.

Current statistics highlight how the laws that apply to drug cases at sentencing have contributed to mass incarceration and racial injustice. Today, drug offenses make up nearly 30% of the federal docket nationwide.[85] Approximately 66% of all drug trafficking cases in Fiscal Year 2019 carried a mandatory minimum penalty.[86] As a direct result of these mandatory minimums, it is a virtual certainty that anyone convicted of a federal drug offense will spend time behind bars: 96.3% of drug offenders were sentenced to prison in Fiscal Year 2019.[87] "The average expected time served for the 55,000 people in prison sentenced pursuant to a mandatory minimum for drug offenses (59% of those in federal prison for drugs) is more than 11 years."[88] Nearly half of those serving federal sentences for drug offenses "have few, if any, prior convictions," and almost 80% "had no serious history of violence."[89] As a consequence of mandatory minimum penalties and the high federal Sentencing Guidelines that are linked to them, "[t]ens of thousands of people are now in federal prison for drug crimes, including people who have minimal criminal histories, did not use violence, and did not play leadership roles in drug enterprises."[90]

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[82] MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT 15 (2016).
[83] *See* Harrison Narcotics Tax, Pub. L. No. 63-223, 38 Stat. 278 (1914).
[84] JEFF GOLDBERG & DEAN LATIMER, FLOWERS IN THE BLOOD: THE STORY OF OPIUM 210 (2014).
[85] U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 1, 45 (2019), https://www.ussc.gov/sites/default/files/pdf /research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf [hereinafter 2019 ANNUAL REPORT].
[86] U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN DRUG TRAFFICKING CASES—FISCAL YEAR 2019 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/FigureD2.pdf.
[87] 2019 ANNUAL REPORT, *supra* note 85, at 62, 67, 122.
[88] CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS 11 (2016), https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf. [hereinafter COLSON REPORT].
[89] *Id.* at 12.
[90] *Id.* at 21.

In the years since the 1986 Act was passed, people of color have borne the brunt of these harsh federal drug laws. The most recent Sentencing Commission data shows that in Fiscal Year 2019, 27% of those sentenced for federal drug offenses were Black and 44% were Hispanic.[91] By comparison, the general population is 13.4% Black and 18.5% Hispanic.[92] Data also shows that people of color ultimately face longer prison terms than whites arrested for the same offenses with the same prior records.[93] For example, the Sentencing Commission recently found that when Black men and white men commit the very same crime, Black men on average receive a sentence that is nearly 20% longer.[94] Some of this is certainly a result of mandatory minimum charging, which "introduces sizeable racial disparities" into the system.[95] Data also shows that Black people who are convicted of a federal drug offense carrying a mandatory minimum are least likely to receive a sentence below the minimum.[96]

Mandatory minimum sentences also serve as a major contributor to wrongful convictions by incentivizing unreliable cooperator testimony.[97] Often the *only* way a person charged with a

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[91] 2019 ANNUAL REPORT, *supra* note 85, at 110.
[92] *Quick Facts 2019*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/US/PST045219.
[93] *See* Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1349 (2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2413&context=articles; AMERICAN CIVIL LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING: HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES 1, 1–2 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf; Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 881–82 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571954 (chronicling the demographics of crack cocaine defendants in federal court and noting that "[n]early 83% of the . . . crack defendants sentenced in 2012 were black").
[94] U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017), https://www.ussc.gov/site/default/files/pdf/research-and0publications/reasearch-publications/2017/20171114_Demographics.pdf.
[95] Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 10 (2013), https://www.yalelawjournal.org/article/mandatory-sentencing-and-racial-disparity-assessing-the-role-of-prosecutors-and-the-effects-of-booker ("Our research suggests that prosecutorial decisions are important sources of [racial] disparity—especially the decision to file mandatory minimum charges, which are prosecutors' most powerful tools for constraining judges.").
[96] U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2, 8 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf [hereinafter 2017 MANDATORY MINIMUM REPORT].
[97] Reliance on cooperators can also "focus" racial disparities. *See, e.g.*, Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 673 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=613521. Cooperators typically can cooperate only against people they know. *Id.* To the degree that they live racially segregated lives, then law enforcement reliance on them "becomes a kind of focusing mechanism guaranteeing that law enforcement will expend resources in" their "community whether or not the situation there independently warrants it." *Id.*

mandatory minimum can watch their children grow up or attend their children's weddings is to cooperate.[98] This reality introduces an extraordinarily high incentive to lie. Empirical estimates show that lying cooperators account for an astounding 15% to 45% of wrongful convictions.[99] If anything, those estimates likely underestimate the problem in drug cases subject to harsh mandatory minimums.[100] The problem is easy to understand: Who wouldn't tell the prosecutors whatever they want to hear if it means getting back to your family before you die?

Federal judges, who are responsible for imposing sentences, are among the most outspoken critics of mandatory minimum penalties. As Judge Jed Rakoff observed: "On one issue—opposition to mandatory minimum laws—the federal judiciary has been consistent in its opposition and clear in its message."[101] The Judicial Conference of the United States has long opposed mandatory minimums and supported legislative reform.[102] In a 2013 letter to Congress, the Judicial Conference's Criminal Law Committee stated: "For 60 years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences" because they waste taxpayer dollars, produce "disproportionately severe sentences," and "undermine confidence in the judicial system."[103] In 2010, federal judges were surveyed about their views on drug mandatory minimum sentences, and the results were overwhelmingly negative. Seventy-six percent responded that the crack cocaine mandatory minimum was too high; 54% responded that the marijuana mandatory minimum was too high; and approximately 44% responded that the heroin, drug, and powder cocaine mandatory minimums were too high.[104]

Supreme Court justices at both ends of the political spectrum have also called for eliminating mandatory minimums. In 2016, Supreme Court Justice Stephen Breyer went before the House of Representatives' Appropriations Subcommittee and lambasted mandatory

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[98] In the federal system, the process of cooperation typically works as follows: A person is either charged with a crime carrying a high mandatory minimum sentence or informed that they could be. However, if the accused provides "substantial assistance," then the government can file a motion that removes the mandatory minimum and asks the court to reduce the sentence. *See* 18 U.S.C. § 3553(e); FED. R. CRIM. P. 35(b). Relatedly, the government can enter into a cooperation plea agreement where they never even file the harshest mandatory minimum sentences for which the accused is eligible.

[99] *See* NORTHWESTERN UNIV. L. SCH. CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004–2005), https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf (45.9%); JIM DWYER ET AL., ACTUAL INNOCENCE 156 (2000) (21%); *The Causes of Wrongful Conviction*, THE INNOCENCE PROJECT (last visited Mar. 8, 2021), https://innocenceproject.org/causes-wrongful-conviction / (15%).

[100] *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 937–38 (1999), https://ir.lawnet.fordham.edu/flr/vol68/iss3/11/.

[101] Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. OF BOOKS (May 15, 2015), https://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/.

[102] *See, e.g.*, Letter from Honorable Robert Holmes Bell to Senator Patrick J. Leahy 1 (Sept. 17, 2013), https://www.uscourts.gov/sites/default/files/judge-bell-chairman-leahy-mandatory-minimums.pdf.

[103] *Id.* at 1, 4.

[104] U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 5 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

minimums: "You want mandatory minimums? I've said publicly many times that I think they're a terrible idea."[105] Retired Justice Anthony Kennedy told the American Bar Association in 2003: "I can accept neither the necessity nor the wisdom of federal mandatory minimums. In too many cases, mandatory minimum sentences are unwise and unjust."[106]

Federal judges with wide-ranging political philosophies have identified many specific problems with drug mandatory minimums:

- They deprive judges of discretion to impose individualized sentences and thus "distort the sentencing process and mandate unjust sentences."[107]
- They improperly transfer sentencing discretion from judges to prosecutors.[108]
- They disparately impact people of color.[109]
- They discourage the accused from exercising their constitutional right to trial.[110]
- They were created to punish high-level drug traffickers, but often don't.[111]

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[105] Justices Anthony Kennedy & Stephen Breyer, *Supreme Court Fiscal Year 2016 Budget*, C-SPAN, https://www.c-span.org/video/?c4532246/user-clip-justices-kennedy-breyer-criminal-justice (Mar. 23, 2015) (User-Created Clip).

[106] Justice Anthony Kennedy, *Speech at the American Bar Association Annual Meeting: An Address by Anthony M. Kennedy* (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html.

[107] Shira A. Scheindlin, *I sentenced criminals to hundreds more years than I wanted to. I had no choice*, WASH. POST (Feb. 17, 2017, 9:31 AM), https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/ (explaining that under the Anti-Drug Abuse Act of 1986, "I was often prohibited from assessing a defendant's history, personal characteristics or role in the offense. In sentencing, where judgment should matter most, I could not exercise my judgment. I felt more like a computer than a judge."); *see also* United States v. Dossie, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012).

[108] *See, e.g.*, *Dossie*, 851 F. Supp. 2d at 485 ("The government simply dictated a five-year sentence without even having to allege, let alone prove, the aggravating fact that it implied warranted the sentence.").

[109] *See, e.g.*, United States v. Clary, 846 F. Supp. 768, 772, 792 (E.D. Miss. 1994) ("[T]he '100 to 1' ratio, coupled with mandatory minimum sentencing provided by federal statute has created a situation that reeks with inhumanity and injustice. . . . [I]f young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago."); Nancy Gertner & Chiraag Bains, *Mandatory minimum sentences are cruel and ineffective. Sessions wants them back*, WASH. POST (May 15, 2017), https://www.washingtonpost.com/posteverything/wp/2017/05/15/mandatory-minimum-sentences-are-cruel-and-ineffective-sessions-wants-them-back/ ("In our experience, mandatory minimums have swelled the federal prison population and led to scandalous racial disparities").

[110] United States v. Bowen, No. 10-CR-204, 2012 U.S. Dist. LEXIS 50670, at *31 (E.D. La. 2012) ("The problem with mandatory minimums is that they have a coercive effect . . . . This extraordinary pressure can result in false cooperation and guilty pleases by innocent people.").

[111] *See, e.g.*, United States v. Leitch, No. 11-CR-609, 2013 WL 753445, at *2 (E.D.N.Y. Feb. 28, 2013), Dkt. 29 ("[M]any low-level drug trafficking defendants are receiving the harsh mandatory minimums that Congress explicitly created only for leaders and managers of drug operations.").

- The most culpable receive more lenient sentences because they can provide "substantial assistance" to the government, while the least culpable have little, if any, information of value.[112]

Some might be willing to live with this constellation of abominations if mandatory minimums had a significant public safety upside. However, evidence demonstrates that mandatory minimums in fact make us *less safe*. "While Congress instituted these reforms in the name of public safety, its actual policies have ended up making recidivism more likely, while creating glaring disparities and disproportionate sentences."[113] There is now ample evidence that warehousing people in prisons *increases* rates of recidivism.[114] And evidence suggests that mandatory minimums do not serve a general deterrence purpose or prevent others from committing drug crimes in the future.[115]

Moreover, recent federal drug law reform establishes that "shorter sentences don't compromise public safety."[116] In assessing evidence gathered after both the 2010 Fair Sentencing Act and the 2007 Sentencing Guidelines reductions in crack cocaine cases, the Colson Task Force concluded, "recent reforms have demonstrated that policymakers can shorten sentences

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[112] *See, e.g.*, United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992) (conservative Seventh Circuit Judge Frank Easterbrook acknowledging the "troubling" nature of drug mandatory minimums that punish the least culpable most severely because "it accords with no one's theory of appropriate punishments."); *Dossie*, 851 F. Supp. 2d at 487.

[113] Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 207 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/200-240_Online.pdf.

[114] *See, e.g.*, Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 50S (2011), https://www.researchgate.net/publication/258194311_Prisons_Do_Not_Reduce_Recidivism_The_High_Cost_of_Ignoring_Science.

[115] *See, e.g.*, *Federal Drug Sentencing Laws Bring High Cost, Low Return*, PEW CHARITABLE TRUSTS (Aug. 2015), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return ("Despite substantial expenditures on longer prison terms for drug offenders, taxpayers have not realized a strong public safety return. The self-reported use of illegal drugs has increased over the long term as drug prices have fallen and purity has risen."); U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 66 (2002), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf ("The declining prices for powder cocaine during the period of increasing penalties appear inconsistent with a deterrent effect of federal cocaine penalties."); Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES (Jul. 3, 2012), https://www.nytimes.com/2012/07/04/business/in-rethinking-the-war-on-drugs-start-with-the-numbers.html; Tanya Golash-Boza, *America's mass incarceration problem in 5 charts – or, why Sessions shouldn't bring back mandatory minimums*, THE CONVERSATION (May 29, 2017), https://theconversation.com/americas-mass-incarceration-problem-in-5-charts-or-why-sessions-shouldnt-bring-back-mandatory-minimums-78019.

[116] Gertner & Bains, *supra* note 109 ("A 2014 study by the U.S. Sentencing Commission found that defendants released early (based on [drug] sentencing changes not related to mandatory minimums) were not more likely to reoffend than prisoners who served their whole sentences. . . . Indeed, research shows it is the certainty of punishment — not the severity — that deters crime.").

and time served in federal prison for drug offenses without a corresponding increase in crime or drug abuse."[117]

C. Reform Recommendations for Mandatory Minimums

Congress has a panoply of options for addressing the scourge of federal mandatory minimum penalties. To ensure justice for everyone and avoid the kinds of disparities evidenced in Dwayne's case, any reform must apply retroactively.

The most comprehensive fix, of course, would be to repeal all mandatory minimums, or at least all mandatory minimums in drug cases. Alternatively, the Colson Report recommends "repeal[ing] the mandatory minimum penalties for drug offenses, except for drug kingpins as defined in the 'continuing criminal enterprise' statute."[118] The Colson Report estimates that this reform would reduce the federal prison population by 37,300 people by 2024 and would save taxpayers $2.188 billion.[119]

Recent data strongly supports the need for Congress to enact comprehensive reform in the federal criminal system and illustrates that merely tinkering around the edges of the criminal system will not have a meaningful impact. Notably, an empirical assessment of the modest reforms implemented by Attorney General (AG) Holder finds that efforts to reduce reliance on mandatory minimums via the "Holder Memo" did not have a meaningful impact on either sentence length or racial disparities in sentencing.[120] The study's author concludes: "[T]he results suggest that policy changes that do not account for the interconnected nature of criminal systems—the ways different elements and actors self-reinforce—are likely to be ineffective. These findings provide a compelling example for policymakers and underscore the need for systemic reform."[121] Moreover, without congressional action, any reforms implemented by one Department of Justice (DOJ) can easily be undone by another.[122]

More targeted reforms would have less impact but would at least begin to ameliorate some of the problems created by mandatory minimums that were not addressed by the First Step Act.

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[117] COLSON REPORT, *supra* note 88, at 21.
[118] *Id.* at 22.
[119] *Id.* at 85.
[120] *See* Stephanie Holmes Didwania, *Mandatory Minimums and Federal Sentencing* 36 (Temple U. Legal Stud. Research Paper, Paper No. 2020-01), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556138 (finding that the Holder Memo did not have a meaningful impact on sentence length or racial disparities in sentencing).
[121] *Id.* at 37.
[122] *See* Memorandum from Jefferson Sessions, U.S. Att'y Gen., to all federal prosecutors on department charging and sentencing policy (May 10, 2017), https://www.justice.gov/archives/opa/press-release/file/965896/download (rescinding previous guidance counseling against the use of § 851 enhancements during plea bargaining).

One such reform would be to pass the Smarter Sentencing Act (SSA), which was first introduced in 2013 and was recently reintroduced in 2019. We submitted written testimony in support of the SSA in 2014 and incorporate those points here.[123]

Another reform is to eliminate the "crack-powder disparity" by passing the new EQUAL Act (Eliminating a Quantifiably Unjust Application of the Law).[124] The 1986 Act created an infamous 100:1 crack-powder sentencing disparity,[125] which punished 50 grams of crack cocaine the same as 5,000 grams of powder cocaine.[126] In 2010, the Fair Sentencing Act reduced that sentencing disparity from 100:1 to 18:1,[127] and in 2018, the First Step Act made that reduction retroactive.[128]

There is no good reason to continue treating crack any differently from powder cocaine. It has long been understood that the fear of crack cocaine in comparison to powder cocaine was overblown.[129] Moreover, punishing crack cocaine more harshly than powder cocaine has deepened racial disparities in the criminal system. Today, approximately 81% of people convicted of crack cocaine crimes are Black, despite Black and white people using crack cocaine at similar rates.[130] Ending the disparity will not threaten public safety. Study after study has confirmed that prior federal sentencing reductions did not increase recidivism rates.[131] It is beyond time to relegate the crack-powder disparity to the dustbin of history.[132]

Another important reform would be to expand so-called "safety valve" provisions to enable judges to sentence lower level and/or non-violent individuals below the mandatory minimum. Today, there are only two ways drug offenders currently have any hope of receiving a

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[123] *See FCJC Senate Written Testimony*, *supra* note 78, at 1–4 (p. 224–28 of the Congressional Record).
[124] *See* EQUAL Act, S. 79., 117th Cong. (2021); *Reps. Jeffries, Scott, Armstrong, and Bacon Introduce Bipartisan Bill to Eliminate Sentencing Disparity Between Crack and Powder Cocaine* (Mar. 9, 2021), https://jeffries.house.gov/2021/03/09/reps-jeffries-scott-armstrong-and-bacon-introduce-bipartisan-bill-to-eliminate-sentencing-disparity-between-crack-and-powder-cocaine/.
[125] Pub. L. No. 99-570, 100 Stat. 3207.
[126] *Id.* § 1002, 100 Stat. at 3207-2.
[127] *Compare* 21 U.S.C. § 841(b)(1)(A)(ii) *with id.* § 841(b)(1)(A)(iii).
[128] First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222.
[129] *See* U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING v–vii (2002), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf.
[130] U.S. SENT'G COMM'N, QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES (June 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY19.pdf.
[131] U.S. SENT'G COMM'N, RETROACTIVITY & RECIDIVISM, THE DRUGS MINS TWO AMENDMENT 1 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.
[132] *See generally* Kevin Ring & Heather Rice-Minus, *Why do we still punish crack and powder cocaine offenses differently?*, THE HILL (Mar. 3, 2021), *https://thehill.com/opinion/criminal-justice/540816-why-do-we-still-punish-crack-and-powder-cocaine-offenses-*differently; Families Against Mandatory Minimums, *Ending the Disparity between Federal Crack and Powder Cocaine Sentences* (last visited Mar. 14, 2021), https://famm.org/wp-content/uploads/Crack-Disparity-One-Pager.pdf.

sentence below the mandatory minimum: safety valve and substantial assistance.[133] Both are very difficult to satisfy, often lead to absurd results, and create racial disparities.[134] The current safety-valve provision excludes many low-level, non-violent drug offenders who would otherwise be eligible because it disqualifies any person who was sentenced to more than a year and a month in prison at any time within fifteen years of the offense,[135] as well as any person who even constructively possessed a gun.[136] The substantial assistance provision also rarely provides relief to low-level drug offenders because it benefits high-level offenders with the knowledge and contacts to help prosecutors investigate and prosecute others.[137] Lower-level offenders in drug cases tend to lack this kind of information.[138]

The original sin of drug sentencing is the 1986 Act's reliance on drug type and quantity to identify "'major' and 'serious' dealers."[139] That framework has failed because drug type and quantity are often very bad proxies for culpability.[140] The Sentencing Commission recently observed that while Congress intended the 1986 Act's mandatory minimums to apply to high-level traffickers, they apply disproportionately to low-level offenders instead.[141] In a 2011 report, the Commission wrote that "the quantity of drugs involved in an offense is not as closely related to the offender's function in the offense as perhaps Congress expected."[142] As one scholar has observed, "the quantity triggers for the mandatory minimums cover anyone involved in the sale of drugs and are not limited to high-level operatives. Most people sentenced under this law are actually low-level members of drug conspiracies."[143] In support, she cites the Colson Report's important finding that only 14% of people incarcerated for federal drug crimes were deemed to have a managerial or leadership role at sentencing.[144]

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[133] *See* U.S. SENT'G GUIDELINES MANUAL § 5C1.2 (U.S. SENT'G COMM'N 2018) [hereinafter U.S.S.G.] (safety valve); *id.* § 5K1.1 (substantial assistance).
[134] *FCJC Senate Written Testimony, supra* note 78, at 2–3 (p. 225–26 of the Congressional Record).
[135] CONG. RESEARCH SERVICE, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 3 (2019), https://fas.org/sgp/crs/misc/R41326.pdf.
[136] *Id.* at 4.
[137] Alexandra Natapoff, *Deregulating Guilt*, 30 CARDOZO L. REV. 965, 1007–08 (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334813.
[138] *Id.*
[139] Zunkel & Siegler, *The Federal Judiciary's Role*, *supra* note 78, at 19 (citing Kimbrough v. United States, 552 U.S. 85, 95 (2007)).
[140] Zunkel & Siegler, *The Federal Judiciary's Role*, *supra* note 78, at 19. For example, the Commission's data shows that only 7.3% of people who were sentenced for drug offenses in Fiscal Year 2019 were considered to be "high-level" traffickers: leaders, managers, or supervisors in drug enterprises. 2019 ANNUAL REPORT, *supra* note 85, at 117. The First Step Act acknowledges that role in the offense distinguishes drug offenders from one another. It codifies that those who the sentencing judge determines to be an "organizer, leader, manager, or supervisor of others in the offense" are ineligible for "earned time credits" for participating in rehabilitative programming. *See* First Step Act of 2018, Pub. L. No. 115-391, §§ 101–02, 132 Stat. 5194, 5202, 5210.
[141] *See* 2017 MANDATORY MINIMUM REPORT, *supra* note 96, at 6 (noting that "nearly one-third (32.2%) of Couriers and more than one-quarter of Mules (25.4%) were convicted of such offenses").
[142] *Id.*
[143] Barkow, *supra* note 113, at 217.
[144] *Id.* (citing COLSON REPORT, *supra* note 88, at 12).

As we wrote in our testimony in support of the Smarter Sentencing Act, drug type and quantity are bad proxies for culpability.[145] On the southern border, for example, dispensable drug mules are promised a few hundred dollars to transport drugs, without any idea about the type or quantity of drugs they are transporting. Yet they face the same mandatory minimum sentences as high-level, sophisticated drug offenders who know all about the drug quantities and reap the financial benefits of the transaction.[146] In its 2013 letter to the Senate Judiciary Committee, the Judicial Conference outlined the problems with the law's misguided focus on drug type and quantity.[147] It must also be remembered that beyond the mandatory minimums, people charged with federal drug offenses often face even higher sentences under the drug sentencing guidelines, which likewise tie punishment to drug type and quantity.[148]

To address the problem with penalties tied to drug quantity, Congress should at a minimum make the First Step Act's expanded safety valve provision retroactive. In addition, Congress should authorize judges to sentence below the mandatory minimum based on a defendant's role in the offense. Lower-level drug offenders should be eligible for sentences below the mandatory minimum if the judge, in her discretion, determines under 18 U.S.C. § 3553(a) that the mandatory minimum sentence is greater than necessary to protect the public, provide rehabilitation, and appropriately punish the offender. This would reduce racial disparities in sentencing and would appropriately transfer sentencing discretion from prosecutors to judges.

A safety valve based on role would be analogous to what the Supreme Court did in the *Kimbrough* case. *Kimbrough* authorized judges to account for the unfair sentencing consequences of the so-called crack-powder disparity, which was seen as racially biased from its inception.[149] Notably, the House Committee on the Judiciary has approvingly cited *Kimbrough*

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[145] *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 350 (2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_12.pdf ("Commission analysis indicates that the quantity of drugs involved in an offense is not as closely related to the offender's function in the offense as perhaps Congress expected."); *see also FCJC Senate Written Testimony*, *supra* note 78, at 2 (p. 225 of the Congressional Record).

[146] Indeed, it is not uncommon for high-level offenders to receive sentences similar to low-level offenders like those profiled in Part II *infra*. For example, several high-ranking members of a large drug trafficking organization in Southern California received sentences at or near the 10-year mandatory minimum in spite of their leadership roles and their participation in a multi-year methamphetamine conspiracy. *See* United States v. David Chavez-Chavez, No. 07-CR-1408 (S.D. Cal. Dec. 1, 2009), Dkts. 1, 699 (121-month sentence for high-level manager of a methamphetamine drug trafficking organization); United States v. Joel Chavez-Chavez, No. 07-CR-1408 (S.D. Cal. Aug. 10, 2010), Dkts. 1, 769 (same).

[147] *See, e.g.*, Letter from Honorable Robert Holmes Bell to Senator Patrick J. Leahy, at 5 (Sept. 17, 2013), https://www.uscourts.gov/sites/default/files/judge-bell-chairman-leahy-mandatory-minimums.pdf.

[148] *See* U.S.S.G. § 2D1.1(c) (drug quantity table).

[149] *See, e.g.*, *Press Release: NAACP Applauds Steps Taken by US Sentencing Commission to Begin Addressing Crack/Powder Cocaine Sentencing Disparities*, NAACP (Nov. 16, 2007), https://www.naacp.org/latest/naacp-applauds-steps-taken-by-us-sentencing-commission-to-begin-addressing-crack-powder-cocaine-sentencing-disparities/. In the early days, people attacked the disparity by alleging racially selective prosecution in crack cases, but the Supreme Court quelled that litigation strategy by setting an insuperable discovery standard in *United States v. Armstrong*, 517 U.S. 456 (1996).

as enabling judges to impose "more reasonable prison sentences" in crack cases.[150] Authorizing judges to sentence below the mandatory minimum for lower-level offenders would likewise enable them to impose more reasonable sentences and would advance racial justice.

Yet another problem with penalties tied to drug quantity is that it enables prosecutors and law enforcement to manipulate and increase statutory *and* guidelines' sentences. It is common for federal agents to approach a single individual to conduct repeated controlled buys, increasing both the drug quantity and the person's sentence. A recent case illustrates this problem. In *United States v. Penn*, undercover DEA agent Christopher Labno purchased cocaine from the defendant in November 2010. Rather than arresting the defendant for that illegal behavior, however, the agent proceeded to return to the defendant on at least *eleven* additional occasions to purchase crack cocaine and heroin and also to purchase two firearms.[151] By the end of this process, the defendant was facing a ten-year mandatory minimum and a Guidelines sentence of 292–365 months—twenty-four to thirty years in prison.[152] The judge granted the defense's motion for a lower sentence under the Guidelines,[153] but could do nothing about the mandatory minimum.

To disincentivize this behavior, Congress should pass legislation that prevents the government from reaping a benefit. Specifically, if the evidence establishes that the government bought drugs from someone on one occasion, then returned to buy more drugs on subsequent occasions before indicting them, the government should be forbidden from increasing the person's sentence based on any drugs the government purchased after the first transaction.

Mass murderer Francisco Javier Arellano-Felix provides an especially horrifying example of how mandatory minimum sentencing, substantial assistance/cooperation, and safety valve restrictions unite to perpetrate injustice. Arellano-Felix led the violent Arellano-Felix cartel in Mexico and was *personally* responsible for "numerous" murders, and supervised more "murder, kidnapping, torture, assault, extortion, firearms trafficking, bribery and public corruption."[154] His organization spent decades "importing hundreds of tons of cocaine and marijuana into the United States from Mexico," generating approximately "hundreds of millions of dollars."[155] Yet, due to Arellano-Felix's admittedly extensive cooperation, he is now serving just twenty-five years in prison[156]—the same sentence prosecutors forced a district judge to give to our client Dwayne, a last-minute participant in a fake stash house operation.[157] This is not what justice looks like.

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[150] H.R. REP. NO. 111-670, at 14 (2010).
[151] Complaint at 4–5, United States v. Penn, No. 13-CR-102, (N.D. Ill. Jan. 31, 2013), Dkt. 1.
[152] Sentencing Memo at 2, United States v. Penn, No. 13-cr-102 (N.D. Ill. Mar. 5, 2015), Dkt. 57.
[153] Judgment and Commitment Order at 3, United States v. Penn, No. 13-cr-102 (N.D .Ill. Mar. 6, 2015), Dkt. 63.
[154] Order Denying Further Reduction of Sentence at 8, United States v. Arellano-Felix, 06-cr-2646-LAB (S.D. Cal. June 15, 2015), Dkt. 546.
[155] *Id.*
[156] *Id.* at 6, 9. Mr. Arellano-Felix was originally sentenced to life in prison. *Id.* at 6. It is widely assumed that his original sentence was itself the result of cooperation, to avoid a capital sentence. *See* Greg Moran, *Source: Cartel bosses met secretly at Miramar*, THE SAN DIEGO UNION-TRIBUNE (Aug. 18, 2013), https://www.sandiegouniontribune.com/sdut-arellano-felix-brothers-meeting-miramar-2013aug18-story.html.
[157] *See supra* notes 7–9 and accompanying text.

The answer is not to wholly prohibit the government from using cooperators like Arellano-Felix, but rather to stop prosecutors from forcing judges to sentence people like Dwayne White as if he led the Arellano-Felix cartel. The legislative reforms proposed in this testimony would do just that.

V. Eliminate or Reduce Recidivist Enhancements

A. Reform Recommendations: Summary

- Section 851 Sentencing Enhancements
  - Repeal 21 U.S.C. § 851 and amend 21 U.S.C. § 841 and § 960 accordingly.
  - Pass legislation making the First Step Act fully retroactive, including its changes to eligible predicate convictions and its reduced penalties.
  - At a minimum, further reduce § 851 penalties.

- ACCA
  - Repeal the Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA).
  - At a minimum, build on the First Step Act and the Sentencing Commission's recommendation regarding the Career Offender directive and remove individuals with prior *drug* convictions from eligibility for ACCA. This would limit ACCA only to recidivist offenders convicted of a federal felon-in-possession offense with three or more prior "violent felony" convictions.

- Career Offender Statute and Guideline
  - Follow the Sentencing Commission's recommendation to remove individuals with prior *drug* convictions from the Career Offender directive in 21 U.S.C. § 994(h). This would limit the ambit of the Career Offender Guideline only to recidivist offenders with prior convictions for a "crime of violence."

Congress must repeal recidivist sentencing enhancements or significantly reduce their use. The federal recidivist laws magnify the problems inherent in mandatory minimum laws by greatly increasing sentences, and have a severely disproportionate impact on people of color. Congress should build on the First Step Act's recognition that the recidivist enhancements of the past are sorely in need of amendment. Just as the First Step Act reduced the penalties for two separate recidivist enhancements,[158] Congress should repeal or reform three other recidivist enhancements: 851s, ACCA, and the Career Offender Guideline and statute.

Like mandatory minimums more generally, federal recidivist laws that increase sentences for people with prior convictions were enacted during the War on Drugs, when there was little recognition of the impact they would have on communities of color. Our understanding of the draconian consequences of these laws has evolved in the past forty years, but our laws have not kept pace. We know now that people of color have more contacts with the criminal legal system

[158] First Step Act of 2018, Pub. L. No. 115-391, §§ 401, 403, 132 Stat. 5194, 5220–22 (reducing recidivist enhancements under 21 U.S.C. § 851 and 18 U.S.C. § 924(c)).

and are over-represented at every stage: arrest, charging, conviction, and sentencing.[159] For example, one study found that federal prosecutors are 1.75 times more likely to levy mandatory minimum charges against Black individuals than against whites charged with similar crimes.[160] As a consequence of the disparate racial impact of the criminal system writ large, people of color are far more susceptible to being charged with a recidivist offense than white people. As writer Ta-Nehisi Coates has said:

> Peril is generational for black people in America—and incarceration is our current mechanism for ensuring that the peril continues. Incarceration pushes you out of the job market. Incarceration disqualifies you from feeding your family with food stamps. Incarceration allows for housing discrimination based on a criminal-background check. Incarceration increases your risk of homelessness. Incarceration increases your chances of being incarcerated again.[161]

B. Eliminate or Reduce Harsh Mandatory Minimums Under 21 U.S.C. § 851

Section 851 allows prosecutors to significantly increase a person's mandatory minimum sentence in a federal drug case if they were previously convicted of one or more state or federal felony drug offenses.[162] Until the First Step Act, prosecutors could increase a person's mandatory minimum for a drug offense to twenty years if they had one qualifying conviction for a "felony drug offense," including drug possession; if they had two or more, the mandatory minimum was life in prison. The First Step Act took an initial step toward reform by reducing the length of the sentencing enhancements and limiting the prior convictions that can serve as predicate offenses. Today, only "serious drug felony" convictions qualify.

Congress should repeal or further reform 21 U.S.C § 851. At a minimum, the First Step Act amendments must be made retroactive to avoid sentencing disparities and promote respect for the system.

In the First Step Act, Congress recognized that certain § 851-enhanced sentences were simply too long. But Congress did not make the change retroactive. That means there are hundreds of people in prison today serving sentences that Congress has admitted are too long with few avenues for relief—including our client Dwayne, whose § 851 was for simple possession.[163] The same is true for many people convicted in connection with the fake stash

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[159] Radley Balko, *Opinion: There's overwhelming evidence that the criminal justice system is racist. Here's the proof*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/.

[160] Starr & Rehavi, *supra* note 93, at 1323.

[161] Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/; *see also id.* ("In 1900, the black-white incarceration disparity in the North was seven to one—roughly the same disparity that exists today on a national scale.").

[162] 21 U.S.C. §§ 841, 851. This section follows common practice and in referring to sentencing enhancements that result from the interplay of Section 841 and Section 851 as "851s."

[163] *See What Is America's 3 Strikes Drug Law?*, THE THIRD STRIKE, https://www.thirdstrikecampaign.com/policy (last visited Mar. 7, 2021) (listing the people "buried under

house operation who received 851s that consigned them to extraordinarily long sentences for a quantity of drugs that was wholly fabricated by the government.

Congress's failure to make the changes to § 851 retroactive falls hardest on people of color. Before the First Step Act, the Sentencing Commission determined that fully *one-quarter* of all drug offenders were eligible for § 851 enhancements.[164] Not surprisingly, people of color are disproportionately subject to 851s. Black individuals represent over 40% of those eligible for the enhancements, and prosecutors filed over 50% of such enhancements against Black individuals.[165]

In addition to making the First Step Act's changes retroactive, Congress should repeal this law to prevent a small number of U.S. Attorney's Offices from using § 851 enhancements as a plea bargaining tool—a hammer to exact guilty pleas out of people of color. In 2012, defendants who were eligible for § 851 enhancements were 8.4 times more likely to receive one if they invoked their right to trial instead of pleading guilty.[166] In five federal districts, the enhancement was sought against more than 50% of those eligible for it.[167] In one district, the prosecutors actually described the 851 enhancement as "a hammer," and said that they filed it against anyone who insisted on taking their case to trial.[168] One judge described the crushing impact of 851s: "Prior felony informations don't just tinker with sentencing outcomes; by doubling mandatory minimums . . . they produce the sentencing equivalent of a two-by-four to the forehead. The government's use of them coerces guilty pleas and produces sentences so excessively severe they take your breath away."[169] Another described § 851 enhancements as the "deeply disturbing . . . shocking, dirty little secret of federal sentencing," and noted that the application of prior felony enhancements was "both whimsical and arbitrary—something akin to the spin of a 'Wheel of Misfortune'—where similarly-situated defendants in the same district, before the same sentencing judge, sometimes received a doubling of their mandatory minimum sentences and sometimes did not."[170]

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the 3 Strikes Drug Law"); *see also America's Three Strikes Drug Law Handcuffs Judges*, THE THIRD STRIKE, https://www.thirdstrikecampaign.com/powerless (last visited Mar. 7, 2021) ("The law requires the judge to impose a life sentence in drug cases – even when the judge believes a life sentence is excessive. For many judges, the 3 Strikes Law is a crisis of conscience. A number of federal judges – powerless from the bench – have spoken out and bravely questioned whether Congress really intended to rubberstamp life sentences onto people.").

[164] U.S. SENT'G COMM'N, APPLICATION AND IMPACT OF 21 U.S.C. § 851: ENHANCED PENALTIES FOR FEDERAL DRUG TRAFFICKING OFFENDERS 6 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180712_851-Mand-Min.pdf [hereinafter USSC 851 REPORT].

[165] *Id.* at 7.

[166] Letter from Fed. Pub. & Cmty. Defs. to Senator Mitch McConnell, Senate Majority Leader, and Senator Chuck Schumer, Senate Minority Leader 15 (Aug. 13, 2018), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/legislative_dev/federal_defender_letter_to_senate_re_first_step_act_and_sentencing_reform_8.13.18.pdf [hereinafter Federal Defenders Letter].

[167] USSC 851 REPORT, *supra* note 164, at 6.

[168] *Id.* at 21.

[169] United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013).

[170] United States v. Young, 960 F. Supp. 2d 881, 882, 889 (N.D. Iowa 2013).

The case of a former client who was ultimately granted clemency captures these many problems. Our client was sentenced to mandatory life in prison after trial because the prosecutor filed two § 851 enhancements. His two co-conspirators cooperated. After that, the government dropped the case against one of his co-conspirators, and a judge sentenced the other to only twelve months in prison—even though he was equally or more culpable than our client. That co-conspirator was charged in the Eastern District of Missouri, whereas our client was charged in the Central District of Illinois. Though just across the border from each other, federal prosecutors in the two districts take vastly different approaches to 851s: The Central District of Illinois files § 851 enhancements in a whopping 80% of eligible cases, but the Eastern District of Missouri files them in only 46% of eligible cases.[171] Indeed, the Central District of Illinois was the fifth-highest district in the country for filing § 851 enhancements. And one study found a disturbing link to racial disparities: "[S]maller [sentencing] discounts are offered where African American populations are relatively larger."[172]

Another stash house client we represent in post-conviction compassionate release proceedings faced a § 851 enhancement for a prior simple possession conviction because he chose to exercise his constitutional right to trial. The co-defendant who recruited him for the offense and spearheaded the planning was eligible for a mandatory life sentence under § 851 because he had two prior felony convictions. The co-defendant pled guilty, however, and the government did not file a single § 851 against him.[173] Just a few weeks before our client's trial began, prosecutors filed a § 851 enhancement against him, doubling the mandatory minimum for the fake drugs from ten to twenty years.[174] The sentencing judge noted that this prosecutorial decision "severely increase[d] the potential penalties."[175] Our client ultimately received a twenty-five-year sentence. At the sentencing hearing, the judge expressed concern about the government's selective use of § 851 enhancements, noting that they resulted in "the difference in treatment of the defendants who went to trial and who had a § 851 notice filed and also the comparison to [the lead defendant], who pled guilty and did not."[176]

C. Eliminate or Reduce Harsh Mandatory Minimums Under ACCA

Congress should repeal or reform the harsh fifteen-year mandatory minimum enhancement in the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which applies in certain firearms cases.[177] This enhancement is a mandatory minimum on steroids and

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[171] *Id.* at 909 app. A.
[172] Brian D. Johnson, *The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts* 99 (Nat'l Inst. of Just. Final Tech. Rep. 2010, Award No. 2010-IJ-CX-0012), https://www.ncjrs.gov/pdffiles1/nij/grants/245351.pdf.
[173] Tankey Plea Agreement at 12, United States v. Tankey, No. 09-CR-50074 (N.D. Ill. Apr. 30, 2008), Dkt. 117.
[174] *See* Notice of Information Regarding Prior Conviction and Penalties at 1, United States v. Tankey, No. 09-CR-50074 (N.D. Ill. April 21, 2008), Dkt. 102.
[175] Tankey Sentencing Transcript at 43:8–10, United States v. Tankey, No. 09-CR-50074 (N.D. Ill. Nov. 21, 2008), Dkt. 215.
[176] Lewis Sentencing Transcript at 13:20–23, United States v. Tankey, No. 09-CR-50074 (N.D. Ill. Aug. 14, 2008), Dkt. 218.
[177] ACCA applies when someone convicted of unlawfully possessing a firearm has three or more prior convictions for certain drug crimes or violent crimes. 18 U.S.C. § 924(e).

has an extraordinarily disproportionate impact on people of color.[178] For federal firearms crimes in general, Black individuals are more likely than individuals of any other race to be arrested, to receive longer sentences, and to receive sentencing enhancements.[179] These racial disparities are most pronounced for those who are subject to ACCA's fifteen-year mandatory minimum, with Black individuals accounting for 70.5% of all such offenders.[180] Relatedly, Black individuals sentenced under ACCA received longer sentences than any racial group—185 months in prison (over fifteen years) on *average*.[181] This is higher than the median prison time people serve for murder (13.4 years).[182]

ACCA has also come under fire for giving prosecutors too much power to dictate a person's sentence, for clogging district and appellate courts with complicated constitutional litigation, and for causing "[t]housands of [less culpable] individuals [to] receive[] punishments disproportionate to their offenses because they were treated on par with the worst offenders Congress had in mind when passing its laws."[183] Moreover, data show that ACCA does not make us safer: "While Congress instituted these reforms in the name of public safety, its actual policies have ended up making recidivism more likely, while creating glaring disparities and disproportionate sentences."[184] And like 851s, there is a striking geographic disparity in the use of ACCA enhancements, with three-quarters of ACCA cases coming from just four federal Courts of Appeals: the Eleventh, Sixth, Eighth, and Fourth Circuits (in descending order), and 20% coming from federal district courts in Florida.[185]

Repealing ACCA would be the simplest way to restore sentencing discretion to judges, rectify the law's unjust racial impact, reduce reliance on mandatory minimum penalties, and cure the many other problems the Sentencing Commission and others have identified.[186]

At a minimum, Congress should pass legislation so that individuals with prior *drug* convictions are not eligible for ACCA, thus limiting it only to people with three or more prior "violent felony" convictions. This is an easy fix, requiring the removal of just a few words from the statute.[187] And it would begin to ameliorate ACCA's harsh and racially unjust outcomes. This

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[178] *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf [hereinafter USSC FIREARMS REPORT].
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] Barkow, *supra* note 113, at 227–28 (2019).
[183] *Id.* at 201.
[184] *Id.* at 207.
[185] USSC FIREARMS REPORT, *supra* note 178, at 36–37.
[186] See *generally* Barkow, *supra* note 113, at 227–40.
[187] With this limitation, the statute would read as follows: "In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony ~~or a serious drug offense, or both,~~ committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a

change is supported by history. Congress passed laws like ACCA and included drug convictions as predicate offenses because it was operating under a misguided, non-evidence-based assumption that people with drug priors were serious criminals who needed to be incapacitated for a very long time.[188] But because prior drug convictions can vary widely, it makes little sense to place individuals with prior drug convictions in the same category as those with prior violence for the purposes of a severe recidivist enhancement. In fact, the Sentencing Commission has recommended a similar reform to the Career Offender directive, which will be discussed next.

ACCA's one-size-fits-all fifteen-year mandatory minimum for people with three prior *drug* convictions sweeps far too broadly, encompassing all sorts of individuals who are not dangerous, including:

- People with no violence in their backgrounds;
- People who have never spent a single day in prison before;
- People who 99% of the time have not caused any physical injury;
- People who 99% of the time will not be convicted of a violent felony in the future, and 98.4% of the time will not be arrested for one;
- People who have been crime free for decades or committed their qualifying offenses as juveniles;[189] and
- People who have three qualifying prior drug convictions for what most people would view as a single crime.[190]

Clearly public safety does not justify sending people in these categories to prison for a decade and a half. These same concerns about the important distinctions between people with prior convictions for drug offenses versus those with prior convictions for violence motivated the Sentencing Commission to recommend that Congress amend the Career Offender Guideline. The Commission's words apply equally here: "drug trafficking only offenders generally do not warrant similar (or at times greater) penalties than those . . . who have committed a violent offense."[191]

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probationary sentence to, such person with respect to the conviction under section 922(g)." 18 U.S.C. § 924(e)(1).

[188] Barkow, *supra* note 113, at 229.

[189] *Id.* at 229–30.

[190] *See generally* Aliza Hochman Bloom, *Time and Punishment: How the ACCA Unjustly Creates a "One-Day Career Criminal*," 57 AM. CRIM. L. REV. 1 (2020), https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-1-time-and-punishment-how-the-acca-unjustly-creates-a-one-day-career-criminal.pdf. Current law improperly considers three interrelated drug counts that arise out of the exact same conduct and are charged in the same indictment to be separate drug convictions. Congress could easily rectify this situation by "preventing conspiracy from being counted separately from the substantive offenses when one individual has been punished for both," or by requiring an intervening arrest or conviction between qualifying priors. *Id.* at 24–25.

[191] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 27 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf [hereinafter 2016 CAREER OFFENDER REPORT].

D. Eliminate or Reduce Harsh Mandatory Minimums Under the Career Offender Guideline

For the same reasons discussed above, Congress should follow the Sentencing Commission's recommendation to amend the Career Offender directive in 21 U.S.C. § 994(h) to remove individuals with prior *drug* convictions from eligibility for the Guideline enhancement. This would limit the ambit of the Career Offender provision only to recidivist offenders with prior convictions for a "crime of violence."[192]

Like the other recidivist enhancements discussed in this section, the weight of the Career Offender enhancement falls most heavily on Black individuals. The Sentencing Commission's Fifteen Year Report highlighted the Career Offender Guideline's "unwarranted adverse impacts" on people of color.[193] In particular, the Fifteen Year Report found that Black people are more often subject "to the severe penalties required by the career offender guideline" than similarly-situated white people because of "the relative ease of detecting and prosecuting offenses that take place in open-air drug markets, which are most often found in impoverished minority neighborhoods."[194] That reality puts Black people at "higher risk of conviction for a drug trafficking crime,"[195] and makes them more likely to have drug convictions on their record in the first place. As a result, Black individuals constitute 61.6% of the people sentenced under this guideline.[196]

In addition, the Committee's data demonstrate that the career offender guideline is overly severe, especially in drug cases. Of the career offenders sentenced in Fiscal Year 2018, the overwhelming majority—78%—were convicted of drug offenses.[197] In approximately 93% of these cases, the person's career offender status increased their guideline range.[198] As the Commission itself has observed, the career offender provision has "resulted in some of the most severe penalties imposed under the guidelines,"[199] with "the greatest impact on the offenders in the drug trafficking only category."[200] Career offender sentences are an average of 147 months in prison (12.25 years).[201] Because their sentences are so lengthy, career offenders now account for over 11 percent of the total BOP population,[202] even though career offender cases only constitute 2.5% of the federal sentencing docket.[203]

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[192] *Id.* at 8.
[193] U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 134 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [hereinafter FIFTEEN YEAR REPORT].
[194] *Id.* at 134–35.
[195] *Id.* at 134.
[196] *Id.* at 19.
[197] U.S. SENT'G COMM'N, QUICK FACTS—CAREER OFFENDERS—FISCAL YEAR 2018 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf.
[198] *Id.*
[199] FIFTEEN YEAR REPORT, *supra* note 193, at 133.
[200] 2016 CAREER OFFENDER REPORT, *supra* note 191, at 31.
[201] *Id.* at 24.
[202] *Id.* at 18.
[203] 2019 ANNUAL REPORT, *supra* note 85, at 77.

In a 2016 report to Congress, the Sentencing Commission recommended that Congress remove individuals with prior drug convictions from the reach of the Career Offender Guideline. The Commission explained that the guideline should "differentiate between career offenders with different types of criminal records, and is best focused on those offenders who have committed at least one 'crime of violence.'"[204] The Commission emphasized that excluding "drug trafficking" only career offenders "would help ensure that federal sentences better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders."[205] It would also surely lessen the racial impacts of this enhancement.

The Sentencing Commission reached this conclusion after evaluating data and soliciting feedback from stakeholders.[206] The report was sparked in part by "growing criticisms" about the career offender guideline and the resulting "overly severe penalties" for certain career offenders, which led to "increased departures and variances from the guidelines."[207] As an example, in *United States v. Newhouse*, the district court sentenced a "drug trafficking only" career offender to a greatly-reduced sentence, explaining in a written opinion that the guideline range went from 70 to 87 months to "a staggering and mind-numbing 262 to 327 months" on the basis of two prior drug convictions that arose out of a single drug raid.[208] After the report, judges find themselves in a "space in which the Commission disagrees with its own Guidelines as applied" for "drug trafficking only" career offenders, with no timeline for when Congress might act on the Commission's reform recommendation.[209] Congress should act swiftly to amend the Career Offender directive.

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[204] 2016 CAREER OFFENDER REPORT, *supra* note 191, at 3.
[205] *Id.*
[206] Zunkel and Siegler, *The Federal Judiciary's Role*, *supra* note 78, at 61.
[207] *Id.* at 11; *see also, e.g.*, United States v. Pruitt, 502 F.3d 1154, 1172 (10th Cir. 2007) ("[D]istrict courts should not be overly shy about concluding that particular defendants, even if third-time drug sellers, do not have the profile Congress and the Commission had in mind when they directed that sentences for career drug offenders be set at or near the top of the statutory range."). The Commission's 2016 report notes that "courts were most likely to depart or vary when sentencing offenders in the drug trafficking only pathway, often at the request of the government." 2016 CAREER OFFENDER REPORT, *supra* note 191, at 44.
[208] United States v. Newhouse, 919 F. Supp. 2d 955, 958 (N.D. Iowa 2013).
[209] United States v. Henshaw, 2018 WL 3240982, at *6–7 (S.D. Ill. 2018) (concluding that the career offender guideline's "categorical treatment of drug trafficking only offenders as severely as those who have a history of violence is unjust, results in sentences that are unduly harsh for the former, and therefore fails to promote the goals of sentencing").

VI. Reform the Federal Pretrial Detention System, Especially in Drug Cases

A. Reform Recommendations: Summary

- Pass the Federal Bail Reform Act of 2020 (FBRA), introduced by Chairman of the House Judiciary Committee Jerrold Nadler (D-NY).
- At a minimum, eliminate all presumptions of detention, especially the drug presumption, and pass the FBRA's data and reporting provision.

B. The Presumption of Detention

Congress should prioritize reforming the federal *pretrial* detention system, especially in drug cases.[210] Such reform is essential to reducing mass incarceration and advancing racial equity. The Bail Reform Act of 1984 (BRA) is another vestige of the War on Drugs.[211] The BRA has enabled widespread jailing of non-violent, low-risk individuals and has resulted in troubling racial disparities.[212] The BRA sent federal pretrial incarceration skyrocketing; today, federal prosecutors and courts deprive three of every four people of their liberty before trial, despite their presumed innocence.[213] This 75% federal jailing rate is far higher than the jailing rate for violent state crimes.[214] Incarceration at such levels is unnecessary and counterproductive. Government statistics show that people released pretrial in federal cases overwhelmingly appear for court as required and are not a threat to community safety.[215]

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[210] *See generally* Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, 44 THE CHAMPION 46 (July 2020). https://www.law.uchicago.edu/files/Rethinking%20Federal%20Bail%20Advocacy%20to%20Change%20the%20Culture%20of%20Detention%20%28NACDL%20Champion%20July%202020%29.pdf; Alison Siegler & Kate Harris, *How Did the Worst of the Worst Become 3 out of 4?*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html.

[211] *See* Zunkel & Siegler, *The Federal Judiciary's Role*, *supra* note 78, at 3; Barkow, *supra* note 113, at 210 ("In the Bail Reform Act, one part of the [Comprehensive Crime Control Act], Congress expanded the availability of pretrial detention.").

[212] Siegler & Zunkel, *Rethinking Federal Bail Advocacy*, *supra* note 210, at 46–48, 50–51. To the non-violence point, according to the DOJ, just 2% of federal arrests are classified as violent. BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS 2015–2016, at 3 tbl.2 (2019), https://www.bjs.gov/content/pub/pdf/fjs1516.pdf. In contrast, the DOJ classifies fully 25% of all state felony arrests as violent offenses. BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, at 2 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [hereinafter BJS URBAN FELONY REPORT].

[213] *See* Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. J. 52, 55 (2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf.

[214] Siegler & Zunkel, *Rethinking Federal Bail Advocacy*, *supra* note 210, at 47 ("[C]ompare the federal detention rate of 75% with the 38% rate for state felonies in large urban counties nationwide, and the 45% detention rate for violent felonies in those same counties. Only one offense—murder—has a higher detention rate than the federal system.") (citing BJS URBAN FELONY REPORT, *supra* note 212, at 17 tbl.12).

[215] ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS: FEDERAL PRETRIAL SERVICES TABLES tbl.H-15 (Dec. 31, 2019), https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

At the pretrial stage, judges jail people charged with *drug offenses* at an astonishingly high rate based on two problematic provisions in the BRA. First, at the initial court appearance, the eligibility net is very wide: The BRA allows prosecutors to ask judges to "temporarily detain almost anyone who is charged with a drug offense until a detention hearing."[216] This mandatory jailing is authorized in nearly half of all federal cases, including low-level drug cases.[217] Second, at the detention hearing, the BRA mandates a presumption that nearly everyone charged in a drug case must be detained throughout the case, even though they are presumed innocent.[218]

As a result of these two statutory provisions, the percentage of people in federal drug cases who were jailed while awaiting trial increased from 76% to 84% from 1995 to 2010.[219] A 2017 government study found that the "presumption of detention" applied in 93% of all federal drug cases.[220]

This is not what Congress intended. When the BRA was passed, Congress expected the presumption "to apply to rich drug traffickers who could buy their way out of jail."[221] Since 2017, the Judicial Conference has repeatedly called on Congress to reform the presumption of detention in drug cases.[222]

Federal pretrial detention reform is especially critical considering the persistent racial disparities. Data establishes that "[w]hite defendants are more likely to be released pending trial than otherwise similar Black and Hispanic defendants," even after controlling for other factors that are predictive of detention or release.[223] The presumption of detention in *drug* cases,

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[216] *See* Zunkel & Siegler, *The Federal Judiciary's Role*, *supra* note 78, at 3 n.5 ("18 U.S.C. § 3142(f)(1)(C) (1984) provides that prosecutors can move for temporary detention in any case that involves 'an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of Title 46 [46 USCS § 70501 et seq.].' 18 U.S.C. § 3142(f)(1)(C) (2008). This encompasses nearly all federal drug offenses.").

[217] 2019 ANNUAL REPORT, *supra* note 85, at 45 (demonstrating that mandatory detention under § 3142(f)(1) is authorized in at least 43% of cases, assuming the breakdown of cases charged is roughly similar to the breakdown of cases sentenced).

[218] *Id.* (citing 18 U.S.C. § 3142(e)(3)(A)).

[219] *Id.* at 53.

[220] Austin, *supra* note 213, at 55.

[221] Zunkel & Siegler, *The Federal Judiciary's Role*, *supra* note 78, at 7.

[222] *See* Siegler & Harris, *supra* note 210. The Judicial Conference is presided over by Chief Justice Roberts and includes the chief judge of every federal circuit—including AG Garland during his time as Chief Judge of the DC Circuit. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10–11 (2017), https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf. The Judicial Conference reiterated this same recommendation during the COVID-19 pandemic. *See* Letter from the Judicial Conference of the United States to the House and Senate Appropriations Committees 2 (April 28, 2020), https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf.

[223] Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1261 (2021), https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss5/1/ (detailing the results of an empirical study of 300,000 federal cases from 2002 to 2016). A recent op-ed situated these racial disparities within the context of the release on personal recognizance of many charged in the wake

specifically, "also creates racial disparities, as Black and Latino individuals are jailed in drug cases at a higher rate than white individuals."[224] In fact, one study found that "white defendants (60%) were more than one and a half times more likely to receive a pretrial release than black defendants (36%)," and even more likely to be released than Latino defendants (who had a 26% release rate).[225]

C. Pass the 2020 FBRA and Eliminate the Presumption of Detention

The best solution is for Congress to enact the Federal Bail Reform Act of 2020 introduced by Chairman Nadler. The FBRA would implement wide-reaching reforms of the federal pretrial detention system. For federal drug cases, it would narrow the eligibility net by removing mandatory detention provisions and authorizing judges to make individualized determinations. In addition, it would eliminate all presumptions of detention, including those in drug cases. And it includes an essential data and reporting provision that would address a major systemic problem, which is that the criminal defense bar is blocked from accessing most data about federal pretrial detention—and *all* detention data related to race.[226] At a minimum, Congress should eliminate the presumption of detention in federal drug cases by passing the bipartisan Smarter Pretrial Detention for Drug Charges Act of 2020 introduced in the Senate.

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of the insurrection: "The bail outcomes in the Capitol insurrection cases are just the latest illustration of the privilege not generally afforded to defendants of color." Seema Ahmad, *Alleged Capitol rioters getting released on bail smacks of racial bias and hypocrisy*, NBC NEWS (Mar. 16, 2021, 4:40 PM), https://www.nbcnews.com/think/opinion/alleged-capitol-rioters-getting-released-bail-smacks-racial-bias-hypocrisy-ncna1261223.

[224] Siegler & Harris, *supra* note 210; *see also* BUREAU OF JUST. STAT., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, at 10 tbl.9 (2012), https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf [hereinafter BJS PRETRIAL MISCONDUCT REPORT] (showing federal pretrial detention rates by race in drug cases).

[225] BJS PRETRIAL MISCONDUCT REPORT, *supra* note 224, at 10.

[226] The data tables released publicly by the Administrative Office of the U.S. Courts contain very little information, and zero information about the race effects of federal pretrial detention. Meanwhile, research into racial disparities in federal pretrial detention has been virtually non-existent for at least the past decade, with the notable exception of a just-released study. *See* Didwania, *Discretion and Disparity in Federal Detention*, *supra* note 223.

VII. Enact Post-Conviction Reform

A. Reform Recommendations: Summary

- Clemency: Pass legislation to support and fully fund reforming the clemency process so that it is transparent and straightforward and so that the DOJ does not have undue influence.

- Second Look Legislation: Pass Senator Cory Booker's (D-NJ) Second Look Act of 2019.

- Repeal the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): AEDPA has greatly reduced the availability of habeas corpus relief, leaving people with meritorious legal claims in prison. Congress should repeal the law.

B. The Absence of Back-End Relief and the Need for Reform

As discussed above, people of color have borne the brunt of our federal drug laws. The tragic reality is that there is often no way to correct these disparities and injustices after a person's conviction is final. Moreover, with the abolition of federal parole in 1986, there are few avenues to reevaluate a long sentence and consider whether a person's rehabilitation or changed circumstances warrant early release. As a result, we incarcerate too many people who do not need to be in prison any longer.[227]

There are several ways for Congress to expand "second looks" to address this problem: (1) reforming the clemency process to make it more objective, transparent, and straightforward; (2) enacting formal "second look" legislation; and (3) eliminating AEDPA.

Clemency is a broad constitutional power that grants the President alone the ability to "grant Reprieves for Offenses against the United States, except in Cases of Impeachment."[228] While clemency was intended to be a back-end safety valve to correct unlawful or unjust sentences, today the clemency process is "fundamentally broken" for three principal reasons: (1) the DOJ plays an outsized role; (2) it is "grossly bureaucratic, requiring multiple layers of review" of a petition before it even reaches the president; and (3) it has "atrophied" from disuse.[229] The problem with the DOJ's involvement is that prosecutors have trouble being objective about cases they or their colleagues prosecuted. And the bureaucratic hurdles make the process inefficient. During the Trump era, many sidestepped the formal process entirely, leading

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[227] Shon Hopwood, *How Joe Biden Can Fix The Broken Clemency Process*, THE APPEAL (Jan. 11, 2021), https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process/ ("[National] forgiveness is urgently needed, as nearly 20 percent of the federal prison population is now over the age of 50 and has effectively aged out of . . . crime.").

[228] U.S. CONST. art. II, § 2, cl. 1.

[229] Hopwood, *supra* note 227; Rachel Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 13 (2015), https://lawreview.uchicago.edu/publication/restructuring-clemency-cost-ignoring-clemency-and-plan-renewal.

to complaints that Trump "showered clemency on people with connections to him and his allies."[230] During his term, Trump often highlighted his commutation for Alice Marie Johnson, a grandmother was serving a life sentence for drugs. Kim Kardashian famously brought Ms. Johnson's case to Trump's attention and lobbied him to grant the commutation. There is no doubt that commuting Ms. Johnson's sentence was the right thing to do, but it raises important questions about the fairness of the process.[231] There are many more Alice Marie Johnsons in federal prison today serving excessive sentences for drug crimes. They should not have to catch the eye of a celebrity to secure clemency.

Many have pushed for removing the clemency process from the DOJ and instituting greater transparency. Leading clemency experts Professor Rachel Barkow and Professor Mark Osler recommend the creation of an independent clemency commission that has a membership that "reflects the range of interests that play a role in the criminal justice process."[232] The Commission should rely as much as possible on data about, among other things, racial disparities, recidivism, prosecutors' charging decisions across the country, and who is applying for and receiving clemency.[233] It is also important to create standards for the clemency process. Congress should support establishing an independent clemency commission that sets clear standards for the review of clemency petitions.

Yet, expanding clemency is not a substitute for formal second chance legislation. Congress should pass Senator Cory Booker's (D-NJ) Second Look Act of 2019 to ensure that our federal criminal system uses resources more efficiently than it does today and that it accounts for a person's growth in prison. At the federal level, 53% of those incarcerated are serving sentences of ten years or more and 30% are serving sentences of fifteen years or more.[234] There are also tremendous racial disparities at play: In 2020, 59% of the approximately 6,252 individuals serving federal life and "virtual life" sentences were Black.[235] Senator Booker's bill would allow any individual who has served at least ten years in federal prison to petition the sentencing judge to take a "second look" at their sentence. At the hearing, the judge would decide whether to reduce the sentence, with a presumption of release for petitioners age fifty or older.[236] Judges

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[230] Rosalind S. Helderman et al., *In one of his final acts, Trump showered clemency on people with connections to him and his allies*, WASH. POST (Jan. 20, 2020, 7:11 PM), https://www.washingtonpost.com/politics/trump-pardons/2021/01/20/dfc79216-5b49-11eb-8bcf-3877871c819d_story.html.

[231] German Lopez, *Alice Johnson deserved a commutation. But the way Trump granted it was a disaster*, VOX (June 6, 2018), https://www.vox.com/policy-and-politics/2018/6/6/17434760/trump-alice-johnson-pardon-kim-kardashian.

[232] Barkow & Osler, *supra* note 229, at 22.

[233] *Id.*

[234] NAT'L ASS'N OF CRIM. DEF. LAW., SECOND LOOK = SECOND CHANCE: THE NACDL MODEL "SECOND LOOK" LEGISLATION 2 (2020), https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-the-nacdl-model-second-look-legislation.pdf.

[235] THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 19 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf.

[236] *Booker, Bass To Introduce Groundbreaking Bill to Give "Second Look" To Those Behind Bars*, CORY BOOKER (July 15, 2019), https://www.booker.senate.gov/news/press/booker-bass-to-introduce-groundbreaking-bill-to-give-and-ldquosecond-look-and-rdquo-to-those-behind-bars.

would rely on factors such as whether the person demonstrates a readiness for reentry and is not a danger to the safety of any person or the community.[237] This commonsense legislation will ensure that our system is more flexible, while at the same time protecting public safety.

To complement these reforms, Congress should also repeal AEDPA. AEDPA has been called "the worst criminal justice law of the past 30 years" because it has "all but slammed the federal courthouse door on the wrongly convicted."[238] There are numerous critiques of AEDPA. First, it requires federal judges to give great deference to state courts, "even when they believe those courts are wrong."[239] This "near-total deference" to state courts was not inevitable.[240] Rather, it was caused by the Supreme Court's increasingly "needless and highly restrictive view" of when a state court's adjudication of a person's federal claim resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"—a requirement of AEDPA.[241] As a result, "the Court's unsurpassed veneration of state courts comes at the expense of individual constitutional rights."[242] Other major problems with AEDPA are the law's strict time limits and often byzantine procedural rules to avoid default. The law should be repealed to restore "the Great Writ."

VIII. Congress Should Not Extend the DEA's Temporary Fentanyl Ban

A. Reform Recommendation: Summary

- Congress should not extend the DEA's temporary ban on and scheduling of all fentanyl analogues.

Prosecutors and law enforcement have asked Congress to make permanent a 2018 temporary ban on fentanyl analogues.[243] This would be a mistake. These cases constitute a very small percentage of all federal drug offenses and in almost all instances are already covered by existing laws. Indeed, in 2019, prosecutors chose to charge ***only two cases*** under the temporary ban.[244] There is simply no need—and a very high cost—to expanding our drug dragnet to include all fentanyl analogues, especially because there are beneficial medical uses for them.

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[237] *Id.*

[238] Radley Balko, *Opinion: It's time to repeal the worst criminal justice law of the past thirty years*, WASH. POST (Mar. 3, 2021, 3:09 PM), https://www.washingtonpost.com/opinions/2021/03/03/its-time-repeal-worst-criminal-justice-law-past-30-years/; *see also* Lincoln Caplan, *The Destruction of Defendants' Rights*, THE NEW YORKER (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights.

[239] *Id.*

[240] Stephen R. Reinhardt, *The Demise of Habeas Corpus and The Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224 (2015), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1217&context=mlr.

[241] *Id.* at 1225 (quotations omitted).

[242] *Id.* at 1229.

[243] These are also referred to as "fentanyl-related substances."

[244] *See* U.S. SENT'G COMM'N, FENTANYL AND FENTANYL ANALOGUES 23 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf [hereinafter 2021 FENTANYL REPORT] (stating that the

Fentanyl is already illegal. It is a Schedule II substance under the Controlled Substances Act (CSA), and many of its harmful analogues are controlled substances as well. The vast majority of all fentanyl offenses in the federal system are criminalized under existing law, making an extension of the temporary ban unnecessary. Thus, law enforcement agencies and prosecutors already have ample enforcement tools to address fentanyl.

The potential harms to expanding the temporary ban on fentanyl analogues greatly outweigh the potential benefits for a sliver of cases. First, history has shown that using the weight of law enforcement to address a public health problem often backfires. Second, data suggest that intensifying regulation, policing, and enforcement of fentanyl-related substances risks exacerbating existing racial disparities in the criminal legal system. Third, extending the ban is likely to hinder beneficial scientific research into fentanyl's medical possibilities by creating bureaucratic barriers that make it more difficult for researchers to study the substance.

B. The Federal Focus on Expanding Fentanyl Laws is Misplaced.

1. *Fentanyl cases comprise a small portion of the federal docket.*

In spite of the media frenzy around fentanyl, very few federal cases would be impacted by letting the expanded ban on all fentanyl analogues lapse. Fentanyl offenses are a vanishingly small part of the federal criminal landscape, constituting just 1.5% of all federal criminal cases in 2019.[245] Out of the 1,119 cases involving fentanyl or fentanyl analogues, most—886—involved fentanyl—a drug already criminalized as a Schedule II substance.[246] Those fentanyl cases constituted only 4.5% of all federal drug cases and only 1.2% of all federal criminal cases.[247] The number of fentanyl analogue cases was even smaller—just 233 cases, constituting a 1.2% of all federal drug cases and 0.3% of federal criminal cases.[248] Moreover, of the fentanyl analogue cases, in only two was an unlisted fentanyl analogue the primary drug establishing the basis for prosecution; in the remainder, there was a different basis for prosecution.[249] The vast majority of fentanyl offenses involved substances already scheduled and criminalized under the CSA, such that no additional ban is needed.[250]

Law enforcement agencies and prosecutors already have numerous enforcement tools to address the exceedingly small number of *unlisted* fentanyl analogue cases. Under the CSA, the

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Commission could only find "several" cases involving fentanyl-related substances that were not listed in the CSA prior to the 2018 DEA emergency order, and in just two cases was the unlisted fentanyl-related substance the only determinant for sentencing purposes).

[245] *Id.* at 19 (1,119 total fentanyl and fentanyl-analogue offenses out of the 76,538 federal criminal offenses).

[246] *Id.* (886 offenses involving basic fentanyl); *see also* 21 USC § 812(b). The Sentencing Commission classifies fentanyl cases in two ways based on the type of substance: (1) fentanyl; and (2) fentanyl analogues. 2021 FENTANYL REPORT, *supra* note 244, at 25.

[247] 2021 FENTANYL REPORT, *supra* note 244, at 19.

[248] *Id.*

[249] *Id.* at 23.

[250] *Id.*

DEA has the authority to temporarily schedule newly-discovered analogues on a substance-by-substance basis as Schedule I or II, allowing federal prosecutors to charge them under the federal drug laws.[251] Additionally, under the Analogue Act, prosecutors can treat unlisted substances as Schedule I substances if they can show that the unlisted substances have a substantially similar chemical makeup as a categorized controlled substance and produce a similar bodily effect.[252]

Given these existing tools and the significant downsides of extending the ban on fentanyl analogues, it is simply not worth Congress's limited time and resources.

2. *A ban on all fentanyl analogues risks repeating the mistakes of the past.*

Some have claimed that the War on Drugs is coming to an end.[253] But the recent efforts to criminalize all fentanyl analogues demonstrate that legislators have simply "dusted off the drug war playbook" to propose a wide range of new punitive measures.[254] This approach risks repeating the mistakes of the past. First, by using a criminal approach to a public health issue, harsher fentanyl laws drive "people who use drugs away from health services and encourage[] them to engage in more risky drug-taking activity to avoid detention and prosecution."[255] Second, if past is prologue, harsher laws will not impact the supply and demand for fentanyl and may actually exacerbate the problem.[256] Third, increasing the eligibility net for fentanyl analogues will have downstream consequences that will be hard to correct. We have seen this play out over and over again with other drugs: crack cocaine in the 1980s, heroin in the 1990s, and methamphetamine in the 2000s.[257] With crack cocaine, for example, we have been trying to unwind the overly harsh penalties for decades, with only relatively recent success in Congress. This is cautionary tale for fentanyl.

3. *The class-wide scheduling of fentanyl exacerbates racial disparities.*

Fentanyl prosecutions mirror the racial disparities present in other areas of policing and prosecution, with people of color bearing the brunt of the laws. In 2019, Black individuals

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[251] Kevin L. Butler, Written Statement of Kevin L. Butler, Federal Public Defender for the Northern District of Alabama for the Judiciary Committee of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security on Fentanyl Analogues: Perspectives on Classwide Scheduling, at 8–9 (Jan. 28, 2020), https://www.congress.gov/116/meeting/house/110392/witnesses/HHRG-116-JU08-Wstate-ButlerK-20200128.pdf [hereinafter Butler Written Statement].
[252] *Id.* at 9–10.
[253] *See* Alex Kreit, *Drug War Truce*, 77 OHIO ST. L.J. 1323, 1324 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023144 (describing efforts by President Barack Obama's drug "czars" to retire the War on Drugs "concept"); Nicholas Kristof, *Seattle Has Figured Out How to End the War on Drugs*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/opinion/sunday/opioid-crisis-drug-seattle.html.
[254] THE DRUG POLICY ALLIANCE, CRIMINAL JUSTICE REFORM IN THE FENTANYL ERA: ONE STEP FORWARD, TWO STEPS BACK 3 (2020), https://drugpolicy.org/sites/default/files/dpa-cj-reform-fentanyl-era-v.3_0.pdf [hereinafter DRUG POLICY ALLIANCE REPORT].
[255] *Id.* at 16.
[256] *Id.* at 15.
[257] *Id.* at 8, 13.

comprised the largest portion of those sentenced for fentanyl offenses by a long shot (40.5% of fentanyl offenses generally and 58.9% of fentanyl-analogue offenses).[258] Altogether, people of color constituted 74.4% of those sentenced for fentanyl offenses and 68% of fentanyl-analogue offenses during the same time period (33.9% and 9.1% Hispanic respectively).[259] Relatedly, because law enforcement efforts have been ineffective at targeting high-level traffickers, only 5.5% of fentanyl offenders and 7.7% of fentanyl-analogue offenders had a leadership or supervisory role in the offense.[260] This suggests that prosecutions have primarily focused on street-level sellers who are people of color—many of whom may not even know that they are distributing a substance containing fentanyl.[261]

This focus on low-level sellers has resulted in only a small percentage of fentanyl-related cases where defendants clearly knew that they were distributing fentanyl and not some other drug.[262] Higher-ups may decide to lace other drugs, such as heroin, with fentanyl, leaving the lower-level distributors unaware that the drugs they are selling are laced with fentanyl or an analogue.[263] Moreover, these sellers are often themselves users, who only engage in drug sales to support their own drug use.[264] Because these sellers are easily replaced, fentanyl prosecutions have been relatively ineffective in reducing overall overdoses.[265]

The push to police all fentanyl analogues parallels the racial disparities at the heart of the War on Drugs. The majority of those who died from synthetic opioid overdoses are white.[266] Yet the majority of those who are charged and prosecuted for fentanyl-related offenses are people of color.[267] While there has been growing sympathy for the victims of drug addiction and overdoses in the wake of the opioid crisis,[268] policymakers and law enforcement officials are pushing for intensified policing and harsh penalties for anyone distributing synthetic opioids like fentanyl and its analogues. Thus, while white victims of opioids garner compassion, people of color bear the cost of ramped-up drug enforcement efforts. This merely furthers our country's long history

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[258] 2021 FENTANYL REPORT, *supra* note 244, at 24.
[259] *Id.*
[260] *Id.* at 38.
[261] *See See* U.S. SENT'G COMM'N, PUBLIC DATA PRESENTATION FOR SYNTHETIC CATHINONES, SYNTHETIC CANNABINOIDS, AND FENTANYL AND FENTANYL ANALOGUES AMENDMENTS (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf [hereinafter PUBLIC DATA PRESENTATION]; *see also* 2021 FENTANYL REPORT, *supra* note 244, at 28 ("street-level dealers" comprised 39.6% of fentanyl offenses, and 45.5% of fentanyl-analogue offenses); DRUG POLICY ALLIANCE REPORT, *supra* note 254, at 9 (citation omitted).
[262] PUBLIC DATA PRESENTATION, *supra* note 261.
[263] *See* DRUG POLICY ALLIANCE REPORT, *supra* note 261, at 9 (citation omitted).
[264] Butler Written Statement, *supra* note 251, at 12–13 (citation omitted).
[265] *Id.* at 10; *see also* Nancy Gertner, *William Barr's new war on drugs*, WASH. POST (Jan. 26, 2020) https://www.washingtonpost.com/opinions/2020/01/26/william-barrs-new-war-drugs/.
[266] Nana Wilson et al., *Drug and Opioid-Involved Overdose Deaths – United States 2017-2018*, 69 MORBIDITY AND MORTALITY WKLY. REP. 294 tbl.2 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6911a4-H.pdf.
[267] *See* 2021 FENTANYL REPORT, *supra* note 244, at 24.
[268] *See* DRUG POLICY ALLIANCE REPORT, *supra* note 254, at 13 (citation omitted).

of visiting harsher punishments on people of color for offenses that are perceived to victimize whites, most notably in meting out the death penalty.[269]

The current push to criminalize all fentanyl analogues should be examined in the context of anti-drug efforts that historically portray white victims falling prey to people of color.[270] Examples include "white women being seduced by Chinese men and their opium" and Mexican immigrants using marijuana to "corrupt white women and destroy society."[271] Racially tinged narratives were also at the heart of the 1980's War on Drugs, perpetuating unfounded fears of "crack babies." During that time, crack cocaine use was heavily policed while law enforcement let powder cocaine—used primarily by white people—go largely unnoticed.[272] Today, headlines such as "U.S. drugs bust uncovers enough Chinese fentanyl to kill 14 million people"[273] and "Death, made in Mexico"[274] perpetuate a racially-charged framing of fentanyl, while law enforcement officials use apocalyptic language to bolster their calls for a permanent class-wide band.[275] Examining these recent trends alongside history casts the efforts to expand the reach of fentanyl offenses in a harsh light.

4. *A class-wide ban on fentanyl analogues will likely make it more difficult to conduct beneficial scientific research.*

Fentanyl analogues have important and beneficial uses. In particular, researchers need to be able to develop and test analogues when searching for beneficial and life-saving remedies. This is because analogues do not necessarily have the same physiological effect as basic fentanyl.[276] In fact, in some cases, analogues can produce the opposite effect of the original substance. This is the case for naloxone, the life-saving antidote for those suffering a drug overdose.[277] Naloxone is an analogue to morphine, a highly potent opioid, and used to reverse

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[269] A recent study of the death penalty found that "Seventy-five percent of murder victims in cases resulting in an execution have been white," although blacks and whites are equally likely to be victims of murder. DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF DISCRIMINATION IN THE U.S. DEATH PENALTY 29 (2020), https://files.deathpenaltyinfo.org/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf; *see also* McCleskey v. Kemp, 481 U.S. 279, 296 (1987) (discussing the Baldus study, which examined over 2000 murder cases in Georgia during the 1970s and found that the death penalty was imposed in 22% of cases involving black defendants and white victims, but just 1% of cases involving black defendants and black victims)*; see generally* BRYAN STEVENSON, JUST MERCY (2014) (recounting the case of Walter McMillian, a Black man sentenced to death in a racially charged prosecution for a crime he did not commit, the murder of a white woman).

[270] *See* DRUG POLICY ALLIANCE REPORT, *supra* note 254, at 13.

[271] *Id.*

[272] *Id.* at 13–14.

[273] *Id.* at 13 (citation omitted).

[274] *Id.* (citation omitted).

[275] *See* William Barr, *Fentanyl could flood the country unless Congress passes this bill*, WASH. POST, (Jan. 10, 2020), https://www.washingtonpost.com/opinions/william-barr-congress-pass-this-bill-so-we-can-attack-the-onslaught-of-illegal-fentanyl/2020/01/10/cbb8ccdc-33cb-11ea-a053-dc6d944ba776_story.html (anticipating a "tsunami of newly legalized fentanyl analogues" if Congress fails to pass a class-wide ban).

[276] Gertner, *supra* note 265.

[277] *Id.*; *see also* Butler Written Statement, *supra* note 251, at 10.

the effects of an opioid overdose.[278] Thus, while some analogues of controlled substances can be highly potent and dangerous, others may hold the key to effective treatment.

Researchers worry that a permanent ban on all fentanyl analogues would make it much more difficult to conduct beneficial research.[279] Class-wide scheduling would put all potentially beneficial fentanyl analogues in Schedule I, requiring researchers to go through the DEA to research them.[280] As it has for marijuana, this would create bureaucratic barriers to the research and development of crucial, life-saving compounds.[281] In fact, Congress added certain protections to the Analogue Act at the urging of the American Chemical Society specifically to protect the research and development of beneficial analogues.[282] A class-wide ban on fentanyl analogues upends the protections Congress intended for legitimate research and development. If the goal is to reduce and prevent overdose deaths, a ban may do more harm than good by hindering medical research.

IX. Pass the MORE Act

A. Reform Recommendation: Summary

- Pass the Marijuana Opportunity Reinvestment and Expungement Act of 2020 (the MORE Act) into law.

B. The Problem of Marijuana Criminalization

Despite its growing legalization in the states, marijuana is illegal under federal law. In fact, the federal government designates it as a Schedule I substance—a designation it shares with heroin, fentanyl, and methamphetamine.[283] This means the federal government currently deems marijuana to have a "high potential for abuse," "no currently accepted medical use," and to "lack accepted safety for medical use," notwithstanding evidence to the contrary.[284] And although federal policy has de-prioritized marijuana-related drug enforcement in the recent past, far too many individuals remain subject to arrest and criminal penalties for such offenses. Unsurprisingly, these individuals disproportionately come from poorer communities with more people of color—the victims of our failed War on Drugs. It is now urgent that Congress pass the MORE Act to address these concerns.[285]

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[278] *Id.* at 10.
[279] *See id.* at 17–18; *see also* Sandra D. Comer et al., *Potential Unintended Consequences of Class-wide Drug Scheduling Based on Chemical Structure: A Cautionary Tale for Fentanyl-related Compounds*, DRUG AND ALCOHOL DEPENDENCE (forthcoming) (manuscript at 2), https://www.sciencedirect.com/science/article/pii/S0376871621000259.
[280] *Id.* at 5.
[281] *Id.*
[282] Butler Written Statement, *supra* note 251, at 10 (citation omitted).
[283] *See* Pub. L. No. 91-513, § 202(c), 84 Stat. 1242, 1249 (1970) (schedule I(c)(10)).
[284] 21 U.S.C. § 812(b)(1).
[285] Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3884, 116th Cong. (2019–2020).

Marijuana is "one of the world's mostly widely used psychoactive substances."[286] Sixteen states[287] have fully legalized marijuana for individuals over twenty-one, and thirty-six states have "approved comprehensive, publicly available medical marijuana/cannabis programs."[288] Current evidence suggests that there is little relationship between marijuana legalization and crime rates.[289] If anything, marijuana legalization is inversely correlated with both property and violent crime.[290]

Marijuana's Schedule I status has had, and continues to have, a debilitating impact on individuals, families, and communities. Though the CSA broadly grants the AG the authority to determine drug scheduling under its provisions,[291] and even though the office of the AG has previously, at times, expressly directed the DEA to shift enforcement away from marijuana offenses,[292] individuals continue to be arrested for marijuana offenses at high rates. In 2019 alone, according to the FBI, there were 545,601 marijuana arrests made in the United States[293]—about 35% of all drug arrests[294]—with simple possession representing the vast majority of *federal* marijuana-related offenses.[295] This, in spite of evidence that illicit marijuana trafficking

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[286] Magdalena Cerdá et al., *Association Between Recreational Marijuana Legalization in the United States and Changes in Marijuana Use and Cannabis Use Disorder From 2008 to 2016*, 77 J. AM. MED. ASS'N PSYCHIATRY 165, 166 (2019), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2755276 [https://perma.cc/3JRZ-UGZR].

[287] Mona Zhang, *Virginia joins 15 other states in legalizing marijuana*, POLITICO (Feb. 27, 2021), https://www.politico.com/news/2021/02/27/virginia-legalizes-marijuana-471840.

[288] *See State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 1, 201), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[289] *See, e.g.*, Shana L. Maier et al., *The Implications of Marijuana Decriminalization and Legalization on Crime in the United States*, 44 CONTEMP. DRUG PROBLEMS 125, 136 (2017), https://journals.sagepub.com/doi/abs/10.1177/0091450917708790?journalCode=cdxa ("The data analyses reveal a lack of relationships between crime rates and the legal status of recreational and medical marijuana.").

[290] Davide Dragone et al., *Crime and the Legalization of Recreational Marijuana*, 159 J. ECON. BEHAV. & ORG. 488, 498, https://www.sciencedirect.com/science/article/pii/S0167268118300386 ("The concern that legalizing cannabis for recreational purposes may increase crime occupies a prominent position in the public debate about drugs. Our analysis suggests that such a concern is not justified. We reach a conclusion in line with . . . a crime drop.").

[291] *Id.*

[292] Memorandum from James M. Cole, Dep. Att'y Gen., to all U.S. Attorneys on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://perma.cc/YM7J-HLUW.

[293] Emily Earlenbaugh, *More People Were Arrested for Cannabis Last Year Than For All Violent Crimes Put Together, According To FBI Data*, FORBES (Oct. 6, 2020), https://www.forbes.com/sites/emilyearlenbaugh/2020/10/06/more-people-were-arrested-for-cannabis-last-year-than-for-all-violent-crimes-put-together-according-to-fbi-data/?sh=4b723d65122f.

[294] JUST. ROUNDTABLE, TRANSFORMATIVE JUSTICE: RECOMMENDATIONS FOR THE NEW ADMINISTRATION AND THE 117TH CONGRESS 34 (2020), https://www.sentencingproject.org/wp-content/uploads/2020/11/Transformative-Justice.pdf.

[295] U.S. SENT'G COMM'N, WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3 (2016), https://perma.cc/V8RQ-XEKJ.

has plummeted.[296] Between fiscal years 2015 and 2019, the Sentencing Commission reports that the number of marijuana trafficking offenders decreased by 51.6%.[297]

Predictably, the vast majority of those affected by arrests and convictions for marijuana-related offenses are people of color. Marijuana criminalization has always had racially dubious origins.[298] It devastated minorities as the War on Drugs ramped up during the early 1980s,[299] with soon-to-be president Ronald Reagan opining, "marijuana—pot, grass, whatever you want to call it—is probably the most dangerous drug in the United States."[300] In 2019, the Sentencing Commission reported that 67.4% of those convicted of federal marijuana-offenses were Hispanic, while another 14.2% were Black—most of whom had had "little to no prior criminal history" (65.2%).[301] Yet, it is well documented that the marijuana usage rates of white and non-white individuals are similar.[302] The ACLU highlights that "black people are approximately four

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[296] DRUG ENF'T ADMIN., 2020 NATIONAL DRUG THREAT ASSESSMENT 47 (2021), https://perma.cc/SL42-MLF7 [hereinafter 2020 DRUG THREAT REPORT] (reporting an 81% decrease in marijuana seizures between 2013 and 2019).

[297] U.S. SENT'G COMM'N, QUICK FACTS: MARIJUANA TRAFFICKING OFFENSES 1 (2019) [hereinafter MARIJUANA QUICK FACTS], https://perma.cc/7346-EYNX.

[298] *See*, *e.g.*, Steven W. Bender, *Joint Reform: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 361–365 (2013), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=faculty; Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 797–800 (2019), https://law.lclark.edu/live/files/28624-lcb233article1vitiellowebsitepdf; Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 104 (2018), https://www.bjcl.org/assets/files/23.1-Todd.pdf. Although prohibitions on marijuana enacted because of their association with minority groups is nothing new in world history. *See* Ryan Stoa, *A Brief Global History of the War on Cannabis*, THE MIT PRESS READER (Jan. 23, 2020), https://thereader.mitpress.mit.edu/a-brief-global-history-of-the-war-on-cannabis/.

[299] *See* Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 691 (2016), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1778&context=faculty ("Marijuana use by youth of color has been the focal point of the War on Drugs from its inception. Most U.S. drug arrests stem from unlawful possession rather than trafficking in drugs, and most of those possession arrests are for marijuana, amounting to near a million arrests annually. Evidencing the racial inequity of the War on Drugs, African Americans and Latinos account for most of those arrests despite their smaller population numbers than whites and studies confirming that white youths use marijuana in the same percentage as African American and Latino Youth."); *see also* Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CENTER FOR AMERICAN PROGRESS (June 27, 2018), https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/.

[300] Simon Moya-Smith, *Marijuana Legalization Must Make War on Drugs' Victims Whole Before Companies Profit*, THINK (Mar. 11, 2019), https://www.nbcnews.com/think/opinion/marijuana-legalization-must-make-war-drugs-victims-whole-companies-profit-ncna981391.

[301] MARIJUANA QUICK FACTS, *supra* note 297, at 1.

[302] *See* Todd, *supra* note 298, at 105 ("Blacks and whites use and sell marijuana at very similar rates"); *see also Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited Mar. 15, 2021) ("In the 2015 National Survey on Drug Use and Health, about 17 million white people and 4 million African Americans reported having used an illicit drug within the last month.").

times more likely to be arrested for marijuana possession than are white people—a disparity that increased 32.7 percent between 2001 and 2010."[303] This disparity continues today.[304]

The impact of marijuana enforcement on persons of color has only been exacerbated by the "civic death" that often follows criminal conviction. Marc Mauer, the former executive director of the Sentencing Project, explained that "policymakers have had to expand their reach beyond just sentencing enhancements, and have enacted a new generation of collateral sanctions that impose serious obstacles to a person's life prospects long after a sentence has been completed. Many obstacles are related to initiatives of the 'War on Drugs,' with a seemingly endless series of restrictions being placed on people convicted of a drug offense."[305] Some of the collateral consequences of a conviction for a marijuana-related offense include the loss of professional licenses, denial of educational loans and aid, barriers to employment, refusal of public housing, and deportation.[306] Ironically, even in states that have chosen to fully legalize marijuana, these consequences can throw salt on the racial wounds of those convicted of marijuana offenses by failing to expunge such offenses from criminal records, effectively barring them from participating in what has now become not only a legal, but a lucrative business.[307]

Past rationales surrounding federal marijuana policy are also undermined by recent data. The vast majority of the individuals convicted of federal marijuana offenses serve a prison sentence,[308] the average length of which is over a year and a half.[309] Yet the Sentencing Commission reports that very few marijuana offenses involved the possession of a weapon (16.2%), and fewer still pertained to individuals with leadership or supervisory roles in marijuana-trafficking (6.0%).[310] These are a far cry from your "career criminals"[311] or the "big-fish drug dealers" stereotyped to the public for decades. Indeed, according to the DEA, illicit marijuana seizures along the Southwest border[312] have plummeted from 1.3 million kilograms in

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[303] ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 14 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf ("Blacks were arrested for marijuana possession at almost four times the rate as whites.").

[304] ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 37 (2020), https://www.aclu.org/sites/default/files/field_document/tale_of_two_countries_racially_targeted_arrests_in_the_era_of_marijuana_reform_revised_7.1.20_0.pdf ("In 2018—unchanged from 2010—Black people were still nearly 4 times more likely than white people to get arrested for marijuana possession, despite similar usage rates.").

[305] Marc Mauer, *Thinking About Prison and Its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 610 (2005), https://www.sentencingproject.org/wp-content/uploads/2016/01/Thinking-About-Prison-and-its-Impact-in-the-Twenty-First-Century.pdf.

[306] Todd, *supra* note 298, at 107–08; *see also* Bender, *Joint Reform*, *supra* note 298, at 380–83.

[307] *See* Moya-Smith, *supra* note 300.

[308] MARIJUANA QUICK FACTS, *supra* note 297, at 1.

[309] *Id.*

[310] *Id.*

[311] *Id.* ("61.1 % had little or no prior criminal history" while only "2.2% were Career Offenders").

[312] 2020 DRUG THREAT REPORT, *supra* note 296, at 47. It seems that DEA uses this statistic as a proxy for trafficking activity carried out by Mexican "transnational criminal organizations" (TCOs).

2013 to 249,000 kilograms—*an over 81% decline*.[313] Not only do those convicted of federal marijuana offenses tend to be people of color, but they are also typically non-violent and lack significant criminal histories.

C. Enact the MORE Act

Given these realities, Congress must pass legislation to decriminalize and deschedule marijuana. In July 2019, House Representative Jerrold Nadler (D-NY) and Vice President Kamala Harris (D-CA) introduced the Marijuana Opportunity Reinvestment and Expungement Act as a way to curb the destructive effects of longstanding federal drug policy.[314] The bill passed in the House in a 228-164 vote (mostly along party lines) on December 4, 2020.[315] The bill has yet to be introduced and passed in the Senate.

The MORE Act would begin to repair the racially-disparate effects of past marijuana policy,[316] and assist minority communities in obtaining employment and business opportunities, thus helping their members on the road to financial security. The MORE Act's stated purpose is to "decriminalize and deschedule cannabis [and] to provide for reinvestment [in those] adversely impacted by the War on Drugs."[317] The Act also acknowledges that "[p]eople of color have been historically targeted by discriminatory sentencing practices resulting [in increased sentencing of Black and Hispanic men]."[318] Among other things, the MORE Act mandates the removal marijuana from "inclusion in any schedule" of the CSA,[319] retroactively expunges most federal convictions relating to marijuana and provides for resentencing of those who have endured such convictions,[320] provides an outline for a regulatory and tax regime regarding the manufacture and sales of marijuana-related businesses, creates an Opportunity Trust Fund designed to benefit those individuals who have been negatively impacted by the War on Drugs,[321] and ensures that the provisions of the MORE Act retroactively amend the CSA.[322] Importantly, the Act would assist impacted individuals in working and starting businesses in the budding marijuana industry[323] and would ensure that adverse immigration consequences no longer stem from marijuana offenses.[324]

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[313] *Id.*
[314] H.R. 3884, 116th Cong. 1 (2019–2020); S. 2227, 116th Cong. (2019–2020).
[315] Catie Edmonson, *House Passes Landmark Bill Decriminalizing Marijuana*, N.Y. TIMES (Dec. 6, 2020), https://www.nytimes.com/2020/12/04/us/politics/house-marijuana.html.
[316] April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), https://www.alternet.org/2014/03/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison/ ("I think we have to be willing, as we're talking about legalization, to also start talking about reparations for the war on drugs, how to repair the harm caused.").
[317] H.R. 3884.
[318] *Id.* § 2 (7).
[319] *Id.* § 3(a)(2).
[320] *Id.* § 10(a)–(c).
[321] *Id.* § 5.
[322] H.R. 3884 § 3(d).
[323] *Id.* § 5.
[324] *Id.* § 9.

Moreover, the Act would shore up a growing, and unnecessary, rift between federal and state law. The administrative authorities heading up drug scheduling, legislation, and the MORE Act, in particular, have a unique opportunity to address the many issues surrounding marijuana policy. The CSA broadly grants the AG and the Secretary of the Department of Health and Human Services the authority to determine the scheduling of particular drugs under its provisions; these officials, in turn, delegate their authority to the DEA[325] and the Food and Drug Administration, respectively.

For its part, the DEA's position is that it has a broad prerogative to interpret the requirements pertaining to a Schedule I substance. For example, in 1992, the DEA promulgated a test consisting of five individually necessary and jointly sufficient conditions pertaining to the meaning of the "accepted medical use" requirement.[326] According to the agency's interpretation, such a use requires (i) "chemistry [that] is known and reproducible," (ii) that there are "adequate safety studies" as well as (iii) studies that are "adequate and well-controlled studies proving its efficacy," (iv) that it is accepted by qualified experts, and (v) that "the scientific evidence is widely available."[327] The agency holds that marijuana has not yet been shown to any of those conditions[328] and is undisturbed by the recent wave of legalization reforms in states across the country.[329] Further, the DEA sees itself as having broad discretion to change drug scheduling as part of the rulemaking process[330] as well as to fashion other standards intended to guide the interpretation of the CSA.[331] Possession (even simple) and distribution of Schedule I substances, including marijuana, are subject to various criminal penalties defined in the CSA.[332]

Given the DEA's delegated authority to interpret the CSA—to which courts have thus far deferred[333]—as well as the agency's long-standing view that marijuana has "no currently accepted medical use," it will likely be extremely difficult to pursue administrative or litigation remedies. This point is magnified by the fact that the DEA has pursued policies that hamper the kind of scientific research it claims is essential to establish that marijuana has an "accepted

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[325] 28 C.F.R. § 0.100 (2020).
[326] Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10506 (Mar. 26, 1992).
[327] *Id.*
[328] *See, e.g.*, Petitioner's Reply Brief at 38, 41, Sisley v. DEA, (No. 20-71433), 2020 WL 7866537 (9th Cir. Dec. 21, 2020)
[329] *Id.* at 29.
[330] 21 U.S.C. § 811(a)–(b).
[331] Grinspoon v. DEA, 828 F.2d 881, 892 (1st Cir. 1987) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).
[332] *See* 21 U.S.C. § 841.
[333] *See* All. for Cannabis Therapeutics v. DEA, 930 F.2d 936, 939 (D.C. Cir. 1991); *see also* All. for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1134 (D.C. Cir. 1994) ("We noted the ambiguity of the phrase and the dearth of legislative history on point and deferred to the Administrator's interpretation as reasonable."), Americans for Safe Access v. DEA, 706 F.3d 438, 449 (D.C. Cir. 2013) (explaining that the court "expressly approved" DEA's five-factor test); Krumm v. DEA, 739 F. App'x 655 (D.C. Cir. 2018) (per curiam) (same).

medical use."[334] If such use could be established, a petition to change marijuana's schedule status would be successful.

Other potential remedies are also not ideal. While the DEA *should* divert resources from drug enforcement for marijuana-related offenses[335] in light of current legislative efforts, strategic administrative abstention is insecure. For instance, Deputy Attorney General David Ogden penned a memorandum that directed DOJ to focus marijuana enforcement efforts on production and distribution, instead of use and possession, in states that have legalized marijuana. His successor, Deputy Attorney General James Cole, affirmed these priorities. But later, AG Sessions "rescinded the Obama-era guidance that deprioritized federal enforcement . . . ."[336]

Recently, AG Merrick Garland testified that low-level cannabis crimes would not be a priority of the Justice Department, saying, "The marijuana example is a perfect example. Here is a nonviolent crime that does not require us to incarcerate people and we are incarcerating at significantly different rate(s) in different communities. That is wrong and it's the kind of problem that will then follow a person for the rest of their lives. It will make it impossible . . . to get a job and will lead to a downward economic spiral. We can focus our attention on violent crimes and other crimes . . . and not allocate our resources to something like marijuana possession. We can look at our charging policies and stop charging the highest possible offense with the highest possible sentence."[337]

While our current political winds are favorable, the instability in federal drug enforcement priorities, coupled with recent numbers on marijuana arrests and convictions, reinforces the idea that administrative abstention in federal marijuana enforcement would be unsatisfactory. Even if diverting enforcement were sustainable, that would not help the countless individuals whose lives have been negatively impacted by the War on Drugs.[338] Similarly, mere

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[334] U.S. SEN. CAUCUS ON INT'L NARCOTICS CONTROL, CANNABIS POLICY: PUBLIC HEALTH AND SAFETY ISSUES AND RECOMMENDATIONS 13 (2021) https://www.drugcaucus.senate.gov/sites/default/files/02 March 2021 - Cannabis Policy Report - Final.pdf ("The DEA and the DOJ have long held the view that, pursuant to the United Nations Single Convention on Narcotic Drugs and the CSA, *there can be only one source of cannabis in the United States*.") (emphasis added).

[335] Legalization of marijuana has not supported an increase in violent crime and has supported the proposition that it has actually had the opposite effect. *See*, *e.g.*, Dragone, *supra* note 290, at 495 ("The concern that legalizing cannabis for recreational purposes may increase crime occupies a prominent position in the public debate about drugs. Our analysis suggests that such a concern is not justified. We reach conclusion in line with . . . a crime drop.").

[336] Ed Chung et al., *Rethinking Federal Marijuana Policy,* CTR. FOR AM. PROGRESS (May 1, 2018), https://www.americanprogress.org/issues/criminal-justice/reports/2018/05/01/450201/rethinking-federal-marijuana-policy/.

[337] John Hudak, *Merrick Garland, cannabis policy, and restorative justice*, BROOKINGS INST. (Feb. 24, 2021) https://www.brookings.edu/blog/fixgov/2021/02/24/merrick-garland-cannabis-policy-and-restorative-justice/.

[338] AG Garland, it seems, was (at least) implicitly sympathetic with this point when he also testified that "[w]e have to focus on the crimes that really matter [. . .] and not have such an overemphasis on marijuana possession, for example, which has disproportionately affected communities of color and damaged them far after the original arrest because of the inability to get jobs." *Attorney General Merrick Garland*

federal decriminalization of marijuana would be an unsettling "half-measure." Decriminalization would fail to help those affected individuals, and, indeed, would simply replace one problem with another: leaving vulnerable individuals open to civil penalties[339] that are often difficult, if not impossible, for them to pay.[340]

For these reasons, the best solution is for Congress to pass the MORE Act, or a comparable piece of legislation, to deschedule marijuana and counter the effects of decades of devastating federal marijuana policy. The MORE Act's many reformswould be significant steps in addressing the harmful legacy of the War on Drugs, would bring federal law in line with a growing number of state laws, and would do so better than the alternatives.

X. Civil Asset Forfeiture

A. Reform Recommendations: Summary

- Pass legislation revoking the Sessions authorization for federal agencies to commence civil asset forfeiture proceedings. This would serve to limit the federal involvement in the state systems of civil forfeiture and mitigate some of the harms that this policy can cause.
- Pass legislation limiting the federal authority to commence civil asset forfeiture proceedings. This would require federal agencies to instead use criminal asset forfeiture proceedings, which require a higher standard of proof and mitigate the underlying concerns with civil asset forfeiture.
- Pass legislation that forbids the distribution of revenue resulting from federal civil asset forfeitures to state law enforcement entities. This would prevent federal funds from being used in a way that violates federal policy.

B. The Problem of Civil Asset Forfeiture and the Need for Reform

Former AG Sessions authorized the DOJ and other federal agencies to forfeit assets that were originally seized by state and local law enforcement agencies. This policy substantially increases the magnitude of the underlying problems with civil asset forfeiture, namely, the imposition of punishment on innocent people, and the perverse incentives to police for profit or bounty hunt instead of enforcing the law neutrally. Congress should formally repeal the Sessions authorization and consider limiting federal civil asset forfeiture proceedings.

Testifies at Confirmation Hearing, C-SPAN (Feb. 22, 2021, 3:48 PM), https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1.

[339] Sam Wood et al., *Despite marijuana's increasing legalization and acceptance, arrests soar*, PHILA. INQUIRER (Oct. 4, 2018), https://www.inquirer.com/philly/news/weed-marijuana-legalization-arrests-pennsylvania-new-jersey-african-american-20181004.html-2.

[340] Todd, *supra* note 298, at 108 ("[e]ven a small fine for a person who cannot pay it can quickly escalate into a larger fine, then a warrant, and then the person is swept into the criminal justice system").

In July 2017, AG Sessions signed an order that allowed the DOJ and other federal agencies to forfeit assets that state and local law enforcement agencies initially seized.[341] This order unquestionably strengthened the federal forfeiture program, making civil asset forfeiture a priority for the DOJ. The DOJ should rescind this order, and the practice of adopting state forfeiture proceedings into the federal system should end.

Current Civil Asset Forfeiture law permits the seizure of property that is even *suspected* of being connected to criminal activity.[342] As long as law enforcement officials have probable cause to believe that the property is properly subject to forfeiture proceedings, law enforcement officials can bring an action against the property *in rem*.[343] The burden of proof for these proceedings is a preponderance of the evidence, and the government must show that there is a substantial connection between the property and the offense.[344] Innocent owners must prove by a preponderance of the evidence that they "did not know of the conduct giving rise to forfeiture; or upon learning of the conduct giving rise to forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property."[345]

Modern day civil asset forfeiture dates to the War on Drugs of the Nixon and Reagan administrations. The original goals of civil asset forfeiture were to provide a method for law enforcement to seize profits from drug offenses.[346] However, these goals have been perverted by the low standards of proof and financial incentives to engage in civil asset forfeiture.

In rem proceedings lower the burden on the government in several ways. First, the culpability of the party does not need to be proven for *in rem* proceedings. There is no requirement that the civil forfeiture proceedings accompany a criminal conviction or a criminal proceeding of any nature.[347] Additionally, the government need only prove that it is more likely than not that the property is connected to a crime.[348] This limited burden of proof is especially concerning given that the Supreme Court has recognized that civil *in rem* forfeitures are at least partially punitive in nature.[349]

Additionally, there are strong financial incentives for law enforcement to engage in civil asset forfeiture, which perverts the intended purposes of the policy. All agencies that deposit assets into the federal Asset Forfeiture Fund are eligible to receive an annual allocation of

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[341] Off. of the Att'y Gen., Order No. 3946-2017 (July 19, 2017); *see also* U.S. DEP'T OF JUST., POLICY DIRECTIVE 17-1, POLICY GUIDANCE ON ATTORNEY GENERAL'S ORDER ON FEDERAL ADOPTION AND FORFEITURE OF PROPERTY SEIZED BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (2017), https://www.justice.gov/file/982616/download; DEPT. OF JUST., ASSET FORFEITURE POLICY MANUAL 2019 (2019), https://www.justice.gov/criminal-afmls/file/839521/download.

[342] Luis Suarez, *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*, 5 TEX. A&M J. PROP. L. 1001, 1002 (2019), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1104&context=journal-of-property-law.

[343] *Id.*

[344] *Id.*

[345] *Id.* (quoting 18 U.S.C. § 983(d)(2)(A)).

[346] *Id.* at 1005.

[347] Suarez, *supra* note 342, at 1007.

[348] *Id.*

[349] *See* Austin v. United States, 113 S. Ct. 2801 (1993)

funding from that fund.[350] In 1986, the second year after the creation of the Assets Forfeiture Fund, proceeds totaled over $93 million.[351] By 2008, the Fund topped $1 billion in net assets for the first time.[352] The Fund's revenue has only increased since that, hitting $1.7 billion in total assets in 2020.[353] As the Fund's size increases, so does its payments to local law enforcement agencies.[354] This increases state and federal interconnection, which is especially concerning given the low standards applied to state civil asset forfeiture proceedings.

Payouts from the Asset Forfeiture Fund to local law enforcement agencies sometimes violate federal law. Under federal asset forfeiture laws, money that is forfeited in the federal system can only be used for law enforcement purposes.[355] One independent audit indicated that approximately one-third of the checks written out of the asset forfeiture account in a local police department constituted questionable expenses that violated federal guidelines.[356] This particular department used revenue from forfeitures to pay for benefits, dinners, football tickets, fundraisers, and a staff Christmas party.[357] Additionally, state and local law enforcement agencies sometimes use civil asset forfeiture proceeds to pay officers' salaries in multiple jurisdictions, which directly conflicts with federal forfeiture policy.[358] Many local law enforcement agencies also depend on forfeiture revenue for a significant portion of their annual budget, despite federal guidelines that limit forfeiture proceeds to increasing, not replacing, budget appropriations.[359] In some jurisdictions, law enforcement officers are permitted to use the property that they seize, and some departments have "wish lists" to determine which property should be forfeited.[360]

Federal courts have recognized that this lucrative and relatively effortless process creates a "built-in conflict of interest" for law enforcement.[361] This perversion in purpose "gives the

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[350] Suarez, *supra* note 342, at 1008–09.
[351] Jennifer Levesque, *Property Rights—When Reform Is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 82 (2015), https://core.ac.uk/download/pdf/267161546.pdf.
[352] *Id.*
[353] DEP'T OF JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2020, at 7 tbl.1 (2021), https://oig.justice.gov/sites/default/files/reports/21-015.pdf.
[354] Levesque, *supra* note 351, at 83.
[355] *Id* at 84.
[356] *Id.*
[357] *Id.*
[358] Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 334 (2017), https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf.
[359] *Id.*; U.S. DEP'T OF JUST., GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 22 (2009), https://www.justice.gov/sites/default/files/usao-ri/legacy/2012/03/26/esguidelines.pdf.
[360] Crepelle, *supra* note 358, at 334; Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 10, 2014), https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html.
[361] Crepelle, *supra* note 358, at 337; United States v. 632-636 Ninth Ave., 798 F. Supp. 1540, 1551 (N.D. Ala. 1992).

government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain for the government."[362] The pull of profit is not localized to the state system—a DOJ publication goes so far as to state that law enforcement priorities in drug enforcement should be guided by what enforcement tactics are most lucrative.[363]

The traditional justifications for civil asset forfeiture are inadequate. AG Sessions argued that civil asset forfeiture benefits the public at large because "it helps return property to the victims of crime."[364] However, a study of over 100 federal cases *conducted by the government* showed that over half of the seizures had "no discernable connection between the seizure and the advancement of law enforcement efforts."[365]

XI. Fourth Amendment and Privacy Reforms

A. Reform Recommendations: Summary

To confront present day realities, Congress should make sweeping changes to the Stored Communications Act (SCA) and related statutes protecting electronic privacy. We recommend the following changes:

- Expand and revise the SCA's warrant requirement: The SCA currently allows law enforcement to use nothing more than a subpoena to obtain vast swaths of personal information. Congress should significantly expand the scope of the statutory warrant requirement to provide increased privacy protections without requiring extensive revisions to the statutory framework.

- Suppression remedy for violations of electronic privacy: The SCA and related statutes provide no suppression remedy for their violation. Congress should revise these statutes to require the exclusion of evidence obtained in violation of the law to encourage compliance with the laws.[366]

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[362] Crepelle, *supra* note 358 at 337; United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 735 (C.D. Cal. 1994).

[363] Crepelle, *supra* note 358, at 338. Law enforcement must figure out whether it is more lucrative "to target major dealers or numerous smaller ones." U.S. DEP'T OF JUST., MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE YEAR REVIEW 1988-1992, at 23 (1993), https://www.ncjrs.gov/pdffiles1/Digitization/146395NCJRS.pdf.

[364] *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, U.S. DEP'T OF JUST. (July 19, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state.

[365] OFF. OF INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE DEPARTMENT'S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES 21 (2017), https://oig.justice.gov/reports/review-departments-oversight-cash-seizure-and-forfeiture-activities.

[366] *See* Orin S. Kerr, *Lifting the "Fog" of Internet Surveillance: How A Suppression Remedy Would Change Computer Crime Law*, 54 HASTINGS L.J. 805, 807–08 (2003), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3518&context=hastings_law_journal (arguing that a suppression remedy would serve both liberty and law enforcement).

- Right to present a defense: Congress should amend the statute to expressly authorize people charged with crimes to obtain electronic records that are material in their defense.

- Rewrite the SCA to include standards that adapt as technology advances: The Stored Communications Act and the related statutes are mired in outdated concepts from the 1980s, such as the distinction between opened and unopened communications. Resting our statutory framework for electronic privacy on irrelevant distinctions degrades our decision-making and leads to absurd results.

B. Our Statutory Electronic Privacy Framework Does Not Work.

In its 2018 decision in *Carpenter v. United States*, the Supreme Court upended decades of Fourth Amendment case law and the thirty-year old SCA.[367] *Carpenter* held that people have a legitimate expectation of privacy in electronic records that track their physical movements.[368] Accordingly, the Court found that obtaining third-party cell-site records that had tracked the defendant's movements for seven days was a Fourth Amendment search.[369] Although *Carpenter* moved electronic privacy law in the right direction, the opinion made plain just how easily law enforcement can obtain huge swaths of extremely personal information with only a subpoena: "[T]he Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy."[370]

Unfortunately, *Carpenter* only scratched the surface; far more reform is needed to bring this area of law up to speed and to adapt to modern technologies. Understanding the problem requires taking a step back to the Fourth Amendment's "third party doctrine" and Congress's statutory responses. In general terms, the Fourth Amendment broadly protects "persons, houses, papers, and effects."[371] In the 1970s, however, the Supreme Court concluded that we have no expectation of privacy when our records are held by third parties such as banks. Accordingly, taking those records does not invoke the Fourth Amendment and does not require a warrant.[372] This is known as the "third-party" doctrine.[373]

The rise of electronics in the 1980s complicated the third-party doctrine by increasing the type and quantity of records held by third parties. On a computer network, "a user does not have a physical 'home,' nor really any private space at all. Instead, a user typically has a network account consisting of a block of computer storage that is owned by a network service

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[367] 138 S. Ct. 2206 (2018).
[368] *Id.* at 2217.
[369] *Id.*
[370] *Id.* at 2224 (Kennedy, J., dissenting).
[371] U.S. CONST., amend. IV.
[372] *See Carpenter*, 138 S. Ct. at 2216–17 (discussing Smith v. Maryland, 442 U.S. 735 (1979) and United States v. Miller, 425 U.S. 435 (1976)).
[373] *Id.*

provider. . . ."[374] Our "most private information"—not just email but *all* electronic interactions—"ends up being sent to private third parties and held far away on remote network servers."[375] In response, in the mid-1980s, Congress enacted a complex statutory regime to provide some privacy protections where the Fourth Amendment appeared to run out: the Electronic Communications Privacy Act (ECPA), which contained and/or revised the Stored Communications Act (SCA), the Wiretap Act, and the Pen Register Act.[376] This "cryptic" statutory framework provides varying levels of statutory privacy rights depending on outdated and now irrelevant statutory distinctions. Troublingly, the statute requires only a subpoena for all non-content information, such as the date on which the communication was sent and its recipient—Internet-age analogies to the pen registers that escape Fourth Amendment protection.[377]

Both the electronic privacy framework and the Fourth Amendment's third-party doctrine predate the widespread use of technology in daily life—email for nearly all correspondence, online bill-pay as the default, "smart" devices in the home from birth (baby bassinets) through death (remote heart monitoring devices), important social life taking place via social media, widespread use of "the cloud" to store the most personal information such as calendars or photos, etc. It also predates contemporary law enforcement surveillance regimes—cell-site emulators such as Stingrays that pretend to be cell phone towers, facial recognition algorithms, widespread license plate readers, state-run video surveillance in cities, etc. All of these technological developments present privacy problems under the statutes, and many or most of them have little protection under the Fourth Amendment.

C. Specific Examples of Problem Areas

The problems with the SCA and related statutes are myriad. This section describes a few issues in depth.

1. Easy government access to pervasive, intimate electronic records.

Even after *Carpenter*, law enforcement can still obtain vast swaths of extraordinarily personal information with only a subpoena. As Justice Kennedy observed: "[I]t is well established that subpoenas may be used to obtain a wide variety of records held by businesses, even when the records contain private information. Credit cards are a prime example. . . . Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples."[378] If anything, this

[374] Orin S. Kerr, *A User's Guide to the Stored Communications Act*, 72 Geo. Wash. L. Rev. 1208, 1209–10 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=421860.
[375] *Id.* at 1209–10.
[376] *See id.* at 1210; Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in 18 U.S.C.).
[377] *Compare* 18 U.S.C. § 2703(a), (b) (content information) *with id.* § 2703(c) (noncontent information); *see also Smith*, 442 U.S. at 745–46; Kerr, *A User's Guide*, *supra* note 374, at 1227–28.
[378] *Carpenter*, 138 S. Ct. at 2228–29 (Kennedy, J. dissenting).

disturbing list *under*states the problem. The dramatic expansion in the type and quantity of electronic records has transformed the nature of government surveillance.

The sheer quantity of electronic versions of traditional business records enables a more pervasive form of surveillance than the "third party" doctrine ever anticipated.[379] A record of all of one's Amazon purchases during the pandemic, for example, paints a detailed picture of daily life in a way that a record of one's purchases at a single corner store does not. Likewise, collecting credit card data can reveal a family's entire purchase history in our cash-less society—something the Supreme Court could hardly have anticipated in the 1970s.

The so-called "Internet of Things" adds a qualitatively new intimacy to these pervasive records.[380] Law enforcement can now collect granular information about us via the "smart" devices that track minute aspects of our lives. Some especially disturbing examples include fitness trackers that collect medical data,[381] linked to location data and personally identifiable information in user accounts; Internet-connected automobiles that track not only our location but also every time we brake or accelerate, our musical choices, and which cars get near us; and smart homes and buildings that collect data on who is in them, when, and what we do—from baby monitors to washing machines to garage door openers.[382]

The SCA and its counterparts were not written to account for the modern world of electronic records. The now-irrelevant categories on which the statutory regime rests result in strange legal arguments. For example, as of at least 2012, the DOJ maintained that federal agents could search emails without a warrant if the emails were opened or over 180 days old.[383] That absurd position was legally well-grounded in the SCA, but orthogonal to any relevant issue about when or why the government should be able to search our emails. Likewise, today, there is little question that the SCA authorizes the DOJ to access nearly all the "non-content" information described in this section with only a subpoena—a distinction that simply elides the issues that matter to mass surveillance.[384]

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[379] *See id.* at 2217–18 (majority opinion).

[380] *See id.* at 2218 (characterizing historical cell-site records as "a category of information otherwise unknowable"). For a helpful overview of the "Internet of Things," see generally UNITED STATES GOV'T ACCOUNTABILITY OFF., TECHNOLOGY ASSESSMENT: INTERNET OF THINGS: STATUS AND IMPLICATIONS OF AN INCREASINGLY CONNECTED WORLD (2017), https://www.gao.gov/assets/690/684590.pdf [hereinafter GAO TECHNOLOGY REPORT]

[381] The GAO found that "health and fitness apps" collected data on "names, email addresses, exercise habits, diets, medical symptom searches, location, gender, and more. . . ." GAO TECHNOLOGY REPORT, *supra* note 380, at 34.

[382] *See id.* at 16–20, 22, 33. For a disturbing catalogue of "always on" devices in the home and their data collection practices, see Letter from Elec. Priv. Info. Ctr. to Loretta Lynch, U.S. Att'y Gen., and Edith Ramirez, Fed. Trade Comm'n Chairwoman (July 10, 2015), https://epic.org/privacy/internet/ftc/EPIC-Letter-FTC-AG-Always-On.pdf.

[383] FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 18.6.8.4.2.4 (2012), https://www.aclu.org/legal-document/warrantless-electronic-communications-foia-requests-june-2012-version-fbi-domestic?redirect=national-security-technology-and-liberty/warrantless-electronic-communications-foia-requests-june. *But see* United States v. Warshak, 631 F.3d 266, 274 (6th Cir. 2010) (Fourth Amendment protection for emails).

[384] *See* Kerr, *A User's Guide*, *supra* note 374, at 1219–20.

2. Modern and emerging technologies allow law enforcement to track you in fine-grained detail.

Law enforcement also uses new technologies under their or private control to track us in fine-grained and previously impossible detail. Law enforcement argues that the use of these technologies requires neither a warrant nor a subpoena. One especially disturbing and emblematic example is automated license plate readers—a technology to which the SCA's dated language doesn't even apply.[385]

The DEA houses the National License Plate Recognition Initiative, a national database containing what are surely millions—if not billions—of snapshots of license plate records.[386] Databases like this transform what was once the unremarkable practice of an officer running your plates into a pervasive system for tracking your movements—both in real time and as far back in time as data is saved. Automated license plate reader systems are established when cities, law enforcement agencies such as the DEA, and private businesses place special license plate cameras throughout the country.[387] The cameras record the license plates of passing vehicles, day and night, then upload that information nearly immediately to enormous databases.[388] The city of Atlanta alone managed to collect snapshots of nearly 30 million license plates with 347 cameras in just one month.[389]

The scope of these databases is staggering—especially considering that law enforcement has regularly queried them for real-time hits or historical data without even a subpoena.[390] The exact size of the DEA's federal database is unknown, but similar databases reveal the enormous

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[385] Law enforcement does not publicly release information about its tracking technologies, and sometimes even goes to some lengths to obscure its use of them. *See, e.g.*, Cyrus Farivar, *FBI would rather prosecutors drop cases than disclose stingray details*, ARS TECHNICA (Apr. 7, 2015) (quoting agreement expressly requiring prosecutor to drop case rather than disclose "Stingray" technology, at the request of the FBI), https://arstechnica.com/tech-policy/2015/04/fbi-would-rather-prosecutors-drop-cases-than-disclose-stingray-details/. This written testimony does not attempt to catalogue the confirmed, likely, and possible emerging forms of law-enforcement surveillance and instead focuses on license plate readers as emblematic of the problem.

[386] Little information is publicly available about this initiative. Most articles appear to rely on the documents collected via FOIA request by the ACLU and available online. *See generally* Jay Stanley & Bennett Stein, *FOIA Documents Reveal Massive DEA Program to Records American's Whereabouts with License Plate Readers*, ACLU (Jan. 26, 2015), https://www.aclu.org/blog/free-future/foia-documents-reveal-massive-dea-program-record-americans-whereabouts-license.

[387] Alison Klein & Josh White, *License plate readers: A useful tool for police comes with privacy concerns*, WASH. POST (Nov. 19, 2011), https://www.washingtonpost.com/local/license-plate-readers-a-useful-tool-for-police-comes-with-privacy-concerns/2011/11/18/gIQAuEApcN_story.html.

[388] The scope of these databases is staggering. In just one month, the city of Atlanta managed to collect snapshots of nearly 30 million license plates with just 347 cameras. Josh Wade & Aaron Diamant, *Eyes on the Road*, ATLANTA J. CONST. (last visited Mar. 5, 2021), http://specials.ajc.com/plate-data/.

[389] *Id.*

[390] *Id.* The question of whether the Fourth Amendment applies to stored license plate reader data after *Carpenter* is an open question. *See, e.g.*, United States v. Yang, 958 F.3d 851, 853, 863–65 (9th Cir. 2020) (Bea, J., concurring in judgment).

number of people being swept into this law enforcement dragnet. For example, the largest commercial database for law enforcement contained at least 5 *billion* snapshots in 2016—with 100 million new scans each month.[391] The database is not limited to any one jurisdiction: As the company owner testified, his database aggregates license plate snapshots from law enforcement and private cameras.[392]

These databases make it easy for law enforcement to conduct startlingly broad searches that reveal intimate information about where we go and when. The commercial database owner explained that officers could search his database by entering in a location and then pull up each and every license plate "scanned within that radius."[393] Or, officers can input a simple query that pulls the dates, times, and locations of a single license plate in the database's billions of license plate snapshots.[394] In *United States v. Yang*, for example, a postal service inspector learned his target's home address after performing just such a search.[395] Following you and your car—via your license plate—can likewise reveal your private beliefs and associations, including "marital fidelity; religious observance; and political activities."[396]

The SCA appears to impose no limitations on law enforcement's use of this relatively new technology. That is because the SCA's limitations apply only to "public" services.[397] The DEA's National License Plate Recognition Initiative is not public, nor is a commercial service available to law enforcement subscribers only.[398] Thus, the SCA, which was adopted for the very purpose of providing some kind of statutory privacy protection, provides none at all against emerging technologies.

The lack of fit between new technologies and our statutory regime for governing electronic privacy is not limited to license plate readers. Similar problems arise for many other government-only technologies. For example, facial recognition software attached to surveillance cameras allows the government to track your movements through the streets in real time—and historically, if the data is stored.[399] The SCA appears to provide no barrier to this or other similarly intrusive law-enforcement-only technologies.

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[391] *Yang*, 958 F.3d at 853; VIGILANT SOLUTIONS, *Vigilant Solutions Bolsters Commercial LPR Database through Agreement with MVTRAC* (May 20, 2015), https://www.prnewswire.com/news-releases/vigilant-solutions-bolsters-commercial-lpr-database-through-agreement-with-mvtrac-300086183.html.

[392] Reporter's Transcript of Dec. 6, 2016, Proceedings at 31, *Yang*, 958 F.3d 851 (No. 16-CR-231), Dkt. 41.

[393] *Id.* at 25.

[394] *Id.*

[395] *Yang*, 958 F.3d at 853.

[396] NORTHERN CAL. REG'L INTEL. CTR., INITIAL PRIVACY IMPACT ASSESSMENT FOR AUTOMATED LICENSE PLATE READER TECHNOLOGY 3 (last accessed Mar. 3, 2021), https://ncric.org/html/NCRIC%20ALPR%20PIA.PDF.

[397] 18 U.S.C. §§ 2702(a)(1), 2711(2).

[398] *See* Kerr, *A User's Guide*, *supra* note 374, at 1226.

[399] This is not a dystopian projection of *future* capabilities but rather appears to describe capabilities the government already has or nearly has. China already purports to use such technology, and Detroit and Chicago have purchased systems that allow it. *See* Clare Garvie & Laura M. Moy, *America Under Watch: Face Surveillance in the United States*, GEORGETOWN LAW CTR. ON PRIV. & TECH. (May 16, 2019), https://www.americaunderwatch.com/.

3. Privacy statutes appear to prohibit people accused of crimes from obtaining exculpatory electronic evidence.

The SCA and related statutes also appear to prohibit people accused of crimes from obtaining electronic records necessary to their own defense. The SCA forbids service providers from disclosing covered records except as authorized by statute.[400] Those statutory exceptions include law enforcement (via the mechanisms discussed above), but do not include people charged with crimes.[401] Thus, where the government can obtain electronic records such as social media with only a subpoena, the defense cannot, no matter how compelling the need. This "privacy asymmetry" is not only arguably unconstitutional but also "risks wrongful convictions."[402]

A recent California case that turned on social media companies' refusal to turn over such records illustrates the unfairness of this practice, as well as its questionable constitutional footing. California charged Lee Sullivan with murder on a shaky case: Only one witness—Mr. Sullivan's ex-girlfriend—claimed that he was involved with the crime.[403] Mr. Sullivan accordingly subpoenaed social media companies for his ex-girlfriend's communications to show that she had lied about his involvement with the murder as revenge for him breaking up with her.[404] Had the records been produced and shown as much, they would have devastated the government's primary evidence against Mr. Sullivan, presumably resulting in a not-guilty verdict.

Mr. Sullivan never received those records and instead was convicted after trial without them.[405] For over *six years*, the social media companies have fought disclosure at every level of the California courts, and all the way to the Supreme Court, arguing that the SCA prohibited them from turning over the materials.[406]

There is no question that the privacy rights of a third party deserve some respect, just as they do when the police are investigating a crime.[407] But those rights can and should be balanced with a defendant's need for, and constitutional entitlement to, exculpatory evidence. Authorizing the government to obtain inculpatory evidence while categorically prohibiting the defense from accessing that evidence is not the answer. The answer is to provide a statutory mechanism

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[400] 18 U.S.C. § 2702(a).
[401] *See* 18 U.S.C. §§ 2702(b), 2703.
[402] Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Investigations*, 68 U.C.L.A. L. REV. (forthcoming 2021) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428607. The specifics of the constitutional conflict can vary, but the core issue is that a person accused of a crime has a Sixth Amendment right to subpoena favorable evidence. *See* U.S. CONST., amend. VI. To the degree that the SCA purports to prohibit companies from complying with that constitutional command, then it would seem to be unconstitutional.
[403] Facebook, Inc. v. Superior Court, 4 Cal. 5th 1245, 1257 (2018).
[404] *Id.*
[405] Brief in Opp. for Respondent Lee Sullivan at 5, *Facebook, Inc.*, 4 Cal. 5th 1245 (No. 19-1006).
[406] *See* Petition for Writ of Certiorari, *Facebook, Inc.*, 4 Cal. 5th 1245 (No. 19-1006).
[407] In addition to standing on their statutory rights, the social media companies purported to be standing up for the privacy rights of the third parties whose accounts they hold. *Id.* at 15–21.

expressly granting people accused of crimes access to electronic records to present their defense (including social media records). At a minimum, Congress should add a "saving provision" expressly providing that the statute does not prohibit disclosing information "otherwise required by law."[408]

XII. Enact Open-File Discovery and Ensure Fair Trials

A. Reform Recommendations: Summary

- Pass legislation to enact a mandatory open-file discovery rule in federal criminal cases. Require prosecutors to automatically disclose all discovery in a timely manner, early enough in the pretrial process that the accused can consider any evidence in determining whether to take their case to trial or plead guilty.

- At a minimum, pass legislation that requires early disclosure of all evidence that is potentially favorable or exculpatory, without any consideration of whether the evidence meets the traditional "materiality" standard that allows prosecutors to withhold evidence.

- Pass legislation requiring thorough and early investigation and disclosure of all complaints and investigations into local police officers involved in cases that are ultimately charged in federal court, as well as any allegations of involvement with white supremacist organizations. This investigation and disclosure requirement should apply to proven, unproven, and under-investigation allegations.

- Require federal prosecutors to keep a database of all credibility findings regarding local or federal law enforcement officers and require disclosure to the defense on a case-by-case basis. At a minimum, the database should include all adverse credibility findings by federal and local courts in their district. Failure to expeditiously put such a system in place should warrant a rebuttable presumption of discovery sanctions.

- Pass legislation regulating the use of confidential informants in federal criminal cases.
    - Require a presumption of early disclosure of informant identity and information.
    - Require agents and prosecutors to record their conversations with informants and cooperators. At a minimum, require contemporaneous documentation of the date and content of each meeting.
    - Require pretrial reliability hearings before allowing a cooperator to testify.
    - Prohibit federal law enforcement agents and prosecutors from relying on evidence gathered from "John Doe" warrants to support federal prosecutions. At a minimum, pass legislation requiring federal law enforcement agents and prosecutors to obtain identifying and criminal history information for any John Doe informant who is relied on to support a federal prosecution.
    - Require federal law enforcement agents and prosecutors to provide documentation to the federal judge regarding steps taken to independently vet and verify the reliability of each John Doe's information.

[408] Wexler, *supra* note 402, at 46–47.

- These revisions should be guided by our *Touchstones for Proposed Legislation to Reform Criminal Discovery*, *infra* Part J.

In our criminal legal system, all people who are charged with a crime have a constitutional right to mount a complete defense.[409] Protecting this right is crucial to the integrity of the system. In addition, prosecutors are supposed to pursue truth and justice.[410] This involves both zealously advocating for the government's interest and ensuring that every person accused of a crime is treated fairly. At times, these interests conflict and threaten to jeopardize the integrity of the system. Nowhere is this more apparent than in the modern doctrine governing pretrial discovery in federal criminal cases.

A. The Need for Broad Discovery Reform

Discovery is the process by which parties obtain information and evidence from each other. In federal civil cases, both parties are entitled to discovery of any piece of evidence held by the other side. Parties must preserve all potentially relevant evidence, their attorneys must seek out that evidence, and each side is entitled to written and oral interviews of key witnesses.[411] But in federal criminal cases, discovery is much more limited. The government can destroy evidence that would be preserved in the civil context; the defense must restrict their discovery requests to specific pieces of evidence set forth in Rule 16 of the Federal Rules of Criminal Procedure, and the defense is nearly always prohibited from interviewing government witnesses.

Congress should pass a law requiring open-file discovery of the government's evidence in federal criminal cases, similar to the standard used in civil cases.[412] This law should have

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[409] *See, e.g.*, Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, THE CHAMPION 26 (May 2013), https://www.nacdl.org/Article/May2013-PursuingDiscoveryinCriminalCas ("[A]n effective argument can be made that the Sixth and Fourteenth Amendments to the U.S. Constitution require full disclosure to the defense of all records and materials prior to trial in a criminal case.")

[410] Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is *not that it shall win a case, but that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor –indeed, he should do so. But, *while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one*.") (emphasis added).

[411] FED. R. CIV. P. 26–37.

[412] "Mandatory and open-file discovery, in which prosecutors make their entire case file available to the defense and disclose particular items at required times, leads to a more efficient criminal justice system that better protects against wrongful imprisonment and renders more reliable convictions." THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf [hereinafter Expanded Discovery Review].

teeth, such as a presumption of sanctions for failure to disclose. Even when prosecutors pledge in court to comply with their discovery obligations, it is not uncommon for the defense attorney to learn later that some critical piece of evidence was destroyed or not turned over—sometimes through concealment, but most often through sheer inattentiveness.

At a minimum, Congress should pass a law that requires prosecutors to automatically disclose all relevant or favorable evidence to the defense early enough in the pretrial process that the accused can consider any favorable evidence in determining whether to take their case to trial or plead guilty. As one federal judge said in responding to a survey about criminal discovery practices: "[A] move toward a completely open file approach from the prosecution, with appropriate discovery from the defense, is more likely to lead to a fair result, which increases public confidence in the system."[413]

Broader criminal discovery is necessary to enable the defense to conduct a full and complete pretrial investigation. Many defendants—especially those who are innocent of the crime for which they have been charged—are "not equipped to provide their attorneys with the information needed for an effective investigation."[414] By contrast, prosecutors and law enforcement agents are sophisticated actors who have well-established and well-funded investigatory processes.[415]

Open-file discovery would also enhance access to effective assistance of counsel for indigent clients and safeguard the presumption of innocence. Defense counsel must be able to assess and respond to the case against their client, *especially* in the pretrial context. Since "[t]he vast majority of cases never proceed to trial, . . . it is the attorney's work in the preparation of the case" that is crucial to ensure a just outcome.[416] Defense attorneys are severely hampered by the limited discovery granted under Rule 16 and *Brady v. Maryland*.[417] It is fair to say that this

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[413] FED. JUD. CTR., A SUMMARY OF REPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 20 (2011), https://www.uscourts.gov/sites/default/files/rule16rep_2.pdf [hereinafter RULE 16 SURVEY RESPONSES].
[414] Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1100 (2004), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1898&context=ulj.
[415] Scott Hardy, Note, *The Right to a Complete Defense: A Special* Brady *Rule in Capital Cases*, 87 S. CAL. L. REV. 1489, 1497 (2014), https://southerncalifornialawreview.com/wp-content/uploads/2014/09/87_1489.pdf ("The government has a number of investigative advantages over the defense in preparing its case: the government is able to begin gathering evidence immediately after the crime is discovered; the government has experienced personnel with expert training, sophisticated investigative equipment and facilities, and cooperation from other law enforcement agencies; the government usually has the cooperation of citizens in gathering evidence and witnesses; and the government can use pretrial procedures (such as grand jury investigations or coroner inquests) as information gathering tools. In contrast, defendants often have very limited resources...") (internal citations omitted).
[416] Klinkosum, *supra* note 409.
[417] Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1308–09 (1988), https://www.jstor.org/stable/1122557. "A reviewing court that uses outcome-determinative analysis determines whether a given error or event affected the outcome of lower court proceedings." *Id*. at 1298

"highly restrictive" discovery regime in fact "constitutes government interference with" the constitutional guarantee of effective assistance of counsel.[418] This injustice disproportionately burdens indigent defendants with appointed counsel whose ability to acquire evidence independently is understandably constricted by limited resources. The outcome of this disparity—a legal system where a person's ability to adequately prove their innocence hinges on their financial resources—is antithetical to the foundational values that undergird our system.[419]

B. The Flaws of the *Brady* Doctrine and the Need for Clear Standards

In *Brady v. Maryland*, the Supreme Court declared that "our system of the administration of justice suffers when any accused is treated unfairly."[420] But the current standard is unfair, inefficient, and costly. Congress should take immediate action to protect this right and provide much-needed clarity.

One problem with the narrow scope of discovery in criminal cases is that the defense is not automatically entitled to any piece of evidence—even evidence that is favorable and might exculpate the accused at trial. Under the rule the Supreme Court set forth in 1963 in *Brady*, a prosecutor's failure to provide exculpatory evidence will only constitute a violation of the defendant's rights if the withheld evidence "is material either to guilt or to punishment."[421] In the *Brady* context, the word "material" has a very specific meaning. Evidence is "material" only if there is a reasonable probability that it will affect the outcome of the accused's trial or sentencing—that is, if it will change the result.[422]

This "materiality" standard has wreaked havoc on our justice system. Congress must legislate a new standard that eliminates the materiality requirement.

The problems with the materiality requirement are legion.[423] At the most basic level, the materiality requirement exempts a prosecutor from disclosing to the defense all sorts of evidence that might be relevant at trial or might mitigate the accused's sentence. It allows a prosecutor to

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n.1. Using such analysis, the defendant bears the burden of proving the impact of an error on the outcome of a proceeding. *Id*. at 1308. The standard for materiality established in *Bagley* (evidence is material only if there is a reasonable probability that its disclosure to the defense would have changed the result of the proceeding) means that, unlike with harmless error analysis, "convictions will stand when neither party would be able to carry the burden of proof." *Id*. at 1308. This creates a substantial obstacle for defendants, and some have even gone so far as to claim that such outcome-determinative tests are "equivalent to requiring the defendant to prove his innocence." *Id*. at 1308–09 & n.62.

[418] *Id*.

[419] For a discussion of the many benefits of reform, see generally EXPANDED DISCOVERY REVIEW, *supra* note 412.

[420] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[421] *Id*.

[422] "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

[423] NAT'L ASS'N OF CRIM. DEF. LAW., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES (2014), https://www.nacdl.org/getattachment/d344e8af-8528-463c-bba4-02e80dfced00/material-indifference-how-courts-are-impeding-fair-disclosure-in-criminal-cases.pdf.

withhold evidence—even evidence that has the potential to negate the guilt of the accused, impeach a witness, or lower the accused's sentence—any time the *prosecutor* thinks that the evidence is unlikely to change the result of the trial or sentencing.[424] As Justice Thurgood Marshall warned in 1985, the *Brady* materiality requirement "enabl[es] prosecutors to avoid disclosing obviously exculpatory evidence" by deeming that evidence nonmaterial.[425] This is wrong. The fact that evidence is favorable, helpful, exculpatory, or mitigating should be sufficient to require its disclosure.

This standard puts the prosecutor in the difficult—if not impossible—position of serving as both a strong advocate for the government's interests *and* as an impartial decisionmaker on whether evidence will be helpful to the defense: "[T]he prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case."[426] Relatedly, the materiality requirement expects prosecutors to put themselves in the shoes of the defense attorney and consider how their adversary might view a given piece of evidence. "What may appear exculpatory to a defense attorney—or lead to the discovery of exculpatory evidence through additional investigation—may appear only tangentially relevant to a prosecutor."[427]

It is especially important to eliminate the materiality requirement in the *pretrial* context, as the relative weight of a piece of evidence cannot yet be considered within the full evidentiary context of the case. As the Washington, D.C. Court of Appeals said in a related context, "[T]here can be no objective, ad hoc way for a prosecutor to evaluate *before* trial whether [evidence] will be material to the outcome."[428] During the pretrial phase, any materiality analysis a prosecutor conducts is prospective and utterly speculative. Notably, *Brady* is "the only area of constitutional criminal procedure in which the fairness of a prosecutor's pretrial decision is governed by an outcome determinative standard."[429] Moreover, there is no way for a court to police the prosecution's compliance with *Brady* during the pretrial phase of a case because the prosecution's file is a black box that neither the court nor the defense can access.

Brady violations are a systemic, longstanding, and ongoing problem. A study by the North California Innocence Project of Santa Clara University School of Law found *Brady* violations to be "among the most pervasive forms of prosecutorial misconduct."[430] There has been at least one Supreme Court case involving *Brady* violations every decade since *Brady* was

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[424] Klinkosum, *supra* note 409.
[425] *Bagley*, 473 U.S. at 700 (Marshall, J., dissenting) (explaining that a materiality standard means "there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial[,] . . . permit[ting] prosecutors to withhold with impunity large amounts of undeniably favorable evidence").
[426] *Id*. at 696 (Marshall, J., dissenting).
[427] Klinkosum, *supra* note 409.
[428] *In re* Kline, 113 A.3d 202, 208 (D.C. 2015) (emphasis added).
[429] Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming* Brady, 56 N.Y.L. SCH. L. REV. 969, 975 (2012), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1817&context=lawfaculty.
[430] KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 36 (2010), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1001&context=ncippubs.

decided, and in the last decade alone, there have been *five* cases involving prosecutors' failures to turn over exculpatory evidence.[431] Given that the Supreme Court "accepts less than one percent of cases for review, it would seem that the number of cases involving *Brady* claims, and for which relief was granted, signifies a systemic problem with prosecutors failing to disclose *Brady* material."[432] Just this month, a state judge in Queens threw out the convictions of three men who had spent the last 24 years in prison.[433] Prosecutors in the 1996 case never turned over multiple pieces of exculpatory evidence, including police reports "showing that investigators had linked the killings to other men."[434] In releasing the men, the judge opined that the prosecution in these cases had "completely abdicated its truth-seeking role."[435]

This standard is untenable and leads to manifestly unjust results for the accused. The right to a complete defense hinges on defense counsel's ability to evaluate all of the relevant evidence in a case. The materiality requirement gives prosecutors too much discretion and expects them to act against their own self-interest and in contravention of their own adversarial role.[436] The copious evidence of prosecutors' inability to abide by their *Brady* obligations in the ensuing sixty-odd years shows it to be a failed experiment. And such violations have disproportionately impacted people of color.

C. Racial Equity and the Need for Discovery Reform

Legislation is also needed because *Brady* violations fall disproportionately on people of color and are especially prevalent in cases where the potential prison time is highest, like murder. A 2017 study by the National Registry of Exonerations found that more than half of all murder exonerations involved *Brady* violations.[437] In the exonerations, official misconduct—including *Brady* violations—occurred at a rate of 76% for cases involving black defendants, compared to 63% for white defendants.[438] Fully 87% of death-row exonerations of black defendants involved

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[431] Wearry v. Cain, 136 S. Ct. 1002 (2016) (per curiam); Smith v. Cain, 565 U.S. 73 (2012); Connick v. Thompson, 563 U.S. 51 (2011); Cone v. Bell, 556 U.S. 449 (2009); District Attorney's Office v. Osborne, 557 U.S. 52 (2009).
[432] Klinkosum, *supra* note 409.
[433] Troy Closson, *They Spent 24 Years Behind Bars. Then the Case Fell Apart.*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/nyregion/queens-wrongful-convictions.html.
[434] *Id.*
[435] *Id.*
[436] *See Federal Discovery Reform*, NAT'L ASS'N OF CRIMINAL DEF. LAW. (Mar. 1, 2021), https://www.nacdl.org/Content/FederalDiscoveryReform ("The materiality standard asks a prosecutor to forecast whether disclosure of a particular piece of information would probably cause them to lose the trial; this standard has often been used to justify withholding extremely favorable information on the ground that it is 'not material' since the prosecutor still believes they can win the trial despite this information. In addition, prosecutors rely on the materiality standard to withhold inadmissible information even though its disclosure may lead to the discovery of admissible favorable information.")
[437] NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 6 (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.
[438] *Upcoming Supreme Court Cases Could Clarify Standard Requiring Disclosure of Exculpatory Evidence*, DEATH PENALTY INFO. CTR. (Mar. 17, 2017), https://deathpenaltyinfo.org/news/upcoming-supreme-court-cases-could-clarify-standard-requiring-disclosure-of-exculpatory-evidence.

official misconduct, including *Brady* violations.[439] Meanwhile, an "analysis of recent death-row exonerations found that police or prosecutorial misconduct was a major factor in 16 of the last 18 exonerations."[440] These disparities in the death row context spurred North Carolina to adopt open-file discovery in 2004.[441] In his recent confirmation hearings, AG Garland testified about the death penalty's disparate impact on Black individuals and highlighted the many exonerations of Black individuals sentenced to death.

D. The Due Process Protections Act Does Not Prevent Discovery Disclosure Problems

The Due Process Protections Act of 2020 (DPPA) was a good first step toward addressing the criminal discovery crisis, but unfortunately does not rectify the fundamental problems with the current disclosure rules.

Recent high-profile *Brady* violations by the U.S. Attorney's Office for the Southern District of New York serve as a stark illustration that additional legislative action in this area is badly needed. Prosecutors charged Ali Sadr with evasion of sanctions against Iran, but failed to disclose a crucial piece of exculpatory evidence before trial. The jury voted to convict Mr. Sadr, but the judge found that the discovery violation constituted a "grave dereliction[] of prosecutorial responsibility" and vacated the jury's verdict.

The judge did not conclude that the discovery violation was intentional,[442] but stressed that prosecutors have an "obligation to ensure that their disclosures to the defense are complete. . . . These obligations require affirmative diligence, not only an absence of bad faith . . . . [T]he prosecutor's first duty is not to prevail in every case but to ensure 'that justice shall be done.'"[443] The judge also noted the complexity of materiality determinations in the pretrial context, finding that it was not clear "that the AUSAs in fact appreciated [the evidence's] exculpatory value at the time, however apparent it may be in hindsight."[444] This highlights how the current standards lead to substantive disagreement and confusion, even where misconduct is unintentional.[445] As the

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[439] *Reports Find Record Number of Exonerations in 2016, Blacks More Likely to be Wrongfully Convicted*, DEATH PENALTY INFO. CTR. (Mar. 8, 2017), https://deathpenaltyinfo.org/news/reports-find-record-number-of-exonerations-in-2016-blacks-more-likely-to-be-wrongfully-convicted.

[440] *Upcoming Supreme Court Cases Could Clarify Standard Requiring Disclosure of Exculpatory Evidence*, DEATH PENALTY INFO. CTR. (Mar. 17, 2017), https://deathpenaltyinfo.org/news/upcoming-supreme-court-cases-could-clarify-standard-requiring-disclosure-of-exculpatory-evidence.

[441] EXPANDED DISCOVERY REVIEW, *supra* note 357, at 8.

[442] United States v. Ali Sadr Hashemi Nejad, No. 18-CR-00224, at *3 (S.D.N.Y. Feb. 17, 2021), Dkt. 387.

[443] *Id.* at *16 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

[444] *Sadr Hashemi Nejad*, No. 18-CR-000224, at *8 (S.D.N.Y. Feb. 22, 2021), Dkt. 399.

[445] Numerous other high-profile *Brady* violations have occurred in the last two decades: Former U.S. Sen. Theodore "Ted" Stevens: In re Special Proceedings, No. 09-MC-198 (D.D.C. 2012) (prosecution withheld several critical pieces of evidence of Senator Ted Stevens' innocence, introduced false business records, and refused to disclose grand jury testimony of an exculpatory witness by representing the testimony was not "material"); United States v. Aguilar, No. CR-10-1031(A) (C.D. Cal. 2011) (prosecution withheld grand jury transcripts that substantially weakened the government's case); United States v. Rivas, 377 F.3d 195 (2d Cir. 2004) (prosecution intentionally withheld a primary witness statement that included an admission of guilt, thereby completely exculpating the defendant. The Second Circuit threw out the defendant's conviction after the admission came to light after trial, but if it had

Sadr court concluded, "only institutional reforms can ensure these mistakes are not repeated."[446]

E. Making Discovery More Fair

Legislation is needed to expand discovery under Rule 16 and to provide clear timelines for disclosure of evidence, exculpatory or not.

Rule 16 requires the prosecution to disclose to the defense only a narrow subset of the evidence in the prosecutor's file. There is no requirement that the government disclose most law enforcement reports from their investigation nor summaries of what a witness said, nor must the government typically preserve its agents' notes. Simply put, this "limited discovery subverts the effectiveness of the adversarial system."[447] It is embarrassing and unfair that federal civil litigants receive so much more information about their cases, so much earlier, when so much less is on the line. Rule 16 should be amended to require mandatory government disclosure of information similar to that required under the Federal Rules of Civil Procedure.[448]

Witness statements are especially problematic. Except where *Brady* applies, the government's only obligation in this area is to disclose *the witness's* prior statements and to do so only *after* the witness testifies at trial.[449] That is absurdly late. "Early disclosure of information, especially police reports and witness statements, is essential to locating and memorializing potentially relevant evidence."[450] Witness statements disclosed in the middle of trial are effectively useless for investigation and are nearly impossible to incorporate into a cross-examination on the fly.[451]

These timing problems are not unique to Rule 16 documents. Exculpatory evidence under *Brady* should also be disclosed early enough in a case to be of use. Such evidence is especially critical in deciding whether a client should plead guilty or go to trial. Beyond that, late disclosure can unjustly subject someone to criminal charges and result in the unnecessary expenditure of untold sums of federal money if attorneys prepare, litigate, and defend a case that is ultimately dismissed. In one case, for example, the prosecutor produced pivotal documents that he characterized as "at least potentially" subject to *Brady* and immediately dismissed a related charge. Had the prosecutor reviewed those documents earlier in the case, the defense would have saved much time investigating and preparing a defense.

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remained undisclosed the defendant would have spent over ten years in prison); United States v. Washington, 263 F. Supp. 2d 413 (D. Conn. 2003) (prosecution failed to disclose that the 911 caller whose testimony was central to its case had previously been convicted of making a false emergency report).

[446] United States v. Ali Sadr Hashemi Nejad, No. 18-CR-00224, at *9 (S.D.N.Y. Feb. 17, 2021).

[447] EXPANDED DISCOVERY REVIEW, *supra* note 419, at 7.

[448] *See id.* at 8.

[449] These witness statements are typically known simply as "Jencks," after the Jencks Act, where the obligation is codified. 18 U.S.C. § 3500(e)(2); FED. R. CRIM. P. 26.2(f)(2)..

[450] EXPANDED DISCOVERY REVIEW, *supra* note 419, at 5.

[451] Klinkosum, *supra* note 409 ("Effective cross-examination is entirely destroyed by the denial of access to information that would serve as the basis for cross-examination. As Justice Brennan observed, '[w]here denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought.'") (citing Pennsylvania v. Ritchie, 480 U.S. 39 (1987)).

The narrowness of the required disclosures is also deeply unfair.[452] Federal agents and prosecutors can interview a witness repeatedly, take copious notes on that interview, and write any number of reports on it. Yet none of those written documents must be disclosed at *any* time unless they are a "substantially verbatim" recording of the witness's remarks or constitute *Brady* material.[453] There are also disturbing reports of federal agents intentionally refraining from taking notes or writing reports of witness interviews to sidestep any production requirement, or even destroying their notes after writing a report. It is a challenge to prepare a defense without knowing the prosecution's evidence.

F. Systemically Address Failure to Investigate and Disclose Local Police Misconduct

In *Giglio v. United States*, the Supreme Court required the government to disclose evidence that undermines the testimony of any of its witnesses as part of its *Brady* obligations.[454] *Giglio* evidence includes, for example, any information that undermines a witness' credibility, prior inconsistent witness statements, evidence of witness bias, and more. All of the problems that apply to *Brady* in general also apply to *Giglio* in particular. Two areas of disclosure requirements pose special problems for *Giglio*: police misconduct (discussed in this section) and informants, *infra* Part XII.G.

Given the abundant evidence of misconduct and racial disparities in local policing, legislation is needed to ensure that the federal government thoroughly investigates all local police officers involved in federal criminal cases and discloses to the defense any information that might impact the credibility of a given police department or officer, including evidence of ties to white supremacist organizations.

Federal criminal jurisdiction has expanded enormously over the last century, accompanied by increased collaboration between federal law enforcement agencies and local police forces.[455] Such collaboration has been on the rise since September 11th. "In the past several decades, the Federal government has assumed a significant role in local law enforcement" in connection with the War on Drugs, and such involvement has "intensified" over time.[456] In fact, in a national survey of local and state police agencies, 75% reported that the

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[452] EXPANDED DISCOVERY REVIEW, *supra* note 419, at 2 ("Though an open-file policy grants access to all material contained in the prosecution's file, information must actually be in the file for the policy to have value.").
[453] FED. R. CRIM. P. 26.2(f)(2).
[454] 405 U.S. 150 (1972).
[455] *See, e.g.*, MALCOLM RUSSELL-EINHORN ET AL., FEDERAL-LOCAL LAW ENFORCEMENT COLLABORATION IN INVESTIGATING AND PROSECUTING URBAN CRIME, 1982-1999: DRUGS, WEAPONS, AND GANGS 11 (2000), https://www.ojp.gov/pdffiles1/nij/grants/201782.pdf ("Federal law enforcement could not have expanded as it did in the 20th Century without a steady enlargement of Federal criminal jurisdiction."); Daniel M. Stewart, *Collaboration Between Federal and Local Law Enforcement: An Examination of Texas Police Chiefs' Perceptions*, 4 POLICE Q. 411 (2011) ("[A]pproximately 95% of all federal criminal cases in 1997 could have been tried in state courts.").
[456] Russell-Einhorn et al., *supra* note 455, at 1.

assignment of their personnel to federal task forces had increased or increased significantly in the two decades from September 11, 2001 to 2011.[457]

Today, there are many joint and multiagency task forces composed of federal and state law enforcement agents.[458] The largest such task force is the giant Organized Crime Drug Enforcement Task Forces (OCDETF), which is aimed at combatting drug trafficking.[459] The OCDETF includes "over 500 federal prosecutors, 1,200 federal agents, and some 5,000 state/local police," with federal agents drawn from the DEA, the ATF, the FBI, and many other agencies.[460] The task force also has permanent "Strike Forces" located in eighteen major U.S. cities and San Juan.[461]

The prevalence of collaboration between federal and state law enforcement raises new concerns in the wake of the killing of George Floyd, especially given the many studies finding racial disparities in policing[462] and overt racism among police. It has been argued that the presence of joint federal/state strike forces in cities with "progressive prosecutors . . . do[es] an end-run around a core tenet of the progressive prosecutor movement, which is to reduce the disproportionate impact of mass incarceration on communities of color."[463] In addition, the FBI and others have uncovered new evidence of "explicit racism" within policing agencies,[464] including copious data showing "white supremacist infiltration of law enforcement."[465] In a recent case of withheld exculpatory evidence, the central police officer in the case was documented as having ties to a white supremacist motorcycle law enforcement group, including being photographed wearing patches with the Confederate flag, as well as one reading, "I only speak English."[466] These concerns have taken on new urgency in the wake of the January 6, 2021, insurrection, which "only amplifies the need for . . . deep reform in American law

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[457] Stewart, *supra* note 455, at 413.
[458] *See, e.g.*, *id*. at 413 (discussing the fact that FBI Joint Terrorism Task Forces increased from 36 in 2001 to 102 in 2008).
[459] *About OCDETF*, U.S. DEP'T OF JUST. (last uptaded Mar. 1, 2021) https://www.justice.gov/ocdetf/about-ocdetf.
[460] *Id*.
[461] A map of the Strike Forces can be found at *OCDETF Strike Forces*, U.S. DEP'T OF JUST. (last updated July 21, 2020), https://www.justice.gov/ocdetf/ocdetf-strike-forces.
[462] *See* Balko, *supra* note 159 (collecting studies).
[463] Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump's DOJ*, 1 HASTINGS J. CRIME & PUNISHMENT 195, 212 (2020), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1009&context=hastings_journal_crime_punishment.
[464] Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement,* BRENNAN CENTER FOR JUSTICE (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law
[465] FED. BUREAU OF INVESTIGATION, INTELLIGENCE ASSESSMENT, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 4 (2006), http://s3.documentcloud.org/documents/402521/doc-26-white-supremacist-infiltration.pdf.
[466] Edwin Brown's Sur-Reply Opposing The Government's Motion for Reconsideration at 8, United States v. Brown, 15-CR-00564 (N.D. Ill. 2015), Dkt. 88.

enforcement."[467] In this context, it is heartening that AG Garland spoke of "the pursuit of white supremacists" as a central component of his agenda for the DOJ.[468]

Brady/*Giglio* also requires prosecutors to obtain and disclose *Giglio* information held by law enforcement agencies with whom they are working.[469] But when federal prosecutors and agents work closely with local police who lack strict internal accountability mechanisms for investigating and recording dishonest behavior, it is impossible to ensure that federal prosecutors comply with their *Brady*/*Giglio* obligations. Likewise, there is a risk of undermining the reliability of federal convictions. DOJ's investigation into the Chicago Police Department (CPD) provides a rare window into these dangers. The DOJ found that CPD's internal accountability mechanisms appeared to be "broken."[470] "[I]nvestigations foundered because of a pervasive cover-up culture among CPD officers," including pervasive, uninvestigated, and unpunished dishonesty.[471] The CPD did not even have a "system in place to ensure that all officer

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[467] William Finnegan, *Law Enforcement and the Problem of White Supremacy,* THE NEW YORKER (Feb. 27, 2021), https://www.newyorker.com/news/daily-comment/law-enforcement-and-the-problem-of-white-supremacy.

[468] *Id.*

[469] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[470] U.S. DEP'T OF JUST., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 46 (2017), https://www.justice.gov/opa/file/925846/download.

[471] *Id.* at 45, 74–77. Some of the DOJ's findings on this point are so disturbing as to be worth quoting in full given that they describe a police department to which members of state/federal task forces belong:

> We cannot determine the exact contours of this culture of covering up misconduct, nor do we know its precise impact on specific cases. What is clear from our investigation, however, is that a code of silence exists, and officers and community members know it. This code is apparently strong enough to incite officers to lie even when they have little to lose by telling the truth. In one such instance, an officer opted to lie and risk his career when he accidentally discharged his pepper spray while dining in a restaurant—a violation that otherwise merits minor discipline. Even more telling are the many examples where officers who simply witness misconduct and face no discipline by telling the truth choose instead to risk their careers to lie for another officer. We similarly found instances of supervisors lying to prevent IPRA from even investigating misconduct, such as the case discussed elsewhere in this Report in which a lieutenant provided a video to IPRA but recommended that the case be handled with non-disciplinary intervention rather than investigated, describing the video as only depicting the use of "foul language" and affirmatively denying that it contained any inflammatory language or that the victim made any complaints — both patently false statements as demonstrated by the video. High ranking police officials and rank-and-file members told us that these seemingly irrational decisions occur in part because officers do not believe there is much to lose by lying.
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> Rather than aggressively enforcing and seeking discharge for violations of CPD's Rule 14, which prohibits making false statements, enforcement in this area is rarely taken seriously and is largely ignored. . . . In practice, IPRA rarely asserts Rule 14 charges when officers make false exculpatory statements or denials in interviews about alleged misconduct, even when the investigation results in a sustained finding as to the underlying misconduct. This is true even in some cases we reviewed in which video shows the accused officer lied about the underlying misconduct or tried to cover up evidence. . . . Nor do investigators hold witness officers responsible for covering up misconduct of others.

disciplinary findings bearing on credibility, . . . are supplied to the State's Attorney's Office and criminal defendants[.]"[472]

Congress can directly address and ameliorate this alarming situation by passing legislation that requires federal prosecutors and law enforcement agencies to thoroughly investigate all local police departments and local police officers who are involved in their cases and to quickly disclose that information to the defense in federal criminal cases.

Such legislation should draw on the excellent proposal of Georgetown Professor Vida B. Johnson, who identifies "an epidemic of white supremacists in police departments."[473] *Federal* prosecutors and agents should be required to actively investigate and disclose any ties between the local police officers on whom they rely and white supremacist or militia organizations.[474] This must include "examining their social media accounts and monitoring their emails and texts for key words that could be suggestive of racial animus."[475] In addition, federal prosecutors and agents should, at a minimum, locate *any* complaints or investigations against local police and likewise disclose those to the defense. Disclosure should include open complaints and even unsubstantiated or unsustained complaints —as the Chicago example shows, they too bear directly on the officer's credibility.

Finally, the law should require federal prosecutors to keep a database of all credibility findings regarding local or federal law enforcement officers and require disclosure to the defense on a case-by-case basis. At a minimum, the database should include all adverse credibility findings by federal and local courts in their district. Failure to expeditiously put such a system in place should warrant a rebuttable presumption of discovery sanctions.

This reform would rectify another common "black box" problem illustrated by a set of cases in one federal court. In the case of *United States v. Thompkins*, the defense filed a motion to suppress evidence in a case that turned on the credibility of a particular Chicago police officer. The defense attached a report from the Chicago Civilian Office of Police Accountability (COPA) finding that officer not credible.[476] Subsequently, the same U.S. Attorney's Office put the same

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Id. at 74–76.

[472] *Id.* at 76–77.

[473] Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 205 (2019), https://law.lclark.edu/live/files/28080-lcb231article2johnsonpdf; *see also Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform*, 116th Cong. 11 (2020) (statement of Vida B. Johnson, Associate Professor of Law, Georgetown University).

[474] *See Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform*, 116th Cong. 12 (2020) (statement of Vida B. Johnson, Associate Professor of Law, Georgetown University) (proposing legislation requiring "[p]rosecutors . . . to investigate their officers and turn that information over for use at a public trial").

[475] Johnson, *supra* note 473, at 237–38.

[476] Michael Thompkins's Post-Hearing Memorandum in Support of Motion to Suppress at 6, United States v. Thompkins, No. 18-CR-664 (N.D. Ill. Apr. 16, 2019), Dkt. 40 (presenting a report from COPA

officer on the stand during another suppression hearing in the same federal courthouse.[477] Although the officer's credibility was at issue again,[478] the government did not disclose the COPA report. Requiring the government to keep a database of adverse credibility findings and to disclose them to the defense would rectify this problem.

G. The Problem of Confidential Informants

The use of confidential informants by federal law enforcement agencies has drawn scrutiny from Congress and scholars.[479] In 2016, for example, the Office of the Inspector General (OIG) conducted an audit of the DEA's confidential source program and concluded: "The deficiencies we identified in this audit raise significant concerns about the adequacy of the current policies, procedures, and oversight associated with the DEA's management of its Confidential Source Program."[480] For example, the DEAs mismanagement led to reactivating informants who had been deactivated due to misconduct and, in at least one case, reactivating a source who had previously lied under oath.[481] A 2017 OIG report found that the ATF's implementation of its confidential informant "policies did not ensure the level of oversight required by" DOJ, and that the ATF's ways of managing higher-risk informants "did not provide adequate oversight or management."[482] Others have described how law enforcement's reliance on informants negatively impacts communities of color: "Like mass incarceration, heavy informant use in such communities imposes collateral harms," including "erosion of personal relationships and trust."[483] These failures create serious concerns about the use of informants in federal cases.

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that found "[Officer] Farias detained the complainant without justification, continued that detention for an excessive period of time, and used force without justification," and concluding, "[Officer] Farias, whose testimony is essential to the government's version of events, was found to lack credibility less than three months after Mr. Thompkins's arrest in this case").

[477] United States v. Phillips, 430 F. Supp. 3d 463, 466 (N.D. Ill. 2020) (identifying Officer Farias as one of the Chicago police officers who testified at the hearing).

[478] *Id.* at 475 ("This is a classic case of circumstantial evidence standing alone presenting a close call, but the in-court testimony providing the ultimate answer."); *id*. at 481 (ultimately denying motion to suppress).

[479] *See, e.g.*, *Use of Confidential Informants at ATF and DEA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. 3–4 (Apr. 4, 2017), https://www.govinfo.gov/content/pkg/CHRG-115hhrg26553/pdf/CHRG-115hhrg26553.pdf (opening statement of Rep. Stephen F. Lynch); Alexandra Natapoff, *Snitching*, *supra* note 97, at 645–46 ("Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful.").

[480] OFFICE OF THE INSPECTOR GENERAL, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE PROGRAM iv (2016), https://oig.justice.gov/reports/2016/a1633.pdf.

[481] *Id.* at i.

[482] OFF. OF THE INSPECTOR GEN., AUDIT OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES' MANAGEMENT AND OVERSIGHT OF CONFIDENTIAL INFORMANTS 26 (2017), https://oig.justice.gov/reports/2017/a1717.pdf.

[483] Natapoff, *Snitching*, *supra* note 97, at 684.

Somewhere between approximately 15% to 45% of the blame for wrongful convictions can be laid at the feet of lying informants or cooperators.[484] Our commitment to fair trials and conviction integrity calls for reforms that focus specifically on ensuring informant and cooperator reliability. "The least transparent and most problematic informant arrangement occurs where the informant is 'flipped' by a law enforcement agent at the moment of initial confrontation and potential arrest" and begins cooperating on behalf of the government.[485] The agent typically does not record that interaction and may not even document it. The agent and cooperator thus wholly control the subsequent narrative of what happened during those early meetings.[486] Professor Ellen Yaroshefsky interviewed federal prosecutors in the Southern District of New York and documented their beliefs about cooperator reliability. As one of them memorably put it, "the black hole of corroboration is the time that cooperators and agents spend alone."[487]

Giglio requires prosecutors to disclose information bearing on an informant's credibility regardless of whether the agent has written it down. But prosecutors can't disclose what they don't know. In *United States v. Chavez*, for example, agents concealed from prosecutors their first two or three meetings with a cooperator.[488] The agents were ultimately forced to reveal the initial meetings days before the scheduled trial, but the absence of any contemporaneous documentation of the meetings allowed the agents to claim without contradiction that the informant's cooperation started *after* his unlawful drug dealing ended. That timeline mattered; had the cooperator been engaging in unauthorized criminal conduct while working for the government, prosecutors would have been forced to abandon the cooperator—and likely the case.

At the other end of the spectrum, prosecutors are not immune from structural and personal biases that can undermine their ability to assess cooperator and informant reliability. For example, prosecutors rely on corroboration to ensure that their cooperators are telling the truth.[489] But corroboration of verifiable facts still leaves room for cooperators to "embellish" key facts that can't be verified—including what was said during unrecorded conversations.[490] One prosecutor explained: "[A] cooperator can tell you about a telephone conversation he had with a defendant. When you ask for the date, the telephone records establish that they did, indeed, have a conversation on that date. So that's the corroboration . . . . You have no independent way to know the substance of the conversation."[491]

Moreover, when prosecutors meet with cooperators for debriefing, proffer, and testimony preparation sessions, there is always a risk that they may intentionally or unintentionally induce cooperators to present false information. Prosecutors inevitably develop personal relationships

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[484] *See supra* note 99.
[485] Natapoff, *Snitching*, *supra* note 97, at 659.
[486] *Id.*
[487] Yaroshefsky, *supra* note 100, at 936.
[488] *See generally* Manuela Chavez's Motion for Discovery and an Evidentiary Hearing at 1–5, United States v. Chavez, No. 16-cr-337 (June 5, 2019), Dkt. 142.
[489] Yaroshefsky, *supra* note 100, at 934.
[490] *Id.* at 935.
[491] *Id.* at 936.

with their cooperators ("falling in love with your rat") and sometimes place too much trust in their cooperators.[492] So, too, relying on an overly "rigid theory of guilt" can lead prosecutors to trust unreliable cooperators and to reject truthful evidence that doesn't fit with their theory.[493] Prosecutors can also over-identify with federal agents out of a desire to "get[] the bad guys off the street."[494] Coupling this with the cooperator's incentives for telling the government what they want to hear can lead to unreliable testimony: "[Federal prosecutors] often have a theory of the case and a specific factual scenario they believe to be true when they confront a cooperator. . . . [T]he AUSA will give the cooperator facts to get him to come clean. For instance, a cooperator might be explaining a drug deal differently from the information available to the agent and assistant. The assistant says, 'the agent said this and this happened. Are you sure that it happened the way you said it did?' The cooperator then pipes up . . . and tells you it happened the way the agent said."[495]

To make matters worse, the prosecutors Yaroshefsky interviewed admitted that "inconsistencies by cooperators in the debriefing sessions are often not disclosed" to the defense, despite *Giglio*.[496] Prosecutors themselves rarely take notes, and sometimes they even order agents not to take notes.[497] Of course, *Giglio* applies to inconsistent witness statements, whether oral and written. However, "[t]he prosecutor is paper conscious about its *Brady* obligations but not oral conscious," meaning when no notes are taken, nothing is disclosed.[498]

Three reforms that open up the informant/cooperation process would begin to resolve these problems. First, prosecutors and law enforcement should record—or, at the very least, contemporaneously document—all conversations with informants or potential. Recording would shed light on "the black hole of corroboration" when cooperators and agents spend time alone.[499] It also would help ensure proper *Giglio* disclosures about how cooperator testimony evolves across multiple meetings with agents or prosecutors. Second, pretrial "reliability hearings" for cooperator testimony, such as those called for by Professor Alexandra Natapoff, would ensure that an independent authority reviews the reliability of informant evidence, subject to cross-examination, before it can be presented to the jury.[500] Third, the same early disclosure of *Brady/Giglio* evidence proposed earlier in this testimony would help enable the defense to adequately investigate and challenge improper use of cooperator testimony.

H. Confidential Informants and John Doe Warrants

One particularly troubling issue arises in connection with informants in places like Chicago, where federal and local law enforcement agencies collaborate, but local law

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[492] *Id.* at 944.
[493] *Id.* at 945–48.
[494] Yaroshefsky, *supra* note 100, at 949–52.
[495] *Id.* at 960–61
[496] *Id.* at 961.
[497] *Id.* at 962.
[498] *Id.* at 962.
[499] Yaroshefsky, *supra* note 100, at 936.
[500] Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U.L. REV. 107, 112–29 (2006).

enforcement does not adhere to the standards required under federal law. Local police commonly rely on so-called "John Doe informants," confidential informants who are not registered and wish to stay anonymous.[501] In theory, even local warrants resting on John Doe informants must meet the same Fourth Amendment standards as in federal court. In practice, however, the "John Doe warrants" issued in state court do not always meet these standards. As collaboration between state and federal law enforcement agencies increases, a growing number of these John Doe warrants are entering the federal system, and some are based on fabricated or insufficiently documented information.[502]

The Supreme Court's test for finding probable cause and issuing a warrant based on a confidential informant in the federal system is rarely met by the lax state processes surrounding John Doe informants. In 1983, the Court held that magistrates must not issue warrants based on the unvarnished word of a confidential informant.[503] Under that test, courts should consider, among other things, whether the informant was acting against their own penal interest and whether the information they provided was corroborated.[504]

Problems arise when local judges sign John Doe search warrants despite minimal independent verification of the John Doe informant's claims.[505] For example, over a three-year period, police officers in Chicago who obtained search warrants for drug offenses *failed to find any drugs in 95% of executed searches*.[506] The problem of judges signing off on warrants where

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[501] *See, e.g.*, David McAfee, *Search Warrants Supported Mostly By Confidential Informant OK'd*, BLOOMBERG LAW (Nov. 18, 2019), https://news.bloomberglaw.com/us-law-week/search-warrants-supported-mostly-by-confidential-informant-okd. A 2014 study showed that approximately 38.5% of the prosecutions in southwestern Pennsylvania involved a complaint from a confidential informant. Rich Lord, *How data on confidential informants was gathered and analyzed*, PITTSBURGH POST-GAZETTE (Oct. 19, 2014), https://www.post-gazette.com/local/region/2014/10/19/How-data-on-confidential-informants-was-gathered-and-analyzed/stories/201410190077; Sam Charles, *City Watchdog calls for immediate changes to CPD's search warrant policy*, CHI. SUN TIMES (Jan. 22, 2021), https://chicago.suntimes.com/news/2021/1/22/22244631/chicago-police-raids-search-warrants-oig-inspector-general-changes-anjanette-young.

[502] *See, e.g.*, United States v. Glover, 755 F.3d 811, 814–16 (7th Cir. 2014).

[503] Illinois v. Gates, 462 U.S. 213, 240 (1983).

[504] *See Gates*, 462 U.S. at 241–46 (factors that support a finding of probable cause include whether the informant's information was based on personal knowledge, whether the information was inherently credible, whether the informant had previously given reliable information, the level of detail provided, whether the informant was acting against his penal interest, and police corroboration of the information); *see also* United States v. Buckley, 4 F.3d 552, 554, 557 (7th Cir. 1993) (finding probable cause when a confidential informant admitted that she had purchased cocaine from the defendant); United States v. Ciampa, 793 F.2d 19, 20–25 (1st Cir. 1986) (finding probable cause because the information provided by the named informant to a confidential informant was consistent with the information provided by the confidential informant); United States v. Jewell, 60 F.3d 20, 20–24 (1st Cir. 1995) (finding probable cause based on the consistency of two confidential informants and police corroboration).

[505] Dave Savini et al., *Chicago Police Raids Rarely Turn Up Drugs. So Why Do Judged Keep Signing Off on Bad Search Warrants?* CBS CHICAGO (Nov. 17, 2020), https://chicago.cbslocal.com/2020/11/17/chicago-police-raids-rarely-turn-up-drugs-so-why-do-judges-keep-signing-off-on-bad-search-warrants/.

[506] *Id.*

the police have not independently verified the informant's claims is well documented.[507] In some cases, judges ask no questions at all about the warrant presented.[508] Sham John Doe warrants—where the unnamed confidential informant doesn't even exist—are also shockingly common in Chicago, and are used by other local police departments as well.[509]

Loose standards and lax practices at the local level can enable outright criminal conduct. The high-profile trial of two Chicago Police Officers, Sgt. Xavier Elizondo and Officer David Salgado brought to light the problematic process local police officers use to obtain John Doe search warrants.[510] This Chicago prosecution arose, in part, because the police officers fabricated a John Doe affidavit to provide probable cause to issue a warrant.[511] On occasion, these same officers would bring confidential informants before a judge to claim that they were the source of information, when, in fact, they were not.[512] The officers were convicted last fall and are now awaiting sentencing, but the systemic failures that allowed these warrants to be issued in the first place have not been remedied.[513]

This is not a matter of a few bad apples. Some local judges systematically apply a much lower level of scrutiny to John Doe warrants—scrutiny that falls far short of federal standards.[514] Some federal courts have even explicitly recognized that the state processes for obtaining John Doe warrants do not meet the probable cause requirements of the federal system. For example, in *United States v. Glover*, the Seventh Circuit examined a warrant obtained by local law enforcement on the basis of a John Doe informant.[515] The court noted that the complaint omitted all information regarding the informant's credibility—including "his criminal record, especially while serving as an informant; his gang activity; his prior use of aliases to deceive police; and his

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[507] *Id.*; *see also* Dave Savini, *CPD Officers Raid Wrong Home, Point Guns At 9-Year Old Boy, "My Life Flashed Before My Eyes,"* CBS CHICAGO (Aug. 14, 2018), https://chicago.cbslocal.com/2018/08/14/chicago-police-cpd-raid-wrong-home-point-guns-at-9-year-old-boy-peter-mendez/.

[508] Savini, *supra* note 505.

[509] *See, e.g.*, Paige Fernandez & Carl Takei, *The use of 'confidential informants' can lead to unnecessary and excessive police violence*, ACLU (Feb. 25, 2019), https://www.aclu.org/issues/criminal-law-reform/reforming-police/use-confidential-informants-can-lead-unnecessary-and.

[510] Jason Meisner, *Search Warrant signed outside Chicago steakhouse to be key at trial of two veteran Chicago cops on charges of stealing drugs, cash*, CHI. TRIB. (Oct. 7, 2019), https://www.chicagotribune.com/news/criminal-justice/ct-chicago-cops-corruption-trial-20191007-j2cc5z47yvc4jdfxkgwnqbz3ly-story.html.

[511] *Id.*

[512] Jason Meisner & Jeremy Gorner, *Two Chicago gang cops indicted on federal charges they stole cash and drugs*, CHI. TRIB. (May 11, 2018), https://www.chicagotribune.com/news/ct-met-chicago-cops-charged-stealing-cash-drugs-20180510-story.html.

[513] John Seidel, *Feds want 10 years in prison for Chicago cops who used bogus warrants to steal cash, drugs*, CHI. SUN TIMES (Mar. 2, 2019), https://chicago.suntimes.com/crime/2020/3/2/21161502/feds-want-10-years-prison-chicago-cops-used-bogus-warrants-steal-cash-drugs.

[514] In some cases, state judges ask *no* questions of the law enforcement officers seeking a warrant. *See* Savini, *supra* note 505. In others, there is no attempt at interrogating the trustworthiness of a particular confidential informant or seeking corroborating information. *See* Meisner, *supra* note 510.

[515] 755 F.3d at 815.

expectation of payment."[516] The court concluded that in the absence of such highly relevant information, the judge did not have a sufficient basis to find probable cause to support the search warrant.[517]

The infiltration into the federal system of local John Doe warrants is especially concerning because once a warrant is issued, any resulting evidence seized will likely be admitted, even when the underlying warrant does not meet federal standards. The legal rule is that the government can use the evidence unless the defense can show the police officer who procured the warrant wasn't acting in "good faith."[518] For a John Doe warrant, meeting that standard would typically require showing that there was a problem with the officer's John Doe informant, and the officer knew it. But given the strong protections our system grants to confidential informants, that can be nearly impossible to do. The common law "informer's privilege" generally shields an informant's identity.[519] While theoretically the Court can order disclosure of that identity under certain narrow circumstances, such disclosure is exceedingly rare in practice.[520] Importantly, if the local police do not know the informant's identity, this becomes a right without a remedy.

The standards that require prosecutors to disclose an informant's identity create a catch-22 for anyone seeking disclosure about an informant—John Doe or otherwise. They are confronted with a black box and are told that the only key is inside that same box. For example, in *United States v. Brown*, the defense filed a motion for disclosure of a John Doe informant's identity.[521] In this case, as in many others, the government argued that the standard was not met. As the defense noted in its response, if the "CPD and the state court authorities relied on this Doe to provide information that formed the basis of two search warrants," surely the defense's investigation would benefit from that same information.[522] The judge initially ordered the government to disclose the John Doe's identity, but later rescinded that order in the face of the government's vociferous objections.

I. Enact Legislation to Increase Reliability and Fairness in John Doe Informant Cases

Congress must enact legislation to prevent these abusive practices from permeating the federal system and subverting the more stringent federal standards. Congress should forbid federal law enforcement agents and prosecutors from using evidence gathered from John Doe warrants to support federal prosecutions regardless of whether a state or federal judge already approved them.

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[516] *Id.* at 817.
[517] *Id.* at 818.
[518] *United States v. Leon*, 468 U.S. 897, 922–23 (1984)
[519] OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES (2005), https://oig.justice.gov/sites/default/files/legacy/special/0509/final.pdf.
[520] *See* Roviaro v. United States, 353 U.S. 53, 59 (1957).
[521] Edwin Brown's Sur-Reply Opposing The Government's Motion for Reconsideration, United States v. Brown, No. 15-CR-00564 (N.D. Ill. 2015), Dkt. 88.
[522] *Id.* at 3.

At a minimum, Congress should pass legislation that requires federal law enforcement agents and prosecutors to obtain identifying and criminal history information for any John Doe—state or federal—who is relied on to support a federal prosecution. The prosecution should provide such information about the John Doe *in camera* to the judge in the federal case to facilitate independent judicial scrutiny of the basis for the warrant. Additionally, that information should presumptively be disclosed to defense counsel.

Moreover, in any federal case where the complaint rests even in part on John Doe evidence, Congress should require federal law enforcement agents and prosecutors to document the steps they have taken to independently vet and verify the reliability of the information the John Doe provided, and to give that documentation to the federal judge *in camera*. Requiring federal law enforcement agencies to engage in this vetting, documentation, review, and disclosure process would provide much-needed accountability.

J. Touchstones for Proposed Legislation to Reform Criminal Discovery

Congress should pass legislation that implements open-file discovery, eliminates *Brady*'s materiality requirement, and requires the pretrial disclosure of *all* evidence that is potentially favorable or exculpatory. Key touchstones for such legislation include:

- Definition: Open-file discovery is defined as "discovery in which everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material, is provided to defense attorneys."[523]

- Mandatory: The new law should make all discovery in federal criminal cases mandatory and automatic, such that the defense does not need to *request* discovery production. This will ensure efficiency and prevent parties from filing time-consuming motions for discovery with the court.[524]

- Timing: The new law should create specific timelines specifying how far in advance of the trial or proceeding the information must be exchanged, as already occurs in the civil context. There is a disparity between the Federal Rules of Criminal Procedure and the ABA standards, which disadvantages both sides.[525] For example, a witness's prior statements must be produced only *after* a witness testifies, plainly undermining the defense's ability to investigate or even use these statements.[526] Early discovery is essential to ensure the protection of defendants' rights.

[523] Klinkosum, *supra* note 409.
[524] CONNECTICUT BAR ASS'N, OPEN FILE DISCOVERY PRIMER 2 (2019), https://www.ctbar.org/docs/default-source/rules-committee/november-18-2019/item-03-02b2-docs-supporting-proposal---open-file-discovery-primer.pdf [hereinafter OPEN FILE PRIMER].
[525] EXPANDED DISCOVERY REVIEW, *supra* note 419, at 1–2, 4.
[526] These are known as Jencks materials, discussed *supra* note 449.

- Scope
  - In addition to all the evidence already dictated by Rule 16, open-file discovery would require the production of:[527]
    - All evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense for sentencing purposes, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[528]
    - A list of all potential witnesses and a copy of their statements. Statements are defined to include not only statements a witness has adopted, but also any recordings, transcripts, summaries, or notes of what a witness has said. If such transcripts, summaries, or notes do not exist, the government must create them.
    - All statements by co-defendants.
    - All forensic evidence.
    - All information regarding line-ups.
    - All law enforcement reports on the case.
    - All communications related to the case, including notes and emails between law enforcement agents. During the investigation, once the case is charged, and after the case has concluded, agents may not destroy or tamper with the originals.
  - Open-file discovery would not include notes, theories, opinions, conclusions, or legal research conducted by the prosecution. However, the new law should stipulate that prosecutors and law enforcement agents may not destroy or edit their notes or communications before, during, or after the case has concluded.
  - The prosecution and law enforcement agents must provide the defense with any and all evidence requested to support a claim of racial discrimination by law enforcement or the prosecution.

- Purpose of a Criminal Case: All discovery revisions must advance the maxim that the prosecution's primary *purpose* in every federal criminal prosecution "is *not that it shall win a case, but that justice shall be done*."[529]

K. This Proposed Legislation Incorporates Best Practices

These reforms would ensure jurisdictional uniformity and require federal prosecutors to follow best practices already in use in many parts of the country.

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[527] *See, e.g.*, OPEN FILE PRIMER, *supra* note 524.
[528] This is a simpler formulation of the ABA's ethical rule. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR. ASS'N 2020) ("The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal").
[529] Berger v. United States, 295 U.S. 78, 88 (1935).

Focusing specifically on *Brady*, the problems with the current standard are well-known, and the federal system is outdated.[530] Since 2009, the American Bar Association Standing Committee on Ethics and Professional Responsibility has declared that prosecutors are required to disclose *all* exculpatory information, without regard to materiality, under Rule 3.8(d) of the ABA Model Rules of Professional Conduct.[531] Both state courts and federal district courts have recognized the need to "expand criminal defendants' right to obtain exculpatory evidence beyond the federal constitutional standard set in *Brady*" and have amended their local rules accordingly.[532]

In 2019, the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee issued notice of a rules amendment to remove the materiality requirement, explaining:[533]

> [The exculpatory evidence rule] was amended in 2019 to remove the provision of "materiality" from the requirement of mandatory disclosure by the prosecution of information favorable to the defense. While originally intended to convey the idea that the information was relevant to the case at issue, the term had become more narrowly defined in practice and used as an obstacle for disclosure.[534]

In addition, Alaska[535] and Hawaii[536] also have state court rules that remove or modify the materiality requirement. A number of federal district courts have enacted similar reforms by amending their local rules to explicitly require disclosure of favorable evidence "without regard to materiality."[537]

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[530] This part of our testimony relies heavily on Siegler & Admussen, *supra* note 17, at 1031.
[531] MODEL R. PRO. CONDUCT r. 3.8(D) (AM. BAR ASS'N 2020).
[532] Siegler & Admussen, *supra* note 17, at 1031.
[533] Proposed Amendment of Pa. R. Crim. P. 573, 49 Pa. Bull. 7173 (Dec. 7, 2019), http://www.pacodeandbulletin.gov/secure/pabulletin/data/vol49/49-49/49-49.pdf.
[534] *Id.* at 7176.
[535] Alaska R. Crim. P. 16(b)(3) (requiring prosecutors to disclose "information . . . which tends to negate the guilt of the accused . . . or would tend to reduce the accused's punishment" without reference to materiality). Interpreting this rule, Alaska courts have articulated a relatively lower requirement for disclosure than *Brady*. When evidence "was known to the prosecution and subject to discovery under Criminal Rule 16 but not disclosed, the defendant[] . . . need only show that the 'undisclosed evidence might have affected the judgment of the jury or the outcome of the trial.'" Roseman v. State, No. A-659, 1985 WL 1078004, at *5 (Alaska Ct. App. Dec. 26, 1985) (quoting Maloney v. State, 667 P.2d 1258, 1264–65 (Alaska Ct. App. 1983)).
[536] Hawaii Rule of Penal Procedure 16(b)(1)(vii), which governs the disclosure of exculpatory evidence in felony cases, does not contain a materiality requirement on its face. *Cf.* Haw. R. Penal P. (16)(d) (providing discovery in misdemeanor cases only "[u]pon a showing of materiality"). The explicit inclusion of a materiality requirement in misdemeanor cases suggests that the court intentionally omitted any materiality requirement for the disclosure of favorable evidence in felony cases. See State v. Townsend, 784 P.2d 881, 883–84 (Haw. Ct. App. 1989) ("[I]n a case involving a felony, Rule 16 discovery is automatically available to the parties as a matter of right. However, the parties in a misdemeanor case may resort to discovery only by grace of the court's discretion, upon a showing of materiality and reasonableness.").
[537] RULE 16 SURVEY RESPONSES, *supra* note 413, at 12 & n.32.

States also see the legislative process as an appropriate vehicle for discovery reform.[538] It is common for state laws to "determine the scope and duties of the discovery process [in both the civil and criminal contexts], such as the default number or length of depositions, the scope of discovery, or procedures for electronically stored evidence."[539] And many of these state laws define relevant evidence more broadly than Rule 16 and *Brady*, and require prosecutors to automatically turn over all such evidence to defendants.[540] Two states—Minnesota and North Carolina—have enacted the "most expansive open-file discovery statutes in the country."[541]

Texas enacted open-file discovery in 2013 "in response to a series of high-profile instances of prosecutorial misconduct, later rectified by exonerations."[542] The Michael Morton Act, named after a man who served 24 years on death row for a murder he did not commit after the prosecution failed to turn over critical exculpatory evidence at trial, "radically changed criminal discovery in Texas by creating an open-file policy."[543] The Act also eliminates the materiality standard and requires automatic disclosure of all "exculpatory, impeachment, or mitigating" evidence that "tend[s] to reduce the punishment for the offense charged."[544]

At the national level, the Advisory Committee on Criminal Rules has repeatedly considered mandating broader disclosure requirements by amending Rule 16 since the 1968 *Brady* decision.[545] The DOJ has consistently opposed the codification of the *Brady* standard or any substitute standard.[546]

Notably, federal prosecutors profess to hold themselves to a higher standard and to disclose favorable evidence without regard to materiality. Taking prosecutors at their word, eliminating the materiality standard will not impose any greater burden on them. In 2011, the Advisory Committee commissioned a report providing a nationwide overview of discovery practices.[547] The survey was highly representative, with 94% of U.S. Attorneys' Offices responding.[548] The report found that, according to prosecutors, the most common approach is to provide discovery without regard to materiality (to "err on the side of disclosure regardless of

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[538] *Id.* at 10.
[539] Siegler & Admussen, *supra* note 17, at 1034.
[540] *See* Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 779 (2017), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6460&context=faculty_scholarship ("About thirty states provide defendants with broader discovery than the federal rule by partially or fully embracing these standards, which are more generous with respect to both witness lists and witnesses' prior statements.") (citation omitted). New York, for example, recently overhauled its criminal discovery statute, instituting an open-file system that requires prosecutors to automatically disclose a wide variety of evidence and implementing timelines for disclosure. N.Y. CRIM. PROC. LAW § 245.20 (McKinney 2020).
[541] Siegler & Admussen, *supra* note 17, at 1035.
[542] *Id.* at 1034.
[543] *Id.*
[544] *Id.*
[545] RULE 16 SURVEY RESPONSES, *supra* note 413, at 3.
[546] *Id.*
[547] *See generally* RULE 16 SURVEY RESPONSES, *supra* note 413.
[548] *Id.* at 32.

materiality").[549] And in districts where the materiality requirement has been eliminated, "[t]he majority of U.S. Attorneys' Offices report that the elimination made no difference."[550]

Finally, eliminating the materiality requirement for pretrial discovery is consistent with the opinions of some federal courts. The Eastern District of Wisconsin, for example, has held that disclosure should be required "without attempting to analyze [the evidence's] 'materiality' at trial."[551] The Ninth Circuit Court of Appeals in 2013 stated that "the retrospective definition of materiality is appropriate only in the context of appellate review," and so—in the pretrial phase of a case—"prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial."[552] The court further explained that "it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be 'material' after trial."[553] However, three years later, the Ninth Circuit clarified that their 2013 decision "did not alter the fundamental construct of *Brady*, which makes the prosecutor the initial arbiter of materiality and disclosure."[554] These two somewhat inconsistent opinions have left district courts confused about whether the materiality standard applies in the pretrial context.[555] Congress is well-poised to eliminate confusion and guarantee uniform federal criminal discovery through legislative action.

L. Discovery reform will receive bipartisan support and benefit all stakeholders

Congress has endeavored to enact discovery reform in the past. For example, in the *Brady* context, Senator Lisa Murkowski (R-AK) and the late Senator Daniel Inouye (D-HI) introduced the Fairness in Disclosure of Evidence Act in 2012.[556] The Senate Judiciary Committee held a hearing on the bill in June of 2012, but no further action was taken. The Act would have eliminated *Brady*'s materiality standard and instead required the prosecution to disclose all evidence that "reasonably appear[s] to be favorable to the defendant" without regard to the admissibility of that evidence.[557] The Act also provided a new standard for post-conviction review of violations of the disclosure requirement.[558] Under the new standard, courts would be empowered to consider the totality of the circumstances of the violation and its impact on the proceeding and impose any remedy deemed appropriate, including ordering a new trial.[559]

Defense attorneys support discovery reform. More than 90% of defense attorneys surveyed by the Advisory Committee favored an amendment to Rule 16.[560] In districts where *Brady*'s materiality requirement has been eliminated, defense attorneys reported that "the

[549] *Id.* at 32.
[550] *Id.* at 10.
[551] United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004).
[552] United States v. Olsen, 704 F.3d 1172, 1183 (9th Cir. 2013).
[553] *Id.* at 1183 n.3.
[554] United States v. Lucas, 841 F.3d 796, 809 (9th Cir. 2016).
[555] *See* United States v. Lischewski, No. 18-CR-00203, 2019 WL 2211328, at *2 (N.D. Cal. May 22, 2019); United States v. Lampkin, No. 315-CR-00005, 2016 WL 11680667 (D. Ala. May 3, 2016).
[556] S. 2197, 112th Cong. (2012).
[557] *Id.* § 2.
[558] *Id.*
[559] *Id.*
[560] RULE 16 SURVEY RESPONSES, *supra* note 413, at 8.

elimination of the materiality requirement has reduced problems and confusion regarding government disclosure in most or some cases."[561]

Federal judges in districts that have already implemented broader disclosure requirements (through local rules) than *Brady* indicated greater support for amending Rule 16 than judges in traditional districts.[562] This supports the idea that, once enacted, discovery reforms gain support as stakeholders experience their benefits. The materiality requirement was a key concern for judges that favored amendment.

[561] *Id.* at 10.
[562] *Id.* at 19.

TESTIMONY OF JANOS MARTON

NATIONAL DIRECTOR OF DREAM CORPS JUSTICE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

U.S. HOUSE COMMITTEE ON THE JUDICIARY

MARCH 11, 2021

"Controlled Substances: Federal Policies and Enforcement"

Chair Jackson Lee, Vice Chair Bush, Ranking Member Biggs, and members of the Subcommittee,

Thank you for the opportunity to submit written testimony to the Subcommittee on Crime, Terrorism, and Homeland Security regarding the federal government's policies regarding controlled substances and enforcement. My name is Janos Marton, and I am the National Director of Dream Corps JUSTICE, an organization founded by Van Jones that seeks to advance bi-partisan policies which will close prison doors and open doors of opportunity, making our communities safer and more prosperous. I want to particularly acknowledge Vice Chair Bush as a former resident of St. Louis and strong supporter of the campaign to close the Workhouse.

Our nation's history of mass incarceration is in large part the result of unjust policies and laws that disproportionately impact Black and brown communities, and there are few greater policy failures than the 50-year "War on Drugs.". Legislation such as the bipartisan First Step Act and Fair Sentencing Act have attempted to deal with the consequences of discriminatory sentencing laws, but Congress and the federal government must do much more if they seek to rectify this issue. Specifically, Congress must pass legislation which substantially reforms this nation's drug laws and enforcement policies, such as sentencing reforms that apply retroactively, reinvesting

money spent on over policing into community development, and banning unjust policing practices such as no-knock drug warrants.

Thankfully, numerous bills which have been introduced and will be introduced that address many of these issues. Legislation such as the Smarter Sentencing Act, Smarter Pretrial Detention for Drug Charges Act, the MORE Act, and other bi-partisan bills can have a substantial impact on drug policy and policing practices in America, and can help to undo decades of harmful and discriminatory policy which has divided communities and jeopardized public safety.

In addition, the Biden Administration should take concrete steps to create a more humane and scientifically based approach to federal drug policy enforcement, emphasizing access to drug counseling and community support programs, and minimizing unnecessary arrests and enforcement actions which contradict state and local drug laws. We are particularly heartened by the Office of National Drug Control Policy's recent groundbreaking call for using the lens of harm reduction as a guiding principle for its work.

America is undergoing a severe health, economic, and social crisis which predates and is exacerbated by the COVID-19 pandemic. As we seek to protect our neighbors from these various threats, we should also work to emphasize a more compassionate and medically-centered approach towards federal drug policy and enforcement. I thank you for the opportunity to advocate on behalf of Dream Corps JUSTICE's Empathy Network - directly impacted leaders from across the country who are calling for these desperately needed criminal justice and drug policy reforms for their communities to thrive. I would be happy to answer any additional inquiries the Subcommittee may have, and look forward to our continued engagement..

Janos Marton
National Director
Dream Corps JUSTICE

January 27, 2020

Speaker Nancy Pelosi House
1236 Longworth H.O.B.
Washington, DC 20515

Minority Leader Kevin McCarthy
2468 Rayburn H.O.B.
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House Majority Leader Steny Hoyer
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House Minority Whip Steve Scalise
2049 Rayburn H.O.B
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On behalf of the undersigned organizations, we write to express our concern with the Senate-passed Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act (S. 3201), a bill to temporarily extend the Drug Enforcement Administration's "class-wide" emergency scheduling of fentanyl-related substances. The bill will expose more people to prosecutions seeking harsh mandatory minimum sentences.

While this measure is an improvement over a permanent approach, like the Stopping Overdoses of Fentanyl Analogues Act, it does not address the civil rights implications of the Drug Enforcement Administration's unprecedented placement of a potentially limitless number of substances on Schedule I.[1] We urge leaders in the House of Representatives to ensure that before an extension measure is enacted, the legislation precludes mandatory minimums and protects people with limited knowledge, responsibility, and authority in the importation of fentanyl analogues.

We urge the House to address the following issues as it considers S.3201:

- Substantial increases in the length of sentences and DOJ's intention to seek mandatory minimums in cases prosecuted under the authority of the class-wide ban. **Any extension of the class-wide ban should bar the use of mandatory minimum sentences in cases prosecuted under this authority**. Legislation introduced in the Senate by Senator Rob Portman and three other Senate colleagues attempts to do exactly this. The House should adopt this approach. It has been only a year since Congress and President Trump enacted the First Step Act, which eased the length of some drug sentences and reflected broad bipartisan recognition that mandatory minimum sentences are costly and counterproductive. Congress should not undermine this progress on sentencing reform.

- The directive to the Government Accountability Office to evaluate the class-wide scheduling does not incorporate an examination of the effectiveness of the class-wide approach in reducing overdose deaths from fentanyl and its analogues, reducing demand for and supply of these and other substances, or how this control will interdict and stop extraterritorial manufacturers and exporters, or domestic high-level importers. We are still rebuilding after a failed war on drugs that did not improve public safety, ameliorate the high rates of substance misuse in the United States, or reduce the

[1] "Coalition Opposes S. 1622 Stopping Overdoses of Fentanyl Analogues Act (SOFA)," https://www.hrw.org/news/2019/07/03/coalition-opposes-s1622-stopping-overdoses-fentanyl-analogues-act-sofa

demand for or supply of harmful substances. In light of these failures, it is deeply troubling that Congress is considering measures that would expand the Department of Justice's authority to schedule and prosecute substances without analyzing if this measure—founded on the idea that incarceration is the answer to a drug epidemic—will somehow succeed where every similar prior measure has failed. **It is critical that any study evaluating the class-wide ban assess the impacts of this expanded authority on public safety, including overdose deaths and interdiction efforts.**

- Federal sentencing data shows that since 2014 the majority of those sentenced for fentanyl trafficking have been involved at the bottom of the distribution chain (such as street-level sellers and couriers/mules), and available data indicates that the vast majority of those prosecuted did not have clear knowledge that they were trafficking fentanyl.[2] Additionally, 2018 sentencing data reveals that 77% of individuals sentenced at the federal level for fentanyl trafficking are people of color,[3] showing that fentanyl enforcement is exacerbating racial disparities in the criminal justice system.[4] **Any extension of the class-wide ban should include an analysis of the impact of this expanded authority on the interdiction of high-level exporters, importers, and manufactures of fentanyl and its analogues.**

Congress must resist the appeal of simplistic solutions to complex problems and redouble its investment in public health approaches to reducing fentanyl overdose deaths and decreasing substance misuse rates. A punitive approach to addressing these public health concerns undermines evidence-based health approaches. We cannot allow enforcement-first rhetoric to divert our focus away from public health approaches that have been proven effective in reducing the harms associated with fentanyl and its analogues. Congress should prioritize removing barriers to medication-assisted forms of treatment, increasing access to overdose prevention tools like naloxone, and increasing investments in funding to help communities scale up access to treatment and harm reduction interventions that save lives and aid recovery.

Ultimately, we remain convinced that granting the Drug Enforcement Administration class-wide scheduling authority for fentanyl analogues will exacerbate already disturbing trends in federal drug prosecutions and incarceration levels and excise public health authorities from their critical role in promulgating drug policy. Congress made progress with its bipartisan passage of the First Step Act and we oppose efforts to undermine this reform.

We look forward to working with lawmakers on alternative approaches that would effectively address fentanyl overdoses and reduce the harms and unfairness of federal mandatory minimum sentences, and address our crises of overincarceration. If you have questions or

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[2] "Public Data Briefing: Synthetic Drugs" – United States Sentencing Commission, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf; https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY18.pdf

[3] "Quick Facts: Fentanyl" – United States Sentencing Commission, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY18.pdf

[4] "Criminal Justice Reform in the Fentanyl Era: One Step Forward, Two Steps Back," http://www.drugpolicy.org/resource/criminal-justice-reform-fentanyl-era-one-step-forward-two-steps-back?spJobID=1682077373&spMailingID=41601505&spReportId=MTY4MjA3NzM3MwS2&spUserID=MTAwNjQyOTM2MDMzMAS2

concerns, please contact Kara Gotsch at kgotsch@sentencingproject.org or Grant Smith at gsmith@drugpolicy.org.

Cc:

House Judiciary Chairman Jerrold Nadler
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Washington, DC 20515

Ranking Member Doug Collins
1504 Longworth H.O.B.
Washington, DC 20515

House Subcommittee on Crime, Terrorism, and Homeland Security Chair Karen Bass
2138 Rayburn H.O.B.
Washington, DC 20515

House Committee on Energy & Commerce Chairman Frank Pallone
2125 Rayburn H.O.B
Washington, DC 20515

House Committee on Energy & Commerce Ranking Member Greg Walden
2322 Rayburn H.O.B.
Washington, DC 20515

Sincerely,

A New PATH (Parents for Addiction Treatment & Healing)

AIDS Alabama

Alliance for Positive Change, LES Harm Reduction Center

American Civil Liberties Union

Baltimore Harm Reduction Coalition

Broken No More

Charles Hamilton Houston Institute for Race and Justice at Harvard Law School

College and Community Fellowship

Colorado CURE

Congregation of Our Lady of the Good Shepherd, U.S. Provinces

CURE BOARD

Desiree Alliance

Dr. Bronner's

Drug Policy Alliance

Drug Policy Forum of California

Empire State NORML

FAMM

FedCURE

Free Minds Book Club & Writing Workshop

Friends Committee on National Legislation

Friends of Recovery New York Dutchess

Harm Reduction Coalition

Health in Justice Action Lab at Northeastern University School of Law

Human Rights Watch

International CURE

Iowa Justice Action Network/Catholic Charities

Justice Arts Coalition

Justice Roundtable

LatinoJustice PRLDEF

Law Enforcement Action Partnership

Legal Action Center

Life for Pot

Multidisciplinary Association for Psychedelic Studies

NAACP

National Advocacy Center of the Sisters of the Good Shepherd

National Association of Criminal Defense Lawyers

National Association of Social Workers

National Center for Lesbian Rights

National Center for Transgender Equality

National Juvenile Justice Network

National LGBTQ Task Force Action Fund

NETWORK Lobby for Catholic Social Justice

Operation Restoration

Prevention Point Pittsburgh

Protect Families First

R Street Institute

Reframe Health and Justice

Research For A Safer New York

Safe Streets Arts Foundation

Safer Foundation

StoptheDrugWar.org

Students for Sensible Drug Policy

Substance Use Policy, Education, and Recovery PAC

Texas CURE

The Center for HIV Law and Policy

The Leadership Conference on Civil and Human Rights

The Sentencing Project

The Taifa Group

The United Methodist Church - General Board of Church and Society

Treatment Action Group

Treatment Communities of America

Trinity United Church of Christ, Chicago

Truth Pharm

Virginia CAN (Change Addiction Now)

VOCAL-NY

Witness to Mass Incarceration

Women With A Vision

March 15, 2021

Chairman Jerrold Nadler
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Rep. Jim Jordan, Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairman Richard Durbin
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Charles Grassley, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Urgent Need for Civil Forfeiture Reform

Dear Chairman Nadler, Chairman Durbin, Ranking Member Jordan, and Ranking Member Grassley,

On behalf of the undersigned organizations dedicated to the protection of civil liberties and property rights, we urge Congress to curb law enforcement's power to use and abuse the practice of civil forfeiture by enacting strong reforms this Congress.

By way of background, civil forfeiture laws allow the government to seize—and keep—cash, cars, homes, and other property that is merely *suspected* of being involved in criminal activity. This is not criminal forfeiture, where property is forfeited to the government after its owner is convicted of a crime. With civil forfeiture, law enforcement can seize property from innocent property owners, and those innocent owners can permanently lose it to the government, without the government ever charging, much less convicting, them of a crime. The very weak procedural

protections for property owners and accompanying high risk of civil liberties violations have been recognized in numerous reports issued in recent years by the Inspectors General of both the Department of Justice and the Department of Homeland Security.[1]

The simple truth is that civil forfeiture continues throughout the United States because law enforcement has a very specific financial incentive to use it: *it gets to keep the money*. In the federal system and most states, the property that is seized and forfeited is not delivered to the federal or state treasuries, but instead is kept by the law enforcement agencies themselves.[2] The proceeds are then spent *not* by Congress or state legislatures, but by the same law enforcement agencies that have sent their agents into the streets to collect it.

Congress can, and should, address this improper financial incentive in several ways. First, and most important, it can direct all federal forfeiture proceeds to be returned directly to the General Fund of the U.S. Treasury so that Congress can appropriate those monies as it sees fit, rather than enabling federal law enforcement agencies to shield it from congressional control.

Second, Congress can abolish the "equitable sharing" program that enables state and local law enforcement to evade any restrictions their state legislatures have imposed on civil forfeiture—including, for example, higher burdens of proof under state law or requirements sending all forfeiture proceeds to the state treasury, as is the practice in several states—by "partnering" with federal law enforcement on forfeitures in exchange for a "cut" of the proceeds. The federal government has no business running a program that is designed to help state and local police evade state laws.

Third, Congress can abolish administrative forfeiture, which typically permits government agencies to decide forfeiture cases themselves without any judicial oversight—not even from an administrative law judge. About 80-90% of federal forfeitures are finalized through an administrative process where the same agency that seized the property acts as judge and jury.[3] American citizens and property owners deserve their day in court before a neutral Article III judge and should not lose their property because the office of forfeiture counsel for the seizing agency makes a self-serving determination that the agency was right to seize and forfeit their property.

In significant part due to the improper financial incentives and conflicts of interest described above, a solid majority of the American public opposes the use of civil forfeiture. In a September 2020 national survey, respondents opposed any use of civil forfeiture as currently practiced, by a margin of 59% to 25%.[4] Moreover, 63% of respondents oppose allowing law enforcement agencies

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[1] See, generally, DHS Office of Inspector General ("OIG"), *DHS inconsistently implemented administrative forfeiture authorities under CAFRA*, available at https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-66-Aug20.pdf (Aug. 2020); DOJ OIG, *Review of the Department's Oversight of Cash Seizure Case and Forfeiture Activities*, (Mar. 2017), available at https://www.oversight.gov/sites/default/files/oig-reports/e1702.pdf; DOJ OIG, *Audit of the Drug Enforcement Administration's Management and Oversight of Its Confidential Source Program*, (Sept. 2016), available at https://oig.justice.gov/reports/2016/a1633.pdf; DOJ OIG, *Investigative Summary of Findings Concerning the DEA's Use of a TSA Airport Security Screener as a Paid Confidential Source* (Jan. 2016), available at https://www.oversight.gov/sites/default/files/oig-reports/f160107b.pdf; DOJ OIG, *Review of the Drug Enforcement Administration's Use of Cold Consent Encounters at Mass Transportation Facilities*, (Jan. 2015), available at https://www.oversight.gov/sites/default/files/oig-reports/e153.pdf.

[2] For a state-by-state analysis of civil forfeiture laws, see *Policing for Profit: The Abuse of Civil Asset Forfeiture (3rd Edition)* (Dec. 2020), available at https://ij.org/report/policing-for-profit-3/.

[3] See *Policing for Profit*, supra n. 2, at pp. 24-26.

[4] The question in this Institute for Justice/YouGov poll was, "As you may or may not know, 'civil forfeiture' allows law enforcement officials to seize cash, cars, or other property if they suspect it is involved in a crime, even if the property

to keep forfeiture proceeds for their own use, and 69% oppose allowing state law enforcement to use the equitable sharing program to evade state restrictions.[5] This is an issue where the public sees the problem, and it wants it fixed.

The problems with civil forfeiture begin with the financial incentive, but they do not end there. In the federal system, any innocent person whose property is unjustly seized through this system faces a profoundly difficult, time-consuming, and often prohibitively expensive process to get it back, one in which the property is presumed guilty, the innocent owner has no right to legal representation, and the government has no obligation to meet criminal standards of proof. These procedural deficiencies, where the deck is structurally stacked against the citizen, in favor of the seizing entity, only add insult to injury.

The widespread use of civil forfeiture also promotes negative interactions between police and the public, which places communities of color at risk. Evidence also shows that civil forfeiture disproportionately affects Black men, and a *Washington Post* investigation found that the majority of those who challenged a seizure for forfeiture in 400 federal court cases were Black, Hispanic or another minority. In 2012, the American Civil Liberties Union settled a lawsuit on behalf of Black and Latino drivers in two East Texas counties where police seized $3 million dollars between 2006 and 2008; none were ever arrested or charged with a crime. Recent research also finds increases in arrest rates for Blacks and Hispanics during times of fiscal stress for law enforcement agencies, and when law enforcement can benefit financially from forfeiture under state law.[6]

The most common public defense of civil forfeiture is the vague claim that its use helps crimefighting, *but the evidence is to the contrary*. The Department of Justice's own Inspector General has found that the agency does not even track how forfeitures might be linked to criminal prosecutions.[7] At the state level, recent research demonstrates that crime rates did not increase and arrest rates did not drop in New Mexico after the state abolished civil forfeiture in 2015.[8] In addition, Prof. Brian D. Kelly conducted the first-ever multistate study of the impact of civil forfeiture and found that there is no data supporting the argument that its use decreases crime, and ample evidence that its primary purpose is to generate revenue.[9]

Congress should not allow this unjust civil forfeiture regime to continue any longer. The most optimal solution is to eliminate civil forfeiture altogether and rely instead on criminal forfeiture after a crime is proven. Congress alternatively could eliminate the financial incentive rot

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owner has not been convicted or charged with a crime. Given this, to what extent do you support or oppose 'civil forfeiture?'" https://ij.org/wp-content/uploads/2020/11/Results-for-Institute-for-Justice-Civil-Forfeiture-245-9.30.2020-1-Civil-Forfeiture-2.pdf.

[5] Id. A 2018 IJ-YouGov poll showed similar results. See https://ij.org/press-release/new-poll-76-of-americans-more-likely-to-vote-for-candidates-who-back-forfeiture-reform/.

[6] See Nathaniel Cary & Mike Ellis, "65% of cash seized by S.C. police comes from black men," *Greenville News* (Jan. 27, 2019); Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, "Stop and Seize," *The Washington Post* (Sept. 6, 2014) (6-part series); Press Release, "ACLU announces settlement in 'highway robbery' cases in Texas," (Aug. 3, 2012), available at https://www.aclu.org/press-releases/aclu-announces-settlement-highway-robbery-cases-texas; Michael D. Makowsky, Thomas Stratmann & Alex Tabarrok, "To serve and collect: The fiscal and racial determinants of law enforcement," *Journal of Legal Studies* (2019), at pp. 189-216; Sean Nicholson-Crotty, Jill Nicholson-Crotty, Danyao Li & Sian Mughan, "Race, representation, and assets forfeiture," *International Public Management Journal* (2020), at pp. 1–20.

[7] See DOJ OIG (Mar. 2017), supra n. 1, at p. 16.

[8] See *Policing for Profit*, supra n. 2, at pp. 32-33.

[9] Prof. Brian D. Kelly, *Does Forfeiture Work: Evidence from the States* (Feb. 2021), available at https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf.

at the core of civil forfeiture by sending all federal forfeiture funds directly to the Treasury and eliminating the "equitable sharing" program that distorts local law enforcement decision making and undermines state laws. And at a bare minimum, Congress should address the procedural deficiencies that undermine the due process rights of property owners, including by eliminating the inherently biased administrative forfeiture system.

We are united in our desire to see significant forfeiture reform become law this Congress and stand ready to help in any way we can. We are aware of several legislative options that have been offered in past Congresses, each of which address some of the issues above. It is our hope that, whether through standalone legislation, provisions included in broader criminal justice reform, or the appropriations process, this Congress will finally solve this longstanding problem.

For further information from any of our organizations, including legal briefs, economic studies, state-by-state analysis, and constituent contacts, please direct your questions through Dan Alban, Senior Attorney at the Institute for Justice, at dalban@ij.org. He will ensure that you reach the appropriate advocate in each of our organizations.

Sincerely,

Institute for Justice
American Civil Liberties Union
American Commitment
Americans for Prosperity
Campaign for Liberty
DKT Liberty Project
Drug Policy Alliance
Due Process Institute
FreedomWorks
Goldwater Institute
Law Enforcement Action Partnership
The Leadership Conference on Civil and Human Rights
National Association of Criminal Defense Lawyers
National Motorists Association
National Taxpayers Union
R Street Institute

cc: Members of the House Judiciary Committee
Members of the Senate Judiciary Committee

The Honorable Sheila Jackson Lee
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
United States House of Representatives
Washington, DC 20515

The Honorable Andy Biggs
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security
United States House of Representatives
Washington, DC 20515

March 11, 2021

Re: Hearing on Controlled Substances: Federal Policies and Enforcement

Dear Chairwoman Jackson Lee and Ranking Member Biggs:

Thank you for holding today's important hearing on federal drug enforcement policies. The Justice Roundtable coalition and the undersigned organizations share an abiding concern over the federal government's harsh mandatory minimum sentencing regime prescribed for people with drug convictions, with an overwhelming impact on Black and Brown people. Given evidence that recent reform efforts to reduce prison sentences have not harmed public safety, we urge Congress to advance legislation that will end the excesses of mandatory minimum sentencing once and for all.

Approximately 66,000 people incarcerated for drug offenses account for almost 50% of the federal prison population today.[1] As of fiscal year 2019, 45% of people sentenced for a drug offense had little or no prior criminal history and the vast majority were low-level, including street-level sellers, couriers and mules, and had no weapons involvement in their cases.[2] Over 70% of the people sentenced for drug offenses in 2019 were also people of color. Federal courts have been obligated to impose stiff mandatory sentences on many of these defendants despite their low levels of engagement in the drug trade.

Fortunately, recent drug sentencing reforms have scaled back the federal prison population, without harming public safety. The federal prison population decreased by 20% relative to its

[1] https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp
[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Drug_Trafficking_FY19.pdf

peak level in 2011. The decline is almost twice the national average rate of decarceration.[3] The reduction in the federal prison population was achieved through changes in sentencing law, including passage of the Fair Sentencing Act in 2010 and First Step Act in 2018, sentencing guidelines, prosecutorial charging policies during President Obama's tenure, and clemency.[4]

Analyses conducted by the U.S. Sentencing Commission repeatedly find that individuals who had served reduced federal drug sentences for crack cocaine and other drugs, following Commission retroactive amendments to reduce sentences, did not experience higher recidivism rates compared to counterparts in federal prison who had served their full term.[5]

The continuation of harsh federal sentencing laws for drug offenses runs counter to research on effective crime and substance abuse policy. Because many people entering the criminal justice system are in the lower- and middle-levels of a drug operation, incarcerating these individuals often results in their being replaced by other sellers willing to fill their roles, and does nothing to address users'—and sometimes sellers' themselves—substance use disorders. Long prison terms for these individuals also have a limited deterrent effect since most people do not expect to be apprehended for a crime, are not familiar with relevant legal penalties, or commit criminal offenses with their judgment compromised by substance use or mental health conditions.

Areas with upticks in crime and substance use problems will require more effective policies than tougher sentences that have limited effect. Expanding access to community-based drug treatment programs, harm reduction tools and services, mental health services, as well as prison-based rehabilitative programs and subsequent re-entry services is a more effective strategy to confront the nation's drug problems.

We urge Congress to end the devastation of mass incarceration perpetuated by the War on Drugs by joining President Biden's call for eliminating mandatory minimum sentences and by pursuing a more public health centered approach to substance use disorders in our communities.

For more information, please contact the Justice Roundtable's Sentencing Reform Working Group Co-chairs, Kara Gotsch at kgotsch@sentencingproject.org, Aamra Ahmad at aahmad@aclu.org, and Nkechi Taifa at Nkechi@thetaifagroup.com.

Sincerely,

AIDS United
American Civil Liberties Union
CAN-DO Foundation
Center for Disability Rights
Center for Popular Democracy Action
Chicago Drug Users' Union
College and Community Fellowship

[3] https://www.sentencingproject.org/publications/can-we-wait-60-years-to-cut-the-prison-population-in-half/
[4] In total, Presidents Barack Obama and Donald Trump commuted federal drug sentences for almost 1,800 people.
[5] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/RG-retroactivity-recidivism.pdf

Communities United
CURE (Citizens United for Rehabilitation of Errants)
Drug Policy Alliance
End AIDS Now
Equal Justice Under Law
Fair and Just Prosecution
FAMM
Federal Public and Community Defenders
Friends of Guest House
Human Rights Watch
Jewish Council for Public Affairs
Justice Strategies
Law Enforcement Action Partnership
The Leadership Conference on Civil and Human Rights
LEAP
Legal Action Center
Let's Kick ASS NY (AIDS Survival Syndrome)
Life for Pot
Mommie Activist and Sons
National Association of Criminal Defense Lawyers
National Association of Social Workers
National Council of Churches of Christ in the USA (NCC)
National Council on Alcoholism and Drug Dependence
National Health Care for the Homeless Council
National Juvenile Justice Network
National Viral Hepatitis Roundtable
Operation Restoration
P.A.I.N. (Prescription Addiction Intervention Now)
Peacebuilding Connections
The Sentencing Project
StoptheDrugWar.org
Students for Sensible Drug Policy
The Taifa Group
Union for Reform Judaism
Urban Survivors Union
The Washington Office on Latin America
Whose Corner Is It Anyway

The Leadership Conference

FACT SHEET: Why Civil Asset Forfeiture is Legalized Theft

Civil asset forfeiture laws allow police to seize property, money, or assets if police merely believe it is connected to criminal activity. Police do not have to file charges or even establish guilt in these cases before seizing and keeping property and there is no limit to what police can seize. In addition, these seizures often take place in instances where law enforcement have engaged in discriminatory profiling people of color and other minorities (e.g., traffic stops, airport searches, and train searches).

Federal forfeiture law provides law enforcement with a strong monetary interest in asset seizures. Under the Department of Justice's equitable sharing program, state and local law enforcement that turn over seized property to the federal government can pocket up to 80 percent of the forfeiture proceeds. Additionally, federal law does not require the collection or reporting of data on state, local, or federal seizures.

In essence, these laws amount to legalized theft and rest on a presumption of guilt that flies in the face of our longstanding principle that everyone is innocent until proven guilty.

Civil asset forfeiture laws are disproportionately harmful to lower-income communities and communities of color.

- A recent series of articles by *The Washington Post* chronicling the issue found that "of the 400 court cases examined by *The Post* where people who challenged seizures and received money back, the majority were Black, Hispanic or another minority."[1]
- Despite making up 43 percent of the city's population, 63 percent of Philadelphia cash seizures each year involve money taken from African Americans. African Americans account for 71 percent of innocent Philadelphians who have cash seized each year.[2]
- Asset forfeiture takes place in situations where minorities are often targeted by police because of racial profiling. According to a study by the ACLU, in "traffic stops, airport seizures, and drug arrests…minorities are hardest hit."[3]

Civil asset forfeiture laws create a perverse financial incentive for federal, state, and local law enforcement to pursue profit over the fair administration of justice.

- Since the terrorist attacks of September 11, 2001, law enforcement nationwide has taken in $2.5 billion from 61,998 cash seizures under the federal civil forfeiture program.

[1] Michael Sallah, Robert O'Harrow Jr., Steven Rich, *Stop and Seize*, WASHINGTON POST, September 6, 2014, http://www.washingtonpost.com/sf/investigative/collection/stop-and-seize-2/.
[2] American Civil Liberties Union of Pennsylvania, *Guilty Property,* June 2015, http://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf.
[3] American Civil Liberties Union, *Letter to the House on the Civil Asset Forfeiture Act of 1999,* June 10, 1999, https://www.aclu.org/letter/letter-house-civil-asset-forfeiture-act-1999.

- If local and state law enforcement collaborate with a federal agency and bypass state forfeiture laws, they can pocket up to 80 percent of the proceeds.[4]
- In 42 states, at least half of the profits from seizures – including money, jewelry, cars, homes and other seized property – go directly to law enforcement, which is often used to make up deficits in budgets or to provide for staff salary.
    - In 26 of these states, 100 percent of the profits from these seizures go to law enforcement.[5]
- As of 2003, only 29 states require law enforcement agencies to report how much money has been raised and on what items the money has been spent, making oversight of the practice difficult and abuses easier. [6]

Civil asset forfeiture laws encourage violations of Americans' right to due process.

- Under federal forfeiture law, the burden of proof strongly favors the government over property owners. Law enforcement only needs to demonstrate by a "preponderance of the evidence" that someone's property is related to criminal conduct before seizing that property.
- In most states, the standard of proof in civil asset forfeiture laws is lower than the standard required to prove that a person has committed a crime. This provides Americans with almost no legal protection from abuse of the law.
    - In 27 states, law enforcement needs to demonstrate by a "preponderance of the evidence" that the property is related to criminal conduct. In 14 states, law enforcement only needs "probable cause" that the property is subject to forfeiture. Only Nebraska and Wisconsin require proof beyond a reasonable doubt for civil asset forfeiture– the highest standard and protection of individual rights.[7]
- Thirty-eight (38) states require the owner of the seized property to prove innocence. Only six states require the government to establish guilt for all kinds of property that may be seized.[8]
- In more than 80 percent of asset forfeiture cases, the owner of the property is never charged with a crime, yet government officials can and usually do keep the seized property.[9]

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[4] Marian Williams, Jefferson Holocomb, Tomislav Kovandzic, and Scott Bullock, *Policing for Profit*, INSTITUTE FOR JUSTICE, March 2010, http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Andrew Schneider and Mary Pat Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, August 11-September 16, 1991.

The Leadership Conference

FACT SHEET: Why Civil Asset Forfeiture is Legalized Theft

The FAIR Act would protect the rights of property owners in asset forfeiture proceedings by making the following reforms to federal civil asset forfeiture laws:

- The FAIR Act would end the federal equitable sharing program, establish reporting requirements for Department of Justice asset seizures, and ensure that owners have the opportunity to receive representation in asset forfeiture proceedings.
- The FAIR Act would restore the American principle of innocent until proven guilty by placing on the government the burden of proof to show that a property owner consented to his or her property being used in a crime.

The Leadership Conference

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[2] American Civil Liberties Union of Pennsylvania, *Guilty Property,* June 2015, http://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf.
[3] American Civil Liberties Union, *Letter to the House on the Civil Asset Forfeiture Act of 1999,* June 10, 1999, https://www.aclu.org/letter/letter-house-civil-asset-forfeiture-act-1999.

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] Andrew Schneider and Mary Pat Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, August 11-September 16, 1991.

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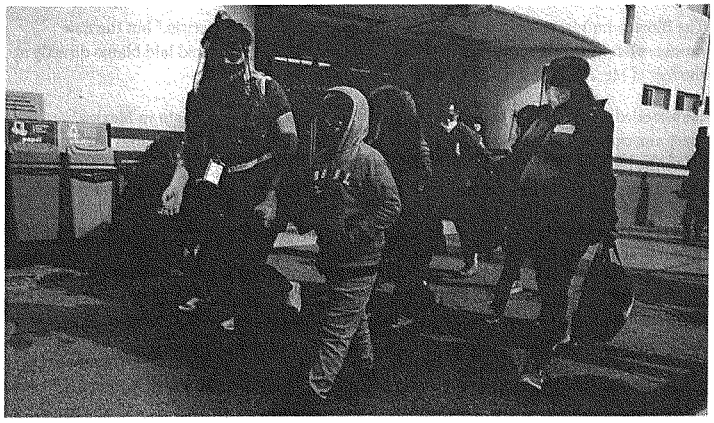
Biden's first full month sets new records for illegal immigration

washingtontimes.com/news/2021/mar/10/illegal-immigrant-children-set-monthly-record-bord/



A migrant family crosses the border into El Paso, Texas, in Ciudad Juarez, Mexico, Friday, Feb. 26, 2021. After waiting months and sometimes years in Mexico, people seeking asylum in the United States are being allowed into the country as ... more >

By Stephen Dinan and Seth McLaughlin - The Washington Times - Wednesday, March 10, 2021

President Biden's first full month in charge of the country's borders set new records for illegal immigration, according to numbers released Wednesday that showed last month was the worst February ever when it comes to illegal immigrant children.

Nearly 9,500 unaccompanied juveniles were nabbed at the southwest border, part of an overall surge of migrants that is double what the country experienced last year at this time, and even runs ahead of the record-breaking 2019 border surge.

Across all demographics, Customs and Border Protection said it recorded more than 100,000 encounters with illegal immigrants. That's the fifth-worst month in the last decade, with the four worse months all coming during that 2019 surge.

But February is usually a relatively slow month for illegal border crossings, and if this year's trend holds, 2021 could top 2019.

Troy Miller, the acting chief at CBP, refused to talk about how many illegal immigrant children were in custody, claiming the number was a law enforcement secret. But leaked reports suggest the number is huge.

"We continue to struggle with the number of individuals in our custody," Mr. Miller said.

The Biden administration has resisted efforts to label the surge a "crisis," but the new numbers left little doubt among Republicans on Capitol Hill, who said laid blame directly at the feet of Mr. Biden and his policy changes.

He canceled tough Trump border policies, such as the so-called "Remain in Mexico" program, canceled cooperative agreements with Latin American partners, and has begun releasing illegal immigrant families directly into American communities, all of which have drawn a new wave of migrants who say they're eager to take advantage of the generosity.

"It's never too late to call a crisis a crisis," said Rep. John Katko of New York, ranking Republican on the House Homeland Security Committee.

For the month, Border Patrol agents nabbed 96,974 border jumpers. Another 3,467 migrants were encountered by CBP officers trying to enter ports of entry without permission.

The number of family migrants arrested by agents leaped from about 7,000 in January to nearly 19,000 in February. That's still far from the record of more than 95,000 in May 2019.

Combined, unaccompanied children and families accounted for about 30% of the border jumpers. At their peak in 2019, they were more than 70% of the flow.

Some of the new numbers were skewed by the coronavirus situation, which allows some migrants to be immediately expelled. Many of those immediately tried again, meaning they were counted as multiple encounters.

Other border yardsticks are also grim.

Drug seizures are running well ahead of last year. Officials believe that more seizures generally means more is getting through.

And Mr. Katko said the number of sex-offender arrests at the border also is poised for a record year.

Congressional Democrats were largely silent on the new numbers, but at the White House Mr. Biden's senior official for the southwest border, Roberta Jacobson, said the administration has a plan to try to stop illegal immigration in the future.

She suggested endemic poverty and violence are the reasons for surges in migration, and said

Mr. Biden will request $4 billion in foreign aid to do nation-building in Central America.

At one point, though, Mrs. Jacobson seemed to acknowledge the Biden policies were at least partly responsible, saying "surges tend to respond to hope, and there was a sign of hope for a more humane policy after four years of pent up demand."

"I certainly think the idea that a more humane policy may be in place may have driven people to making that decision," she said.

Mrs. Jacobson also blamed smugglers for encouraging the current surge, saying they are using "disinformation" about Biden policies to tell migrants if they reach the U.S. they can gain a foothold.

The trouble for the Biden team is that the smugglers' story is often true. Mr. Biden reversed a Trump policy that saw the unaccompanied children pushed back across the border, and he's also overseeing catch-and-release of hundreds of families a day.

And even Mrs. Jacobson went off-message during the press briefing. While speaking in Spanish to deliver a message to would-be migrants that the border was closed and not to come, she actually said the border was open.

Former Secretary of State Mike Pompeo said the Biden team deserved blame for the border situation.

"This administration threw away all the good work we had done," he told Fox Business Network's Maria Bartiromo.

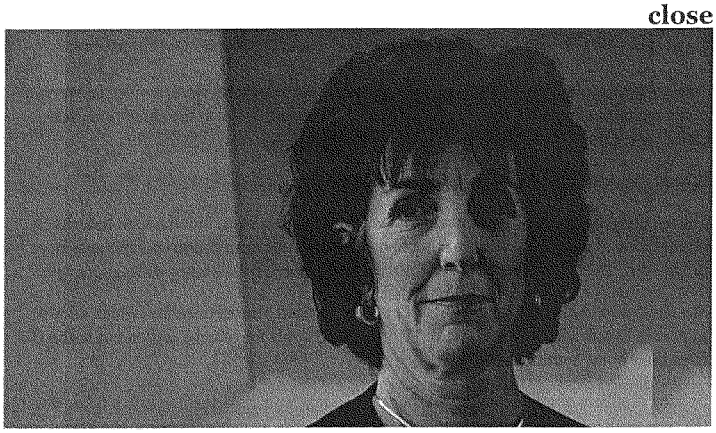
He said the Trump policies the Biden administration now criticizes created the right set of incentives, discouraging illegal migration. The Biden message has reversed those incentives, he said.

• *S.A. Miller contributed to this article.*

Biden adviser admits immigration policy 'may have driven' migrant surge, encouraged 'smugglers'

foxnews.com/politics/bidens-immigration-policy-may-have-driven-migrant-surge-encouraged-smugglers

close



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Southern Border Coordinator Roberta Jacobson said Wednesday that it was not a "coincidence" border crossing attempts spiked after President Biden took office.

Asked if surges at the border could be linked to Biden's undoing of Trump-era border policies, Jacobson said: "We've seen surges before. Surges tend to respond to hope, and there was significant hope for a more humane policy after four years of pent-up demand.

"There was a hope for a more humane policy after four years of pent-up demand, so I don't know if I would call that a coincidence," said Jacobson, who spoke during the daily White House briefing. "But the idea that a more humane policy would be in place may have driven people to make that decision, but perhaps, more importantly, it definitely drove smugglers to express disinformation, spread disinformation about what was now possible," said Jacobson, who also serves as special assistant to the president, told reporters. She was also ambassador

to Mexico from 2016 to 2018.

Smugglers, sometimes known as "coyotes," are known to lure migrants across the border, promising few repercussions.

Jacobson said that the White House is trying to balance better policies and messaging. She repeated the frequent message of the Biden administration that now is not the time to come to the U.S.

"We are trying to walk and chew gum at the same time. We are trying to convey to everyone in the region that we will have legal processes in the future ... But at the same time, you cannot come through irregular means," Jacobson said.

"The border is not open," Jacobson added in Spanish.

The southern border coordinator said that with a $4 billion plan, Biden hoped to tackle immigration at its root causes, working to make Latin American countries safer and more prosperous. The money will be asked for through the foreign assistance package request.

She also said Biden plans to restart the Central American Minors program, which allows minors in El Salvador, Guatemala, and Honduras to apply for refugee settlement in the U.S. from their home countries.

Spiking numbers of migrants suggest the surge in migrants risks turning into a tidal wave by the time peak migration season hits later this year. In the 2019 border crisis, the height was in May when agents encountered 144,000 migrants. In February that year, apprehensions were at 76,000 and 57,000 in January.

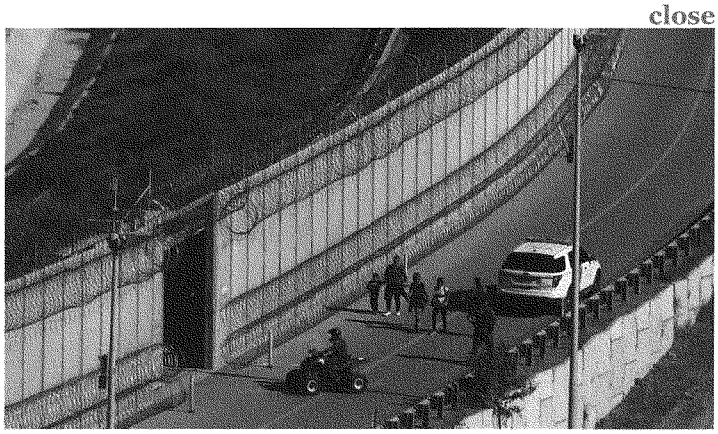
The administration has ended policies like the Migrant Protection Protocols (MPP) which kept migrants south of the border while waiting for their hearings -- as well as asylum agreements with Northern Triangle countries. It has also narrowed Immigration and Customs Enforcement (ICE) priorities for arrests and deportations. But Title 42, instituted by Trump amid the coronavirus pandemic, remains in place. It allowed for the rapid expulsion of migrants at the border under the public health emergency.

Fox News' Adam Shaw contributed to this report.

Border encounters top 100,000 in February as migrant crisis spirals

foxnews.com/politics/border-encounters-february-migrant-crisis-spirals

close



Law enforcement at the border encountered more than 100,000 migrants at the border in February, Customs and Border Protection (CBP) announced Wednesday, as the Biden administration faces a dramatically escalating crisis – and admits the numbers are "overwhelming."

CBP encountered 100,441 individuals in February, a 28 percent increase over January, the agency said. Of those, 19,246 individuals were in family units; 9,457 were unaccompanied children (UACs) and 71,598 were single adults.

So far, encounters in FY 2021 to date is 97 percent higher than FY 2020 and 24 percent higher than FY 2019 -- when there was a crisis at the border. In FY 2021 through February, officials encountered 29,792 UACs and single minors -- over 3,000 of these children are under age of 12 and 26,850 are aged 13 to 17.

A source told Fox News earlier that more than 70% of those encountered were expelled via the Title 42 public health order that allows authorities to quickly return migrants to country of travel. Activist groups have urged the administration to end Title 42 expulsions, but so far it has not done so.

The numbers are the latest sign that the surge in migrants risks turning into a tidal wave by the time peak migration season hits later this year. In the 2019 border crisis, the height was in May when agents encountered 144,000 migrants. In February that year, apprehensions were at 76,000 and 57,000 in January.

Acting CBP Commissioner Troy Miller said on a call with reporters that the administration is "moving as fast as we can" to rebuild the immigration system but warned "this is going to take time."

"The border is not open -- do not believe human smugglers who tell you otherwise," he said.

Meanwhile drug seizures are up 50 percent from Jan. 2021. While fentanyl seizures were down slightly in February, Miller noted a "dramatic" 360 percent increase in seizures compared to this time last year.

The administration has been scrambling to deal with a migrant crisis and has seen a spike in child migrants – the number of migrant children in custody along the border has tripled in the past two weeks to more than 3,250. Meanwhile, it has been opening more facilities, including looking at opening a Virginia military base – and ending capacity limits due to COVID-19.

The administration has come under fire from Republicans, who have said the dramatic reversal of Trump-era policies has incentivized migrants to come north, and made the U.S. less able to handle the surge

Biden's administration has ended policies like the Migrant Protection Protocols (MPP), which kept migrants south of the border while waiting for their hearings – as well as asylum agreements with Northern Triangle countries. It has also narrowed Immigration and Customs Enforcement (ICE) priorities for arrests and deportations. Meanwhile, the White House has proposed a sweeping immigration bill that will grant a pathway to citizenship for millions of illegal immigrants.

The administration has denied there is a crisis, calling it a "challenge" instead – although DHS Secretary Alejandro Mayorkas this week admitted the numbers were "overwhelming" and asked staff to volunteer to help CBP.

It has also been trying to spread the message that the border is not open, and that migrants should not make the journey.

"We are not saying, 'Don't come,'" Mayorkas said last week. "We are saying, 'Don't come now because we will be able to deliver a safe and orderly process to them as quickly as possible.'"

Miller, asked by reporters why there was a surge, cited "unparalelled" economic instability, the pandemic, hurricanes, violence and unemployment in their home countries.

'Put all those issues together and you are going to see folks who are looking for a better way of life," he said.

Roberta Jackson, the special coordinator for the southern border, on Tuesday repeated the claim that the border was "not open," adding that part of the plan was to fund measures with a $4 billion package that would tackle the "root causes" of migration.

Asked if it was a coincidence that the surge coincided with Biden-era policies, Jackson said migrants were responding to "hope."

"There was a hope for a more humane policy after four years of pent up demand, so I don't know if I would call that a coincidence but the idea that a more humane policy would be in place would have driven people to make that decision, but more importantly it definitely drove smugglers to express disinformation, spread disinformation about what was now possible," she said at a White House press briefing.

Republicans, however, have blamed the administration squarely for the crisis. Senate Minority Leader Mitch McConnell, R-Ky., said on the Senate floor that Mayorkas and the administration was "failing" at the border, and took issue with his warning for migrants that now was not the time to travel.

"Now is not the time to come? Well when is the right time to break federal law? There is going to be a good time and people need to just be patient and wait for their signal?" he asked. "What on earth are they talking about?"

Fox News' Peter Hasson and John Roberts contributed to this report.

Adam Shaw is a reporter covering U.S. and European politics for Fox News. He can be reached at adam.shaw@foxnews.com.

Biden administration rushes to accommodate border surge, with few signs of plans to contain it

washingtonpost.com/national/border-surge-biden-crisis/2021/03/05/d0933282-7db8-11eb-b0fc-83144c02d676_story.html

By Nick Miroff March 6, 2021

As the Biden administration races to find shelter for a fast-growing migration surge along the Mexico border, it is handling the influx primarily as a capacity challenge. The measures are aimed at accommodating the increase, not to contain it or change the upward trend.

The administration has quickly turned detention centers into rapid-processing hubsfor families with young children, relaxed shelter capacity rules aimed at lessening the spread of the coronavirus, deployed hundreds of backup border agents to the busiest crossings and tried to mobilize the Federal Emergency Management Agency to help with coronavirus testing and quarantining those who test positive. With bed space filling quickly, officials have drafted plans to put families in hotels in Texas and Arizona.

On several days last week, U.S. agents took more than 4,000 migrants into custody, nearly double the number in January. Roughly 350 teens and children have been crossing the U.S. border without their parents each day in recent weeks, four times as many as last fall, and many are stuck for days in dour detention cells waiting for shelter openings. While most adult migrants are turned away, unaccompanied minors are allowed to stay, as are some families with young children.

President Biden will soon send top advisers to the border to assess the inflow and report back their findings, the White House said Friday. Although Department of Homeland Security officials have warned internally that the largest migration wave in more than two decades could arrive in the coming months, Biden officials have not said publicly what new legal or enforcement tactics they are considering, if any, to slow it.

Theresa Cardinal Brown, an immigration analyst at the Bipartisan Policy Center in Washington, said the administration is treating the strain as a logistical and operational problem, "but whether they see it as a political problem is a different question."

"Biden ran on being the anti-Trump," she said. "He made clear that an emphasis on deterrence was not what he was going to do, and he got elected. So I think using enforcement as a primary means of managing what is happening at border is not what he wants to do."

Biden ran for president on promises to repudiate his predecessor's policies and make the United States more welcoming to immigrants again. Six weeks after taking office, he appears on a path to a crisis, despite months of warnings from veteran Homeland Security officials about the risks of abrupt policy moves during the pandemic and when millions of Mexicans,

Central Americans and others are facing deteriorating and desperate conditions back home.

Border arrests and detentions were already at their highest levels in years when Biden took office, and the pandemic has severely reduced the government's detention and shelter capacity. Biden quickly ordered a halt to border wall construction, curtailed deportations and ended deterrent measures such as President Donald Trump's "Remain in Mexico" policy that left thousands of asylum seekers stranded in dangerous border cities.

Republican leaders have accused Biden of triggering a crisis at the border, and they often highlight how the new president's tone and tactics are less stern than those of the Obama administration. They have also seized on the border surge as a wedge issue for the 2022 midterm elections.

Biden and his top officials have publicly urged migrants not to make the journey north, but the message appears to be having little impact. Apprehensions at the border are approaching the levels that overwhelmed Border Patrol agents and facilities with a record influx of families and children during fiscal year 2019, when the authorities took nearly one million crossers into custody.

The difference between that crisis and the current influx is the Trump administration had teams of attorneys, border officials and senior White House aides, including Stephen Miller, planning enforcement strategies to shut the border to asylum seekers and, in some cases, escalate the suffering of the migrants with harsh measures.

Biden officials emphasize that they are taking a different approach, at times deflecting skeptical questions about their border management strategy by bringing up Trump's widely denounced separationof migrant families in 2018 and the "Remain in Mexico" policy that left hundreds stranded in squalid tent camps while awaiting U.S. court hearings that never came.

Last March, the Trump administration used a public health order known as Title 42 to implement emergency border-control measures allowing agents to rapidly "expel" most migrants back to Mexico. After Biden took office, he ordered a halt to the practice for unaccompanied minors, and their numbers have shot up since then.

"Obviously, we're going to have more kids crossing into the country since we've been letting more children stay and the last administration inhumanely kicked them out," White House press secretary Jen Psaki told reporters Friday, when asked whether Biden accepted responsibility for the growing surge.

"We're going to tread our own path forward, and that includes treating minors with humanity and respect," Psaki said.

Less clear is what the administration will do if unauthorized crossings continue on a record-

breaking path. The latest U.S. Customs and Border Protection figures show Mexican adults and children crossing at levels not recorded in years — a change from 2019 when Central American families made up the largest group of asylum seekers. Mexico's economy contracted 8.5 percent last year, and manyMexican migrants appear to be fleeing states scarred by some of the country's worst drug cartel violence.

Analysts also note the Title 42 policy has produced soaring levels of repeat crossings, known as recidivism, because migrants who return to Mexico try again and again with no fear of prosecution or jail time. CBP enforcement figures may rise to 2019 levels in the coming months as a result of more arrests, but they do not necessarily reflect the arrival of more people.

Border agents are just as busy though, and they say the number of migrants observed on surveillance cameras who successfully evade capture, known as "got-aways," has also soared. Officials said they counted 1,000 got-aways on a single day last month.

Minors arriving without their parentsare the one group not being returned to Mexico under Biden, and their fast-growing numbers have created the most immediate challenge. One agent in Arizona described grim conditions at a Border Patrol station where dozens of teens have been waiting for as long as six days forspace to open up in shelters run by the Department of Health and Human Services, despite U.S. laws mandating their transfer within 72 hours. Agents brought in soccer balls and sports equipment for the teens to play with in the garage area of the station. "As a parent with kids, it's tough to see," said the agent, who spoke on the condition of anonymity because they were not authorized to speak to reporters.

The Centers for Disease Control and Prevention said federal shelters could temporarily expand to the pre-pandemic full capacity so that they could house more minors, according to a memo obtained Friday by The Washington Post. The shelters have been operating at reduced capacity to mitigate the spread of the coronavirus. But in the memo, the CDC noted children are less at risk of severe complications from the disease and said the shelters could limit transmission by continuing to test minors upon entry and quarantining those who are infected.

Ron Vitiello, a former Border Patrol chief and top ICE official under Trump, said he did not see anything on the horizon that would change the momentum of the influx. "This gets a lot worse before it gets better," he said.

"You have thousands of people in custody at locations built for hundreds, but everyone has to be processed," he said. "You can't send kids to shelters if the kids haven't been booked in. You can't release families until they are booked in, so they can have their day in court."

"It's a physics problem — you only have so many agents and work stations, and those lines

are going to get really long," he added.

Adam Isacson, a border security analyst at the Washington Office on Latin America, said he thinks the Biden administration does not want to return to the kind of "metering" system that Trump used to limit the number of people allowed to seek asylum along the border.

"I think the end goal is to be able to hear as quickly as possible the asylum claims of all those who need protection," Isacson said. "But they're not going to swing the gates open."

DHS Secretary Alejandro Mayorkas last week blamed the capacity limitations faced by the administration on Trump policies he said left the U.S. immigration system "gutted" and "dismantled." Biden has continued to rely on the Title 42 policy as its main enforcement tool for preventing the entry of single adults and most families.

Immigrant advocates have challenged the legality of the Title 42 process, and some are demanding that Biden revoke it, saying it endangers asylum seekers. Less clear is what the Biden administration would use as an enforcement tool in its place.

Andrew Selee, the president of the Migration Policy Institute, a nonpartisan think tank, said the kinds of long-term solutions Biden and his team have advocated, including job creation in Central America and an expedited system for deciding asylum claims, are not short-term measures that could replace Title 42.

"It is the only mechanism they have to manage numbers right now," Selee said. "They are under extreme pressure to take it down, but if they do they need to be prepared for what happens after that."

Biden was vice president and Mayorkas was deputy DHS secretary in 2014, when the government faced its first large influx of unaccompanied minors and parents with children. The Obama administration responded by establishing family detention centers where it attempted to keep parents with their children in custody long enough to make an initial decision on their asylum claims.

Those are the centers the Biden administration is converting into rapid-processing hubs designed to receive families and provide them with coronavirus tests and court dates, releasing them within 72 hours. Migrant advocates have criticized the plan, saying families with children should not be detained for any amount of time.

"One thing the U.S. government does not control is how many people arrive and where," said Cardinal Brown of the Bipartisan Policy Center, adding thatadministrations of both parties have failed do develop and solidify emergency response plans for migration surges. "Every time this happens, it's like we're making this up all over again."

Cardinal Brown said Biden is also coping with what amounts to pent-up demand produced

by years of deterrent measures.

"Trump's answer was keep everyone out, but that didn't mean there were fewer people wanting to migrate," she said. "It just meant they were waiting for their time."

Maria Sacchetti contributed to this report.

Biden administration says it's struggling for right message on immigration

politico.com/news/2021/03/10/biden-immigration-message-475103

President Joe Biden's coordinator for the southern border acknowledged on Wednesday that the administration sometimes struggled to convey an ultimately promising message to migrants while also urging them not to travel to the U.S. until the country's immigration system was better equipped.

The remarks from Ambassador Roberta Jacobson, a special assistant to the president who previously served as the U.S. envoy to Mexico, come as the southern border is experiencing a rapid influx of unaccompanied migrant children — provoking criticism from Republicans and some Democrats of the administration's handling of the situation.

"I think, when you look at the issue of mixed messages, it is difficult at times to convey both hope in the future and the danger that is now. And that is what we're trying to do," Jacobson told reporters at a White House press briefing.

"I will certainly agree that we are trying to walk and chew gum at the same time. We are trying to convey to everybody in the region that we will have legal processes for people in the future, and we're standing those up as soon as we can," Jacobson said.

"But at the same time, you cannot come through irregular means," she added. "It's dangerous, and the majority of people will be sent out of the United States, because that is the truth of it. We want to be honest with people. And so we are trying to send both messages."

Smugglers, however, are only propagating the message that the U.S. southern border is ready for a surge of migrants, Jacobson warned, which is not the case. "It's really important that that message get out, because the perception is not the same as the reality," she said.

Although numerous administration officials have emphasized in recent weeks that now is not the time for migrants to seek entry to the U.S., conservative critics of Biden's current immigration policy have blamed the president for not more forcefully discouraging people from Central American countries from traveling north.

House Republicans from border states, including many from Texas, laid into the Biden administration's immigration policies during a news conference on Wednesday.

"For political purposes, they're perfectly fine having open borders," said Rep. Chip Roy (R-Texas). "Secure borders is pro-immigrant, pro-America and pro-our values. And the Biden administration doesn't care."

Some progressives, meanwhile, have faulted Biden for the conditions the migrant children are being kept in at the border, equating the holding facilities and broader policy approach to that of former President Donald Trump's administration — which took a hard line against both illegal and legal immigration to the U.S.

Biden administration officials have maintained that their overarching response at the southern border has been complicated by the coronavirus pandemic, Trump's dismantling of the immigration system and the administration's refusal to turn migrants away — which would force them to make a perilous journey home.

On Wednesday, Jacobson echoed other administration officials in declining to describe the southern border as in a state of crisis. "I'm not trying to be cute here, but I think the fact of the matter is, we have to do what we do regardless of what anybody calls the situation," she said.

House Republicans at the news conference on Wednesday hit the Biden administration for not calling the situation a crisis.

"The first step in solving a crisis is to first admit you have one," said Rep. Jodey Arrington (R-Texas). "But let's be clear. Even if you don't admit it, it doesn't mean that there isn't a crisis. And the facts on the ground, folks, do not lie."

Jacobson also alluded to the starkly divergent immigration rhetoric of Trump and Biden, and stressed that the current administration did not view the most extreme anti-migrant messages as the most effective at slowing travel to the border.

"I think it's really important to understand that you can't and shouldn't say, in this administration's opinion, that the only way to message 'Do not come in an irregular fashion' is to act as cruelly as you possibly can," she said.

While the Trump administration pursued controversial policies such as family separation in order to deter migrants from traveling to the U.S., "this administration's belief is that we can get our message across — that it is a more humane policy — by opening up avenues of legal migration," Jacobson said.

Jacobson's remarks on Wednesday were accompanied by the administration's formal reopening of the Central American Minors program — under which the Departments of State and Homeland Security seek "to reunite qualified children" from the Northern Triangle countries of El Salvador, Guatemala and Honduras "with their parent or parents who are lawfully present" in the U.S., according to a State Department spokesperson.

"This program provides a safe, legal, and orderly alternative to the risks incurred in the attempt to migrate to the United States irregularly," the spokesperson said in a statement.

"The U.S. southern border remains closed to irregular migration, and we reiterate our warning that people not attempt that dangerous journey."

Ben Leonard contributed to this report.

'Crisis' looms at Pima migrant shelter; Feds are 'ill-prepared' to help county with COVID issues

tucsonsentinel.com/local/report/021621_casa_alitas/crisis-looms-pima-migrant-shelter-feds-are-ill-prepared-help-county-with-covid-issues/

Posted Feb 16, 2021, 9:16 am

Paul Ingram TucsonSentinel.com

Pima County may be facing another shelter crisis for migrants, and officials are pushing for federal funding to help deal with COVID-19 issues. According to a letter from Arizona's senators, the Border Patrol's capacity in Arizona is already strained.

County Administrator Chuck Huckelberry warned the Board of Supervisors in a memo last week that the ability to shelter asylum-seekers and other who are released by the federal government here is strained by the requirements of COVID-19 public health measures, including greatly reduced capacity at the Casa Alitas shelter set up by the county.

"In addition to the current pandemic and public health crisis, we potentially face another emergency shelter and housing crisis" if the number of immigrants seeking asylum increases, he said. "We have been advised by U.S. Customs and Border Protection, through the Border Patrol, that the number of individuals being received for asylum could be triple what was formerly processed during 2018 and 2019. If so, this will put a substantial, additional burden on Pima County and the community."

The ability of the Border Patrol and other federal agencies to handle an increase in migrants is already under pressure.

Sens. Krysten Sinema and Mark Kelly said that on Jan. 29 detention capacity was just over 50 percent in the Tucson Sector, and approximately 80 percent in the Yuma Sector, prompting questions about how the Department of Homeland Security—which oversees CBP and U.S. Immigration and Customs Enforcement—would handle migrants who had COVID-19 and may be released from custody.

Facing an influx of Central American families coming to the U.S. to seek asylum in late 2018 and early 2019, U.S. Immigration and Customs Enforcement — later followed by the Border Patrol — began releasing people directly to the streets of border communities. As the situation accelerated, the county made a controversial move to renovate an unused portion of the Juvenile Detention Center, as part of a deal with the nonprofit Catholic Community Services.

By the end of 2019, the shelter now dubbed the Casa Alitas Welcoming Center had provided

refuge for about 5,000 out of roughly 20,000 people released by federal officials in the Tucson area that year.

Overall, ICE released about 41,600 people in Arizona, and 222,200 people across California, Arizona, New Mexico, and Texas.

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By December 2019, Huckelberry was attempting to get more federal support, and sought reimbursements for the county's efforts in 2019, predicting that the county would shelter another 12,000 people. However, by the end of 2020, the shelter supported just 1,086 people as the Trump administration clamped down harder along the border, and a CDC order allowed Border Patrol agents to immediately expel people from the United States.

This along with the highly controversial program, known as the Migrant Protection Protocols, which required Central Americans to wait for months in Mexico while their asylum status remained in limbo, kept thousands from entering the U.S. to seek asylum.

On January 28, Huckelberry wrote a memo to the board, warning that while the Casa Alitas shelter had been sheltering about nine people per week on average, "in the last few weeks we have been experiencing an uptick." And, he told the board he was "reactivating" the shelter.

"However, we have been alerted and working with U.S. Border Patrol and U.S. Customs in the anticipation of a significant increase of individuals being processed and essentially reactivating Casa Alitas and preparing it to provide maximum capacity and temporary shelter services," Huckelberry wrote. "The purpose of this communication is to alert you to the pending matter and our preparation with federal authorities to significantly accept and process asylum seekers," he wrote.

Last week, U.S. Border Patrol agents released some asylum-seeking families into the U.S. after Mexican authorities began refusing to take some people back in January, prompting worries of a new crisis, exacerbated by COVID-19, which drastically limits how many people can be held in CBP's holding facilities.

The agency instead released the families — legally seeking asylum in the U.S. — with documents requiring a court appearance for future immigration hearings, and CBP said that the Biden administration officials will continue using what legal authorities it has to avoid crowded facilities during the pandemic.

CBP said border agents have faced a "growing number" of people attempting to cross the U.S. border, averaging about 3,000 arrests per day in January. Troy Miller, the senior official performing the duties of the agency's commissioner, called the shift an "uptick" across a "small faction of locations," along the southwest border, and said that about 38 percent of

those arrests were people caught multiple times.

"While CBP continues to experience an increase in attempted monthly border crossings as seen since last April, the uptick seems to be occurring in a small fraction of locations across the southwest border, which is consistent with trends in years past," Miller said.

"As we have said, there have been incredibly narrow and limited circumstances where individuals have come into the country awaiting for their hearing, but for now the vast majority have been turned away. This is not the time to come," Miller said.

'Transferring a federal problem to local communities'

On Friday, Huckelberry increased his warnings, telling the board: "We have been advised by US Customs and Border Protection, through the Border Patrol, that the number of individuals being received for asylum could be triple what was formerly processed during 2018 and 2019. If so, this will put a substantial, additional burden on Pima County and the community."

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In a dense memo to the board regarding COVID-19, including shortages in vaccines from the state, Huckelberry also outlined the issues at Casa Alitas.

While the shelter normally could support about 180 people, COVID-19 precautions diminish the shelter's capacity to just 60 people, Huckelberry warned. He also said that the county was "prepared" to provide rapid COVID-19 testing for all individuals released to the custody of Catholic Community Services, and "prepared contingency plans" for sheltering those who test positive for COVID-19, but that the county would need financial help from the Federal Emergency Management Agency.

In the past, FEMA would reimburse the county for expenses related to Casa Alitas, but this "problematic since we have not been reimbursed any costs from the state, through the federal government, for COVID-19 testing and vaccination," he said. "We have nothing to advance for reimbursement," Huckelberry said.

"Hence, we cannot operate an emergency housing/shelter program on a federal grant reimbursement basis," he said. He added that during a phone call he asked Congress to get "a rapid response from the federal agency most appropriate to fund emergency shelter, FEMA, for an advance grant program to pay for this pending housing emergency."

In his memo, Huckelberry also told the board that a lack reimbursement for our COVID-19 continuing expenses without an increasing number of people at Casa Alitas has "significantly deteriorated" the county's finances, and said that he would move to get FEMA to cover some

expenses from COVID-19 testing and vaccinations.

Huckelberry told that board that Sinema and Kelly sent their letter to DHS, and said he welcomed their letter, and said that the agency is "ill-prepared to handle the issue," of migrants released to humanitarian groups.

FEMA should be "closely working" with CBP to "ensure there is sufficient emergency housing or shelters within communities to accept asylum seekers," he said.

"This includes those within Pima County, including our faith-based organizations and public shelters operated for this purpose, such as the county's Casa Alitas Welcome Center facility," he said."To date there has been no contact or development of any emergency shelter plan" by either CBP or FEMA," Huckelberry said.

He also said that the mayor of Yuma was told on February 11 that Border Patrol "began street releases within" Yuma.

"It is unfortunate these units within this federal agency do not communicate with themselves to prepare and avoid transferring a federal problem to local communities," he said.

In their letter, Sinema and Kelly wrote to DHS Secretary Alejandro Mayorkas, and said that "recent reports indicate Arizona faces a looming challenge at the border due to the combination of increasing numbers of migrants and the ongoing COVID-19 pandemic."

Sinema and Kelly asked Mayorkas to take" immediate steps" to ensure DHS "has sufficient resources in Arizona to keep our communities safe and ensure migrants are treated fairly and humanely. These resources should include COVID-19 testing capability so that DHS and Arizona communities can take appropriate measures to manage the ongoing pandemic."

Sinema and Kelly wrote that according to according to information they received from CBP, Border Patrol detention capacity was just over 50 percent in the Tucson Sector and approximately 80 percent in the Yuma Sector as of January 29. "We are also aware of the situation in Texas, where CBP recently began to direct releases of migrants. It is important to act now to prevent the type of crisis we saw at the border in the spring of 2019."

DHS should plan for and provide COVID-19 testing capability as part of this effort, the senators wrote.

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No. 20-71433

In the United States Court of Appeals for the Ninth Circuit

SUZANNE SISLEY, M.D.; SCOTTSDALE RESEARCH INSTITUTE, LLC; BATTLEFIELD FOUNDATION, DBA FIELD TO HEALED; LORENZO SULLIVAN; KENDRICK SPEAGLE; GARY HESS,

Petitioners,

v.

U.S. DRUG ENFORCEMENT ADMINISTRATION; WILLIAM BARR, ATTORNEY GENERAL; TIMOTHY SHEA, ACTING ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION,

Respondents

AMICUS CURIAE BRIEF OF RICE UNIVERSITY'S BAKER INSTITUTE OF PUBLIC POLICY, DRUG POLICY PROGRAM, DR. KEVIN BOEHNKE AND DR. DANIEL CLAUW IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Amicus Baker Institute for Public Policy, Drug Policy Program, is a non-profit research and policy institute affiliated with Rice University in Houston, Texas. The Institute does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public. Amici Drs. Kevin Boehnke and Dan Clauw are research scientists.

All Parties have consented to the filing of this amicus brief. No counsel for any party authored the brief in whole or in part, nor did any person or entity other than Amici Curiae or their counsel make any monetary contribution to the preparation or submission of this Brief.

INTEREST OF AMICI CURIAE:

Founded in 1993, Rice University's Baker Institute for Public Policy (the "Institute") is one of the country's premier nonpartisan public policy think tanks. Named for former Secretary of State James Baker, the Institute is guided by his vision that practical imperatives must impact public policy. An integral part of Rice University, one of the nation's most distinguished and high-ranking universities, the Institute's achievements are supported by its fellows, scholars, Rice faculty, and staff.

Begun in 2001, the Baker Institute Drug Policy Program ("Program") pursues research and debate on drug policies to develop pragmatic solutions based on common sense and human rights interests to focus on reducing death, disease, crime and suffering associated with drug use, legal and illegal. The Program has hosted then-

current DEA Administrator Asa Hutchinson, then-current National Drug Policy Director John Walters, former Director Lee Brown, and Kevin Sabet, co-founder of Smart Approaches to Marijuana.

William Martin, Ph.D., and Katharine Neill Harris, Ph.D., resident Program Directors/Fellows, have researched, written, lectured, lobbied, and testified on reduction/removal of criminal penalties for low-level nonviolent drug use, marijuana regulation and taxation, and marijuana therapeutics. After interviewing many veterans who have successfully managed their PTSD with marijuana, Drs. Martin and Harris were led to Dr. Suzanne Sisley's work. The Program follows her efforts to perform critically needed scientific research about the potential benefits of marijuana for treating PTSD. The Program shares her frustration over the difficulties she has faced because of obstacles that hinder research that might challenge the assumption that marijuana belongs in Schedule I.

The Program is aware of the complexities involved in scientific research on marijuana. This amicus brief is filed because the solution is not to prohibit all research; but rather to facilitate and encourage research, using a variety of marijuana products from numerous vetted producers, with a variety of research participants, in particular, afflicted veterans and those suffering from opioid dependency and abuse.

Dr. Kevin Boehnke is a Research Investigator at the University of Michigan, Ann Arbor. He studies chronic pain and cannabis, with a special emphasis on the

intersection of cannabis and opioids. Dr. Daniel Clauw is a Professor of Anesthesiology, Medicine (Rheumatology) and Psychiatry at the University of Michigan, Ann Arbor, where he serves as Director of the Chronic Pain and Fatigue Research Center. Dr. Clauw is a recognized thought-leader in chronic pain research, known for his pioneering contributions to evidence-based understanding of chronic pain mechanisms and chronic pain management. Drs. Boehnke and Clauw helped develop the Arthritis Foundation's first and only guidance documents on CBD and have offered expert guidance on how best to use cannabis for chronic pain management, as reported in the 2019 Annals of Internal Medicine. Drs. Boehnke and Clauw support this amicus brief as proponents for allowing uncompromised cannabis research to better develop the pharmacopeia and to discover what forms of cannabis treatments may help certain populations dealing with pain and opioid abuse.

Amici submit this brief in support of Dr. Sisley, the Scottsdale Research Institute, and the other Petitioners to elucidate the public policy imperatives, backed by scientific data, which support Petitioners' legal arguments. Amici encourage this Court to grant Petitioners' petition, find that the DEA's conclusion that marijuana has no accepted medical use is arbitrary, capricious, and contrary to the medical conclusions in a supermajority of the States, and to require a reconsideration of scheduling and facilitation of research.

SUMMARY OF ARGUMENT

The fact that someone can legally, but unscientifically, self-medicate with marijuana unsupervised in one building, but cannot have a physician administer a scientific dose in a monitored study in the building next door, is an untenable situation that ignores current reality and robs us of scientific discoveries and potential treatment options. The DEA's continued inaction and refusal to allow real world research on marijuana, despite 47 states' determination that marijuana has some medical potential, stifles the development of the very research that, if recognized, would justify the removal of marijuana from Schedule I, and thus beget more research. Forbidding research continues to harm all those who could benefit from it.

The public policy arguments made here detail scientific studies performed to date about marijuana's effectiveness for treating pain and reducing opioid misuse, which could also benefit those suffering from post-traumatic stress disorder ("PTSD"), who are often prescribed a panoply of medications. Dr. Sisley specifically endeavors to research the healing interaction between marijuana and PTSD to treat U.S. veterans in a scientifically measured way.

In 1970, President Richard Nixon signed into law the Controlled Substances Act ("CSA"), which placed marijuana on Schedule I. Despite the flexibility intended by the scheduling regime, and despite fifty years of petitions, there it inexplicably remains. It is time to reconsider the blind dogmatic adherence to this position, as the States and

other countries have already done. The World Health Organization has already descheduled low THC cannabis (hemp CBD) and is scheduled to reconsider marijuana this year—it has been conducting hearings of evidence in furtherance its removal from the 1961 Single Convention on Narcotic Drugs. It is time the United States consider current medical uses for marijuana as well and revisit the original scheduling determination, applying currently medically acceptable treatments with it. To date the Drug Enforcement Administration ("DEA") has employed a results oriented approach to marijuana scheduling, ignoring currently accepted medical treatment. This brief is submitted in support of the premise that medical science should prevail.

Amici urge this Court to grant Petitioners' petition for review, and to find that DEA's retention of marijuana on Schedule I of the Controlled Substances Act is arbitrary and capricious, given current medically accepted uses throughout the States and the world.

ARGUMENT

I. As a Practical Imperative, Marijuana Research Is Necessary to Follow Mass Statewide Legalization

A. Research Obstructed and Impeded

Marijuana's Schedule I status prevents research and development of marijuana-derived pharmaceuticals. Schedule I controlled substances are defined as substances with high potential for abuse and no currently accepted safe medical use, even when supervised by a physician, resulting in unduly onerous regulatory hurdles for any attempted research.[1] As more state-legal marijuana markets emerge, and as marijuana[2] products diversify, government officials should not ignore commercialization, but instead, study it to create policies based on best practices for public health and protection.[3]

To research Schedule I controlled substances, scientists must obtain difficult and time-consuming approvals from DEA. Further, state-legal marijuana program licensees

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[1] 21 USC § 812(b)(1).

[2] United States Commission on Marihuana and Drug Abuse, *Marihuana: A Signal of Misunderstanding: First Report*, 184 (1972); RC Randall, United States Drug Enforcement Administration, *Marijuana, Medicine & the Law* (Vol. 11988).

[3] C.M. Bowling, A.Y. Hafez, S.A. Glantz, *Public Health and Medicine's Need to Respond to Marijuana Commercialization in the United States: A Commentary*, JOURNAL OF PSYCHOACTIVE DRUGS, 1–6 (2020); J. Marcu, *Regulators Need to Rethink Restrictions on Marijuana Research*, NATURE, 572, S19–S19 (2019); Russo EB, Mead AP, Sulak D., *Current Status and Future of Marijuana Research*, CLINICAL RESEARCHER, 58-63 (April 2015); A. Mead, *The Legal Status of Marijuana (Marijuana) and Cannabidiol (CBD) Under U.S. Law*, EPILEPSY & BEHAVIOR, 70, 288-91, (May 2017).

cannot obtain DEA approval because the application disqualifies anyone already growing marijuana, despite the expertise that experience and those products would lend to research.

As recounted in Petitioners' brief, researchers are limited to NIDA University of Mississippi marijuana, which does not mirror products available to actual consumers. This sole-source prevents researchers from studying the effect of a plant's full cannabinoid expression as contained in the trichomes of the outer leaves, which are crushed and eviscerated by the NIDA marijuana.[4] The NIDA pulverization shaves off the valuable trichomes, but in commercial marijuana, they are preserved through proper trimming, curing, and drying.[5] Moreover, NIDA marijuana contains less than 50% of the cannabinoid concentration than state-legal marijuana and often 80% fewer terpenes, another therapeutic cannabinoid component of marijuana lost by long periods of storage as it becomes embrittled.[6]

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[4] https://coloradomarijuanatours.com/guides/trichomes-terpenes-types-uses/.

[5] https://www.leafly.com/news/cannabis-101/what-are-trichomes-on-cannabis#:~:text=The%20actual%20definition%20of%20trichome,of%20a%20science%20fiction%20novel.

[6] EB Russo, ML Mathre, A Byrne, R Velin, PJ Bach, J Sanchez-Ramos, *et al.*, *Chronic Marijuana Use in the Compassionate Investigational New Drug Program: an Examination of the Benefits and Adverse Effects of Legal Clinical Marijuana*, JOURNAL OF MARIJUANA THERAPEUTICS, 2:1, 3-57 (2002); RN Bloor, TS Wang, P Spanel, D Smith, *Ammonia Release from Heated 'Street' Marijuana Leaf and Its Potential Toxic Effects on Marijuana Users*, ADDICTION, 103 (2008); EB Russo, *Current Therapeutic Marijuana Controversies and Clinical Trial Design Issues*, FRONT PHARMACOL, 7:309 (2016); https://coloradomarijuanatours.com/guides/trichomes-terpenes-types-uses/.

Here are pictures of commercially available fresh leafy marijuana, the first displaying fully expressed trichomes, and the second showing the delicate trichomes under a microscope:

In addition to Petitioners' arguments, Amici posit the Schedule I status has created obstacles that have been detrimental to America's public health. The federal scheduling of marijuana is of significant public concern because the Schedule I status prevents researchers from conducting appropriate research to gather medical and scientific data, and its federal prohibition constitutes an overreach into a healthcare matter which should be one of local control. As such, many states deemed medical marijuana businesses "essential" during the COVID pandemic.

B. Incongruent Federal Position

At the same time the DEA is maintaining marijuana at Schedule I status and denying research, incongruently, DEA is not allowed by Congress to enforce the CSA directly against state-compliant medical marijuana businesses. In 2009, the Department of Justice ("DOJ") issued a memorandum directed at U.S. attorneys indicating that the

federal government would not devote its resources to prosecuting "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[7] Since 2014, Congress has expressly prohibited the DEA and DOJ from using appropriated funds to block states from implementing laws that authorize the use, distribution, possession, or cultivation of medical marijuana. ("Funding Riders," also referred to as the "Joyce-Blumenauer Amendment").[8] The Funding Riders were enacted after the DOJ's 2013 "Cole Memorandum" prosecutorial enforcement priority direction from then Attorney General James Cole that recognized state legalization of marijuana.

Despite a change in administration, the Department still does not prioritize enforcement of the CSA for individuals using medical marijuana under state law. *See Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of the United States: Hearing Before the S. Judiciary Comm.*, S. Hrg. 116-65, 116th Cong., at 70 (2019) (statement of William P. Barr) ("My approach to this would be not to upset

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[7] Mem. from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Selected U.S. Att'ys, 1-2 (Oct. 19, 2009), *available at* https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

[8] C.M. Bowling, A.Y. Hafez, S.A. Glantz, *Public Health and Medicine's Need to Respond to Marijuana Commercialization in the United States: A Commentary*, JOURNAL OF PSYCHOACTIVE DRUGS, 1–6 (2020); J. Marcu, *Regulators Need to Rethink Restrictions on Marijuana Research*, NATURE, 572, S19–S19 (2019); Russo EB, Mead AP, Sulak D., *Current Status and Future of Marijuana Research*, CLINICAL RESEARCHER, 58-63 (April 2015);A. Mead, *The Legal Status of Marijuana (Marijuana) and Cannabidiol (CBD) Under U.S. Law*, EPILEPSY & BEHAVIOR, 70, 288-91, (May 2017);A. Mead, *Legal and Regulatory Issues Governing Marijuana and Marijuana-Derived Products in the United States*, FRONT PLANT SCIENCE, 10, 697 (2019); *See United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016) (prohibiting prosecution of individuals engaged in activity authorized by state marijuana laws).

settled expectations and the reliance interests that have arisen as a result of the Cole Memoranda.")

No medical institution that receives or seeks federal funding is willing to sponsor and undertake the high-quality clinical studies of marijuana the DEA and FDA demand because of the significant risk and catastrophic consequence of losing the many streams of federal funding on which they rely. Hospitals cannot afford to jeopardize the Medicare, Medicaid, and many other streams of federal funds they receive by engaging in clinical research activity that requires them to procure and dispense a Schedule I drug in violation of the CSA.

Likewise, colleges and universities cannot afford to sponsor this research and risk losing the billions of dollars in research grants, student financial aid, and other forms of federal financial assistance upon which they rely. Moreover, most research hospitals and research universities are 501(c)(3) nonprofit organizations that cannot afford to jeopardize the tax-exempt status of their institutions by allowing researchers to properly evaluate the medical efficacy and safety of marijuana.

Moreover, approximately 80 million Americans, about 25 percent of the U.S. population, live in a state where marijuana is legal for medical and adult-use purposes.[9] Over two-thirds of Americans, roughly 225 million people, live in a state with legalized

[9] https://www.washingtonpost.com/business/2018/11/07/michigan-becomes-th-state-allow-recreational-marijuana/.

medical access.[10] These figures are likely to increase by 2021, as several states have medical and adult-use legalization initiatives on their November 2020 ballots.[11] Support for legalization of medical marijuana is overwhelming; the latest Pew Research poll found that 91 percent of Americans approve of legalizing marijuana for medical use.[12] 59 percent of Americans say marijuana should be legal for general adult use.[13]

Gary Hale, a 31-year DEA veteran who retired in 2010 after serving nine years as Chief of intelligence in the Houston field division of the DEA, writing in the *Houston Chronicle* about the incongruity of the placement of marijuana in Schedule I, observed: "The agency in which I worked for 31 years, many of them at a high level, must accept that the American people simply do not wish to have our federal government continue to spend time, money and resources fighting marijuana possession and use, especially in light of convincing evidence that marijuana provides alternative medicinal choices for epileptics, veterans with post-traumatic stress disorder, those suffering the pains of cancer and others."[14]

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[10] https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/.

[11] https://www.mpp.org/policy/ballot-initiatives/.

[12] https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/.

[13] https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/.

[14] https://www.houstonchronicle.com/opinion/outlook/article/Gary-Hale-Pot-legalization-is-no-longer-a-trend-5626411.php.

The change in attitudes—and the growing acknowledgement that marijuana has therapeutic value in the United States—is part of a growing global trend. Canada, Mexico, Germany, France, Greece, Portugal, South Korea, Australia, South Africa, Argentina, Chile, and 29 other countries allow for medical access to marijuana.[15]

It is time the DEA caught up with its own government, the States, the World Health Organization, and other countries to consider the already medically accepted uses by removing marijuana from its untenable status as a Schedule I substance and allowing research of the plant.

II. Scientific Data Demonstrates Marijuana's Propensity to Treat Symptoms of Chronic Pain and PTSD, and to Combat the Opioid Epidemic

A. The Widespread Harms of Untreated Pain

Chronic pain, defined as lasting longer than six months, is debilitating and difficult to treat.[16] The Institute of Medicine estimated "more than 100 million Americans suffer from chronic pain,"[17] that the annual direct and indirect costs of untreated chronic pain totals $560-$635 billion, and more Americans suffer from

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[15] *See* The Cannigma Staff, *Marijuana Regulation Around the World* (Oct. 2, 2019), https://cannigma.com/regulation/marijuana-regulation-around-the-world/#central-south-america.

[16] The Cleveland Clinic, 2017, "Acute vs. Chronic Pain," https://my.clevelandclinic.org/health/articles/12051-acute-vs-chronic-pain.

[17] 100 Million have chronic pain. https://wb.md/2FsaDHW.

chronic pain conditions than heart disease, cancer, and diabetes combined.[18] Chronic pain may also induce depression.[19]

Untreated chronic pain contributes to opioid and alcohol misuse and to the overdose epidemic.[20] According to the National Survey on Drug Use and Health, 9.9 million Americans aged 12 and older misused prescription pain killers in 2018.[21] When asked their primary reason for that misuse, 63.6 percent of respondents said it was to "relieve physical pain."[22]

Misuse of prescription pain killers increases the risk of developing a substance use disorder (SUD) and overdosing. Nearly 1.7 million people had a SUD involving a prescription pain reliever in 2018, and in 2019, there were an estimated 72,707 drug overdose deaths, approximately 50,000 of which involved an opioid.[23]

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[18] *Id.*

[19] Sheng, J., et al., 2017, "The Link between Depression and Chronic Pain: Neural Mechanisms in the Brain," *Neural Plasticity*, https://psycnet.apa.org/record/2017-27829-001.

[20] Witkiewitz, K., & Vowles, K.E., 2018, "Alcohol and Opioid Use, Co-Use, and Chronic Pain in the Context of the Opioid Epidemic: A Critical Review," *Alcoholism Clinical & Experimental Research, 42*(3), 478-488, https://onlinelibrary.wiley.com/doi/full/10.1111/acer.13594?casa_token=5l-m3nCZWr4AAAAA%3AGT2q2K_GmQHwJ2TLQ0QgCp9gxN8lJnJZBZ7Vsh6WiRZEO2Ef5l5khFLyDuNy0sNX-JHzLGmzm7n2xA.

[21] 2018 National Survey on Drug Use and Health: Detailed Tables, Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables.

[22] 2018 National Survey on Drug Use and Health: Detailed Tables, Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables.

[23] 2018 National Survey on Drug Use and Health: Detailed Tables, Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables; National Center for Health statistics, 2020, *Provisional Drug Overdose Death Counts*, Centers for Disease

B. Implications for Marijuana's Potential to Alleviate Pain and Reduce Opioid Use

Marijuana and cannabinoids have an established ability to diminish chronic pain.[24] For acute pain such as that from surgery, burns, broken bones, or advanced cancer, cannabinoids alone are often insufficient.[25] However, there is some evidence suggesting that, used in combination with opioids, they could reduce the amounts needed for acute pain and thereby lessen the chance of overdose.[26] Studies have also shown that statewide opioid prescribing tends to decrease following passage of medical marijuana legislation.[27]

For chronic pain, a review of evidence carried out by the National Academies of Science, Engineering, and Medicine found "substantial evidence" from clinical trials that cannabinoids (mainly THC or THC and CBD) can help relieve chronic pain –

Control and Prevention, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm#COD_classification_definition_drug_deaths.

[24] Nielsen, Suzanne, et al. "Opioid-sparing effect of cannabinoids: a systematic review and meta-analysis." *Neuropsychopharmacology* 42.9 (2017): 1752-1765.

[25] Stevens, A. J., and M. D. Higgins. "A systematic review of the analgesic efficacy of cannabinoid medications in the management of acute pain." *Acta Anaesthesiologica Scandinavica* 61.3 (2017): 268-280.

[26] https://drugabuse.com/legalizing-marijuana-decreases-fatal-opiate-overdoses/.

[27] Bradford AC, Bradford WD. Medical Marijuana Laws Reduce Prescription Medication Use In Medicare Part D. Health Aff (Millwood) 2016;35:1230-6; Bradford AC, Bradford WD. Medical Marijuana Laws May Be Associated With A Decline In The Number Of Prescriptions For Medicaid Enrollees. Health Aff (Millwood) 2017;36:945-51; Bradford AC, Bradford WD, Abraham A, Bagwell Adams G. Association Between US State Medical Marijuana Laws and Opioid Prescribing in the Medicare Part D Population. JAMA Intern Med 2018;178:667-72.

mostly of neuropathic origin.[28] This report highlighted research barriers (most notably: marijuana's Schedule I status) that prevented effective understanding of marijuana as medicine.

Marijuana's ability to alleviate chronic pain and reduce reliance on opioids has far-reaching implications. Numerous studies have found that "when given access to marijuana, individuals currently using opioids for chronic pain decrease their use of opioids by 40–60 percent and report that they prefer marijuana to opioids," reporting fewer side effects, better symptom management, and a better quality of life.[29] These studies have been conducted throughout the U.S. as well as in Canada and Israel.[30]

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[28] The National Academies of Sciences, Engineering, and Medicine, 2017, *The Health Effects of Marijuana and Cannabinoids*, https://www.nap.edu/catalog/24625/the-health-effects-of-marijuana-and-cannabinoids-the-current-state.

[29] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6135562/#B36.

[30] Boehnke KF, Litinas E, Clauw DJ. Medical Marijuana Use Is Associated With Decreased Opiate Medication Use in a Retrospective Cross-Sectional Survey of Patients With Chronic Pain. J Pain 2016;17:739-44; Boehnke KF, Scott JR, Litinas E, Sisley S, Williams DA, Clauw DJ. Pills to Pot: Observational Analyses of Marijuana Substitution Among Medical Marijuana Users With Chronic Pain. J Pain 2019;20:830-41; Reiman A, Welty M, Solomon P. Marijuana as a Substitute for Opioid-Based Pain Medication: Patient Self-Report. Marijuana Cannabinoid Res 2017;2:160-6; 1; Lucas P, Walsh Z, Crosby K, et al. Substituting marijuana for prescription drugs, alcohol and other substances among medical marijuana patients: The impact of contextual factors. Drug Alcohol Rev 2016;35:326-33; Lucas P, Walsh Z. Medical marijuana access, use, and substitution for prescription opioids and other substances: A survey of authorized medical marijuana patients. Int J Drug Policy 2017;42:30-5; Baron EP, Lucas P, Eades J, Hogue O. Patterns of medicinal marijuana use, strain analysis, and substitution effect among patients with migraine, headache, arthritis, and chronic pain in a medicinal marijuana cohort. J Headache Pain 2018;19:37; Lucas P, Baron EP, Jikomes N. Medical marijuana patterns of use and substitution for opioids & other pharmaceutical drugs, alcohol, tobacco, and illicit substances; results from a cross-sectional survey of authorized patients. Harm Reduct J 2019;16:9; Abuhasira R, Schleider LB, Mechoulam R, Novack V. Epidemiological characteristics, safety and efficacy of medical marijuana in the elderly. Eur J Intern Med 2018;49:44-50; Bar-Lev Schleider L, Mechoulam R, Lederman V, et al. Prospective analysis of safety and efficacy of medical marijuana in large unselected population of patients with cancer. Eur J Intern Med 2018;49:37-43; Sagy I, Bar-Lev

Moreover, the risks of using opioids for chronic pain management often outweighs the potential benefits, demonstrated by CDC guidelines suggesting that opioids should only be used after all other options have failed and only when benefits outweigh risks.[31]

Additionally, given the widespread use of marijuana among veterans for PTSD symptoms, and their concurrent experience with chronic pain and over-prescription of opioids to treat those symptoms, there is a great need to understand how best to effectively use marijuana for PTSD symptom management, especially as there is evidence of cannabinoid efficacy for treating some common PTSD symptoms (*e.g.*, pain, sleep disturbances). Unfortunately, the scientific literature has been effectively limited by research barriers that have resulted in few rigorous studies of marijuana in PTSD. While there are several ongoing PTSD clinical trials using herbal cannabis and synthetic cannabinoids, these trials cannot use products currently available in medical cannabis dispensaries. Dr. Sisley's research would be crucial in this regard.

To summarize, millions of Americans suffer from chronic pain. Prescription opioids can reduce pain for some individuals, but are generally not appropriate for

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Schleider L, Abu-Shakra M, Novack V. Safety and Efficacy of Medical Marijuana in Fibromyalgia. J Clin Med 2019; 8; Naftali T, Bar-Lev Schleider L, Sklerovsky Benjaminov F, Lish I, Konikoff FM, Ringel Y. Medical marijuana for inflammatory bowel disease: real-life experience of mode of consumption and assessment of side-effects. Eur J Gastroenterol Hepatol 2019;31:1376-81.

[31] Collen, M., 2012, "Prescribing Marijuana for Harm Reduction," *Harm Reduction Journal, 9*, https://link.springer.com/article/10.1186/1477-7517-9-1; Dowell, Deborah, Tamara M. Haegerich, and Roger Chou. "CDC guideline for prescribing opioids for chronic pain—United States, 2016." *JAMA* 315.15 (2016): 1624-1645.

chronic pain management as long-term opioid use can lead to depression and addiction, and they have contributed heavily to the current opioid crisis. In contrast, marijuana can alleviate chronic pain in some cases, and while it does carry some risks (intoxication, behavioral disturbances, dependence), marijuana is not known to cause lethal overdoses. As such, marijuana and cannabinoids represent an alternative to opioids for chronic pain management that scientists should be allowed to study to best determine how to maximize benefits and minimize harm among people using marijuana in this context.

C. Marijuana's Relationship with Substance Use Disorders and Other Drug Use

Emerging evidence suggests that marijuana may help reduce illicit opioid use or help wean people off of opioids. Recent research conducted in Vancouver, Canada, and published in *PLOS Medicine* found that among people who use drugs and have chronic pain, illicit opioid use was lower among daily marijuana users.[32] This is consistent with previous research finding that people who inject drugs and also use marijuana report significantly less frequent opioid use compared to people who inject drugs and do not use marijuana.[33] Other studies indicate that cannabinoids can ease symptoms

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[32] Lake, S. Walsh, Z., Kerr, T., Cooper, Z.D., Buxton, J., Wood, E., Ware, M.A., & Milloy, M.J., 2019, Frequency of Marijuana and Illicit Opioid Use among People Who Use Drugs and Report Chronic Pain: A Longitudinal Analysis," *PLOS Medicine*, https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002967.

[33] Kral, A.H., Wenger, L, Novak, S.P., Chu, D., Corsi, K.F., Coffa, D., Shapiro, B., Bluthenthal, R.N., 2015, "Is Marijuana Use Associated with Less Opioid Use Among People Who Inject Drugs?" *Drug and Alcohol Dependence, 153*, 236-241,

experienced during opioid withdrawal, a necessary precursor to starting an opioid antagonist therapy such as naltrexone.[34] A randomized control trial involving dronabinol, the FDA-approved synthetic version of THC, found that patients receiving the dronabinol experienced less severe opioid withdrawal symptoms.[35] Similarly, another study showed that compared to placebo, CBD reduced cue-induced craving and anxiety among participants recovering from heroin addiction.[36] A study of opioid dependent patients that were being treated with oral naltrexone found intermittent marijuana use to be associated with significantly improved treatment retention rates.[37]

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https://www.sciencedirect.com/science/article/pii/S0376871615002501?casa_token=7UO_w3pL9IQAAAAA:nSlMoPu6DMfIMh3e2Tt_x2tudVQeudfic55WpZBm9Q8JtsplhbRs0jymkkNzyFgyVzI2d07i2A.

[34] Wiese, B., & Wilson-Poe, A.R., 2018, "Emerging Evidence for Marijuana' Role in Opioid Use Disorder," Marijuana and Cannabinoid Research 3(1), https://www.liebertpub.com/doi/full/10.1089/can.2018.0022; American Society of Addiction Medicine, The National Practice Guideline for the Use of Medications in the Treatment of Addiction Involving Opioid Use, https://www.asam.org/docs/default-source/practice-support/guidelines-and-consensus-docs/asam-national-practice-guideline-supplement.pdf.

[35] Bisaga, A., Sullivan, M.A., Glass, A., Mishlen, K., Paclicova, M., Haney, M., Raby, W.N., Levin, F.R., Carpenter, K.M., Mariani, J., & Nunes, E. V., 2015, "The Effects of Dronabinol during Detoxification and the Initiation of Treatment with Extended Release Naltrexone," *Drug and Alcohol Dependence*, 154: 38-45, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4536087/#:~:text=Dronabinol%20reduced%20the%20severity%20of,regardless%20of%20treatment%20group%20assignment.

[36] Boehnke KF, Scott JR, Litinas E, et al. Marijuana Use Preferences and Decision-making Among a Cross-sectional Cohort of Medical Marijuana Patients with Chronic Pain. J Pain 2019;20:1362-72.

[37] Raby, W.N., 2009, "Intermittent Marijuana Use is Associated with Improved Retention in Naltrexone Treatment for Opiate-Dependence," American Journal of Addiction, 18 (4), 301-308, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2753886/. Oral naltrexone is an opioid antagonist that prevents a person from experiencing opioids' effects by blocking the brain's opioid receptors; it must be taken every day and thus often has limited effectiveness due to lack of treatment adherence.

While most of these studies were uncontrolled and are not definitive, they highlight a trend that warrants further study.

Preliminary studies also demonstrate marijuana's potential efficacy in addressing other substance use issues.[38] The Summer 2017 issue of *Neuroscience Quarterly* reported CBD can significantly reduce preference for alcohol in mice.[39] Similarly, surveys have shown that up to twenty-five percent of Canadian marijuana users self-reported substituting marijuana for alcohol.[40] Approximately 14.8 million Americans had an alcohol use disorder in 2018, so reductions of that magnitude may have significant public health benefits.[41]A scoping review published in March 2020 that included 57 articles in 33 countries found marijuana can enhance the pain management properties of prescription opioids and reduce dependence on opioids, cocaine, alcohol, and nicotine, and that these benefits can be gained through routes of administration other than smoking, such as vaporizing and ingesting marijuana.[42] While these results suggest

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[38] Risso, Constanza, et al. "Does cannabis complement or substitute alcohol consumption? A systematic review of human and animal studies." *Journal of Psychopharmacology* 34.9 (2020): 938-954.

[39] Neuroscience Quarterly, 2017, "Inside Neuroscience: Tapping into the Cannabinoid System," http://bit.ly/2HIIFt8.

[40] Lucas & Walsh, "Medical Marijuana Use."

[41] 2018 National Survey on Drug Use and Health: Detailed Tables, Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/data/report/2018-nsduh-detailed-tables; Neill Harris, K., & Martin, W., 2020, Vaping: Clearing the Air, Baker Institute Report.

[42] Siklos, Whillans, J., Bacchus, A., & Manwell, L.A., 2020, "A Scoping Review of the Use of Marijuana and Its Extracts as Potential Harm Reduction Strategies: Insights from Preclinical and Clinical Research, *International Journal of Mental Health and Addiction*, https://link.springer.com/article/10.1007%2Fs11469-020-00244-w#citeas.

great promise, the lack of controlled studies highlights how important marijuana research is to understand the populations in which this substitution is occurring and how to monitor the substitution in a judicious way.

Research to date suggests that marijuana can potentially address unmet health problems that many people attempt to alleviate through other pharmacological means, both licit and illicit, some of which carry significant risks.[43] To judiciously approach the complex issue of addiction–especially given that marijuana itself can be addictive–there is a dire need for future research with rigorous control and selection criteria that examines variations in marijuana's effects that may be dependent on route of administration, cannabinoid concentrations, and dose.[44]

D. Harms Caused by Research Restrictions

Legalization of medical marijuana is rapidly progressing across the country.[45] Over two-thirds of the US population lives in a state where medicinal marijuana is legal,

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[43] Benzodiazepines, for example, a commonly prescribed class of sedatives, are increasingly implicated in overdose deaths and have dependence potential, Kang, M., Galuska, M.A., & Ghassemzadeh, S., 2020, "Benzodiazepine Toxicity," StatPearls Publishing, https://www.ncbi.nlm.nih.gov/books/NBK482238/; National Institute on Drug Abuse, 2018, "Benzodiazepines and Opioids," https://www.drugabuse.gov/drug-topics/opioids/benzodiazepines-opioids.

[44] Siklos et al., "A Scoping Review of the Use of Marijuana;" Volkow, Nora D., et al. "Adverse health effects of marijuana use." *New England Journal of Medicine* 370.23 (2014): 2219-2227.

[45] *See* National Conference of State Legislatures, 2020," State Medical Marijuana Laws," March 10, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

and there are an estimated 4.38 million medical marijuana patients in the U.S.[46] Yet, marijuana is still considered by the DEA to have "no currently accepted medical use and a high potential for abuse."[47] This outdated justification perpetuates daunting research restrictions, leading to a critical mismatch between knowledge and practice, in which millions of Americans consume a psychoactive substance with relatively little guidance regarding safe use, proper dosage, possible interactions with other medications and medical conditions, and long-term effects.[48]

Currently allowed research is typically narrow in scope and must be conducted using unrepresentative marijuana.[49] However, marijuana is increasingly consumed through vaporizing, tinctures, concentrates and edibles. The health effects of these newer routes of administration are less known, and there is concern that highly potent products (e.g., concentrates) could have unknown negative side effects. The DEA's restrictions on marijuana hamper insight into that agency's chief concern, marijuana's harms. Further, while research into marijuana's therapeutic properties has been blocked, NIH funding to investigate harms from marijuana is over *twenty-fold higher* than what is

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[46] Marijuana Policy Project, 2020, "Medical Marijuana Patient Numbers," July 6, https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/.

[47] Drug Enforcement Administration, "Drug Scheduling," https://www.dea.gov/drug-scheduling#:~:text=Schedule%20I%20drugs%2C%20substances%2C%20or,Schedule%20II.

[48] https://www.fda.gov/news-events/public-health-focus/fda-and-marijuana-research-and-drug-approval-process_2018 National Survey on Drug Use and Health; Lucas & Walsh; Cooke et al.

[49] https://cen.acs.org/biological-chemistry/natural-products/Marijuana-research-stalled-federal-inaction/98/i25.

spent on therapeutic research, according to an analysis of marijuana research grants from 50 public agency and charity funders—untenably justified in 2020 when pain management alternatives are desperately needed.[50]

Research restrictions also mean the U.S. now lags behind other Western nations in this critical area of scientific inquiry.[51] Limitations and "red tape" in the study approval process create significant obstacles that discourage talented researchers from pursuing important marijuana research. Clinical trials involving human subjects, considered the gold standard of medical research, are especially difficult to implement.[52] Instead, U.S. companies interested in marijuana research outsource it to other countries, primarily Israel, where research has government support.[53] The National Institutes of Health, a U.S. government organization, funds medicinal marijuana research in Israel.[54]

The lack of research causes significant public harm, as trends in use have outpaced scientific inquiry. For example, a study of individuals with chronic non-cancer pain found that it was common for patients receiving opioids for pain management to

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[50] https://www.sciencemag.org/news/2020/08/marijuana-research-database-shows-how-us-funding-focuses-harms-drug.

[51] https://www.usnews.com/news/best-countries/articles/2017-04-11/israel-is-a-global-leader-in-marijuana-research; https://www.analyticalmarijuana.com/articles/inside-the-clinical-trials-using-marijuana-for-cancer-treatments-311737.

[52] *Ibid.*

[53] https://www.usnews.com/news/best-countries/articles/2017-04-11/israel-is-a-global-leader-in-marijuana-research.

[54] *Ibid.*

supplement their prescribed medication regimen with marijuana,[55] and patients often report using multiple administration routes (smoking, vaping, edibles, etc.) and various CBD:THC ratios in combination with many medications.[56] While patients reported benefits from marijuana use, both patients and clinicians consistently point to a lack of knowledge and evidence-based guidance regarding the effects of dual use of marijuana and opioids.[57] The study authors conclude that marijuana's federal classification as a Schedule I substance "contributes to the lack of scientific evidence on marijuana that could inform clinicians about dosing clinical efficacy, routes of administration, and contraindications."[58]

The plant's complexities and effects that vary with potency, route of administration, and individual physical/psychological characteristics, combined with

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[55] Cooke, A.C., Knight, K.R., & Miaskowski, C., 2019, "Patients' and Clinicians' Perspectives of Co-Use of Marijuana and Opioids for Chronic Non-Cancer Pain Management in Primary Care," *International Journal of Drug Policy, 63*, 23-28, https://www.sciencedirect.com/science/article/pii/S0955395918302287?casa_token=69rTLOCdmiwAAAAA:vo89tMv4rJ76pbpq6gJz89FfIZ73AEnOpqQYe1FA2q4PuEO3o_ZslTfpRf1XXhR6ZXcAyokCA.

[56] Boehnke KF, Scott JR, Litinas E, et al. Marijuana Use Preferences and Decision-making Among a Cross-sectional Cohort of Medical Marijuana Patients with Chronic Pain. J Pain 2019; 20:1362-72.

[57] Cooke *et al.*

[58] Cooke *et al.*, *See also* Maher, D.P., Carr, D.B., Hill, K., McGeeney, B., Weed, V., Jackson, W.C., DiBenedetto, D.J., Moriarty, E., & Kulich, R.J., 2017, "Marijuana for the Treatment of Chronic Pain in the Era of an Opioid Epidemic: A Symposium-Based Review of Sociomedical Science," *Pain Medicine, 20*(11), 2311-2323, https://academic.oup.com/painmedicine/article-abstract/20/11/2311/3964518?redirectedFrom=PDF

See Campbell, G., Hall, W., & Nielsen, S., 2018, "What does the Ecological and Epidemiological Evidence Indicate about the Potential for Cannabinoids to Reduce Opioid Use and Harms? A Comprehensive Review," *International Review of Psychiatry, 20*(55), 91-106, https://www.tandfonline.com/doi/abs/10.1080/09540261.2018.1509842.

the fact that millions of people legally consume it, demands research to understand these effects. By imposing research restrictions, the federal government is actively blocking the development of well-informed public policies and medical guidelines regarding marijuana use to protect the health and safety of the American citizenry.

In its letter to Mr. Zyszkiewicz, the DEA states it will "never los[e] sight of the need to protect the public."[59] The DEA's preferred method for protecting the public from drugs has been to reduce their supply. Given the widespread availability and increasingly legal use of marijuana, it is reasonable to conclude that the DEA has failed in this mission. Continued resistance to advancing research, predicated on the notion that there is enough evidence of marijuana's dangers and not enough evidence of its benefits to warrant further study, does not protect the public but in fact harms it by obstructing insight into the health effects of an activity that 45 percent of Americans over the age of 12 have done at least once in their lifetime.[60] Moreover, the harms of the criminalization of marijuana include an average of more than 622,000 arrests in the past three years which result in massive individual, community, and societal trauma.

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[59] Case No. 20-71433, *Sisley v. U.S. Drug Enforcement Administration, et al.*, 5/21/2020, ID: 11698131, DktEntry: 1-6, Page 25 of 203 (Ex. 2, Letter from DEA to Stephen Zyszkiewicz (undated)).

[60] NSDUH 2018.

E. Public Policy Demands Advances Allowing Research

Allowing more research on marijuana's health effects is critical to helping policymakers make informed decisions about how to properly regulate marijuana products and how to balance competing priorities of allowing access to people who can benefit from marijuana use while discouraging use among youth and others for whom marijuana use might have negative impacts.[61] Research that addresses gaps in knowledge about marijuana can also provide guidance to health care professionals and can aid public education efforts that are intended to educate the public about the health effects of marijuana use.[62]

The U.S. government also stands to benefit from allowing more marijuana research. Providing citizens with accurate and evidence-based information about a substance that is commonly consumed is a critical part to fulfilling the government's role of supporting the health and safety of its citizens.

One of the many collateral consequences of the War on Drugs is that a large segment of the American public distrusts the intent of U.S. drug policy and the information on drug use that the government provides. Regarding marijuana specifically, government misinformation in the style of "Reefer Madness," as well as revelations that enforcement of marijuana prohibition historically was intended to target

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[61] Siklos et al., "Scoping Review of Marijuana for Harm Reduction."

[62] Siklos et al., "Scoping Review of Marijuana for Harm Reduction."

minorities, has resulted in widespread and deep-seated mistrust of government. The DEA's assertions that marijuana has no established medical benefits and high abuse potential is inconsistent with scientific evidence from the 2017 National Academies of Sciences, Engineering, and Medicine report on this topic.

While many people who consume marijuana do not experience serious adverse effects, research would illustrate what causes adverse effects and who is at risk for problematic marijuana use versus who would benefit from it.[63] But a sizable portion of the public, and perhaps especially those who are more inclined to marijuana use, see the government's resistance to research as indicative of its anti-marijuana bias and evidence that its claims about marijuana cannot be trusted.[64] Attempts by the government to educate the public on marijuana's harms, then, often fall on deaf ears. Allowing more research could help rebuild public trust by demonstrating a sincere desire to craft drug policies that are grounded in scientific evidence and designed to advance public health.

In addition to improving the public's and medical practitioner's marijuana knowledge base, advancements in medical marijuana could be fiscally advantageous as well. For example, the use of prescription opioids dropped by more than 3.7 million

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[63] Volkow ND, Baler RD, Compton WM, Weiss SR. Adverse health effects of marijuana use. N Engl J Med 2014;370:2219-27; Volkow ND, Swanson JM, Evins AE, et al. Effects of Marijuana Use on Human Behavior, Including Cognition, Motivation, and Psychosis: A Review. JAMA Psychiatry 2016;73:292-7.

[64] Keyhani, Salomeh, et al. "Risks and benefits of marijuana use: a national survey of US adults." *Annals of Internal Medicine* 169.5 (2018): 282-290.

daily doses among Medicare D enrollees from 2007 to 2014 in states with legal medical marijuana,[65] the authors estimated that if all states legalized medical marijuana, the savings to Medicare in 2014 would be $468 million.[66] Similarly, a 2018 paper examining Medicaid data estimated that all-states medical legalization would produce national savings for fee-to-service Medicaid of $1.01 billion; if Medicaid managed care were included, the estimated savings would be $3.89 billion.[67] A 2019 study concluded that smoked marijuana could be cost-effective as a second line therapy for chronic neuropathic pain.[68] While inconclusive at this time, these suggestive studies highlight the potential cost-savings associated with effectively harnessing cannabis's therapeutic benefits.

CONCLUSION

Policy experts, scientists, researchers, and physicians all agree that marijuana has demonstrated therapeutic potential and should be further researched without delay or undue restriction. The only entity that disagrees, and that has been the source of decades of impeded research, which quite possibly has resulted in the suffering of millions that

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[65] Ashley and David Bradford Medicare study. http://bit.ly/2CyAVpX.

[66] Ashley and David Bradford Medicare study. http://bit.ly/2CyAVpX.

[67] Ashley C. Bradford, et al., "Association Between US State Medical Marijuana Laws and Opioid Prescribing in the Medicare Part D Population," *JAMA Internal Medicine*, 2018; DOI: 10.1001/jamainternmed.2018.0266.

[68] Tyree, Griffin A., et al. "A Cost-Effectiveness Model for Adjunctive Smoked Marijuana in the Treatment of Chronic Neuropathic Pain." *Marijuana and cannabinoid research* 4.1 (2019): 62-72.

could have been avoided or reduced, is the DEA. As recounted herein from a legal, public policy, and scientific perspective, the continued inconsistency in federal policy and federal and state law cannot be tolerated any longer. DEA can no longer rest on outdated conclusions to continue to summarily reject all petitions to remove marijuana from Schedule I, and, to continue to take no action on allowing the research on the therapeutic potential of marijuana.

Dated: October 6, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amici is not aware of related cases.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 4549 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Signature */S/ Lisa L.* Pittman Date October 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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RICE UNIVERSITY'S
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POLICY BRIEF

RECOMMENDATIONS FOR THE NEW ADMINISTRATION

Drug Policy Priority Issues for Biden Administration

William Martin, Ph.D., Director, Drug Policy Program
Katharine Neill Harris, Ph.D., Alfred C. Glassell, III, Fellow in Drug Policy

This brief is part of a series of policy recommendations for President-elect Joe Biden's incoming administration. Focusing on a range of important issues facing the country, the briefs are intended to provide decision-makers with relevant and effective ideas for addressing domestic and foreign policy priorities. View the entire series at www.bakerinstitute.org/recommendations-2021.

INTRODUCTION

Drug addiction and drug policy continue to wreak havoc on the lives of millions of Americans. For over two decades, the U.S. has been grappling with an overdose epidemic.[1] This crisis, which has occurred alongside the drug war, is perhaps the clearest indictment yet of the failure of prohibition to curb drug use. COVID-19 has worsened the overdose epidemic, and 2020 will likely be another record-breaking year for drug-related deaths.

Effective drug policy requires acceptance that, for better or worse, licit and illicit drug use is part of our world. The public response to drug use should work to minimize its harmful effects rather than simply ignore or condemn it. The war on drugs ignores the complex causes of drug use; it fails to provide effective treatment for addiction; it is unable to stop the steady flow of drugs into communities across the U.S.; it is exceedingly expensive; it contributes to mass incarceration and violence on our Southern border; and it inflicts immeasurable harm on people who use drugs and on minority communities writ large.

There are several steps the federal government can take to facilitate more pragmatic and effective drug policy at all levels of government. We recommend the following as policy priorities:

FACILITATE EXPANSION OF HARM REDUCTION AND EVIDENCE-BASED DRUG TREATMENT SERVICES

Though federal funding for evidence-based treatment, such as medication-assisted treatment (MAT) for opioid use disorder, has increased in recent years, there has been no corresponding support for harm reduction services. Current polices ban federal funding for syringe service programs and prohibit localities from establishing safe consumption sites. In addition, rules regulating MAT programs and the use of federal funds to treat substance use disorders (SUDs) are overly restrictive, creating high barriers to care. Low-barrier treatment programs are more likely to attract and retain people with SUDs, and abundant evidence demonstrates the efficacy and cost-effectiveness of harm reduction services that can pair with more traditional treatment services. The following

Effective drug policy requires acceptance that, for better or worse, licit and illicit drug use is part of our world.

recommendations should be prioritized to develop a more effective system of care for substance use disorders.

1. Work with Congress to remove the federal funding ban on syringe service programs and authorize localities to establish safe consumption sites.[2]
2. Encourage states and localities to provide comprehensive harm reduction services that include supportive housing, safe consumption sites, and syringe and drug testing services by providing grants for these purposes.[3]
3. Make permanent the lower barriers to MAT access that are in place temporarily due to the COVID-19 pandemic.[4]
4. Provide funding for MAT to state prisons and local jails to include all three FDA-approved medications.[5]
5. Authorize pilot programs for heroin-assisted treatment.
6. Enforce parity laws requiring insurers to provide equal coverage for mental health and substance use disorder treatment.[6]

A growing body of scientific research and extensive practical experience with cannabis by people dealing with myriad afflictions make clear that its medical use is quite widely accepted, even if federal authorities insist on denying that fact.

REMOVE CANNABIS FROM SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT

As cannabis regulation works itself out from state to state, advocates and opponents of decriminalization and legalization of cannabis for adult and/or medical use generally agree that more scientific research is needed. This has long been hampered by the placement of cannabis by the Drug Enforcement Administration (DEA) and Food and Drug Administration (FDA) in Schedule I of the Controlled Substances Act, which deems it to have "a high potential for abuse" and "no currently accepted medical use in treatment in the United States." The first assertion is exaggerated; the second is simply false. A growing body of scientific research and extensive practical experience with cannabis by people dealing with myriad afflictions make clear that its medical use is quite widely accepted, even if federal authorities insist on denying that fact.

Unfortunately, scientific research on the potential benefits of cannabis is extremely difficult to conduct, especially since the only legal source of the plant that can be used in studies that can clear most Institutional Review Boards, receive government and most other grants, and be published in mainstream professional journals is a government marijuana farm on the campus of the University of Mississippi, and under tight control of the National Institute on Drug Abuse (NIDA). The American Medical Association, the American College of Physicians, the Institute of Medicine, the National Cancer Institute, and a host of other medical and scientific groups in this country and internationally have called for more research on the therapeutic benefits of cannabis. NIDA has consistently declined to participate.

A team of medical cannabis researchers has petitioned the U.S. Ninth Circuit Court of Appeals to legally require the DEA to permit cannabis research. The courts are expected to issue a ruling in 2021; a decision in the petitioners' favor would mark a significant advancement in the pursuit of rigorous cannabis research. To further facilitate such research, we offer the following recommendations:

1. Push DEA and Congress to remove cannabis from Schedule I so that research to determine the utility and risks of cannabis can proceed without hindrance.
2. Permit researchers to conduct their studies with strains and strengths of cannabis that their subjects actually use, especially when legally obtainable in their states.

EXAMINE OPTIONS FOR DECRIMINALIZING OTHER CURRENTLY ILLEGAL DRUGS

In various ways, states and cities are moving toward decriminalizing use of some drugs, most often cannabis, by such measures as reducing the status of the offense, declining to prosecute minor drug use, and officially instructing police to regard enforcement against low-level possession as their lowest priority. In the 2020 election, Oregon became the first state in the nation to decriminalize the possession and personal use of all drugs, offering an option of paying a modest $100 fine or completing a health assessment.[7]

While new in the United States, several countries, including Portugal, the Netherlands, and Switzerland, have decriminalized possession of small amounts of "hard" drugs for some time. The key pioneer of this trend is Portugal, which began its new national strategy in 2001, but more than two dozen other countries have moved in this direction.[8]

We urge the Biden administration to examine and assess various options for decriminalizing the use of a wide range of currently illegal drugs.

ADDRESS THE DAMAGES OF THE WAR ON DRUGS

The Summer 2020 protests against police violence and systemic racism bring into sharp focus the need for structural change to the American justice system, of which drug reform is one piece. The drug war contributes to police violence by normalizing aggressive policing and increasing the frequency of interactions between citizens and law enforcement that have the potential to turn violent.[9] Decades of unequal enforcement of drug laws against people and communities of color have resulted in collateral consequences that extend beyond isolated incidents of arrest or violence to include long-term damage to family structures, economic opportunity, mental well-being, and overall quality of life. To begin the process of repairing the harms of the drug war, we recommend the following:

1. Restructure grants to law enforcement agencies so that funds are not based on arrest volume, but instead incentivize development of arrest alternatives, such as pre-arrest diversion programs and crisis intervention response teams.[10]
2. Work with Congress to pass the Community Reinvestment Grant Program (part of the MORE Act) to fund services for communities impacted by the drug war.
3. Bar discrimination and denial of benefits in areas including but not limited to employment, health care, housing, and education based on prior convictions for low-level drug possession. Work with Congress to amend the Drug-Free Workplace Act so that it applies only to people whose work involves hazards to physical safety.
4. Work with Congress to amend or repeal provisions of the Child Abuse Prevention Treatment Act and the Adoption and Safe Families Act that require and incentivize states to remove children from their homes and terminate parental rights on the basis of substance use alone. Redirect funds to community-based treatment and family services.[11]
5. Improve nationwide data collection on race and ethnicity of people involved in stops, arrests, and use of force incidents related to drug use and possession.

CONCLUSION

If followed, these recommendations would be a significant but sensible pivot away from the failed policies of prohibition toward a realistic approach to drug use. By taking the lead on research and communication with the public about policy alternatives, the White House could provide political cover to legislators and encourage bipartisan solutions at all levels of government.

ENDNOTES

1. For more information on the precise nature of this epidemic, see Katharine Neill Harris, *The drug overdose epidemic: Not just about opioids*, Baker Institute for Public Policy, November 1, 2018, https://www.bakerinstitute.org/media/files/files/dc464f15/bi-brief-110118-drug-overdoseepidemic.pdf.

2. For more information on syringe service programs, see William Martin, *Syringe Exchange: Sound Science, Proven Policy*, Baker Institute for Public Policy, March 9, 2017, https://www.bakerinstitute.org/media/files/files/3f4e6675/BI-Brief-030917-DRUG_SyringeExch.pdf.

3. Housing is a key component of curbing harmful drug use. In November 2020, Oregon voters approved a measure that will use tax dollars from legal cannabis sales to fund comprehensive treatment and harm reduction services, including supportive housing. See Oregon Measure 110, Estimate of Financial Impact, https://bit.ly/2WcUSvP; British Columbia, which opened the first safe consumption site in North America, has started to offer residents safer alternatives to street drugs to help reduce overdoses. See https://www.theguardian.com/world/2020/sep/16/british-columbia-opioids-safer-supply-drugs-canada; for information on efficacy of safe consumption sites, see Jennifer Ng, et al., "Does evidence support supervised injection sites?" *Canadian Family Physician* 63 (November 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5685449/; for information on efficacy of drug testing services, see Nicholas Peiper, "Fentanyl test strips as overdose prevention strategy," *International Journal of Drug Policy* 63 (January 2019), https://www.sciencedirect.com/science/article/pii/S0955395918302135.

4. DEA and SAMHSA relaxed rules regulating prescribing methadone and buprenorphine in response to the COVID-19 pandemic; these changes have the added benefit of increasing treatment access for people who live in rural locations or are without transportation. See "FAQs: Provision of methadone and buprenorphine for the treatment of Opioid Use Disorder in the COVID-19 emergency," https://www.samhsa.gov/sites/default/files/faqs-for-oud-prescribing-and-dispensing.pdf.

5. The Department of Justice funds MAT for prisons, but there is a strong preference for the opioid antagonist Vivitrol over methadone and buprenorphine, the other two FDA-approved medications to treat OUD. Best practices recommend that all three be made available to fit patients' individualized needs. Rhode Island was the first state to offer all three MATs in its correctional system; for an evaluation of that program see Traci Green, et al., "Postincarceration fatal overdoses after implementing medications for addiction treatment in a statewide correctional system,' *JAMA Psychiatry*, April 2018, https://pubmed.ncbi.nlm.nih.gov/29450443/.

6. Several high-quality studies have shown that heroin-assisted treatment for chronic opioid users who do not respond well to other forms of MAT can result in higher rates of treatment retention, reduced spread of blood borne viruses, reduced criminal activity, and lower risk of incarceration. See M. Ferri, et al., "Heroin maintenance for chronic heroin-dependent individuals," *Cochrane Database of Systematic Reviews*, 2011, https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD003410.pub4/full and Jens Reimer, et al., "Physical and mental health in severe opioid-dependent patients within a randomized controlled maintenance treatment trial," *Addiction*, 2011, https://pubmed.ncbi.nlm.nih.gov/21489005/ .

7. Oregon Measure 110, Estimate of Financial Impact, https://bit.ly/2WcUSvP

8. For Portugal drug policy, see Transform Drug Policy Foundation, "Drug decriminalisation in Portugal: setting the record straight," https://bit.ly/3ncK50z; other countries decriminalize many drugs, see Release-Drugs, the Law & Human Rights, "A Quiet Revolution: Drug Decriminalisation the Globe," https://bit.ly/379CpqD.

9. For more information, see Katharine Neill Harris,"End the War on Drugs to Help Fix American Policing," June 8, 2020, http://blog.bakerinstitute.org/2020/06/08/fixing-american-policing-also-requires-an-end-to-the-war-on-drugs/.

10. For discussion of pre-arrest diversion and the need for federal funding, see Jay Jenkins and Katharine Neill Harris, "Leading the way to sensible policy on drug use," *The Houston Chronicle*, August 19, 2017, https://www.houstonchronicle.com/opinion/outlook/article/Jenkins-Harris-11944671.php#photo-13862165. For discussion on alternative models of policing, see Stuart Butler and Nehath Sheriff, *Innovative solutions to address the mental health crisis: Shifting away form police as first responders*, Brookings Institution, November 23, 2020, https://www.brookings.edu/research/innovative-solutions-to-address-the-mental-health-crisis-shifting-away-from-police-as-first-responders/.

11. For a comprehensive review of the relationship between the drug war and the foster care system, see Lisa Sangoi, *How the foster system has become ground zero for the U.S. drug war*, Movement for Family Power, 2020, https://www.movementforfamilypower.org/ground-zero.

AUTHORS

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Katharine Neill Harris, Ph.D., is the Alfred C. Glassell, III, Fellow in Drug Policy at the Baker Institute. Her current research focuses on the availability of drug treatment for at-risk populations, the opioid epidemic, and the legalization of medical and adult-use cannabis. She supports policy reforms that treat drug use as a public health issue, such as alternatives to incarceration for drug offenders, needle-exchange programs, safe-consumption sites, drug testing services, and expanded access to medication-assisted treatments.

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The New York Times

What to Know About Breonna Taylor's Death

Fury over the killing of Ms. Taylor by the police in Louisville, Ky., fueled tense demonstrations, and questions persist about how the botched raid unfolded.

By Richard A. Oppel Jr., Derrick Bryson Taylor and Nicholas Bogel-Burroughs

Jan. 6, 2021

The death of Breonna Taylor, a Black medical worker who was shot and killed by Louisville police officers in March during a botched raid on her apartment, has been one of the main drivers of wide-scale demonstrations that erupted in the spring and summer over policing and racial injustice in the United States.

A grand jury in September indicted a former Louisville detective involved in the raid, Brett Hankison, for wanton endangerment of neighbors whose apartment was hit when he fired without a clear line of sight into the sliding glass patio door and window of Ms. Taylor's apartment. He pleaded not guilty. No charges were announced against the other two officers who fired shots, and no one was charged for causing Ms. Taylor's death.

Detective Myles Cosgrove, one of the officers who shot Ms. Taylor, and Detective Joshua Jaynes, who prepared the search warrant for the raid, received letters of termination in late December, according to lawyers representing the officers. Detectives Cosgrove and Jaynes were officially fired on Jan. 5, according to The Louisville Courier-Journal.

A new New York Times examination of video footage from the scene, witness accounts, statements by the police officers and forensics reports showed that the raid was compromised by poor planning and reckless execution. It found that the only support for a grand jury's conclusion that the officers had announced themselves before bursting into Ms. Taylor's apartment — beyond the assertions of the officers themselves — was the account of a single witness who had given inconsistent statements.

Also in December, the police in Oakland, Calif., were investigating an apparent act of vandalism directed at a bust of Ms. Taylor that had been installed near City Hall. The sculptor, Leo Carson, said the statue had been smashed into several pieces.

"I built it to support the Black Lives Matter movement," Mr. Carson said in an interview, "but that also makes it a target for racist aggression."

Since the national demonstrations over police brutality and systemic racism that began in late May, Louisville officials have banned the use of no-knock warrants, which allow the police to forcibly enter people's homes to search them without warning, and, in late June, fired Mr. Hankison, finding that he had shown "an extreme indifference to the value of human life."

For months, Ms. Taylor's family has pleaded for justice, pushing for criminal charges against the other officers. Ms. Taylor's case began to draw national attention in May, and she has since been the center of campaigns from several celebrities and athletes, some of whom have dedicated their seasons to keeping a spotlight on her case. In September, Louisville officials agreed to pay $12 million to settle a wrongful-death lawsuit brought by Ms. Taylor's mother and to institute reforms aimed at preventing future deaths by officers.

Still, critics say progress in the case has been slow, especially when compared with the police killing in May of George Floyd in Minneapolis, where officers were swiftly fired and charged.

"At this point it's bigger than Breonna, it's bigger than just Black Lives," Ms. Taylor's mother, Tamika Palmer, said over the summer as she beseeched the authorities to bring criminal charges. "We've got to figure out how to fix the city, how to heal from here."

What happened in Louisville?

Shortly after midnight on March 13, Louisville police officers executing a search warrant used a battering ram to enter the apartment of Ms. Taylor, a 26-year-old emergency room technician.

The police had been investigating two men who they believed were selling drugs out of a house that was far from Ms. Taylor's home. But a judge had also signed a warrant allowing the police to search Ms. Taylor's residence because the police said they believed that one of the men had used her apartment to receive packages. Ms. Taylor had been dating that man on and off for several years but had recently severed ties with him, according to her family's lawyer.

Ms. Taylor and her boyfriend, Kenneth Walker, had been in bed, but got up when they heard a loud banging at the door. Mr. Walker said he and Ms. Taylor both called out, asking who was at the door. Mr. Walker later told the police he feared it was Ms. Taylor's ex-boyfriend trying to break in.

After the police broke the door off its hinges, Mr. Walker fired his gun once, striking Sgt. Jonathan Mattingly in a thigh. The police responded by firing several shots, striking Ms. Taylor five times. Mr. Hankison shot 10 rounds blindly into the apartment.

Mr. Walker told investigators that Ms. Taylor coughed and struggled to breathe for at least five minutes after she was shot, according to The Louisville Courier Journal. An ambulance on standby outside the apartment had been told to leave about an hour before the raid, counter to standard practice. As officers called an ambulance back to the scene and struggled to render aid to their colleague, Ms. Taylor was not given any medical attention.

It was not until 12:47 a.m., about five minutes after the shooting, that emergency personnel realized she was seriously wounded, after her boyfriend called 911.

"I don't know what's happening," Mr. Walker said on a recorded call to 911. "Someone kicked in the door and shot my girlfriend."

Ms. Taylor received no medical attention for more than 20 minutes after she was struck, The Courier Journal reported, citing dispatch logs.

The Jefferson County coroner told The Courier Journal that Ms. Taylor most likely died less than a minute after she was shot and could not have been saved.

While the department had received court approval for a "no-knock" entry, the orders were changed before the raid to "knock and announce," meaning that the police had to identify themselves.

The officers have said they did announce themselves, but Mr. Walker said he did not hear anything.

No drugs were found in the apartment, a lawyer for Mr. Walker said.

Jamarcus Glover, Ms. Taylor's ex-boyfriend whose alleged packages led the police to her door that night, was arrested on Aug. 27 in possession of drugs, according to a charging document. He told The Courier Journal that Ms. Taylor had no involvement in the drug trade. "The police are trying to make it out to be my fault and turning the whole community out here, making it look like I brought this to Breonna's door," he said.

Ms. Taylor's mother, Tamika Palmer, said her daughter had big dreams and planned a lifelong career in health care after serving as an E.M.T.

"She was a better version of me," said Ms. Palmer, a dialysis technician. "Full of life. Easy to love."

"Breonna was a woman who was figuring everything out in her life, who had turned a corner," said Sam Aguiar, a lawyer representing Ms. Taylor's family. "Breonna was starting to live her best life."

Why did the police fire their weapons?

Breonna Taylor, 26, was killed on March 13 by officers executing a so-called no-knock warrant.
Family of Breonna Taylor, via Agence France-Presse — Getty Images

The Louisville police say that they fired inside Ms. Taylor's home only after they were first fired upon by Mr. Walker, Ms. Taylor's boyfriend. They said that Mr. Walker wounded one of the officers, who was hit in the leg but was expected to make a full recovery. Mr. Walker was subsequently charged with attempted murder of a police officer, though the charge was dismissed in May.

The police also assert that they knocked several times and identified themselves as police officers with a warrant before entering the apartment. Mr. Walker has said he and Ms. Taylor heard aggressive banging at the door and asked who it was, but they did not hear an announcement that it was the police.

The police said that the officers "forced entry into the exterior door and were immediately met with gunfire." Three officers returned fire, the police said.

One of the officers, Mr. Hankison, was fired, and another, Detective Cosgrove, received a letter of termination in December. The other officer, Sergeant Mattingly, was been placed on administrative reassignment.

Is the police account disputed?

Yes, hotly. Ms. Taylor's relatives and their lawyers say that the police never identified themselves before entering — despite their claims. They also say that Mr. Walker was licensed to carry a gun.

And Mr. Walker, 27, has said that he feared for his life and fired in self-defense, believing that someone was trying to break into the home.

"He didn't know these were police officers, and they found no drugs in the apartment — none," said Rob Eggert, Mr. Walker's lawyer. "He was scared for his life, and her life."

Understand the George Floyd Case

- On May 25, 2020, Minneapolis police officers arrested George Floyd, a 46-year-old Black man, after a convenience store clerk claimed he used a counterfeit $20 bill to buy cigarettes.
- Mr. Floyd died after Derek Chauvin, one of the police officers, handcuffed him and pinned him to the ground with a knee, an episode that was captured on video.
- Mr. Floyd's death set off a series of nationwide protests against police brutality.
- Mr. Chauvin was fired from Minneapolis police force along with three other officers. He has been charged with second-degree murder and second-degree manslaughter and now faces trial, which is likely to begin the week of March 8.
- Here is what we know up to this point in the case, and how the trial is expected to unfold.

In a 911 call just after the shots were fired, Mr. Walker told a dispatcher that "somebody kicked in the door and shot my girlfriend."

The police's incident report contained multiple errors. It listed Ms. Taylor's injuries as "none," even though she had been shot several times, and indicated that officers had not forced their way into the apartment — though they used a battering ram to break the door open.

Ms. Taylor's family also said it was outrageous that the police felt it necessary to conduct the raid in the middle of the night. Their lawyers say the police had already located the main suspect in the investigation by the time they burst into the apartment. But they "then proceeded to spray gunfire into the residence with a total disregard for the value of human life," according to a wrongful-death lawsuit filed by Ms. Taylor's mother.

There was no body camera footage from the raid. And, for now, prosecutors have said they had dismissed the charges against Mr. Walker, adding that they would let investigations into the killing run their course before making any final decisions. Some legal experts said the fact that prosecutors dropped charges after a grand jury indictment suggested that they may have doubts about the version of events told by the police.

Has there been other fallout?

Some — even aside from the continuing protests.

On June 23, the Louisville Metro Police Department released a letter of termination that it sent to Mr. Hankison, the officer who "blindly fired" 10 rounds into a covered patio door and a window, according to the termination letter.

Chief Robert Schroeder accused Mr. Hankison of violating the Police Department's policy on the use of deadly force, saying his actions were "a shock to the conscience" that discredited the Police Department.

Detectives Cosgrove and Jaynes also received letters of termination. In her letter to Detective Jaynes, Chief Yvette Gentry said he was being fired for violating department polices on search warrants and truthfulness.

Thomas Clay, a lawyer representing Detective Jaynes, said his client had never lied in getting the search warrant to search Ms. Taylor's apartment. The detective would get an opportunity to respond to the chief's claims at a department hearing, according to the letter.

Also, city officials banned the use of no-knock warrants on June 11.

Mayor Greg Fischer has announced other changes to ensure "more scrutiny, transparency and accountability," including the naming of a new police chief; a new requirement that body cameras always be worn during the execution of search warrants; and the establishment of a civilian review board for police disciplinary matters.

One of the officers involved, Sergeant Mattingly, sued Mr. Walker for assault and battery. In a court document filed on Oct. 29, counsel for Sergeant Mattingly said he should be entitled to compensatory damages for the medical treatment, trauma, physical pain and mental anguish he experienced as a result of the night Ms. Taylor died. Steve Romines, Mr. Walker's lawyer, said the charges were baseless.

Sergeant Mattingly had previously told ABC News and The Louisville Courier Journal in an interview broadcast on Oct. 21 that the case was not comparable to those of other Black people whose killings have become the focus of national protests.

"This is not relatable to a George Floyd. This is nothing like it. It's not an Ahmaud Arbery. It's nothing like it," he said.

He said the Louisville officers were doing their job when they returned fire: "This is not us going hunting somebody down, this is not kneeling on a neck."

About 15 hours' worth of grand jury audio was released.

On Oct. 2, recordings of about 15 hours from the grand jury inquiry were released. The audio files have begun to shed light on what evidence jurors considered when choosing to indict Mr. Hankison and declining to bring charges against the other police officers involved in the shooting.

Grand jurors heard at least two police officers who were at the raid on Ms. Taylor's apartment say the group knocked and announced their presence several times before breaking down the door.

Those accounts have been questioned by several of Ms. Taylor's neighbors and her boyfriend. Detective Cosgrove said officers knocked for 90 seconds, and that the volume escalated from "gentle knocking" to "forceful pounding" to pounding while yelling "police."

For one to two minutes, Detective Michael Nobles said he knocked and announced himself as the police before using a battering ram to force his way into Ms. Taylor's apartment.

Grand jurors were played recordings of radio calls from Mr. Hankison as well as 911 calls made after the shooting began. The calls suggest that Mr. Hankison believed that Sergeant Mattingly had been wounded by someone with an "A.R." who was "barricaded" inside the apartment.

Mr. Hankison's reference to an "A.R." on the call appears to be a reference to either an assault rile or the AR-15, a type of a military-style semiautomatic rifle.

Grand jurors also raised several questions, including if Mr. Walker had been named in the search warrant (he had not), what exactly the officers saw when the apartment door opened and whether the officers executing the warrant were aware that the police had already found Mr. Glover.

The release of the recordings came after one of the grand jurors filed a court motion that asked for the proceedings to be made public; the juror also accused Kentucky's attorney general, Daniel Cameron, of using the jurors "as a shield to deflect accountability and responsibility." Mr. Cameron has insisted that jurors were given "all of the evidence."

A Kentucky judge on Oct. 20 granted grand jurors permission to speak publicly. That led to a statement from an anonymous juror, who said the group "didn't agree that certain actions were justified, nor did it decide the indictment should be the only charges in the Breonna Taylor case."

Christina Morales, Christine Hauser Will Wright, Sarah Mervosh, Lucy Tompkins, Giulia McDonnell Nieto del Rio, Neil Vigdor, Jenny Gross and Rukmini Callimachi contributed reporting.

NEWS IN THE NUMBERS

January 22, 2020

Four-in-ten U.S. drug arrests in 2018 were for marijuana offenses – mostly possession

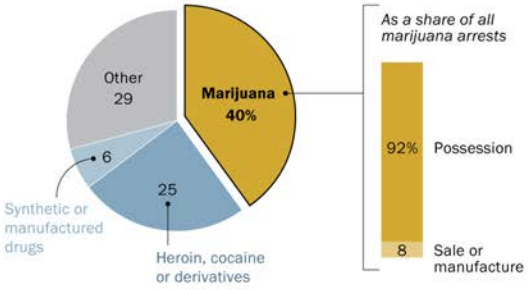
By John Gramlich

Deuel County's then-sheriff, Adam Hayward, displays confiscated marijuana items in Chappell, Nebraska, in 2014. (Nikki Kahn/The Washington Post via Getty Images)

A growing number of states have legalized or decriminalized the possession of small amounts of marijuana. But the drug remains illegal in other states and under federal law – and police officers in the United States still make more arrests for marijuana offenses than for any other drug, according to FBI data.

Four-in-ten U.S. drug arrests in 2018 were for possession, sale or manufacture of marijuana

% of arrests for each drug category, including possession, sale and manufacture



Source: FBI's Uniform Crime Reporting Program.

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Police officers made about 663,000 arrests for marijuana-related offenses in the 50 states and the District of Columbia in 2018, amounting to 40% of the 1.65 million total drug arrests in the U.S. that year (the most recent for which data is available). The second-largest category of drug arrests involved "other" drugs (29%), followed by heroin, cocaine or their derivatives (25%) and synthetic or manufactured drugs (6%). These figures include arrests for possessing, selling or manufacturing each kind of drug. They are based on information submitted to the FBI from thousands of state and local law enforcement agencies, which make the vast majority of arrests in the U.S. each year.

It's difficult to assess changes in the *number* of marijuana arrests over time because the list of state and local police agencies that submit arrest data to the FBI is not identical from year to year. But as a *share* of all reported drug arrests in the U.S., marijuana arrests have decreased in the last decade and are now at their lowest level in at least 20 years, down from 52% of all drug arrests in 2010.

How we did this

As more states legalize or decriminalize marijuana – and as U.S. public opinion about the drug shifts – we wanted to explore the extent to which police still make arrests for marijuana offenses.

This analysis examines U.S. arrest data published by the FBI. To provide a national picture of arrests, the FBI collects statistics each year from thousands of law enforcement agencies around the country. In 2018, the most recent available year, more than 16,500 agencies submitted data to the FBI.

The analysis also includes an examination of current state laws regarding the use of marijuana. State legal information is drawn from the National Conference of State Legislatures.

As has long been the case, around nine-in-ten U.S. marijuana arrests are for possessing the drug, rather than selling or manufacturing it. In 2018, 92% of marijuana arrests were for possession and 8% were for selling or manufacturing. The share of marijuana arrests for possessing the drug has inched higher in recent years: In 2011, 87% of marijuana arrests were for possession and 13% were for selling or manufacturing it.

The FBI does not publish state-by-state data on marijuana arrests, but patterns differ somewhat by region. In the West, 15% of all drug arrests were for marijuana-related offenses in 2018, compared with around half in the Northeast (53%), Midwest (50%) and South (49%). Marijuana is legal for recreational use in six of 13 Western states – Alaska, California, Colorado, Nevada, Oregon and Washington – but there were fewer marijuana arrests in the West even before the first state-approved recreational sales in the U.S. began in Colorado and Washington in 2012.

Recent changes in state laws mean that a growing share of Americans live in a jurisdiction where marijuana is legal or decriminalized, at least under state law.

Several more states are expected to debate legalization proposals this year.

Where recreational marijuana is legal in the U.S.

States that have legalized small amounts of cannabis for adult recreational use, January 2020

Note: The Northern Mariana Islands, a U.S. commonwealth, legalized recreational marijuana in 2018.
Source: National Conference of State Legislatures.

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Illinois, the nation's sixth most populous state, this month began allowing the sale of marijuana for recreational use. It joined 10 other states and the District of Columbia in legalizing small amounts of the drug for adult recreational use, according to the National Conference of State Legislatures (NCSL). Together, these jurisdictions are home to 29% of the U.S. adult population. To coincide with the new law, Illinois Gov. J.B. Pritzker issued more than 11,000 pardons to people previously convicted of low-level marijuana offenses in the state.

Another 26 states and the District of Columbia have decriminalized small amounts of marijuana. Decriminalization differs from legalization in that it is still against the law to possess the drug, but violations for small amounts intended for personal consumption tend to be civil or local infractions rather than state-level crimes that come with the possibility of incarceration.

Meanwhile, 33 states and the District of Columbia (as well as other U.S. jurisdictions including Guam, Puerto Rico and the U.S. Virgin Islands) have legalized marijuana for medical purposes, according to NCSL.

Public support for marijuana legalization has steadily increased in recent years. In a Pew Research Center survey last September, two-thirds of U.S. adults said marijuana should be legal, up from around half (52%) five years earlier. The same survey found that 59% of adults believe marijuana should be legal for medical and recreational use, while 32% say it should be legal for medical use only. Just 8% of adults said it should not be legal under any circumstances.

Of course, just because a state has legalized or decriminalized marijuana does not mean its residents are immune from being arrested for having it. Among other things, people in legal marijuana states can face arrest for possessing more than the authorized limit. And since marijuana remains illegal federally, U.S. law enforcement agencies such as the Drug Enforcement Administration can make arrests for marijuana offenses, too.

Mr. BIGGS. Thank you. Then, Mr. Maltz, my clarifying question for you is, in response to something that Professor Harris said when she talked about the increase in drug trafficking is, in part at least, due to prohibition policies with regard to drugs.

That is an interesting contraindication. In some corridors right now, the number one drug being illegally transited into the United States is marijuana. This is the case in Colorado they have seen an increase in Black market marijuana. This is the case even though marijuana is legalized in many states, including Colorado.

The rationale that has been suggested not today by anybody on the panel but in other studies that I have read is that domestic pot costs more because of taxes and regulatory schemes, and that because of those additional tax burdens and regulatory burdens what we see is it is still cheaper for cartels to transit pot across the border where they can't create the grow houses that they are creating in the United States. Is that accurate?

Mr. MALTZ. Yes. I mean, the people that are using marijuana do not want to pay these exorbitant prices that they would have to pay because of the taxes. So, the Black market is going to explode, and the Chinese and the cartels are going to continue to get the marijuana into the United States.

We see the same thing with cigarette trafficking, right? People don't want to pay $13 a pack for cigarettes in New York City, so they buy the cigarettes on the Black market. This is nothing new, and it is going to continue.

Mr. BIGGS. Thank you, and I appreciate the share.

Ms. JACKSON LEE. Not at all, to the Ranking Member.

Let me quickly clarify two points. First of all, quickly, Dr. Henderson, if you could, there was some discussion about middle class African Americans and maybe suggesting that, why is this happening, and this does not necessarily need to happen to the population of African Americans.

Can you do a deep dive very quickly on why the idea of addiction and possession for African Americans winds up with incarceration and mass incarceration?

Mr. HENDERSON. Yeah. Thanks for the opportunity to chime in here. One of the realities that we understand—and I want to correct the record—supply side drug interdiction has never worked. It has never been effective in any period of the War on Drugs. We understand that.

We also understand that 75 percent of the individuals who have been convicted at the federal level for Fentanyl have been people of color. When you talk about the decimation of the Black community, we understand that ultimately the Black community and the Hispanic community and overall poor community have received the brunt of the bad drug policies in this country. We understand the impact of the school-to-prison pipeline. We understand the reality of being incarcerated, and we understand the mark on the criminal record.

I thank this Committee for having the opportunity to conversate about possible solutions to moving this country in the right direction. But ultimately, we have to reframe our thinking in the right direction and focus on harm reduction.

Ms. JACKSON LEE. Thank you.

Ms. Austin-Hillery, a quick response to that dichotomy?

Ms. AUSTIN-HILLERY. I am in complete agreement with Mr. Henderson. It is those very circumstances that lead to disparity.

Now, I also need to point out that there are economic changes that make it very difficult to compare the circumstances that existed for African Americans 40 and 50 years ago than exist now. Changes such as gentrification and other kinds of policy reforms have made the African American experience different, and in many ways more difficult for African Americans to access some of the benefits that they might have had available to them previously. So, we have to keep these things in context.

Ms. JACKSON LEE. Thank you.

Mr. Maltz, very quickly, you indicated that you were being stifled through some technology in terms of what information you can secure—and I want to make it very clear—against the murderous big guys like the cartels. What was that specifically that you said that you were being stymied because of the encrypted aspects of the work that you were trying to do or what you were trying to obtain?

Mr. MALTZ. Thank you for the concern. So, obviously, the communications are very vital to a law enforcement investigation. If the bad guys are using encrypted apps that are being used every day all over America, law enforcement is not going to be able to intercept the content pursuant to a federal court order.

So, we have to look closer at the encryption issue with these new types of technologies.

Ms. JACKSON LEE. Excellent. Thank you. I wanted to clarify that for the record.

Mr. MALTZ. Thank you.

Ms. JACKSON LEE. Ensure all of us against the murderers, bad guys. Thank you so very much.

Let me indicate that we appreciate very much the witnesses who have been very open and very provocative and very thorough. Let me thank Nicole Austin-Hillery, executive director of the Human Rights Watch; Dr. Howard Henderson, director of Center for Justice Research, Texas Southern University; Derek Maltz, 28 years in public service with DEA; and Dr. Katharine Neill Harris of the Alfred C. Glassell, III, fellow in drug policy at Rice University. Thank you very much for your testimony.

This concludes today's hearing. Thank you to our distinguished witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions that the witness—or additional materials for the record.

The hearing is adjourned. Thank you again.

[Whereupon, at 1:38 p.m., the Subcommittee was adjourned.]

APPENDIX

CBP Officers at the World Trade Bridge Seize Narcotics Worth Over $24 Million

Release Date:
March 4, 2021

LAREDO, Texas—U.S. Customs and Border Protection (CBP), Office of Field Operations (OFO) officers at the Laredo Port of Entry seized methamphetamine that totaled over $24 million in street value.

"The nation continues to experience an epidemic of drug trafficking and drug dependence. Nevertheless, as this massive methamphetamine seizure illustrates, our frontline CBP officers maintain heightened vigilance and bring all of our high tech tools and resources to bear against criminal organizations attempting to smuggle contraband into the United States," said Acting Port Director Eugene Crawford, Laredo Port of Entry.

Containers filled with 1,234 pounds of methamphetamine seized by CBP officers at World Trade Bridge.

The enforcement action occurred on Wednesday, March 3rd, when CBP officers assigned to the cargo facility encountered a tractor manifesting a shipment of acrylic paint arriving from Mexico. The 2014 Kenworth tractor and shipment were referred for a canine and non-intrusive imaging system inspection, resulting in the discovery of 28 containers filled with 1234.58 pounds of alleged methamphetamine within the shipment.

The narcotics have an estimated street value of $24,691,520.

CBP officers seized the narcotics. The case was turned over to U.S. Immigration and Customs Enforcement-Homeland Security Investigations (ICE-HSI) special agents for further investigation.

For more information about CBP, please click on the attached link.

Follow the Director of CBP's Laredo Field Office on Twitter at @DFOLaredo and on Instagram at @dfolaredo for breaking news, current events, human interest stories and photos.

U.S. Customs and Border Protection is the unified border agency within the Department of Homeland Security charged with the management, control and protection of our nation's borders at and between official ports of entry. CBP is charged with securing the borders of the United States while enforcing hundreds of laws and facilitating lawful trade and travel.

Last modified:
March 4, 2021

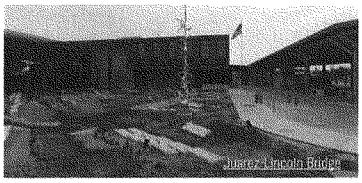
Laredo CBP Officers Seize Narcotics Worth Over $2.5 Million

Release Date:

March 8, 2021

LAREDO, Texas—U.S. Customs and Border Protection (CBP), Office of Field Operations (OFO) officers at the Juarez-Lincoln Bridge seized methamphetamine that totaled over $2.5 million in street value.

"CBP is responsible for facilitating the lawful flow of goods into the United States. This seizure illustrates the enforcement efforts that our officers perform in stopping illicit drugs and other contraband from entering our country," said Acting Port Director Eugene Crawford, Laredo Port of Entry.



Juarez-Lincoln Bridge

The enforcement action occurred on Saturday, March 6th, when a CBP officer referred a 2008 Volkswagen Touareg for a secondary inspection. The vehicle was driven by a 24-year-old female U.S. citizen traveling from Mexico. Following a canine and non-intrusive imaging system inspection, CBP officers discovered a total of 126.67 pounds of alleged methamphetamine within the vehicle.

The narcotics have an estimated street value of $2,533,526.

CBP officers seized the narcotics and the vehicle. The driver was arrested, and the case was turned over to U.S. Immigration and Customs Enforcement-Homeland Security Investigations (ICE-HSI) special agents for further investigation.

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Last modified:

March 8, 2021

CBP Field Operations Arrests Woman with Over $1.9 Million in Methamphetamine at Pharr International Bridge

Release Date:

March 9, 2021

PHARR, Texas—U.S. Customs and Border Protection, Office of Field Operations (OFO) at the Pharr International Bridge arrested a 23-year-old woman from Georgia after seizing $1,982,000 worth of alleged methamphetamine concealed within the vehicle she arrived in from Mexico.

"This seizure of alleged methamphetamine is consistent with past interceptions of this type of hard narcotic, which appears to be the drug of choice for drug smuggling organizations who are attempting to introduce these illicit substances into our communities," said Carlos Rodriguez, Port Director, Hidalgo/Pharr/Anzalduas.

Packages containing 99 pounds of methamphetamine seized by CBP officers at Pharr International Bridge.

On March 7, 2021, the Cuban national and lawful permanent resident (LPR) woman arrived at the Pharr-Reynosa International Bridge in a Chevy Malibu and a CBP officer referred her for further inspection. Utilizing non-intrusive imaging (NII) equipment as part of the secondary

examination, officers discovered that the vehicle's gas tank contained packages of suspected narcotics. Officers removed 20 packages weighing 99 pounds (44.94 kg) of alleged methamphetamine.

CBP OFO seized the narcotics, the vehicle and arrested the woman who was then released to the custody of agents with Homeland Security Investigations (HSI) as they continue with the investigation.

For more information about CBP, please click on the attached link.

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U.S. Customs and Border Protection is the unified border agency within the Department of Homeland Security charged with the management, control and protection of our nation's borders at and between official ports of entry. CBP is charged with securing the borders of the United States while enforcing hundreds of laws and facilitating lawful trade and travel.

Last modified:

March 9, 2021

Laredo Sector Border Patrol Apprehends Over 100 Individuals in Separate Smuggling Attempts

Release Date:
March 10, 2021

LAREDO, Texas – U.S. Border Patrol agents assigned to the Laredo North Station apprehended 111 individuals during three separate human smuggling attempts involving commercial trailers north of Laredo, Texas.

The first incident occurred during the late evening of March 8, when a tractor trailer approached the checkpoint on Interstate Highway 35 (I-35). A Service canine alerted to the vehicle during the immigration inspection and referred to secondary for further inspection. A search at secondary revealed 44 individuals during this incident.

The second incident occurred just a few minutes later when agents encountered a commercial tractor hauling a tanker on the west access road. Agents conducted a vehicle stop and discovered 43 individuals during this incident.

The last incident occurred during the morning of March 9, when a tractor-trailer arrived at the I-35 checkpoint for an immigration inspection. A Service canine alerted to vehicle and was referred to secondary for further inspection. During the search, 24 individuals were found. All the individuals were determined to be in the United States illegally from the countries of Ecuador, El Salvador. Guatemala, Honduras, and Mexico. None of the individuals were wearing personal protective equipment (PPE). They were all medically screened and provided PPE. All individuals were placed under arrest pending further investigation by Special Agents of Homeland Security Investigations. U.S. Border Patrol seized all vehicles.

Human smugglers continue to have no regard for the safety and health of the people they exploit for profit. With a noted increase in COVID-19 infections among detainees, the transporting of large groups of people without PPE in close dangerous quarters endangers the individuals and safety of our Nation. The Laredo Sector of the U.S. Border Patrol focuses on its enduring mission priorities of countering terrorism, combatting transnational crime, securing the border, facilitating lawful trade, protecting revenue, and facilitating lawful travel.

Help take a stand against criminal organizations and their potentially dangerous acts by reporting suspicious activity. To report suspicious activity such as alien and/or drug smuggling, download the "USBP Laredo Sector" App or contact the Laredo Sector Border Patrol toll free at 1-800-343-1994. If you see something, say something.

At border, record number of migrant youths wait in adult detention cells for longer than legally allowed

Unaccompanied minors are transported in a Border Patrol vehicle after being apprehended in Penitas, Tex., on Tuesday. (Adrees Latif/Reuters)

By
Nick Miroff
March 10, 2021 at 7:54 p.m. EST

The magnitude of the crisis facing President Biden at the U.S.-Mexico border came into clearer focus Wednesday as the new administration was holding record numbers of unaccompanied migrant teens and children in detention cells for far longer than legally allowed and federal health officials fell further behind in their race to find space for them in shelters.

More than 8,500 migrant teens and children who crossed the border without their parents are being housed in Department of Health and Human Services shelters as they wait to be placed with relatives or vetted sponsors. Nearly 3,500 more are stuck at Border Patrol stations waiting for beds in those shelters to open up, the highest figure ever, according to internal data reviewed by The Washington Post.

Held in grim steel-and-concrete cells built for adults, these young people are spending an average of 107 hours awaiting transfer to an HHS-run shelter, well over the 72-hour legal limit, the data shows. The largest number of unaccompanied minors held this way during the Trump administration was about 2,600 in June 2019, according to congressional testimony and two former Customs and Border Protection officials who were involved in handling that crisis.

The Border Patrol warehouse with chain-link holding pens that were decried as "cages" in 2018 has been closed for renovations, but the conditions in the stations are not much better. Young people are waiting in cramped, austere holding cells with concrete floors and benches. Lights remain on 24 hours a day, agents say, and there are few places to play.

Troy Miller, the acting CBP head, said those housed at the stations have full access to meals, snacks and medical care, as well as showers every 48 hours.

"Many of us, maybe most of us, are parents," Miller told reporters Wednesday. "I myself have a 6-year-old, and these Border Patrol agents go above and beyond every single day to take care of the children."

He acknowledged that the Border Patrol continues "to struggle with the number of individuals in our custody, especially given the pandemic."

Administration rushes to accommodate border surge, with few signs of plans to contain it

Over the first week of March, HHS received more than 450 migrant teens and children per day on average, roughly three times as many as the agency was able to release to family members and sponsors, according to data reviewed by The Post. About

87 percent of the migrant minors in government custody are between the ages of 13 and 17, the latest statistics show.

"As far as HHS, we continue to work with them to move children out of our custody as quickly as we can," Miller said, "and we need to move them out quicker."

HHS officials are scrambling to identify new government sites that could shelter migrant teens and children. Officials are scheduled Thursday to visit California's Moffett Field, a former Navy station in Santa Clara County that now hosts a NASA research center and Google facilities, according to an email sent Wednesday to congressional offices and obtained by The Post. They are also considering Fort Lee, an Army training installation in central Virginia.

Late last month, HHS reopened an emergency facility in Carrizo Springs, Tex., that was used for just one month in 2019 during the Trump administration. It reopened with capacity for 700 teens between the ages of 13 and 17 and can now hold up to 952, according to an HHS notice obtained by The Post. Officials are also looking into reopening a similar facility in South Florida that was called Homestead during the Trump administration but has been renamed Biscayne.

HHS officials have lifted capacity restrictions implemented to lessen the spread of the coronavirus, a move that potentially opens up thousands of additional beds.

Veteran officials at the Department of Homeland Security worry that the influx at the border is building with unprecedented speed, with the potential to be the largest in decades. Homeland Security Secretary Alejandro Mayorkas this week sent a mass email to department employees seeking volunteers to travel to the border and help with what he described as an "overwhelming" number of migrants seeking access to the country.

Administration facing 'challenge' at border but not a crisis, DHS chief says

Biden has quickly reversed or rescinded several of his predecessor's immigration policies, delivering on campaign promises to make the United States more welcoming and humane while overhauling the nation's clogged asylum system.

But families and children without their parents are arriving in greater numbers every week, many saying they have heard Biden has eased border controls. A year ago, the Trump administration implemented a public health order that returned nearly all migrants caught at the border back to Mexico. Soon after taking office, Biden stopped turning back children traveling without their parents, and the latest data shows that the administration is no longer sending back most families, especially those with young children.

CBP published enforcement data Wednesday showing that the agency made 100,441 arrests and detentions in February, a 28 percent increase from the previous month. The number of unaccompanied minors taken into custody jumped 61 percent to 9,457, the agency reported, and the Biden administration is on pace to receive a record number of unaccompanied minors this month if trends continue.

"The Biden administration's border crisis of unaccompanied children being detained at overcrowded Border Patrol stations is a direct result of their undoing the previous administration's policies with no consideration of the ramifications of removing those policies and how it would incentivize migration," Sen. Rob Portman of Ohio, the ranking

Republican on the Senate Homeland Security and Governmental Affairs Committee, said in a statement. "I hope the administration will change course soon."

AD

Biden officials have urged migrants not to travel to the border, telling asylum seekers they need more time to rebuild the system. But the message does not appear to be working, with the U.S. government competing against smuggling organizations encouraging migrants to leave now, as well as word of mouth from the thousands of migrants who are being processed and released into the United States each week with a notice to appear in court.

"The United States is continuing to strictly enforce our existing immigration laws and border security measures," Miller said in a statement. "Those who attempt to cross the border without going through ports of entry should understand that they are putting themselves and their families in danger, especially during the pandemic."

The border is not open, he said: "Do not believe smugglers or others claiming otherwise."

Biden squeezed on immigration policy, bracing for border crisis

In private, frustration is building among government agencies that see no end in sight and potentially dangerous overcrowding, especially for teens and children who are not supposed to languish in detention cells. Officials described the surge as "overwhelming," "on fire" and potentially larger than the 2019 crisis, when CBP took nearly 1 million migrants into custody amid a historic influx of Central American families.

AD

"This surge is going to make the 2019 crisis pale in comparison," said one official, who was not authorized to speak to reporters and commented on the condition of anonymity.

The 2019 surge ended when Trump hectored Mexico into carrying out a militarized crackdown on Central American migrants and allowing the expansion of the "Remain in Mexico" program requiring asylum seekers to wait outside U.S. territory. More than 70,000 were sent to wait in Mexico under the program, which immigrants' advocates denounced as subjecting vulnerable groups to dangerous and squalid conditions in border cities.

This month, the Biden administration is on pace to make more than 130,000 detentions and arrests, a volume eclipsed only by the peak of the 2019 surge, when 144,000 were taken into custody. U.S. agents are detaining more than 4,200 people along the border each day, internal data shows.

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Biden officials have blamed the rising numbers and their struggle to keep pace on the Trump administration's deterrent approach to irregular migration, saying they have inherited a broken and inadequate system.

Roberta Jacobson, the veteran former diplomat that Biden has appointed a special adviser on border issues, told reporters Wednesday that the influx is also the result of migration demand that was bottled up during the Trump years, then made worse by the economic impacts of the coronavirus and damaging hurricanes in Central America.

Jacobson said Biden's team has veteran advisers who have handled previous humanitarian emergencies along the border.

"We've seen surges before. Surges tend to respond to hope. And there was a significant hope for a more humane policy after four years of pent-up demand," said Jacobson, the

former U.S. ambassador to Mexico. At times during her briefing she spoke in Spanish to reiterate a message that migrants should not attempt the journey.

"So I don't know whether I would call that a coincidence, but I certainly think that the idea that a more humane policy would be in place may have driven people to make that decision" to migrate, she said. "But perhaps more importantly, it definitely drove smugglers to express disinformation, to spread disinformation about what was now possible."

The solutions Biden officials have presented are aimed at addressing the long-term "root causes" of irregular migration, rather than the current emergency at the border.

Jacobson said the administration is seeking to channel $4 billion into development aid and job creation programs for Central America's Northern Triangle — El Salvador, Guatemala and Honduras.

Jacobson also said the administration will restore the Central American Minors program, which Biden, as vice president, helped establish during the first major influx of families and children in 2014. That program allows minors with parents living in the United States to apply in their home countries for permission to reunite in the United States, rather than hiring a smuggler and risking the dangerous journey north.

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