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# ARTICLES

## DRUGS AND VIOLENCE

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*The war on drugs has increased the U.S. prison population by tenfold. The foundation for the war on drugs, and this unparalleled increase in prisoners, relies on the premise that drugs and violence are causally linked. Politicians, media, and scholars continue to advocate this view either explicitly or implicitly. This Article identifies the pervasiveness of this premise and questions the link between drugs and violence. It demonstrates that a causal connection between drugs and violence is unsupported by historical arrest data, current research, or independent empirical evidence. That there is little evidence to support the assumption that drugs cause violence is an important insight, as the assumed causal*

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*link between drugs and violence forms the foundation of a significant amount of case law, statutes, and commentary.*

*In particular, the presumed connection between drugs and violence has reduced constitutional protections, misled government resources, and resulted in the unnecessary incarceration of a large proportion of nonviolent Americans. In short, if drugs do not cause violence—and the empirical evidence discussed in this Article suggests they do not and that the connection is quite complicated—then America needs to rethink its entire approach to drug policy.*

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## I. INTRODUCTION

Over the years, with the help of the media, scholars,<sup>1</sup> politicians, and the war on drugs,<sup>2</sup> Americans have developed a firm belief that drugs are linked to violence.<sup>3</sup> The assumption that drugs cause violence is at the core

1. See, e.g., Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736, 738–39 (1953) (discussing how the Narcotics Bureau used propaganda to paint addicts as criminals); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 423 (2006) (“People who report to researchers conducting the National Household Survey on Drug Abuse that they used illegal drugs in the past year are nine times more likely than people who did not report using illegal drugs to also report having been arrested and booked on an assault charge during the past year.”); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2022 (2008) (discussing how drug arrests are the focus of police because of the link between drug markets and high rates of violence, the cheapness of investigations, and the requirement of “fewer man-hours than in a robbery or homicide”).

2. See DAVID LENSON, ON DRUGS 167–72 (1995) (examining the costs of the American war on drugs, both economically and socially); Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1489 (2000) (same, specifically highlighting the social impact of the war on drugs on African Americans); Matt Sledge, *The Drug War and Mass Incarceration by the Numbers*, HUFFINGTON POST (Apr. 8, 2013), [http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration\\_n\\_3034310.html](http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html) (demonstrating the effect the war on drugs has had in dramatically increasing the prison population). See generally ARTHUR BENAVIDE, DRUGS: AMERICA’S HOLY WAR (2009) (providing further insight into the economic and social costs of the war on drugs).

3. L. N. Robins, *The Natural History of Drug Abuse*, 284 ACTA PSYCHIATRICA SCANDINAVICA SUPPLEMENTUM 7, 19 (1980), available at <http://www.rkp.wustl.edu/VESlit/RobinsActaPsyScan1980.pdf> (“In adolescent and adult life . . . [t]hose who use drugs heavily have higher than expected rates of adult arrest . . .”). Some commentators claim that when drug use has shifted to minorities, politicians have relied on fear of citizens in order to enact anti-narcotics laws. See, e.g., Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 561 (1997) (“[W]hen drug use was denominated by the Caucasian middle class in the 1970s, drug arrests and prison sentences were relatively low. In contrast, when drug use became synonymous with impoverished minorities in the late 1980s, law enforcement was uncompromisingly aggressive.”); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 420–21 (2009) (“Between 1986 and 1991, the number of white drug offenders in state prisons increased by 110 percent, but the number of Black drug offenders rose by 465 percent.” (quoting Kendall Thomas, *Racial Justice: Moral Or Political?*, 17 NAT’L BLACK L.J. 222, 240 (2003))).

of American drug policy<sup>4</sup> and helps explain why drug convictions increased almost tenfold from 1980 to 1996.<sup>5</sup> While many commentators blast drug laws for failing to reduce drug abuse,<sup>6</sup> or being overly punitive,<sup>7</sup> no scholars have previously identified the fundamental flaw of U.S. drug policy: the assumed premise that drugs<sup>8</sup> cause violence.

4. See *infra* Part II.B–D.

5. Fareed Zakaria, *Incarceration Nation*, TIME (Apr. 2, 2012), <http://content.time.com/time/magazine/article/0,9171,2109777,00.html> (pointing out that the United States has spent \$1 trillion in the last four decades fighting the war on drugs, with the number of drug convictions increasing from 15 inmates per 100,000 adults in 1980 to 148 in 1996).

6. JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 19–46 (2001) (arguing that despite drug laws, illicit drugs have increased harm to communities and drug users); Editorial, *It Is Time to End the War on Drugs*, 93 JUDICATURE 48, 83 (2009) (“While consumption of many traditional street drugs has actually declined over the past decade, prescription drug abuse continues to grow.”); David C. Leven, *Our Drug Laws Have Failed—So Where Is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L.J. 293, 293 (2000) (asserting that “drug . . . use ha[s] continued virtually unabated” in spite of drug laws that “impose harsh sentences on low level offenders”); Noah Mamber, Note, *Coke and Smack at the Drugstore: Harm Reductive Drug Legalization: An Alternative to a Criminalization Society*, 15 CORNELL J.L. & PUB. POL’Y 619, 629 (2006) (arguing that the “zero tolerance criminalization policy has not reduced the number of drug users,” but instead has increased a swath of societal ills). See also SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 13 (2012), available at <http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/nsduhresults2011.pdf> (“[T]he overall rate of . . . illicit drug use among persons aged [twelve] or older in 2011 (8.7 percent) . . . was higher than the rates in most years from 2003 through 2008”); Annabelle Bugge, *After 40-Year Fight, Illicit Drug Use at All-Time High*, HUFFINGTON POST (Sept. 22, 2013, 5:12 AM), [http://www.huffingtonpost.com/annabelle-buggle/after-40year-fight-illici\\_b\\_3623714.html](http://www.huffingtonpost.com/annabelle-buggle/after-40year-fight-illici_b_3623714.html) (indicating that since its inception the war on drugs has received over \$1 trillion, but the number of Americans incarcerated for drug offenses has “skyrocketed from 40,000 in 1980 to 500,000 today”); Jennifer Warner, *U.S. Leads the World in Illegal Drug Use*, CBS NEWS (July 1, 2008), <http://www.cbsnews.com/news/us-leads-the-world-in-illegal-drug-use/> (“Americans report the highest level of cocaine and marijuana use” (referencing Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MED. 1053, 1057 (2008), available at <http://www.plosmedicine.org/article/doi/10.1371/journal.pmed.0050141>&representation=PDF)). See generally GLOBAL COMM’N ON DRUG POLICY, WAR ON DRUGS: REPORT OF THE GLOBAL COMMISSION ON DRUG POLICY (2011), available at [http://www.globalcommissionondrugs.org/wp-content/themes/gcdp\\_v1/pdf/Global\\_Commission\\_Report\\_English.pdf](http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf) (detailing the global failure of “[v]ast expenditures on criminalization and repressive measures” to “curtail the supply or consumption” of illegal drugs).

7. See, e.g., Norval Morris, *Teenage Violence and Drug Use*, 31 VAL. U. L. REV. 547, 547 (1997) (“The rhetoric of the drug warriors, their promises of success in the task of making America drug free are so powerfully and regularly delivered, even at the very highest level of governments, federal and state, with presidential and gubernatorial force, that the drug addict has been demonized and the advocate of change rendered deeply suspect. The public discourse does not seem to have learned enough from eighty-two years of uninterrupted failure of our prohibitory drug policy to countenance radical reform. Prudentially, all that has a hope . . . is a steady move towards regulatory, much less punitive policies.”).

8. For purposes of this Article, the use of the word “drugs” specifically refers to illicit drugs,

U.S. drug policy stands upon an unsteady foundation. Nearly a century of drug regulations<sup>9</sup> have amassed a legal structure supported largely by political rhetoric and misguided public attitudes about drug users.<sup>10</sup> The edifice of drug policy relies on the premise that drugs cause violence, with incarceration as the primary tool. The war on drugs launched by the Nixon administration, and carried forward from the Reagan administration to the Obama administration, solidified America's belief that drugs are dangerous and linked with violent crime.<sup>11</sup> Yet this drug criminalization lacks an understanding of the actual impact of drugs on violence.

Even beyond the political and media rhetoric, the belief that drugs cause violence has led to harsh penalties and increased incarceration rates. Drug defendants face harsh penalties for drug offenses.<sup>12</sup> At the end of

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including marijuana, heroin, methamphetamines, and other illegal drugs listed later within the Article. It does not include alcohol or nicotine.

9. Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 et seq. (2012)); Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567; Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914) *repealed by* Controlled Substances Act of 1970, *supra*.

10. Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQUENCY 419, 425 (1999) (asserting that two of the reasons U.S. incarceration rates are so high are strict penalties and misinformed public opinion about drugs).

11. Since the beginning of the war on drugs under President Richard Nixon up through President Barack Obama's administration, the federal government has spent over \$1 trillion dollars trying to bring drug use to an end. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 52 (2014) (noting that during President Ronald Reagan's first administration, "anti-drug funds at the FBI surged from \$38 million to \$181 million, and the Drug Enforcement Agency's spending skyrocketed from \$86 million to over \$1 billion" while "spending on health care for drug treatment plummeted, with the National Institute on Drug Abuse suffering a budget cut from \$174 million to \$57 million, and with anti-drug funds for the Department of Education slashed from \$14 million to \$3 million"); Martha Mendoza, *U.S. War on Drugs Has Met None of Its Goals: AP Impact*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/2010/05/13/us-war-on-drugs-has-met-n\\_n\\_575351.html](http://www.huffingtonpost.com/2010/05/13/us-war-on-drugs-has-met-n_n_575351.html) (discussing President Nixon's "first drug-fighting budget" of \$100 million, and President Obama's request for \$15.5 billion for the 2011 drug war).

12. HUMAN RIGHTS WATCH, *AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY* 3-4 (2013), *available at* [http://www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0.pdf) (examining the rarity of drug defendants who choose to go to trial and face severe sentencing in light of mandatory minimums, and observing the practice of prosecutors seeking plea bargains to charge or threaten to charge drug defendants with offenses carrying harsh mandatory sentencing); JENNIFER TURNER & WILL BUNTING, AM. CIV. LIBERTIES UNION, *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES*, 2-13 (Vanita Gupta et al. eds., 2013), *available at* <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=4> (discussing in particular harsh life without parole sentencing for nonviolent drug crimes); Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES (Dec. 5, 2013), <http://www.nytimes.com/2013/12/06/us/federal-prosecutors-assailed-in-outcry-over-sentencing.html> ("[P]rosecutors routinely threaten ultraharsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate." (quoting *United States v. Kupa*,

2011, one in every thirty-four adult residents in the United States was under some form of correctional supervision.<sup>13</sup> Worldwide, the United States has one of the highest incarceration rates.<sup>14</sup> Minorities have been disproportionately affected.<sup>15</sup> And despite the billions of dollars spent on the war on drugs since the 1970s, drug use has remained constant throughout the past forty years.<sup>16</sup> Recognizing the unfairness of drug policies, over the past few years federal and state officials have made meaningful efforts to lessen the punishment they administer to low-level drug offenders.<sup>17</sup> Despite these efforts, the incarceration rates in the United

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976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013))).

13. LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239972, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/epus11.pdf> (counting 6.98 million adult offenders, or nearly 2.9 percent of the adult population, under correctional supervision in 2011).

14. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES 1 (10th ed. 2013), available at [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf) (noting that "[t]he United States' prison total constitutes a rate of 716 per 100,000 of the national population," compared to the world prison population rate of 144 per 100,000).

15. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 1, 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> ("The imprisonment rates indicate that about 0.5% of all white males, more than 3.0% of all black males, and 1.2% of all Hispanic males were imprisoned in 2011."); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) ("For all categories of crime, the best evidence of discriminatory prosecution exists for drug violations; while African Americans are not more likely to commit drug crimes than members of other races, they are much more likely to be arrested, prosecuted, convicted, and sentenced to prison.").

16. Claire Suddath, *Brief History: The War on Drugs*, TIME (Mar. 25, 2009), <http://content.time.com/time/world/article/0,8599,1887488,00.html> ("And yet, within the past [forty] years, the U.S. government has spent over \$2.5 trillion dollars fighting the War on Drugs. Despite the ad campaigns, increased incarceration rates and a crackdown on smuggling, the number of illicit drug users in America has risen over the years and now sits at 19.9 million Americans.").

17. See, e.g., Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.) (eliminating mandatory minimum sentence for simple drug possession); Smarter Sentencing Act of 2014, S. 1410, 113th Cong. (proposed legislation retroactively applying the Fair Sentencing Act of 2010 to certain low-level drug offenders); Smarter Sentencing Act of 2013, S. 1410, 113th Cong. (same); Memorandum from Eric Holder, Att'y Gen., U.S. Dep't of Justice, to U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 1 (Aug. 12, 2013) [hereinafter Memorandum from Att'y Gen. Eric Holder], available at <http://big.assets.huffingtonpost.com/HolderMandatoryMinimumsMemo.pdf> (instructing U.S. Attorneys to reserve severe mandatory minimum penalties for "serious, high-level or violent drug traffickers," not "low-level, nonviolent drug offenders"); Press Release, White House Office of the Press Sec'y, President Obama Grants Pardons and Commutation (Dec. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation> (announcing President Barack Obama's decision to commute the sentences of eight nonviolent drug offenders); Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html> (discussing Holder's memorandum); Charlie Savage, *Trend to Lighten Harsh Sentences Catches on in*

States are projected to remain disproportionately high for nearly another century.<sup>18</sup> This is because current case law and many statutes create or allow harsh punishments for drug crimes, assuming violence will result.<sup>19</sup> Additionally, drug policy cannot be reformed in the United States without recognition that all drugs do not cause violence.<sup>20</sup>

Although scholars have examined drugs and violence,<sup>21</sup> and the history of drug policy in America,<sup>22</sup> no scholars have studied the effect of the assumed link between drugs and violence on the justice system. In contrast to previous scholarship on this topic, this Article demonstrates that the connection between drugs and violence lacks solid support. This revelation—that there is weak evidence to support the assumption drugs cause violence—is an important insight, because the assumed causal link between drugs and violence is the foundation of a significant amount of

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*Conservative States*, N.Y. TIMES (Aug. 12, 2011) [hereinafter Savage, *Trend to Lighten Harsh Sentences*], <http://www.nytimes.com/2011/08/13/us/13penal.html> (discussing efforts in “red” states to limit the incarceration of low-level drug offenders).

18. Marc Mauer & Nazgol Ghandnoosh, *Can We Wait 88 Years to End Mass Incarceration?*, HUFFINGTON POST (Feb. 19, 2014), [http://www.huffingtonpost.com/marc-mauer/88-years-mass-incarceration\\_b\\_4474132.html](http://www.huffingtonpost.com/marc-mauer/88-years-mass-incarceration_b_4474132.html) (“[I]t will take until 2101—88 years—for the prison population to return to its 1980 level.”).

19. See *infra* Part III.A–B.

20. The pharmacological effects of drugs are not easily proven with scientific evidence. This does not necessarily mean that drugs do not with certainty cause violence, but rather that there is no evidence to this effect. The most that can be asserted is that the causal connection has not been clearly established and is debatable, perhaps even doubtful, at least for any drugs other than crack cocaine and amphetamines. It is almost certain that there is no such link between marijuana and violence. See *infra* Part IV and specifically note 228.

21. See *infra* Part IV.

22. See MARGARET P. BATTIN ET AL., DRUGS AND JUSTICE: SEEKING A CONSISTENT, COHERENT, COMPREHENSIVE VIEW 29–89 (2008) (summarizing the history and current state of drug law and policy); DAVID SCHULTZ, AMERICAN POLITICS IN THE AGE OF IGNORANCE: WHY LAWMAKERS CHOOSE BELIEF OVER RESEARCH 76–78 (2013) (stating that “there is little evidence that legalization has resulted in increased [drug] usage” and that criminalizing drug use may further social problems); Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 694 (2005) (“As a result of their historical growth together, drug abuse and crime have long been associated in the minds of Americans.”); Peter Reuter, *Why Has U.S. Drug Policy Changed So Little over 30 Years?*, 42 CRIME & JUST. 75, 79–85 (2013) (detailing the history of drug laws, and specifically marijuana laws, between 1980 and 2010); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285–97 (1995) (providing a brief history of crack cocaine policy during the 1980s); Stuntz, *supra* note 1, at 2020–25 (arguing that drug laws in the late twentieth century helped “to make punishment for other conduct easier,” such as violent crimes). See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing how mass incarceration of communities of color has created a sort of racial hierarchy similar to Jim Crow laws); DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (3d ed. 1987) (chronicling the history of drug laws from nineteenth century America through present day); Symposium, *The Drug Policy Debate*, 28 FORDHAM URB. L.J. 3 (2000) (including scholarly discussions of past, present, and future U.S. drug policy).

case law, statutes, and academic commentary. In particular, the assumed connection between drugs and violence underlies many judicial decisions reducing constitutional rights for drug defendants and statutes creating harsh sentences for nonviolent drug offenses.

This Article demonstrates through an examination of independent empirical evidence, historical and arrest data, and a review of prior research, that the foundation for U.S. drug policy is fundamentally flawed. The Article discusses: the psychopharmacological effects of particular drugs on the propensity of the consumer to engage in violence; the systemic effects of drug distribution under prohibition; and the assertion that addiction and the high cost of prohibited drugs incentivize drug users to commit crimes to either get more drugs or obtain more money to buy drugs. The link between drugs and violence that underlies much of U.S. drug policy lacks sufficient empirical support, but yet pervades modern day legislative statutes and judicial decisions. Part I provides a historical overview of drug crime legislation in the United States, describing the origins of the link between drugs and violence and how this link misinformed public opinion and allowed for major drug prohibitions. Part II reveals that evidence of drug crime and empirical evidence does not match perceptions of the problem of drugs in America. It concludes, significantly, and for the first time using original empirical evidence, that detaining drug criminals is not making us any safer. Specifically, it finds that drug defendants are less likely to commit violent crimes than any other class of defendant released pretrial.<sup>23</sup> Part III demonstrates that the assumptions underlying case law and statutes—that drugs make people violent, that people commit violent crimes to obtain drugs, and that the drug trade is inherently violent—are flawed and highlights the impacts of these flawed assumptions about drugs and violence. Such impacts include wasted resources, discrimination against minorities, and reductions in constitutional rights. Part IV demonstrates that although media reports, government accounts, and cases and statutes assert a strong link and powerful rhetoric to support a causal link between drugs and violence, this link is much more complicated and lacks a strong foundation. Part V focuses on the results on the criminal justice system of connecting drugs to violence, including ineffectiveness, harsh punishments of nonviolent

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23. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 558 (2012) (“We . . . show that though defendants with drug felonies—both drug use and trafficking—are presumed to be dangerous, they are among *the least* likely to be rearrested for a violent crime. In fact, people charged with drug felonies are about as likely to be rearrested as those brought in on driving-related offenses.”).

individuals—particularly minorities—and a misuse of resources. Finally, this Article concludes that if drugs do not cause violence—which the evidence seems to support—then we should rethink the entire basis for American drug policy.

## II. HOW DRUGS HAVE BECOME LINKED TO VIOLENCE: A HISTORY OF U.S. DRUG POLICY

Before the link between drugs and violence, nineteenth century Americans had a permissive attitude toward drug use for medicinal<sup>24</sup> or recreational purposes,<sup>25</sup> which was reflected in a lack of drug regulations. Despite the widespread use of drugs such as opium and cocaine,<sup>26</sup> there was little demand to make opium, cocaine, or other drugs illegal because individuals who used those drugs were viewed as contributing members of society.<sup>27</sup> Americans from all social and economic classes used drugs, which were not yet illegal.<sup>28</sup> However, even from early on, when there was a discussion about regulating drugs, there was discussion of the violent effects of such drugs. The three main arguments made historically for the drug-violence connection are: (1) drugs make people act violently, (2) drug addiction makes people commit violent crime to get drugs, and (3) the drug trade is inherently violent. Although these three arguments may have substantially different causes or explanations, they have all been used to justify this drug-violence connection and will all be discussed in this Article.

Early on, the only negative consequences discussed in relation to drugs were the consequences of addiction. Even though some worried about moral decay caused by the use of drugs, early Americans did not

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24. Some referred to early Americans as having an “almost insatiable demand for psychoactive substance[s]” as medical cure-alls. Lawrence S. Brown, Jr., *Substance Abuse and America: Historical Perspective on the Federal Response to a Social Phenomenon*, 73 J. NAT’L MED. ASS’N 497, 499 (1981).

25. EDWARD M. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT DRUGS: THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA—INCLUDING CAFFEINE, NICOTINE AND ALCOHOL 3–5 (1972) [hereinafter LICIT AND ILLICIT DRUGS] (describing nineteenth century America “as a dope fiend’s paradise” (internal quotations omitted)).

26. Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 571–72 (1995).

27. *Id.* at 572; LICIT AND ILLICIT DRUGS, *supra* note 25, at 6–7 (“Addicts continued to participate fully in the life of the community.”).

28. Ironically, even “a noted temperance lecturer” was a steady user of opiates. LICIT AND ILLICIT DRUGS, *supra* note 25, at 4–5.

generally associate drugs with crime and violence.<sup>29</sup> As time went on, however, public sentiment changed and regulators supported drug laws with exaggerated fears of violence or crime. Initially, drug laws passed were not a reflection of society's view of narcotics or a reaction to the drugs themselves, but rather, were often the result of exaggerated fears of violence.

What follows here examines the connection made by the public between drugs and violence in select periods of U.S. history. Unlike prior work examining drug history, this Article starts from early American history to document the marked change in viewing drugs as a source of recreation and medicine to a cause of violence and crime. By examining drug laws and their impetus, this part provides a glimpse into the public perception and legislative concerns surrounding violence and crime that contributed to today's drug regime.

#### A. THE PRE-HARRISON ACT ERA (1800S TO EARLY 1900S)

Drug use has not always been socially or legally condemned in the United States.<sup>30</sup> When opium and cocaine were introduced into the states, they gained widespread popularity and medical usage.<sup>31</sup> Cocaine, introduced into the United States in 1884,<sup>32</sup> was hailed as an over-the-counter cure for common ailments such as hay fever.<sup>33</sup> It was used in a variety of medicines and, by 1885, most drug stores in America had a supply of cocaine.<sup>34</sup> Heroin, a trademark name of the Bayer Company for opium, entered the commercial market in 1898 as a cough medicine that could be drunk, sniffed, or injected.<sup>35</sup> Patients were thus regularly prescribed medicines containing heroin and cocaine.<sup>36</sup> Physicians faced no

29. Drug users were not a "deviant addict subculture, cut off from respectable society." *Id.* at 7.

30. Robins, *supra* note 3, at 8 ("Few drugs have been illicit from the moment of their discovery or synthesis. . . . Many drugs now illegal have enjoyed a period of legal popularity with the upper and middle classes.").

31. Duke, *supra* note 26, at 571–72.

32. David F. Musto, *Is Our Drug Policy Effective? Are There Alternatives?*, 28 *FORDHAM URB. L.J.* 20, 26 (2000).

33. LICIT AND ILLICIT DRUGS, *supra* note 25, at 275–76; Gopal Das, *Cocaine Abuse in North America: A Milestone in History*, 33 *J. CLINICAL PHARMACOLOGY* 296, 297 (1993).

34. Das, *supra* note 33, at 297 ("[C]ocaine, along with milder forms of coca, was already available to Americans in drug stores, grocery stores, saloons, and from mail-order medicine vendors.").

35. MUSTO, *supra* note 22, at 5; Morris B. Hoffman, *The Drug Court Scandal*, 78 *N.C. L. REV.* 1437, 1450–51 n.37 (2000).

36. Virginia L. Rothwell, *Boggs Act*, in *ENCYCLOPEDIA OF DRUG POLICY* 96–97 (Mark A. R. Kleiman & James E. Hawdon eds., 2011); Ellen M. Weber, *Failure of Physicians to Prescribe Pharmacotherapies for Addiction: Regulatory Restrictions and Physician Resistance*, 13 *J. HEALTH*

legal limits to prescribing these drugs.<sup>37</sup> Upper and middle class white women especially enjoyed the use of pharmaceutical products containing opium or cocaine to treat minor ailments.<sup>38</sup> In addition, marijuana was also readily available and used for recreational purposes into the twentieth century.<sup>39</sup> Marijuana, like opiates and other narcotics, was readily available through the 1800s; however, it did not obtain the same level of popularity as opiates.<sup>40</sup> Accordingly, there was very little public opposition in the nineteenth century against drugs.<sup>41</sup>

Even as drug use increased rapidly across the country,<sup>42</sup> public perception of drug users remained uncondemning.<sup>43</sup> Early drug regulation aimed merely to provide consumers access to safe narcotics and protect them from the importation of adulterated drugs.<sup>44</sup> In 1848, Congress passed the Drug Importation Act, requiring U.S. Customs Service inspection to prevent adulterated drugs from entering the country.<sup>45</sup> In 1906, Congress passed the Pure Food and Drug Act, requiring labels to identify the

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CARE L. & POL'Y 49, 56 (2010) ("Throughout the mid- to late- nineteenth century, physicians regularly prescribed patent medicines that contained morphine, cocaine and heroin.").

37. Weber, *supra* note 36, at 56 ("In the early twentieth century . . . physicians prescribed opioid medications for the care of addicted patients without legal restrictions.").

38. LICIT AND ILLICIT DRUGS, *supra* note 25, at 6 n.23, 18 (quoting D. W. Nolan, *The Opium Habit*, 33 CATHOLIC WORLD 827, 827–28 (1881) ("Opium-eating . . . is an aristocratic vice and prevails more extensively among the wealthy and educated classes than among those of inferior social position . . .")).

39. *Id.* at 410.

40. *Id.* at 409–10.

41. *See id.* at 275 ("By 1890, the addicting and psychosis-producing nature of cocaine was well understood in medical circles; yet for another twenty years it does not appear to have occurred to many people to demand a *law* against the drug.").

42. *See* DRUGS AND DRUG POLICY IN AMERICA: A DOCUMENTARY HISTORY 10 (Steven R. Belenko ed., 2000) [hereinafter DRUGS AND DRUG POLICY] (concluding that "opium use was on the rise").

43. EDWARD M. BRECHER & THE EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT DRUGS: THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA—INCLUDING CAFFEINE, NICOTINE AND ALCOHOL (1972), *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 4, 4–5. Others who began recognizing the dangers of addiction advocated merely for a drug prescription system whereby an individual must consult a physician before receiving opiates from a drug store. Virgil G. Eaton, *How the Opium Habit Is Acquired*, 33 POPULAR SCI. MONTHLY 663 (Sept. 1888), *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 10, 10–12, *available at* <http://www.druglibrary.org/schaffer/history/opiumhabit1888.htm>.

44. *E.g.*, Drug Importation Act of 1848, ch. 70, 9 Stat. 237; Pure Food and Drug Act of 1906, Pub. L. No. 59-382, 34 Stat. 768.

45. Dennis B. Worthen, *Pharmaceutical Legislation: An Historical Perspective*, 10 INT'L J. PHARM. COMPOUNDING 20, 21 (2006); *Significant Dates in U.S. Food and Drug Law History*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/aboutfda/whatwedo/history/milestones/ucm128305.htm> (last updated Dec. 19, 2014).

contents of drugs for consumers.<sup>46</sup> Thus, the public generally accepted drug users as a normal part of society in the nineteenth century, which is markedly different from the public perception of stereotypical drug users today.

#### B. THE HARRISON ACT ERA (1910–1940)

The link between drugs and violence began in early twentieth century America with arguments that cocaine makes people commit violent crime. In the early 1900s, Southern states banned cocaine use due to the fear of the violent “negro.”<sup>47</sup> Southern states enacted anti-cocaine legislation in order to combat the dangers of “the cocainized black.”<sup>48</sup> Politicians supporting drug regulation played on society’s fear of “drug-crazed, sex-mad negroes.”<sup>49</sup> A 1910 federal survey alleged that cocaine was a direct “incentive” to rape by “negroes” throughout the country.<sup>50</sup> Southern sheriffs believed cocaine even rendered blacks immune to .32-caliber bullets.<sup>51</sup> During this same period, several articles appeared in medical journals and news media linking violent attacks by black men on southern white women with cocaine use.<sup>52</sup>

46. Worthen, *supra* note 45, at 22–23.

47. MUSTO, *supra* note 22, at 6–8.

48. Kathleen Auerhahn, *The Split Labor Market and the Origins of Antidrug Legislation in the United States*, 24 L. & SOC. INQUIRY 411, 427 & n.7 (1999) (citing *Cocaine Sniffers: Use of the Drug Increasing Among Negroes of the South*, N.Y. TRIBUNE, June 21, 1903, at A11) (“I am satisfied that many of the horrible crimes committed in the Southern States by the colored people can be traced directly to the cocaine habit.”).

49. *Special Report: Illegal Drugs: How Did We Get Here? History Has a Way of Repeating Itself*, ECONOMIST (July 26, 2001), <http://www.economist.com/node/706583>.

50. Evan Thomas, *America’s Crusade: What is Behind the Latest War on Drugs*, TIME MAG. (Sept. 15, 1986), <http://content.time.com/time/magazine/article/0,9171,962287,00.html>. See also Auerhahn, *supra* note 48, at 424 (“It did not matter whether the use of cocaine really *did* . . . increase[] their lustful urges for white women . . .”).

51. Auerhahn, *supra* note 48, at 424. As a result, many police departments switched to .38-caliber bullets. See Edward Huntington Williams, *The Drug-Habit Menace in the South*, 85 MED. REC. 247, 248 (1914) (“The following day [a police officer] exchanged his .32-20 for a .38 caliber army model, the weapon carried by the men of our army and navy. And a similar exchange has been made by many of the officers in the South who have had experience with the homicidal negro, both before and since the days of cocaine-taking.”). “[T]he cocainized negro has [also] exhibited deadly accuracy in shooting.” *Id.* Certainly the shift from .32- to .38-caliber bullets was not solely attributable to fears of drug-induced violence by black Americans, but also as a result of advanced technology. *Id.* There were even claims that cocaine made a user “insensitive to pain.” David F. Musto, *Opium, Cocaine and Marijuana in American History*, SCI. AM., July 1991, at 40, 44.

52. Catherine Carstairs, “The Most Dangerous Drug:” *Images of African-Americans and Cocaine Use in the Progressive Era*, 7 LEFT HIST. 46, 46 (2000) (“News and medical reports frequently depicted black men on cocaine as frenzied, manic, homicidal, lascivious, excitable, criminal, and immoral. They were accused of raping white women, and killing white men.”).

A report from 1911 asserted that it is the “unanimous opinion” of government entities that enforce pharmaceutical laws that “the misuse of cocaine is a direct incentive to crime.”<sup>53</sup> Contemporary historians agree that “[r]eal incidents of violent and erratic behavior resulting directly from cocaine use almost surely did occur,”<sup>54</sup> but there is also agreement that many accounts of violence resulted from fear and prejudice.<sup>55</sup> The real effects of cocaine on the user were often exaggerated by the media and politicians<sup>56</sup> due to the concern that young people and minorities had started using cocaine.<sup>57</sup>

In addition to government reports lamenting the violence caused by drugs, local media in this time period also specifically asserted that drugs caused violence. Newspapers specifically stated that police traced the influence of drugs to many or all crimes of violence.<sup>58</sup> One newspaper reported that “reliable authorities [estimated] that 50 [percent] of the crimes of violence can be traced back to some form of drugs.”<sup>59</sup> Newspapers even reported that most crimes of violence were committed to provide funds to buy drugs.<sup>60</sup> Also, some reported that drugs supplied criminals with

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53. Edward Marshall, *Uncle Sam is the Worst Drug Fiend in the World*, N.Y. TIMES MAG. Mar. 12, 1911, at SM12, reprinted in DRUGS AND DRUG POLICY, *supra* note 42, at 45, 46.

54. JOSEPH SPILLANE, RAND CORP., MODERN DRUG, MODERN MENACE 310–17 (1994), reprinted in DRUGS AND DRUG POLICY, *supra* note 42, at 44, 44.

55. *Id.*

56. H. WAYNE MORGAN, DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980 at 91–92 (1981).

57. *Id.* at 92. In fact, “[v]iolent cocaine fiends . . . appear to have been more a terrifying social fiction than an empirical reality and one with a sharp racial overtone.” JOSEPH F. SPILLANE, COCAINE: FROM MEDICAL MARVEL TO MODERN MENACE IN THE UNITED STATES, 1884–1920, at 121 (2000).

58. Clare Elliott, *How I Would Stop the Crime Wave*, SIOUX CITY J., June 7, 1925 (“All crimes of violence are committed while the author is either temporarily insane or under the influence of a drug . . . and in either case he is to be treated on the basis of a dangerous outlaw.”); Alfred G. Reed, *Hemp is the Popular Source of Drunkenness in India: A Harmless Plant in Other Parts of World Transformed by Heat of East*, HAMILTON DAILY NEWS, Oct. 24, 1930, at 6 (discussing that marijuana leads to “psychomotor activity with tendency to [cause] willful damage and violence”); *Novelist’s Plots Pale in Story of Federal Fight on Drugs*, SYRACUSE HERALD, Oct. 1, 1922, at 11 (“The direct results of habitual use of narcotics are terrible enough. . . . Police trace to its influence many of the crimes of violence that have made the phrase ‘crime wave’ familiar in many parts of the country.”).

59. Hamilton Fish, Jr., *Government Control of Narcotics Urged as Crime Deterrent*, SIMPSONS’ DAILY LEADER-TIMES, June 10, 1931, at 4 (“The crime wave which has assumed such terrible proportions in the United States is largely attributable to the use of smuggled heroin and cocaine and other vicious drugs. One-third of all the inmates of our federal prisons are addicts or violators of our narcotic laws.”). While these claims are greatly exaggerated, there may be a causal connection between drug addiction and acquisitive crime. See STEVEN B. DUKE & ALBERT C. GROSS, AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 108–11 (1993) (“If a drug habit can be fed only at great expense, and if the demand for drugs is relatively inelastic, then crimes to obtain the money to buy drugs are inevitable.”).

60. *E.g.*, *Enough Narcotics in United States to Put Whole Country to Sleep for Week*, SALT LAKE TRIB., Feb. 28, 1926, at 6 (“Practically all professional criminals are drug addicts and most crimes of

courage to commit a robbery,<sup>61</sup> and others even went so far as claiming that violence, including a “desire to mutilate or kill,”<sup>62</sup> was caused by drugs, including cocaine, heroin, morphine and opium.<sup>63</sup>

In the lead up to the Harrison Act of 1914,<sup>64</sup> the first federal act to penalize drug use, American media promulgated a condemnatory view of a link between drugs and violent crime.<sup>65</sup> The *Los Angeles Times*, for example, ran a story in 1919 claiming “ninety-nine percent of the present series of holdups, burglaries, armed robberies and other deeds of violence . . . are the work of drug fiends seeking to get narcotics.”<sup>66</sup> Thus, the media and politicians relied on arguments that drugs make people act violently and that people commit crimes to obtain drugs. Many of the reasons for the enactment of the Harrison Act had nothing to do with drugs, but were the result of irrational fears. In the end, these fears of violence motivated greater action by the government in the form of drug prohibition.

Legislators responded by enacting the Harrison Act of 1914.<sup>67</sup> The Harrison Act, a flagship of U.S. drug policy, became the first piece of

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violence are committed to provide funds to buy drugs.”)

61. According to “an old detective” [t]he criminal who works in the open uses drugs to supply him with courage. It is sort of a false courage, for it dies out with the effects of the opiate. Nevertheless without it your holdup man would never have the nerve to carry through a daylight robbery. A census of the drug addicts is a roster of the crooks in nine cases out of ten.

*Use Drugs to Gain Courage*, ELGIN ECHO, Dec. 15, 1921 (internal quotation marks omitted).

62. E.g., Bruce Grant, *A Home-Grown New Drug that Drives Its Victims Mad*, SALT LAKE TRIB., Dec. 30, 1928, at 3 (“The addict, after five years of smoking, becomes violently insane, is seized with a strange desperation that leads to violence and later to a fiendish desire to mutilate or kill.”).

63. Bruce Grant, *Exposing Traffic in Dope the World’s Wickedest Evil All Over the Globe Today*, SALT LAKE TRIB., Oct. 26, 1930, at 2 (“[The addict] is prompted by a fiendish desire to commit violence and to mutilate or kill.”); George C. Henderson, *The Madhouse—The Dope Fiend’s Finish*, OAKLAND TRIB., Oct. 16, 1921, at 3 (“Dementia, melancholia and periods or states of violence necessitating restraint are characteristic of the victims of cocaine, heroin, morphine and opium.” (internal quotation marks omitted)).

64. Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914) *repealed by* Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 et seq. (2012)).

65. LICIT AND ILLICIT DRUGS, *supra* note 25, at 414 (“Distorted news has prepared the public to support extreme measures to suppress imagined evils.”). Additionally, former American Psychiatric Association President Lawrence Kolb has accused the media of spreading “false propaganda about the nature of drug addiction.” Lawrence Kolb, *Let’s Stop This Narcotics Hysteria!*, SATURDAY EVENING POST, July 28, 1956, *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 207–08.

66. Albert F. Nathan, *Drug Fiends Make “Crime Wave,”* L.A. TIMES, Nov. 30, 1919, at III, *available at* <http://latimesblogs.latimes.com/thedailymirror/2009/11/drug-addicts-blamed-for-crime-wave.html>.

67. For an in-depth overview of the passage of the Harrison Act, see MUSTO, *supra* note 22, at 54–63.

legislation validating the fears of violence caused by drugs.<sup>68</sup> The Act was designed to limit the amount of narcotics dispensed by physicians and pharmacists;<sup>69</sup> only small amounts of heroin were to remain available over the counter, while prescriptions would be required for larger amounts or for cocaine.<sup>70</sup> The law taxed manufacturers, distributors, producers, and sellers of drugs, but allowed drugs to be available.<sup>71</sup> But by 1918,<sup>72</sup> the executive<sup>73</sup> and judicial branches<sup>74</sup> enforced the Harrison Act as a ban on drugs.<sup>75</sup> As a result, drugs increased in price,<sup>76</sup> and drug use became subversive and connected to a culture of crime.<sup>77</sup> Many addicts, cut off from drugs,

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68. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1217–18 (1998).

69. *Significant Dates in U.S. Food and Drug Law History*, *supra* note 45.

70. LICIT AND ILLICIT DRUGS, *supra* note 25, at 49.

71. Brown, *supra* note 24, at 500. Legislative intent was merely to “regulate the distribution of opium, cocaine, and their derivatives.” *Id.* See also MUSTO, *supra* note 22, at 54–63 (discussing the history surrounding the enactment of the Harrison Act).

72. As one commentator noted, narcotics users were not viewed as criminals “until the furious blitzkrieg launched around 1918 in connection with the enforcement of the Harrison Act.” King, *supra* note 1, at 737.

73. See Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501, 509 & n.41 (1990) (indicating that the Treasury Department’s interpretation of the act was “that a doctor could not prescribe opiates to an addict to maintain his addiction”).

74. See, e.g., *Webb v. United States*, 249 U.S. 96, 99–100 (1919) (discussing the prohibition of non-prescription narcotic sales); *United States v. Doremus*, 249 U.S. 86, 92 (1919) (“It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.”); *United States v. Jin Fuey Moy*, 241 U.S. 394, 402 (1916) (considering the implications of the Act and stating that “[o]nly words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal”).

75. LICIT AND ILLICIT DRUGS, *supra* note 25, at 87 (“Thus a law apparently intended to ensure the orderly marketing of narcotics was converted into a law prohibiting the supplying of narcotics to addicts, even on a physician’s prescription.”); Auerhahn, *supra* note 48, at 423 (“After a series of constitutional challenges and contradictory court opinions, the Harrison Act was, by 1919, firmly in place as a means for total narcotic prohibition.”).

76. For example, in New York City before the Harrison Act took effect, an ounce of heroin sold for \$6.50, whereas after the bill passed an ounce sold for \$96.00. *Poorer Drug Users in Pitiful Plight*, N.Y. TIMES, Apr. 15, 1915, reprinted in DRUGS AND DRUG POLICY, *supra* note 42, at 56, 56.

77. Jerome H. Jaffe, *Drug Addiction and Drug Abuse*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 285, 292 (Louis S. Goodman & Alfred Gilman eds., 3d ed. 1965) (“[M]uch of the ill-health, crime, degeneracy, and low standard of living are the result not of drug effects but of the social structure that makes it a criminal act to obtain or to use opiates for their subjective effects.”); Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 988 (1970) (“Inflated underground prices often provoked criminal activity and this activity in turn evoked in the public a moral response, cementing the link between iniquity and drug addiction.”).

resorted to criminal activity to support their habits.<sup>78</sup> The price of narcotics increased dramatically,<sup>79</sup> further provoking criminal activity.<sup>80</sup> As a result, drug users were forced underground to purchase their previously legal drugs, which led to a host of other problems, cementing the perceived link between drugs and violence.<sup>81</sup>

Due to a concerted effort by the federal government,<sup>82</sup> drug convictions increased dramatically in the 1920s. From 1923 to 1930, there was an average of five thousand narcotics convictions each year,<sup>83</sup> and by 1928, almost one-third of prisoners in federal penitentiaries were Harrison Act violators.<sup>84</sup> Ultimately, the Harrison Act, initiated by fears of cocaine violence and minority violence, resulted in an increase in crime and incarceration rates.

### C. THE BOGGS ACT AND PUBLIC AWARENESS CAMPAIGNS (1940–1970)

In the period after the Harrison Act, states uniformly prohibited drugs due to a fear of crime and violence proffered in public awareness campaigns. Between 1940 and 1970, politicians and the media cemented the view that drugs lead to violence and crime, supporting the Boggs Act and its resultant higher incarceration rates.

#### 1. 1940s

The federal government lobbied states to pass drug regulations and initiated public awareness campaigns demonstrating the link between drugs and violence. By 1937, every state had passed legislation concerning marijuana, including thirty-five that had adopted the Uniform Narcotic Drug Act.<sup>85</sup> Even though marijuana use was still limited to fringe groups

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78. King, *supra* note 1, at 737 (asserting that narcotics users were “pushed out of society and relegated to the criminal community”).

79. *Poorer Drug Users in Pitiful Plight*, *supra* note 76, at 56.

80. Bonnie & Whitebread, *supra* note 77, at 988.

81. *Id.* at 987–88.

82. For instance, the Narcotic Division of the Prohibition Unit was established in 1920 to enforce the Harrison Act. MORGAN, *supra* note 56, at 118. The Narcotic Drugs Import and Export Act of 1922 prohibited importation and use of certain narcotics for any non-medical purpose. Narcotic Drugs Import and Export Act of 1922, ch. 202, 42 Stat. 596 (amending the Harrison Act); Brown, *supra* note 24, at 500–01 & n.24. For a discussion of the passage of the Narcotic Drugs Import and Export Act, see MUSTO, *supra* note 22, at 197.

83. MORGAN, *supra* note 56, at 122.

84. MUSTO, *supra* note 22, at 184 (This was “more than the combined total for the next two categories—liquor prohibition and car theft.”). *See also* King, *supra* note 1, at 738 n.12 (“As of June 30, 1928, of the 7738 prisoners in federal penitentiaries, 2529 were sentenced for narcotics offenses, 1156 for prohibition law violations, and 1148 for stolen-vehicle transactions.”).

85. Bonnie & Whitebread, *supra* note 77, at 1030–34 (detailing the drafting of the Uniform

and was not an issue to many citizens, these bills passed easily in each state due in part to the lobbying efforts of the Narcotics Bureau.<sup>86</sup> Even though most middle-class Americans knew nothing about marijuana use during the 1930s, a public awareness campaign by the Narcotics Bureau and news reports on drug-related crime educated the public on the violence that could result from marijuana.<sup>87</sup>

The public awareness campaign by the Narcotics Bureau was designed to educate the public about marijuana and its violent effects.<sup>88</sup> The media publicized sensational reports from politicians, such as Narcotics Bureau Commissioner Harry Anslinger, who spoke of “pitifully crazed” drug addicts committing heinous crimes.<sup>89</sup> For instance, one report described a man who “murdered a friend and put his body in a trunk ‘while under the influence of marijuana.’”<sup>90</sup> During hearings on the Marijuana Tax Act of 1937, Commissioner Anslinger testified before Congress and related horror stories about people who smoked marijuana and then committed atrocities.<sup>91</sup> After hearing the one-sided testimony, both houses of Congress passed a bill, which, like the Harrison Act, imposed taxes on drugs.<sup>92</sup>

News reports often connected crime to marijuana use and eliminated references to alcohol or other motivations behind the crime. The media asserted that marijuana use “so often leads to violence.”<sup>93</sup> One news report related the story of a young man who killed another in a “vicious, marijuana-induced murder,” even though the murderer drank whiskey

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Narcotic Drug Act, which included optional provisions regulating marijuana as a drug).

86. *Id.* at 1034.

87. *Id.* at 1036–37.

88. *Id.*

89. Commissioner Harry Anslinger himself authored an article attributing a particularly bloody murder to marijuana use:

With an ax he had killed his father, mother, two brothers, and a sister. He seemed to be in a daze. . . . He had no recollection of having committed the multiple crime. The officers knew him ordinarily as a sane, rather quiet young man; now he was pitifully crazed. They sought the reason. The boy said he had been in the habit of smoking something which youthful friends called ‘muggles,’ a childish name for marihuana.

LICIT AND ILLICIT DRUGS, *supra* note 25, at 414 (quoting Harry J. Anslinger & Courtney Ryley Cooper, *Marijuana: Assassin of Youth*, 124 AM. MAG., July 1937, at 19).

90. *Id.* at 415 (noting that this report, which appeared in a United Nations bulletin, differed significantly from the Narcotic Bureau’s report, in which there was no indication that the murderer was under the influence of marijuana, only that the victim was a heroin addict).

91. *Id.* at 416.

92. *Id.* at 416–18.

93. Jack Stinnett, *New Dope on Marihuana*, IND. EVENING GAZETTE, Feb. 8, 1945, at 16 (“Treasury Enforcement officials are particularly perturbed about the spread of marihuana because it so often leads to violence.”).

along with smoking marijuana before the shooting.<sup>94</sup> However, the newspaper emphasized the marijuana smoking and downplayed the significance of the whiskey drinking.<sup>95</sup> On this topic, the Narcotics Commissioner went as far as to say “[m]uch of the most irrational juvenile violence and killing . . . is *traceable directly* to this hemp intoxication.”<sup>96</sup> Marijuana use was also linked to Mexican criminality,<sup>97</sup> and marijuana opponents focused on the drug’s “capacity to induce violence in users.”<sup>98</sup> Assertions that marijuana use caused violent crime were not based on sound science but on fears of government officials expressed through the media, and soon formed public opinion.<sup>99</sup>

## 2. 1950s–1960s

With the 1950s came harsh drug laws that increased prison time for drug use and instituted mandatory penalties,<sup>100</sup> partly justified on the belief

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94. LICIT AND ILLICIT DRUGS, *supra* note 25, at 415 (quoting LAWRENCE KOLB, DRUG ADDICTION: A MEDICAL PROBLEM 55 (Charles C. Thomas ed., 1962)).

95. *Id.*

96. HARRY J. ANSLINGER & WILL OURSLER, THE MURDERERS: THE STORY OF THE NARCOTIC GANGS 38 (1961) (emphasis added). This body of thought continued to grow such that “[b]y the 1940[s], a body of literature had begun to develop that stereotyped drug users as sex-crazed maniacs, degenerate street criminals . . . and members of the ‘living dead.’” Paul J. Goldstein, *Drugs and Violent Crime*, in PATHWAYS TO CRIMINAL VIOLENCE 16, 19 (Neil Alan Weiner & Marvin E. Wolfgang eds., 1989) (quoting J. A. Inciardi, *Drug Use and Criminal Behavior: Major Research Issues*, in THE DRUGS/CRIME CONNECTION 7, 10 (J. A. Inciardi ed., 1981)).

97. Auerhahn, *supra* note 48, at 432–36 (“The ‘criminality of the Mexican’ was much discussed and linked to the use of marijuana.” (citing CAL. DEV. ASS’N, SURVEY OF THE MEXICAN LABOR PROBLEM IN CALIFORNIA (1928); JOHN HELMNER, DRUGS AND MINORITY OPPRESSION 54–79 (1975))).

98. *Id.* at 435 (“Another popular theme in the antimarijuana literature was the drug’s apparent capacity to induce violence in users.”). Thus it was not until the 1960s, when marijuana began to be widely used by the white middle class, that marijuana policies changed. See MUSTO, *supra* note 22, at 239 (discussing changes in marijuana policies starting in 1963). By 1970, the federal Comprehensive Drug Abuse Prevention and Control Act differentiated marijuana from other narcotics and lowered federal penalties for possession of small amounts. David F. Musto, *Faith in the Legal Control of Drugs: Then and Now*, N.Y. ST. B.J., May–June 1994, at 14, 16 [hereinafter Musto, *Legal Control*]. Many states began revising their laws as well, decriminalizing low-level possession. MUSTO, *supra* note 22, at 241. As drug policy expert David Musto explained:

[M]iddle-class Americans in the 1960s were surprised to discover how severe the drug laws had become and shocked at the long sentences meted out to their children. Laws were softened and often unenforced as movements to remove curbs on individual drug use gathered steam. The sophisticated read reports on how safe a drug like cocaine really was and wondered what antediluvian forces had ever enacted the old drug laws.

Musto, *Legal Control*, *supra*, at 17.

99. JAMES C. HOWELL & SCOTT H. DECKER, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, *The Youth Gangs, Drugs, and Violence Connection 2* (1999), available at <https://www.ncjrs.gov/pdffiles1/93920.pdf> (“Youth gangs are still characterized mainly by public perceptions conveyed in the California studies and by popular media images rather than by scientific knowledge.”).

100. DRUGS AND DRUG POLICY, *supra* note 42, at 183; Brown, *supra* note 24, at 503.

that drugs increase violent crime.<sup>101</sup> The Boggs Act of 1951 increased penalties for drug use by four times and included mandatory penalties.<sup>102</sup> In 1954, President Dwight Eisenhower launched a “war on drugs” that resulted in new legislation, creating even harsher penalties for narcotics possession and use. President Eisenhower, in his call for a new war on drugs, appointed a cabinet committee to oversee the fight against illegal narcotics.<sup>103</sup> This committee issued its final report in 1956, calling for, among other things, an increase in the size of the Federal Bureau of Narcotics and instituting even more severe sentences for first-time and repeat drug offenders.<sup>104</sup>

Again, as with the passage of the Harrison Act, government reports of drugs leading to violent crime and increases in other crime supported harsher drug legislation. A 1956 government report stated that about half of all crime in U.S. cities, including violent crime, and 25 percent of all crime in the nation could be attributed to drugs.<sup>105</sup> As a result of these committee reports, many states passed legislation similar to the Boggs Act,<sup>106</sup> and in 1956, Congress passed the Narcotic Control Act.<sup>107</sup> This Act further increased the mandatory minimum sentences for many narcotics violations,<sup>108</sup> and for the first time, imposed a possible death sentence for a

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101. During the Senate floor debate over the Boggs Act, Senator Hale Boggs supported his bill by reading into record a number of newspaper articles that had been published during that time period and detailed sensationalized stories of crimes—such as theft, robbery, forgery, and prostitution—that were committed in connection with drug use or in order to procure drugs. 97 CONG. REC. 8198–204 (daily ed. July 16, 1951) (statement of Sen. Hale Boggs). See also LICIT AND ILLICIT DRUGS, *supra* note 25, at 414 (quoting Anslinger & Cooper, *supra* note 89, at 19, an article written in the years leading up to the passage of the Boggs Act of 1951 describing heinous crimes performed by drug users).

102. The Boggs Act of 1951, Pub. L. No. 82-555, 65 Stat. 767 (codified as amended at 21 U.S.C. § 174 (1952)) (providing for mandatory minimum sentences in drug cases), *repealed by* Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 801 et seq. (2012)). See also DRUGS AND DRUG POLICY, *supra* note 42, at 195–96 (discussing the increased penalties of and providing relevant excerpts from the Boggs Act).

103. *President Launches Drive on Narcotics*, N.Y. TIMES, Nov. 28, 1954, at 1, *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 197, 197.

104. *U.S. Report Spurs Drive on Narcotics*, N.Y. TIMES, at 1, Feb. 6, 1956, *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 197, 197–99.

105. *Drug Addiction*, TIME, Jan. 16, 1956, *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 202, 202–03. For a record of the information highlighted during the relevant Senate Subcommittee hearings and subsequent reports, see *Hearings on Illicit Narcotics Traffic Before the Subcomm. on Improvements in the Fed. Criminal Code of the S. Comm. on the Judiciary*, 84th Cong., 1st Sess., 57 (1955).

106. Bonnie & Whitebread, *supra* note 77, at 1074. (“Seventeen states . . . and the Territory of Alaska responded by passing ‘Little Boggs Acts’ by 1953, and eleven other states increased their penalties by 1956.”)

107. *Id.* at 1076–77; Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567.

108. Bonnie & Whitebread, *supra* note 77, at 1077 (noting that the Narcotic Control Act of 1956

drug crime.<sup>109</sup>

In the 1960s, many Americans began viewing drugs more favorably as marijuana came into popular use by the middle class.<sup>110</sup> Despite the popularity of marijuana, the harsh drug laws of the 1950s still worked to punish drug use and sales in an unforgiving manner,<sup>111</sup> and the media still reported that doctors, legislators, and prison officials all asserted that drugs “induce violence and hostility.”<sup>112</sup> The problem of youth in the 1960s was often tied to drugs and violence.<sup>113</sup> Overall, during the period between 1940 and 1970, the Boggs Act and other legislation led to increased prohibitions on drug use and a greater perceived connection between drugs and violence, which was used to justify increased incarceration.

#### D. THE WAR ON DRUGS (1970S–1980S)

During the war on drugs, the media and government officials strongly advocated that drugs cause violence and justified increased penalties for drug crimes based on this assumption.

##### 1. 1970s

Shortly after taking office, President Richard Nixon declared a

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established the precedent of classifying marijuana with hard narcotics).

109. DRUGS AND DRUG POLICY, *supra* note 42, at 203. The law stated that if an individual at least eighteen years old sold heroin to a minor—that is, someone under the age of eighteen—that individual “may be fined not more than \$20,000, shall be imprisoned for life, or for not less than ten years, except that the offender shall suffer death if the jury in its discretion shall so direct.” Narcotic Control Act of 1956, Pub. L. No. 84-728, sec. 107, *reprinted in* DRUGS AND DRUG POLICY, *supra* note 42, at 204, 205.

110. *See* Bonnie & Whitebread, *supra* note 77, at 1096–1100 (discussing the “revolution” of marijuana use that occurred in the 1960s); Musto, *supra* note 51, at 46 (stating that marijuana use became widespread in the 1960s, and further discussing the “shift to drug toleration in the late 1960s and early 1970s”).

111. *See* Bonnie & Whitebread, *supra* note 77, at 1098 (arguing that marijuana’s heightened middle-class use prompted more medical inquiry into the effects of marijuana and challenges to the constitutionality of narcotics laws, “spur[ring] the passage of more lenient legislation”).

112. *Stricter Laws Needed On Stimulating Drugs*, JEFFERSON CITY POST-TRIB., June 30, 1965, at 4 (“But doctors, prison officials and legislators say these [stimulating] drugs ‘induce violence and hostility in those who use them unwisely.’”).

113. *See, e.g., Decency Fights Losing Battle, Doctor Claims*, BENTON HARBOR NEWS-PALLADIUM, Apr. 23, 1969, at 10 (“Decent society is fighting a losing battle against pandering of sex evils, drugs and violence . . .”); David Lawrence, *Nixon Pledge Against Narcotics Traffic Deserves More Attention*, VICTORIA ADVOCATE, Aug. 16, 1968, at 4 (“[T]he American people have not been made conscious of just what stimulates so many teenagers to engage in acts of violence. Officials here blame much of it in the use of narcotics.”); Ruth L. Ward, Letter to the Editor, *The People’s Forum: Doomsday*, CEDAR RAPIDS GAZETTE, Mar. 18, 1969, at Editorial Page (expressing fear that the debauchery of youth involving drugs, sex, and violence would destroy the country).

“national attack on narcotics abuse.”<sup>114</sup> In 1971, he formally initiated a “war on drugs” and named drug abuse as “public enemy number one in the United States.”<sup>115</sup> The impact on public opinion regarding drugs was quick. In 1957, only 5.6 percent of the U.S. population viewed crime-related problems, like drug use, as the most important problem facing the nation.<sup>116</sup> By 1971, 37.9 percent of the population viewed crime as the most important problem facing the nation.<sup>117</sup> The media similarly connected drugs and violence by claiming that marijuana and “knives, chains, and handguns” were commonplace in American schools.<sup>118</sup> Even though these laws were adopted across the nation, they were not effective at eliminating drug use or sales,<sup>119</sup> rather, they were used primarily as a means for politicians to appear “tough on crime.”<sup>120</sup>

## 2. 1980s

President Nixon’s war on drugs culminated in President Ronald Reagan’s own war,<sup>121</sup> with a brief respite during the Ford and Carter

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114. JILL JONNES, *HEP-CATS, NARCS, AND PIPE DREAMS: A HISTORY OF AMERICA’S ROMANCE WITH ILLEGAL DRUGS* 261 (1996).

115. *Thirty Years of America’s Drug War: A Chronology*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Jan. 8, 2015) [hereinafter *A Chronology of America’s Drug War*].

116. Katherine Beckett, *Setting the Public Agenda: “Street Crime” and Drug Use in American Politics*, 41 *SOC. PROBS.* 425, 425 (1994).

117. *Id.* Certainly the fear of violent crime in 1971 had to do with the high violent crime rates, and not just to the connection of drugs and violence painted by the media.

118. *See, e.g., Drugs, Violence Together in Public Schools*, KINGSPORT NEWS, June 19, 1975, at 1 (“A panel of four high school students and several teachers testified Tuesday about the prevalence of marijuana, ‘uppers’ and ‘downers’ in their schools, along with knives, chains and handguns.”). However, some argue that drug use in America did peak around this time, in 1979, with over twenty-five million Americans in one survey admitting they had used drugs within the last thirty days. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PRELIMINARY ESTIMATES FROM THE 1995 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 2, 11 (Aug. 1996) (“The number of current illicit drug users was at its highest level in 1979 . . .”).

119. *E.g., Gabriel Sayegh, After the Rockefeller Drug Laws: A New Direction in New York and the Nation*, DRUG POL’Y ALLIANCE (Feb. 2010), available at [http://www.drugpolicy.org/docUploads/AftertheRockefellerDrugLawsFeb\\_2010.pdf](http://www.drugpolicy.org/docUploads/AftertheRockefellerDrugLawsFeb_2010.pdf) (“Over the years study after study concluded that [New York’s] Rockefeller Drug Laws failed to reduce drug use or sales in New York, wasted billions of taxpayer dollars, and destroyed communities through mass incarceration.”).

120. *See, e.g., Brian Mann, The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013), <http://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> (framing New York Governor Nelson Rockefeller’s push for the enactment of the Rockefeller Drug Laws in relation to President Nixon’s war on drug).

121. David Schultz, *Rethinking Drug Criminalization Policies*, 25 *TEX. TECH L. REV.* 151, 165 (1993) (“President Reagan declared his war on drugs on October 2, 1982 . . .”). This new war on drugs, as “[f]ormally announced by President Ronald Reagan in 1982, . . . was marked by deep public

administrations between 1974 and 1980.<sup>122</sup> In 1980, Ronald Reagan became President of the United States and returned the federal government to a strict anti-narcotics stance.<sup>123</sup> During his administration, “illicit drugs were increasingly blamed for many of society’s ills,”<sup>124</sup> and were viewed as the “most important component and cause of ‘street crime.’”<sup>125</sup> First Lady Nancy Reagan even went so far as to declare that a “casual drug user [is] an accomplice to murder.”<sup>126</sup>

Admittedly, drug abuse had become a matter of substantial public concern by the time President Reagan took office in 1980—even if the concern stemmed from political propaganda.<sup>127</sup> Harrowing news stories of drugs and crime fostered the public’s “crisis mentality” toward drugs.<sup>128</sup> Violence among drug dealers reportedly increased,<sup>129</sup> and the media

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concern, bordering on hysteria, toward the nation’s drug problem. Under the leadership of President Reagan, the nation focused unprecedented energy and resources towards eliminating illicit drug use and trafficking.” Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV 557, 600–01 (1998).

122. MUSTO, *supra* note 22, at 257 (stating that President Gerald Ford created an atmosphere in the White House that was accepting of some recreational drug use); DRUGS AND DRUG POLICY, *supra* note 42, at 284 (noting that, during President Jimmy Carter’s administration, the policy of toleration of the use of narcotics continued).

123. DRUGS AND DRUG POLICY, *supra* note 42, at 285–86.

124. *Id.* at 305.

125. Beckett, *supra* note 116, at 427. President Reagan decried drug abuse as “a repudiation of everything America is. The destructiveness and human wreckage mock our heritage.” President Ronald Reagan, Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986), available at <http://www.reagan.utexas.edu/archives/speeches/1986/091486a.htm>.

126. Stephen Chapman, *Nancy Reagan and the Real Villains in the Drug War*, CHI. TRIB. (Mar. 6, 1998), [http://articles.chicagotribune.com/1988-03-06/news/8804050059\\_1\\_drug-war-casual-drug-user-wave-of-drug-related-killings](http://articles.chicagotribune.com/1988-03-06/news/8804050059_1_drug-war-casual-drug-user-wave-of-drug-related-killings).

127. See Blanchard & Chin, *supra* note 121, at 601 (“The zeal and enthusiasm with which the War on Drugs was waged . . . helped create a common perception that the exigencies of the drug crisis necessitated the limited sacrifice of constitutional protections from governmental intrusion on privacy and due process of law.”).

128. For example, popular sports figure Len Bias—the second overall pick in the 1986 NBA draft—died of a cocaine overdose before he ever set foot on the court as an NBA player. Mike Anthony, *Bias’ Mom Still in Fight Against Drugs*, L.A. TIMES (May 28, 2006), <http://articles.latimes.com/2006/may/28/sports/sp-d2commentdog28>. The death shocked the nation and led to both the Democratic and Republican parties “getting tough” on drugs. The Anti-Drug Abuse Act of 1986 was passed just months later. Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/> (last visited Jan. 8, 2015).

129. See, e.g., HOWELL & DECKER, *supra* note 99, at 3 (“As the size and stakes of the cocaine economy grew, violence increasingly came to be used in the regulatory process.”); Peter Reuter, *Systemic Violence in Drug Markets*, 52 CRIME, L. & SOC. CHANGE 275, 281 (2009) (explaining that four factors—the youth of participants, the value of drugs, the intensity of law enforcement, and the indirect consequences of drug use—were responsible for “the extraordinary violence associated with crack markets in the late 1980s”); *Mad Dads’ Group Leads Community Response to Gangs, Drugs*,

asserted that violence rates would decrease if profits were taken out of the drug trade.<sup>130</sup> But ironically, the national mood favored harsher penalties for drug crimes.<sup>131</sup> This was contradictory because the way to take profit out of drugs would be to legalize them, not increase punishment, which may increase systemic violence and crimes by addicts.

During President Reagan's tenure in office, two major anti-drug laws were passed: the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988.<sup>132</sup> The 1986 bill continued with the precedent established by prior bills of mandating minimum sentences.<sup>133</sup> In 1986, toward the end of his presidency, drug use was viewed as the most important problem facing the nation by only 3 percent of the population,<sup>134</sup> but that number climbed to 64 percent in 1989.<sup>135</sup> This dramatic increase in the public's perception of the severity of the drug problem over such a short period was not the result of an increase in drug use.<sup>136</sup> Rather, it was the result of President Reagan—and later President George H.W. Bush—"getting tough" on drugs, and framing drug use as America's number one problem.<sup>137</sup>

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BLYTHEVILLE COURIER NEWS, Sept. 27, 1989, at 15 ("Los Angeles-based gangs have established a drug trade laced with a kind of violence . . . Drive-by shootings are becoming commonplace, and one public housing project is so racked by drugs and violence that residents have nicknamed it 'Vietnam.'"); *A Chronology of America's Drug War*, *supra* note 115 ("Outraged by the drug trade's increasing violence in their city, Miami citizens lobb[ie]d the federal government for help."). *But see* Alan W. Block, *Guns and Opiates of the Masses*, ORANGE CNTY. REG., Mar. 26, 1989, at G4 ("It's not the drugs themselves (except in a few instances) that make people go out and mug, rob, burglarize, or join gangs. Most of the drugs in question are sedatives that tend to make people passive. Except perhaps for PCP, there's no evidence that any of them, in and of themselves, induce violent or criminal behavior.").

130. John Jacob, *People Fail to Wage Good War Against Drug Abuse*, OXNARD PRESS-COURIER, June 4, 1988, at 4 ("Calls for legalization claim that taking the profit out of drugs would reduce violence.").

131. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1, 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> ("But the national mood seemed to be calling for harsher drug laws, not sympathy for drug addicts.").

132. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections in U.S. Code); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (same).

133. DRUGS AND DRUG POLICY, *supra* note 42, at 306–13 (providing excerpts from the Anti-Drug Abuse Act of 1986).

134. Beckett, *supra* note 116, at 425.

135. *Id.*

136. *Id.* at 425–26 ("[T]he reported incidence of drug use declined while the drug issue in national politics and public concern increased during the 1980s."). *See also id.* at 435 fig. 6 (showing a steady decline in drug use from 1986 to 1992).

137. *Id.* at 427. Indeed, one study found that the percentage of people viewing drug use as the most serious problem facing the nation peaked "at the end of a period characterized by unprecedented media and state anti-drug activity." *Id.* at 443.

The 1980s media was a critical partner for the government in framing drug abuse as a universal American problem; the link between drugs and violence received an unprecedented amount of airtime,<sup>138</sup> reaching new heights during the war on drugs.<sup>139</sup> Major media sources during the 1980s devoted extraordinary amounts of airtime and newsprint to America's "drug crisis."<sup>140</sup> For example, "[i]n July 1986 alone, the three major TV networks offered seventy-four evening news segments on drugs, half of these about crack."<sup>141</sup> *Time* magazine called crack cocaine the "Issue of the Year" while *Newsweek* claimed that crack "was the biggest story since Vietnam and Watergate."<sup>142</sup> Countless local news reports recounted

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138. Dr. Norman Zinberg, noted addiction psychoanalyst, has observed the following:

On August 14, 1970, a day chosen at random, when there was no sensational item of drug news, the Boston Globe devoted [eleven] columns, the Washington Post [sixteen], and The New York Times [nineteen] to it, and discussed the problem in terms more suitable to a major cholera epidemic than to a practice that in fact does serious harm to a very small number of people. As often happens in an emotionally charged atmosphere, the opinion-forming groups in society—the politicians, journalists, teachers, doctors—use the increasing number of newspaper reports of young people damaged or killed by drug use as irrefutable evidence of a drug epidemic. In fact, the drug problem is exaggerated by the newspapers and we suggest that it is worsened by this overreaction.

Norman Zinberg, *Public Attitudes Toward Illegal Drug Use*, DRUG TEXT, <http://www.drugtext.org/Drugs-The-Public/public-attitudes-toward-illegal-drug-use.html> (last visited Jan. 8, 2015).

139. *Id.*; Paul J. Goldstein et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 113, 122–23 (Craig Reinerman & Harry G. Levine eds., 1997) [hereinafter *CRACK IN AMERICA*] (noting that complex murder cases were often classified as "crack-related" when in reality they stemmed from multi-dimensional factors and behaviors); Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 853–55 & n.60 (2010) (explaining how the media exaggerated the proliferation of crack cocaine during the mid-1980s); Beverly Xaviera Watkins & Mindy Thompson Fullilove, *The Crack Epidemic and the Failure of Epidemic Response*, 10 TEMP. POL. & CIV. RTS. L. REV. 371, 375 (2001) (discussing how late 1980s media coverage of crack focused on violence and described crack cocaine addiction as "growing at alarming rates" and becoming "an authentic national crisis" (internal quotation marks omitted)).

140. See JIMMIE L. REEVES & RICHARD CAMPBELL, *CRACKED COVERAGE: TELEVISION NEWS, THE ANTI-COCAINE CRUSADE, AND THE REAGAN LEGACY* 48–72 (1994) (chronicling the 1980s media's role in creating and reaffirming the "cocaine narrative" by using ongoing "spectacle of surveillance" tactics in daily news reporting); Craig Reinerman & Harry Levine, *The Crack Attack: Politics and Media in the Crack Scare*, in *CRACK IN AMERICA*, *supra* note 139, at 18, 20–24 (discussing the media "bonanza" set in motion by the crack-related deaths of two celebrity athletes during the spring of 1986); MARTIN TORGOFF, *CAN'T FIND MY WAY HOME: AMERICA IN THE GREAT STONED AGE, 1945–2000*, 350–57 (2004) (chronicling the media's coverage of the "crack epidemic" following its rise); Ahrens, *supra* note 139, at 853 ("The media coverage of crack cocaine began in earnest in 1986, and was promptly distinguished by both its volume and its remarkable levels of hyperbole and disinformation.").

141. Reinerman & Levine, *supra* note 140, at 20. In the months preceding the 1986 elections, *Time*, *Newsweek*, NBC and CBS each produced numerous headline stories about the drug "plague" or "epidemic." *Id.*

142. *Id.* See also Watkins & Fullilove, *supra* note 139, at 375 (further discussing the media's coverage of crack cocaine's emergence in 1986).

shocking tales of drug-related violence, robbery, and other crimes.<sup>143</sup> One article, cited by Democratic Senator Lawton Chiles in support of the Anti-Drug Abuse Act of 1986, recounted how a drug-addicted teenager brutally murdered his own mother “with a butcher knife in a fight over crack.”<sup>144</sup> Another news story lamented the fate of a “pretty young girl with dirty-blond hair, deep blue eyes, and a model’s figure . . . [who] started stealing” in order to get drug money.<sup>145</sup> Other politicians blamed drugs for the increase in crime under the Reagan administration’s social and economic policies.<sup>146</sup> The majority of Congress overlooked government data that demonstrated that drug use in America had peaked in 1978 and 1979 and declined slowly but steadily through 1984.<sup>147</sup> Despite the drop in drug usage rates in the 1980s, the public perception that drugs were a major problem in America and were strongly linked to violent crime was solidified.

#### E. 1990S TO THE PRESENT DAY WAR ON DRUGS

During the 1990s, the perceived link between drugs and violence was strong and demanded harsh treatment for users and sellers, though some

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143. Reinerman & Levine, *supra* note 140, at 20. *See, e.g.*, Paul J. Goldstein et al., *supra* note 139, at 122–24 (noting local media coverage of crack-related murders in New York).

144. 132 CONG. REC. 7637 (daily ed. June 17, 1986) (statement of Sen. Lawton Chiles). *See also* *16-Year-Old Confesses to Killing His Mother*, N.Y. TIMES (May 5, 1986), <http://www.nytimes.com/1986/05/05/nyregion/16-year-old-confesses-to-killing-his-mother.html> (“A [sixteen]-year-old boy walked into a Manhattan police station yesterday morning and confessed to having stabbed his mother to death two days earlier, apparently in a fight over his use of cocaine . . .”).

145. 132 CONG. REC. 4672 (daily ed. Apr. 22, 1986) (statement of Sen. Lawton Chiles) (discussing a series of newspaper articles entitled *Cocaine Rocks: The New Epidemic* (citing Paul Blythe, *Police Fast Being Educated About Drug*, PALM BEACH POST & EVENING TIMES)). *See also* 132 CONG. REC. 4670 (daily ed. Apr. 22, 1986) (statement of Sen. Lawton Chiles) (citing Paul Blythe, *It’s Cheap, It’s Available and It’s Ravaging Society*, PALM BEACH POST & EVENING TIMES (“Less than a block from where unsuspecting white retirees play tennis, bands of young black men push their rocks on passing motorists, interested or not.”)).

146. *See, e.g.*, 132 CONG. REC. 13765 (daily ed. Sept. 26, 1986) (statement of Sen. Howell Heflin) (discussing the strengths of proposed legislation in helping fight the war on drugs, as “the battleground has moved into middle-class neighborhoods, into glass skyscrapers, and even into school playgrounds” and prior laws had been stripped of their toughest provisions); 132 CONG. REC. 4673 (daily ed. Apr. 22, 1986) (citing Carol Smelser Perry, *School Officials Amass Weapons in War on Drugs*, PALM BEACH POST, Mar. 24, 1986, at A1 (“[Cocaine] doesn’t identify any race, creed or economic background.”)); Reinerman & Levine, *supra* note 140, at 21–24 (discussing the Bush and Reagan administrations’ reactions to the perceived crack “epidemic”); Edwin M. Yoder, Jr., *We Know Who Will Lose the Drug War*, WASH. POST, Sept. 18, 1986, at A25 (“[T]here’s been nothing since the great Red Scare of the early 1950s to match the current drug-bashing hysteria.”).

147. 132 CONG. REC. 13752 (daily ed. Sept. 26, 1986) (statement of Sen. Daniel J. Evans) (“But, indeed, even President Reagan about 2 months ago, if I am correct, said that the No. 1 national security issue was drugs.”).

demanded legalization of marijuana. The media claimed that 80 percent of violent crimes were drug related,<sup>148</sup> and continued to claim that drugs led to violence. Racial implications of the war on drugs continue to the administration of the war on drugs today, as they have since the twentieth century.<sup>149</sup>

In recent years, states have treated marijuana differently and have moved toward legalization; yet, federal laws still punish drug crimes severely based largely on the perceived drug-violence link. Twenty-three states have legalized medical marijuana, and four states plus the District of Columbia have decriminalized marijuana for recreational purposes for those over twenty-one years of age.<sup>150</sup> Colorado, Washington, Alaska, Oregon and D.C. voters have passed ballot initiatives to legalize recreational marijuana use.<sup>151</sup> However, individual state legalization of marijuana presents legal challenges. The federal government still classifies marijuana as a Schedule I drug, and the U.S. Supreme Court has not viewed state initiatives contrary to federal law positively.<sup>152</sup> The federal and state groundwork—including legislation and case law—for maintaining a drug-violence connection and strict punishments for drug possession and trafficking is still intact. In other words, despite some legalization efforts, the war on drugs is alive and well when it comes to statutes and case law.

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148. E.g., Alan Whitehead, *D.A. Says Give Drug War a Chance to Work*, FARMINGTON DAILY TIMES, May 9, 1990, at A5 (“[D]rugs (and/or alcohol) are directly or indirectly a factor in approximately 80 percent of all the street, property and violent crimes that occur, including murder, rape, armed robbery, assault and battery, burglary, theft, child abuse and other domestic violence.”).

149. See *infra* Part V.C.

150. Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES (Nov. 3, 2014), [http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html?\\_r=1&abt=0002&abg=0](http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html?_r=1&abt=0002&abg=0); 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Jan. 8, 2015). See generally Symposium, *A Step Forward: Creating a Just Drug Policy for the United States*, 91 OR. L. REV. 993 (2013) (discussing federalism issues related to state initiatives to decrease penalties for drug use).

151. Josh Harkinson, *Map: The United States of Legal Weed*, MOTHER JONES (Nov. 5, 2014), <http://www.motherjones.com/politics/2014/11/map-united-states-legal-marijuana-2014-2016>. See also *Alaska Legalizes Marijuana*, MARIJUANA POLICY PROJECT, <http://www.mpp.org/states/alaska/> (last updated Dec. 2, 2014) (showing that recreational legalization in Alaska took effect on February 24, 2014); *New Council Session Begins; Marijuana Legalization and Regulation Introduced*, MARIJUANA POL’Y PROJECT, <http://www.mpp.org/states/district-of-columbia/> (last updated Jan. 23, 2015) (describing congressional interference with when and if legalization will be able to go into effect); *Oregon Votes to Legalize Marijuana for Adults!*, MARIJUANA POL’Y PROJECT, <http://www.mpp.org/states/oregon/> (last updated Nov. 19, 2014) (showing that recreational legalization in Oregon will take effect on July 1, 2015).

152. E.g., *Gonzales v. Raich*, 545 U.S. 1, 14–15 (2005).

The next part discusses the state of the current war on drugs and assertions in both case law and statutes that persist in propagating this flawed link between drugs and violence.

### III. CASE LAW AND STATUTES CONNECT DRUGS AND VIOLENCE

A long history of cases and statutory law support the view that drugs and violence are inseparable.<sup>153</sup> Case law—from the Supreme Court down to lower courts, and from as early as 1890 until today—asserts that drugs cause violence and crime. Statutes rely on the presumption that drugs cause violence, and defendants are punished more severely based on this presumption. These statutes and cases assume that drugs make people violent, that people commit violent crimes to obtain drugs, and that the drug trade is inherently violent. This is all without regard to the empirical reality and disconnected from the wealth of social science research discussed in Part IV.

It may be that legislatures and courts should be held to different standards as far as relying on the link between drugs and violence. Arguably, legislatures are fact-finding bodies and should rely on sound research in enacting statutes that perpetuate links between drugs and violence.<sup>154</sup> Courts, arguably, should consider individually cases that rely

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153. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (reasoning that warrants to search for narcotics may result in violence against police); *United States v. Carter*, 669 F.3d 411, 413 (4th Cir. 2012) (stating that disarming drug users might reasonably serve the objective of reducing gun violence), *remanded to 2012 U.S. Dist. LEXIS 168011* (S.D. W. Va. Nov. 27, 2012), *aff'd*, 750 F.3d 462 (4th Cir. 2014), *cert. denied sub nom. Carter v. United States*, 135 S. Ct. 273 (2014); *United States v. Burden*, 600 F.3d 204, 218 (2d Cir. 2010) (holding that it was reasonable for the jury to conclude that violence was necessary to protect a drug trafficking enterprise); *United States v. Williams*, 81 F.3d 1434, 1441 (7th Cir. 1996) (finding that the leaders of a conspiracy to sell drugs would have had to know that their conspiracy would involve violence to anyone who threatened the work of the conspiracy); *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994) (holding that the use of an anonymous jury was justified during the prosecution of a drug dealer because the defendant was involved in drug and RICO conspiracies, which could lead to potential harm of jury members); *United States v. Edmond*, 718 F. Supp. 109, 110 (D.D.C. 1989) (holding that an anonymous jury was warranted because of the “realistic threat of violence” from the defendant’s involvement in violence to protect the drug conspiracy), *aff’d* 52 F.3d 1080 (D.C. Cir. 1995); *State ex rel. I.D.*, 2011-1570 (La. App. 3 Cir. 4/4/12), 87 So. 3d 351, 358 (upholding the trial court in terminating parental rights due to violence as a consequence of a parent’s drug abuse); *People v. Hollingsworth*, 360 N.Y.S.2d 765, 767 (Albany Cnty. Ct. 1974) (stating the sale of drugs is potentially as dangerous, or more dangerous, than crimes of violence to persons or property); *State v. Putt*, 955 S.W.2d 640, 644 (Tenn. Crim. App. 1997) (stating that drugs within correctional facilities lead to “stabblings and general outbursts of violence”).

154. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260–61 (2012) (discussing judicial use of extra-record research to ascertain additional information regarding “legislative facts”).

on the drug-violence link. Certainly, in cases in which there is evidence that a defendant involved with drugs has a propensity for violent behavior, there is an argument that a defendant should lose certain constitutional rights, including and not limited to the right to bail, privacy rights, or the right to carry a gun. What this part highlights, though, is that sometimes there is a blanket presumption by courts and legislatures that where there are drugs, guns will be found and inevitably violence—without empirical backing or an individual showing based on particularized facts. This blanket presumption by courts and legislatures that drugs cause violence is separated from the empirical reality and disconnected from the wealth of social science research discussed in Part IV.

#### A. CASE LAW SUPPORT FOR THE DRUG-VIOLENCE LINK

The connection between drugs and violence has even been embraced by the Supreme Court.<sup>155</sup> For instance, the Court relied on arrest evidence of individuals committing violent crimes while on drugs to support a direct nexus between drugs and violence.<sup>156</sup> Many lower courts and legislatures have directly cited the connection between drugs and violence and relied on it to reduce individual rights for defendants and support inferences in many cases.

Courts' connection of drugs and violence can be traced back to as early as 1890.<sup>157</sup> Courts have affirmatively held that drug sales or use leads to violence.<sup>158</sup> They have even asserted, without much evidence to back

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155. *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (demonstrating three ways in which drugs affect crime: “(1) [a] drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) [a] drug user may commit crime in order to obtain money to buy drugs; and (3) [a] violent crime may occur as part of the drug business or culture”).

156. *Id.* at 1003 (discussing further that there is “a direct nexus between illegal drugs and crimes of violence,” referring to various statistics that demonstrate a strong relationship between the number of males arrested for homicide and what percentage of those males tested positive for drugs—57 percent for homicide, sometimes even higher for other violent crimes).

157. *Territory v. Ah Lim*, 24 P. 588, 593 (Wash. 1890) (Scott, J., dissenting) (conforming to the belief that drug use “may tend to the increase of pauperism and crime,” even while dissenting from the majority’s decision to legalize the use of opium).

158. *Panduro-Chanchabi v. I.N.S.*, No. 91-70453, 1993 U.S. App. LEXIS 18432, at \*4–5 (9th Cir. May 10, 1993) (upholding lower court ruling based on court’s reasoning that increased violence and crime is a consequence of drug abuse); *United States v. Carter*, No. 2:09-00055, 2012 U.S. Dist. LEXIS 168011, at \*11–17 (S.D. W. Va. Nov. 27, 2012) (finding that evidence regarding the nexus between violent crime and drugs was “compelling” and the “two factors frequently coincide”), *aff’d*, 750 F.3d 462 (4th Cir. 2014), *cert. denied sub nom. Carter v. United States*, 135 S. Ct. 273 (2014); *United States v. Santos-Santos*, No. CR 06-611 JB, 2007 U.S. Dist. LEXIS 97075, at \*14 (D.N.M. Aug. 20, 2007) (concluding that when drugs are used in criminal activity, “there is always a potential for violence”); *United States v. Stevenson*, 829 F. Supp. 99, 100 (S.D.N.Y. 1993) (finding that involvement with controlled substances causes harm to society and leads to violence among distributors); *Jones v.*

these claims, that: drug addicts need to commit crimes of violence to satisfy their demand for drugs;<sup>159</sup> the drug trade inevitably involves violence;<sup>160</sup> and individuals involved with drugs are more likely to be involved with violence based simply on the fact that these two things are connected, even if a defendant has never exhibited any violent behavior.<sup>161</sup> The combination of drugs and guns equates to violence according to many courts.<sup>162</sup> Courts have said that to decrease violence, the state must focus on decreasing drug abuse.<sup>163</sup> They have also asserted that violence is endemic to the sale of drugs.<sup>164</sup>

Without any specific findings, courts have said that those who sell or use drugs are dangerous and risky people.<sup>165</sup> In many cases, courts find

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Prudential Ins. Co. of America, 388 A.2d 476, 480 (D.C. 1978) (finding addicts are often involved in crimes of violence); State v. Mastin, No. A09-1007, 2010 Minn. App. Unpub. LEXIS 687, at \*7 (Ct. App. July 13, 2010) (“[D]rugs are typically linked to violence . . .”); State v. Lallathin, 2003-Ohio-3478, ¶ 29 (Ct. App. June 26, 2003) (stating drugs “would increase [the defendant’s] risk of violence”); State v. Maldonado, No. 13530, 1993 Ohio App. LEXIS 4673, at \*11 (Ct. App. Sept. 24, 1993) (stating street-level drug crime often has violent consequences); State v. Calhoun, 468 P.2d 908, 909 (Or. Ct. App. 1970) (holding the argument that the defendant was not violent unless he was using drugs was not improper given the circumstances); Anderson v. State, 512 S.W.2d 665, 671 (Tenn. Crim. App. 1974) (finding crimes of violence result from drug addicts needs “to satisfy their demand”); State v. Quinonez, Nos. 2011AP1497-CR, 2011AP1498-CR, 2012 Wisc. App. LEXIS 480, at \*1 (Ct. App. June 13, 2012) (recognizing that “selling drugs contributes to rampant violence”).

159. *Anderson*, 512 S.W.2d at 671.

160. *Harmelin*, 501 U.S. at 1002–03 (finding that there is a direct nexus between drugs and violence); *United States v. 6109 Grubb Rd.*, 890 F.2d 659, 663 (3d Cir. 1989) (Greenberg, J., dissenting) (quoting a portion of the legislative history of the Comprehensive Crime Control Act of 1984 stating that violence inevitably attends the trade in dangerous drugs).

161. *State v. Stacy*, 458 N.E.2d 403, 405 (Ohio Ct. App. 1983) (stating that an officer could not arrest a person for a misdemeanor based solely on hearsay unless it dealt with violence or illegal drugs, as drug users and violent offenders were categorized together).

162. *United States v. Price*, 13 F.3d 711, 734 (3d Cir. 1994) (finding that combining firearms and drugs causes a risk of violence); *State v. Clark*, 764 A.2d 1251, 1262 (Conn. 2001) (discussing a correlation indicative of increased potential of violence when drug dealing and firearms are jointly involved); *White v. State*, 155 S.W.3d 927, 928 (Tex. Ct. App. 2005) (holding that police could break in without announcement due to the strong correlation between drugs and firearms and the increased chance of violence).

163. *See, e.g., State v. Santini*, Nos. C.A. IN-93-03-0136, C.A. IN-93-03-0139, 1998 WL 109844, at \*3 (Del. Super. Ct. Feb. 19, 1998) (finding that there is a close relationship between drugs and violence and the state can serve a legitimate interest in reducing violence by reducing drug abuse).

164. *United States v. Fife*, 624 F.3d 441, 447 (7th Cir. 2010) (“The association between drug dealing and weapons, and the corresponding violence inexorably linked to the drug trade, is well-documented in our opinions. . . . and the courts have recognized the indisputable fact that violence is endemic to the trade in drugs.”), *abrogated by United States v. Miller*, 721 F.3d 435 (7th Cir. 2013).

165. *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (stating habitual drug users likely “have difficulty exercising self-control” and are thus as dangerous trafficking firearms as felons and mentally ill people); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010) (*per curiam*) (reasoning that habitual drug abusers are presumptively risky people and keeping guns away from them would support the objective of suppressing armed violence).

there to be a very high correlation between trafficking contraband and violence, going so far as stating that this violence is “inevitable” when drugs are concerned.<sup>166</sup> Courts often rely on anecdotal evidence of shootouts involving drugs to support a direct cause and effect relationship between drug trafficking and violence.<sup>167</sup> Furthermore, courts typically allow expert testimony in criminal cases to support the link between drugs and violence. However, often the testimony is limited to a “general” connection and cannot be directly applied to the specific case at hand.<sup>168</sup> Other courts have specifically supported the claim that drug offenses are crimes of violence with evidence.<sup>169</sup>

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166. *United States v. Bannister*, 786 F. Supp. 2d 617, 669, 689–90 (E.D.N.Y. 2011) (“In moral terms, those working in the drug trade are primarily responsible not for drug abuse but for the trade itself and the violence and extortion attendant to it. Those who engage in violence and extortion should be punished in accordance with the danger their actions represent to the community.”).

167. *See, e.g., id.* at 675 (“Shootouts conducted in residential areas to protect drug operations are among the worst consequences of the illegal drug trade. They contribute to the climate of terror in which residents of drug-ridden neighborhoods are forced to live.”); *United States v. Jackson*, Nos. 90-5918–5923, 1992 U.S. App. LEXIS 398, at \*2–3 (4th Cir. Jan. 14, 1992) (using examples of drug enterprises’ involvement in shootouts with other drug dealers and people who owed them money to show their history of violence). *See also* *United States v. Carlton*, 356 F. App’x 864, 873 (6th Cir. 2009) (finding that transporting marijuana leads to potential violence); *United States v. Martinez*, 938 F.2d 1078, 1083 (10th Cir. 1991) (mentioning how courts have recognized that violence is associated with drug distribution); *United States v. Williams*, No. 89-50249, 1990 U.S. App. LEXIS 20727, at \*3–4 (9th Cir. July 11, 1990) (concluding violence is a consequence of drug transactions near schools); *United States v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987) (stating that the consequences of drug transactions contribute directly to violence); *United States v. Mabry*, No. 11-10102-01-EFM, 2011 U.S. Dist. LEXIS 105420, at \*6 n.9 (D. Kan. Sept. 9, 2011) (“[D]rug trafficking is often connected with violence.”); *United States v. Alexander*, 923 F. Supp. 617, 623 (D. Vt. 1996) (“[D]rug trafficking in cocaine necessarily includes a reasonable risk of violence.”); *People v. Arista*, No. F061906, 2012 Cal. App. Unpub. LEXIS 3191, at \*5 (Cal. Ct. App. Apr. 26, 2012) (concluding that drug use and trafficking causes violence in prison); *Commonwealth v. Moses*, 557 N.E.2d 14, 18 (Mass. 1990) (“[D]rug trafficking is fraught with violence . . . .”); *People v. Broadie*, 332 N.E.2d 338, 342–43 (N.Y. 1975) (finding that it is reasonable to conclude that drug trafficking generates violent crime); *People v. Soler*, 460 N.Y.S.2d 537, 541 (App. Div. 1983) (reasoning that drug traffickers often commit violent crimes against police).

168. *See, e.g., Johnson v. Commonwealth*, No. 2007-SC-000612-MR, 2008 Ky. Unpub. LEXIS 129, at \*8–9 (Oct. 23, 2008) (restricting expert testimony to a general opinion of the fact that cocaine can cause violent behavior and disallowing the expert from testifying that he knew with certainty whether it actually did cause the defendant’s behavior in this specific case), *aff’d in part, rev’d in part* by *Johnson v. Commonwealth*, 2012 Ky. App. Unpub. LEXIS 852 (Ct. App., Nov. 9, 2012); *Roberts v. State*, 220 S.W.3d 521, 531 (Tex. Crim. App. 2007) (concluding that an expert witness could offer testimony about the connection between alcohol, cocaine, and violence in generalities, but could not to provide specific relation to the defendant’s behavior in the case); *Witterman v. Commonwealth*, No. 2655-03-2, 2005 Va. App. LEXIS 281, at \*3–4 (App. Ct. July 19, 2005) (allowing evidence that individual binge drank and used cocaine for five days before wounding another individual with a board due to the relationship between drugs and violence).

169. *See, e.g., State v. Santini*, Nos. C.A. IN-93-03-0136, C.A. IN-93-03-0139, 1998 WL 109844, at \*2 (Del. Super. Ct. Feb. 19, 1998) (discussing whether drug offenses are crimes of violence and

Other courts have linked drug use with domestic violence.<sup>170</sup> Many courts have explicitly connected drugs and violence, often making the assumption that drugs are dangerous even though there is little empirical support for this.<sup>171</sup>

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deciding that they are based on, among other things, the fact that in 1996 nearly half of the shooting suspects in the City of Wilmington had at least one drug charge on their records, 39 percent had three or more drug charges on their histories, and 44 percent of the shooting victims in Wilmington had a drug arrest in their history). *See generally* STATISTICAL ANALYSIS CTR. & CRIMINAL JUSTICE COUNCIL, WILMINGTON SHOOTINGS 1996: A COMPARATIVE STUDY OF VICTIMS AND OFFENDERS IN WILMINGTON, DELAWARE (1997), available at [http://cjc.delaware.gov/pdf/crime\\_wilmington\\_shootings\\_1996.pdf](http://cjc.delaware.gov/pdf/crime_wilmington_shootings_1996.pdf).

170. *See, e.g.*, *State v. Burnette*, No. E2008-01900-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 311, at \*3–5 (Crim. App. Apr. 24, 2009) (considering a tie between drug abuse and domestic violence); *In re N. L.*, No. 2012-198, 2012 WL 5971210, at \*2 (Vt. Sept. 26, 2012) (finding drug addiction led to domestic violence).

171. *E.g.*, *United States v. Quinn*, 475 U.S. 791, 791–92 (1986) (“The question presented is one of considerable significance. It frequently arises in criminal prosecutions because drug smugglers often purchase vessels or airplanes for others to use in criminal enterprises. Given the massive infusion of dangerous drugs into this country by water and air we have an obligation to decide the issue presented. The drug problem presents as great a danger to the United States as any foreign power or fiscal problem.”); *United States v. Alvarez-Bernabe*, 626 F.3d 1161, 1166 (10th Cir. 2010) (“As the government points out, these arguments would not, in fact, affect [the defendant’s] sentence, since he received a four-year sentence for his prior conviction (*i.e.*, not the minimum thirteen-month sentence), the drug involved in his prior conviction was methamphetamine, an indisputably dangerous drug, and his prior conviction followed a search of his residence in which drugs were found (as well as on his person and in his car.”); *United States v. Whited*, 473 F.3d 296, 300 (6th Cir. 2007) (“In passing the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 . . . the U.S. House of Representatives drew attention to methamphetamine’s potential to harm human life, and more disturbing, the lives of children . . .” (internal quotation marks omitted)); *United States v. Field*, 39 F.3d 15, 21 (1st Cir. 1994) (“It was possession, true, but it was a loaded weapon and the defendant was intoxicated, and there is nothing more dangerous, there is no more dangerous a combination than a loaded gun and alcohol or a loaded gun and being under the influence of drugs.”); *United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991) (“Drug abuse is a cancer that threatens society, particularly in the form of increased criminal activity. The highly addictive nature of crack, its growing availability, and relatively low cost all serve to increase the risks associated with its use.”); *United States v. Richards*, 737 F.2d 1307, 1310 (4th Cir. 1984) (“The decision to treat trafficking in marijuana more harshly than trafficking in heroin also is a rational one. Congress could have concluded that extensive marijuana operations posed an even greater threat to the public health and welfare than heroin trafficking operations, reasoning that using marijuana is only the first step in becoming involved with more dangerous drugs, like heroin, and that marijuana was more likely to ensnare those who did not yet have drug problems.”); *United States v. Toscanino*, 504 F.2d 1380, 1381 (2d Cir. 1974) (Mulligan, J., dissenting) (“While the indignation of the majority with kidnappings abroad is understandable and commendable, the widespread importation of dangerous drugs by foreign nationals has also created horror and havoc here.”); *Blefare v. United States*, 362 F.2d 870, 885 (9th Cir. 1966) (Ely, J., dissenting) (“It is undeniable that the national interest demands the apprehending and punishment of outlaws so evil as to engage in the smuggling of illicit and dangerous narcotic drugs.”); *Perry v. Larson*, 104 F.2d 728, 730 (5th Cir. 1939) (“[M]orphine and kindred narcotics . . . are powerful and dangerous drugs, capable of producing addiction of a most serious sort, and even death.”); *Menna v. Menna*, 102 F.2d 617, 618 (D.C. Cir. 1939) (“In consequence of all of this, it has become a matter of general knowledge that the habitual use of opium produces crime, violence, brutality, and insanity. The Narcotic Bureau’s Report for 1937 discloses that 63% of

However, against the grain of the majority, some courts have recognized that drugs do not always lead to violence in either sales or trafficking, and that these links are weak at best.<sup>172</sup> Other courts understand that *some* drugs may stimulate a defendant and encourage violence but others may have the opposite effect.<sup>173</sup> Overall, however, the case law very strongly supports the assertion that drugs cause violence and that there is a link between the two. Research data, however, tells a much more complicated story, as will be discussed in Part IV.

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the narcotic violators arrested in that year had previously criminal records. There can be, therefore, no question of doubt in anyone's mind that the peddler of these dangerous drugs is a menace to society. Nor can there be the slightest doubt that the crime which it is the purpose of the statute to punish is one involving moral turpitude. An act which creates human misery, corruption, and moral ruin in the lives of individuals is necessarily so base and shameful as to leave the offender not wanting in the depravity which the words 'moral turpitude' imply."); *State v. Bulington*, 802 N.E.2d 435, 440 (Ind. 2004) ("[T]his case brings us face to face with the serious dangers of methamphetamines. Indeed, a major publication has recently written about the methamphetamine 'menace' in Indiana and other Midwestern states and the danger it poses 'to the lives of children who suffer from the drug—from the noxious fumes its manufacturers produce, from the risk of fire and explosions, and from abuse or neglect by adults on a long, cheap high.'" (citation omitted)); *Minnesota Fire & Cas. Co. v. Greenfield*, 805 A.2d 622, 624 (Pa. Super. Ct. 2002) ("Just as it is certain that frequently long-term harm will occur from abusing a child, it is certain that frequently harm will occur to the buyer if one sells heroin. Not only is it criminalized because of the great risk of harm, but in this day and age, everyone realizes the dangers of heroin use."), *aff'd on other grounds*, 855 A.2d 854 (Pa. Super. Ct. 2004).

172. See *United States v. Cruz*, 805 F.2d 1464, 1474 (11th Cir. 1986) (finding that the court is unable to make a "conclusion that drug crimes by their nature involve a substantial risk of violence"); *United States v. Moore*, 486 F.2d 1139, 1228 (D.C. Cir. 1973) ("[c]rimes of violence are rarely . . . committed by [drug] addicts"); *Duran v. Castro*, 227 F. Supp. 2d 1121, 1129 n.12 (E.D. Cal. 2002) (stating that statistics do not show that a given individual who possesses a controlled substance would resort to violence and crime), *abrogated by* *Pennsylvania v. Kramer*, No. CIV S-04-0760 MCE JFM P, 2007 U.S. Dist. LEXIS 87831 (E.D. Cal. Nov. 29, 2007); *Shrader v. White*, No. 82-0247-R, 1983 U.S. Dist. LEXIS 15888, at \*44 (E.D. Va. June 29, 1983) (finding that drugs have not increased incidents of crime among inmates); *People v. Edwards*, 1 Cal. Rptr. 2d 631, 635 (Ct. App. 1991) (finding that a drug offense does not constitute a crime of violence unless the offense played some part in commission of violent crime); *State v. Clark*, 570 N.W.2d 195, 202 (N.D. 1997) ("[D]rug use and trafficking do not necessarily go hand in hand with violence or a propensity for violence."); *State v. Herrick*, 567 N.W.2d 336, 342 (N.D. 1997) (stating that the mere allegation that drugs are present does not give right for police to use "no-knock warrants," which were designed "to protect the safety of law enforcement"); *State v. Starks*, No. M1999-00340-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 334, at \*10 (Crim. App. 2000) ("[M]ost drug offenses do not involve violence."); *State v. Richards*, 549 N.W.2d 218, 230-31 (Wis. 1996) (Abrahamson, J., concurring) (citing statistics demonstrating that drug crimes do not present any more danger to police officers than any other crime), *aff'd*, 520 U.S. 385 (1997).

173. E.g., *Moore*, 486 F.2d at 1228 & n.122 (recognizing that heroin may produce a tranquil state whereas other opiates, such as cocaine, may stimulate the user to violence).

B. LEGISLATURES RELY ON THE DRUG-VIOLENCE LINK TO SUPPORT  
LEGISLATION

Statutes have similarly made assertions about the strong link between drugs and violence. Many federal and state statutes treat a drug crime as though it were a crime of violence.<sup>174</sup> Due to the assumption that drug crime is violent crime, the federal sentencing guidelines do not make distinctions between violent crimes and nonviolent crimes, so a defendant convicted of murder may have a lower sentence than a nonviolent drug dealer.<sup>175</sup> And statutes assume that the more drugs a person possesses, the more violent an individual is. Finally, pretrial detention laws presume dangerousness and require detention when a person is caught with a certain amount of drugs.

By definition, many statutes designate a crime of violence as one where drugs are involved and the person is simply armed with a weapon, even if it is not discharged.<sup>176</sup> Therefore, to commit armed violence, a defendant must possess only drugs and a firearm; the defendant need not even discharge the weapon. Indeed, a person carrying a firearm while committing a drug trafficking crime often faces the same sentence as an individual carrying a firearm in relation to a violent crime.<sup>177</sup> Also, many drug crime penalty structures, under both federal and state statutes, include sentencing enhancements based upon the quantity of the drug in possession—essentially assuming that the more drugs you possess, the

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174. *E.g.*, 11 U.S.C. § 707(c)(2) (2012); 18 U.S.C. § 924 (2012)(c)(1); 28 U.S.C. § 994(h) (2012); LA. REV. STAT. ANN. § 14:95(E) (2014) (“If the offender uses, possesses, or has under his immediate control any firearm . . . while committing or attempting to commit a crime of violence or while in possession of or during the sale or distribution of a controlled substance, the offender shall be fined not more than ten thousand dollars or imprisoned at hard labor for not less than five nor more than ten years . . .”); MD. CODE ANN., CRIM. LAW § 5-621(a)(2) (West 2014) (referring to drugs as “controlled *dangerous* substances” in defining a “drug trafficking crime” (emphasis added)).

175. *United States v. Garrison*, 560 F. Supp. 2d 83, 88 (D. Mass. 2008) (“Indeed, the [Sentencing Guidelines] scoring makes no distinction between violent and non violent offenses: an addict with a record of drug convictions could have a higher score than another defendant with a murder conviction.”).

176. *People v. Harre*, 614 N.E. 2d 1235, 1237 (Ill. 1993) (discussing what constitutes “armed violence” according to an Illinois statute and finding that when a defendant is in possession of both drugs and a firearm, he has committed armed violence).

177. *See, e.g.*, 18 U.S.C. § 924(c)(1) (suggesting the same sentence to a person carrying a firearm in relation to a crime of violence as a person carrying a firearm in relation to a drug trafficking crime); *id.* § 929(a) (same); 28 U.S.C. § 994(h) (same); James Guelff and Chris McCurley Body Armor Act of 2002, Pub. L. No. 107-273, 116 Stat. 1819, sec. 11009 (codified as amended at 42 U.S.C. § 3796l-3(d)(1)) (instructing the U.S. Sentencing Commission to amend the Federal Sentencing Guidelines to add a sentencing enhancement for defendants who used body armor in committing a crime of violence or drug trafficking crime).

more violent you are<sup>178</sup> and the more you threaten the safety of others.<sup>179</sup> For example, most states have sentencing ranges for illegal possession of marijuana that statutorily increase the term of the sentence as the amount of possession increases.<sup>180</sup> In addition to lengthier sentences, many laws also allow for higher fines for greater amounts of possession of controlled substances.<sup>181</sup> The more drugs a person possesses, the more dangerous the person is deemed to be, or at least the more deserving of a longer sentence the person is deemed to be.<sup>182</sup> This connection between drugs and violence

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178. Assuming the distribution and consumption of drugs is harmful, one could argue that the larger the cache involved, the more likely it is that violence will occur. Similarly, one could argue that just as stealing one thousand dollars is worse than stealing ten dollars, the larger the drug quantity involved, the more evil the criminal.

179. See 21 U.S.C. § 841(b) (2012) (providing a step-up basis in sentencing for possessing greater amounts of drugs); *id.* § 960(b) (same); GA. CODE ANN. § 16-13-31 (Supp. 2014) (same); LA. REV. STAT. ANN. § 40:966 (2014) (same); N.Y. PENAL LAW §§ 220.06, 220.09, 220.16, 220.18, 220.21 (McKinney 2008) (same); S.C. CODE ANN. § 44-53-375 (2014) (same); TENN. CODE ANN. § 39-17-417 (2014) (same); TEX. HEALTH & SAFETY CODE ANN. § 481.115–.118, (2013) (same); VT. STAT. ANN. tit. 18, § 4233 (2014) (same, and detailing the sentencing ranges for possessing different quantities of heroin). Although Congress passed the Fair Sentencing Act of 2010, amending 21 U.S.C. § 960 in order “[t]o restore fairness to [f]ederal cocaine sentencing,” the sentencing guidelines still present a disparity and base sentencing ranges upon the quantity of crack cocaine, called “cocaine base,” in possession. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C. & 28 U.S.C.). See also *infra* note 180 and accompanying text.

180. See, e.g., ARIZ. REV. STAT. ANN. § 13-3405(B) (2014) (providing a step-up basis in felony classification for possessing, possessing with intent to sell, producing, or transporting greater amounts of marijuana); ARK. CODE ANN. § 5-64-419 (2014) (providing a step-up basis in felony classification for possessing greater amounts of “Schedule VI controlled substances,” including marijuana); CAL. HEALTH & SAFETY CODE § 11357 (Deering Supp. 2015) (providing a step-up basis in sentencing for the possession of greater amounts of marijuana); DEL. CODE ANN. tit. 16, §§ 4752–56 (Supp. 2012) (providing a step-up basis in felony classification for the “aggravated possession” of greater amounts of marijuana based on a “Tier” system); GA. CODE ANN. § 16-13-31(c) (providing a step-up basis in sentencing for the possession of increasingly larger amounts of marijuana that exceed ten pounds); HAW. REV. STAT. § 712-1249.4 to .5 (1993 & Supp. 2014) (providing a step-up basis in felony classification for the possession of increasingly larger amounts of marijuana that exceed two pounds); N.M. STAT. ANN. § 30-31-23(B) (Supp. 2014) (providing a step-up basis in sentencing for the possession of increasingly larger amounts of marijuana); UTAH CODE ANN. § 58-37-8(2) (West 2014) (same); VT. STAT. ANN. tit. 18, § 4230(a) (2014) (same).

181. See, e.g., CAL. HEALTH & SAFETY CODE § 11357 (permitting increased fines for increased amounts of marijuana possession); MICH. COMP. LAWS § 333.7403 (West 2012) (starting fines at \$25,000 for possessing less than twenty-five grams of a “controlled substance,” excluding “marihuana,” and continuing up to \$1,000,000 for one thousand grams or more); WASH. REV. CODE § 69.50.401(2)(a)–(b) (West Supp. 2014) (allowing up to \$25,000 in fines for less than two kilograms of specific controlled substances; for greater than two kilograms, allowing up to \$100,000 in fines for the first two kilograms of the drug and up to fifty dollars for each kilogram thereafter).

182. ARK. CODE ANN. § 5-64-419 (classifying possession of controlled substances from a Class A misdemeanor to a Class D felony level based on weight and substance). See also ARK. CODE ANN. § 5-4-401 (2014) (identifying minimum sentences for each class of felony); GA. CODE ANN. § 16-13-30 (establishing sentencing ranges for felony offenses based on weight, as well as considering whether the substance has been mixed or otherwise combined with other substances); UTAH CODE ANN. § 58-37-

in statutory law is also clear in federal and state law, where sentences are at least double—and sometimes quadruple—what they would be when an individual who possesses drugs also possesses a gun.<sup>183</sup> The inference is that a person who possesses drugs and is also armed will participate in violent behavior.

This connection between drugs and violence is quite apparent in relation to pretrial detention. Under certain circumstances, federal law provides for pretrial detention under a rebuttable presumption that certain drug offenses make a defendant a danger to the community.<sup>184</sup> There is a presumption of dangerousness—such that it is not safe to release a defendant before trial—if an individual is charged with a drug possession crime involving a large amount of drugs. Various state statutes also create a presumption of detention when drugs of a certain quantity are involved.<sup>185</sup> Other states take into account drug offenses or dependency when considering whether release is reasonable.<sup>186</sup> The assumption underlying all of these statutes is that the more drugs you are found with, the more likely

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8(2)(b) (classifying the criminality of marijuana possession based on weight).

183. Compare LA. REV. STAT. ANN. § 14:95(E) (2012) (requiring that offenders convicted for the first time of using or possessing a firearm or instrumentality customarily used as a weapon during the possession, sale, or distribution of a controlled dangerous substance receive a fine of no more than ten thousand dollars and be imprisoned at hard labor for between five and ten years without parole), with LA. REV. STAT. ANN. § 40:967(C) (2013) (punishing possession of a Schedule II controlled substance such as methamphetamines with hard labor for between two and five years and imposing a fine of no more than five thousand dollars); and compare ARK. CODE ANN. § 5-74-106 (2011) (punishing committing or attempting to commit a crime of possession of felony-level controlled substances while in possession of a firearm as a Class Y felony, which is the highest class of non-death sentence eligible felonies in Arkansas), with ARK. CODE ANN. § 5-64-419 (2013) (punishing possession of controlled substances at a Class B to Class D felony level). See 18 U.S.C. § 924(c)(1)(D)(2) (2012) (causing a defendant's sentence for a gun offense to run consecutively to his sentence for a drug offense, meaning the gun charge cannot begin until the sentence for the drug offense has been completed, and imposing a mandatory minimum of five years, which can be extended by type and number of firearm); VA. CODE ANN. § 18.2-308.4 (2014) (sentencing an offender who unlawfully possesses a controlled substance and knowingly possesses a firearm to a minimum of two years imprisonment, which is separate and apart from the sentence for the drug offense which is the primary felony).

184. 18 U.S.C. § 3142(e)(3)(A) (2012) (creating a rebuttable presumption that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed [certain drug offenses]”).

185. See, e.g., VA. CODE ANN. § 19.2-120(B)(3) (Supp. 2014) (providing a rebuttable presumption in cases involving a minimum amount of a Schedule I or II controlled substance if “(i) the maximum term of imprisonment is [ten] years or more and the person was previously convicted of a like offense or (ii) the person was previously convicted as a ‘drug kingpin’ as defined in § 18.2-248”).

186. See, e.g., MASS. GEN. LAWS ch. 276, § 58A(5) (LexisNexis 2014) (effective Jan. 1, 2015) (“[A] justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release . . . [if] any illegal drug distribution or present drug dependency [occurred] . . .”).

you are to be a violent person and a threat to the safety of the community.

Many federal statutes link drugs and violence simply by using the term “dangerous drugs” in various contexts.<sup>187</sup> Various state statutes also make this same link by referring to dangerous drugs.<sup>188</sup> As a whole, large

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187. *E.g.*, 21 U.S.C. § 1115 (2012) (“Notice relating to the control of dangerous drugs”); *id.* § 881(e)(1)(D) (2012) (requiring forfeited property under the subchapter to be forwarded to the “Bureau of Narcotics and Dangerous Drugs for disposition”); 42 U.S.C. § 5117aa-11(b)(2) (2012) (conditioning grants on recipient’s commitment “to give priority to abandoned infants and young children who . . . have been perinatally exposed to a dangerous drug”); *id.* § 5117aa(4) (noting congressional findings that “appropriate training is needed for personnel working with infants and young children with life-threatening conditions and other special needs, including . . . , those who have been exposed to dangerous drugs”); *id.* § 5117aa-21(2) (defining “[d]angerous drug” as “a controlled substance, as defined in section 802 of Title 21”); 46 U.S.C. § 2101(8a) (2012) (defining “dangerous drug” as “a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. [§] 802)”); *id.* § 7503(b) (authorizing denial of a “license, certificate of registry, or merchant mariner’s document” if the applicant “within [ten] years before applying for the license, certificate, or document, has been convicted of violating a dangerous drug law of the United States or of a State”); Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, sec. 2, 110 Stat 3099, 3100 (codified as amended at 21 U.S.C. § 801 (1996)) (noting the congressional finding that “[m]ethamphetamine is a very dangerous and harmful drug”). However, one federal Racketeer Influenced and Corrupt Organizations (“RICO”) statute was specifically amended to refer to drugs as “controlled substances,” moving away from the 1994 version that referenced their “dangerous nature.” *Compare* 18 U.S.C. § 1961(1) (1993) (amended 1994) (defining “racketeering activity” as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or *dealing in narcotic or other dangerous drugs*, which is chargeable under State law and punishable by imprisonment for more than one year” (emphasis added)), *with* 18 U.S.C. § 1961(1) (2012) (defining “racketeering activity” as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or *dealing in a controlled substance* or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year” (emphasis added)).

188. *See, e.g.*, OR. CONST. art. VII, § 8(1)(f) (authorizing removal, suspension, or censure of judges for “[h]abitual drunkenness or illegal use of narcotic or dangerous drugs”); ALA. CODE § 20-2-190(h)(1)(a) (2014) (“These programs may be targeted for, but not limited to, employees of establishments where ephedrine or pseudoephedrine products or other key or critical or common ingredients in the illegal manufacture of methamphetamine or other illegal or dangerous drugs are available for sale.”); ARIZ. REV. STAT. ANN. § 13-3407(A) (2014) (“A person shall not knowingly: 1. Possess or use a dangerous drug. 2. Possess a dangerous drug for sale. 3. Possess equipment or chemicals, or both, for the purpose of manufacturing a dangerous drug. 4. Manufacture a dangerous drug. 5. Administer a dangerous drug to another person. 6. Obtain or procure the administration of a dangerous drug by fraud, deceit, misrepresentation or subterfuge. 7. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a dangerous drug.”); FLA. STAT. § 905.34(2) (2014) (authorizing the impaneling of a grand jury for “[c]rimes involving narcotic or other dangerous drugs”); HAW. REV. STAT. § 712-1241 (2014) (criminalizing the “[promotion of] a dangerous drug in the first degree”); 20 ILL. COMP. STAT. 310/310-5 (2014) (identifying the existence of and responsibilities of the “Dangerous Drugs Commission”); IND. CODE § 12-7-2-150(4) (2014) (identifying “[a]ddiction to narcotic or dangerous drugs” as not among psychiatric disorders for purposes of the relevant statutory section); MISS. CODE ANN. § 19-25-3 (1972) (requiring law enforcement officers to “attend and complete an appropriate curriculum in the field of narcotics and dangerous drugs at the Mississippi Law Enforcement Officers’ Academy”);

sentences for drug criminals result from the link between drugs and violence.<sup>189</sup> Congress has written legislation that specifically tries to punish violence that is allegedly “too often associated” with trafficking.<sup>190</sup> In the past, courts have worked hand-in-hand with legislators by defending the creation of offenses that target those addicted to narcotics in order to prevent the “grave threat of future harmful conduct” that drug users pose.<sup>191</sup> Governmental bodies also have lent support to drug legislation by

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MONT. CODE ANN. § 50-32-101(6) (2014) (“‘Dangerous drug’ means a drug, substance, or immediate precursor in Schedules I through V set forth in Title 50, chapter 32, part 2.”); NEB. REV. STAT. § 86-291 (2013) (authorizing applications for wiretaps for investigating crimes involving “dealing in narcotic or other dangerous drugs,” among other crimes); N.H. REV. STAT. ANN. § 570-A:7 (Supp. 2013) (authorizing applications for wiretaps for investigating crimes involving “dealing in narcotic drugs, marijuana, or other dangerous drugs” among other crimes); N.J. STAT. ANN. § 53:1-18.5 (West 2014) (defining “[d]angerous drugs”); N.Y. CRIM. PROC. LAW § 715.05 (McKinney 2014) (same); OKLA. STAT. tit. 63, § 2-102 (Supp. 2013) (establishing the “Bureau of Narcotics and Dangerous Drugs Control”); R.I. GEN. LAWS § 7-15-1(c) (1999) (including in its definition of racketeering “any dealing in narcotic or dangerous drugs which is chargeable as a crime under state law and punishable by imprisonment for more than one year”); S.C. CODE ANN. § 14-7-1610(A) (Supp. 2013) (“The General Assembly finds that crimes involving narcotics, dangerous drugs, or controlled substances . . . often transpire or have significance in more than one county of this State. When this occurs, these crimes are most effectively detected and investigated by a grand jury system with the authority to cross county lines.”); S.D. CODIFIED LAWS § 34-20B-89(3) (2011) (authorizing the state to forward forfeited property to the “Bureau of Narcotics and Dangerous Drugs for disposition”); UTAH CODE ANN. § 78A-6-508(2)(c) (West 2012) (including “habitual or excessive use of intoxicating liquors, controlled substances, or dangerous drugs that render the parent unable to care for the child” as a factor for a court’s consideration of whether a parent is unfit or has neglected a child); WIS. STAT. § 302.375 (2014) (placing restrictions on liquor and dangerous drugs and discussing the placement of prisoners).

189. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007: STATISTICAL TABLES (2010), <http://www.bjs.gov/content/pub/pdf/cvus07.pdf> (defining violent crimes as rape, sexual assault, robbery, and assault); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 614 (2011) (“The long prison sentences distinctive to the United States are imposed primarily for drug offenses, offenses which are not formally labeled ‘violent.’ But support for severe penalties for drug offenses is unquestionably fueled by an association of drugs with violence. There is considerable evidence that political leaders have explicitly sought to link drug use to violent crime in order to win support for the war on drugs.” (citations omitted)). For example, in 2001, the U.S. Sentencing Commission concluded that the sentencing ratio for MDMA should be more severe than for powder cocaine, but less severe than that for heroin in part because heroin had a greater association with violence. See Deborah Ahrens, *Drug Panics in the Twenty-First Century: Ecstasy, Prescription Drugs, and the Reframing of the War on Drugs*, 6 ALB. GOV’T L. REV. 397, 421 nn.117–18 (2013) (citing U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MDMA DRUG OFFENSES: EXPLANATION OF RECENT GUIDELINE AMENDMENTS 6 (2011), available at [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200105\\_RtC\\_MDMA\\_Drug\\_Offenses.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200105_RtC_MDMA_Drug_Offenses.pdf)).

190. *United States v. James*, 834 F.2d 92, 93 (4th Cir. 1987) (“The statute [18 U.S.C. § 924(c) (2012), mandating a five-year sentence for carrying a firearm during the commission of a drug trafficking crime,] is obviously intended to discourage and punish the deadly violence too often associated with drug trafficking.”).

191. *E.g.*, *Robinson v. California*, 370 U.S. 660, 683–84 (1962) (Clark, J., dissenting) (“Can this

strengthening the link between drugs and violence.<sup>192</sup>

As demonstrated in Part IV, none of these assumptions are supported by studies on this topic. For instance, it is unclear that people who carry a gun while transacting drug deals cause more violence than those who do not.<sup>193</sup> It is also unclear that people who possess more drugs are more violent than those who possess less.<sup>194</sup> Finally, it is unlikely that individuals who transact drugs commit more violent crimes than other defendants.<sup>195</sup>

### C. ONE-WAY RATCHET DOWN ON RIGHTS

Courts seem to use the drug-violence connection as a one-way ratchet.<sup>196</sup> Defendants lose Fourth Amendment and Second Amendment rights when they are suspected of having drugs because courts assume that they will participate in violence.<sup>197</sup> Indeed, courts use the presence of drugs to reduce privacy rights and protections against unreasonable searches and seizures. However, when a defendant under the influence of drugs tries to claim that the drugs made him act violently, courts often do not allow it.<sup>198</sup>

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Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?"). *See also* William W. Wilkins, Jr., Phyllis J. Newton, & John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305 (1993), reprinted in ALEX KREIT, CONTROLLED SUBSTANCES: CRIME, REGULATION, AND POLICY 409, 409–10 (Alex Kreit ed., 2013) (describing Congress's implementation of statutorily mandated sentences for drug offenses in an attempt to halt the "revolving door" of drug traffickers in the criminal justice system).

192. *E.g.*, OFFICE OF NAT'L DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL STRATEGY: 1999, at 24 (1999) [hereafter DRUG CONTROL STRATEGY], available at <https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/99ndcs.pdf> ("Drug trafficking and violence go hand in hand."). *See also* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 132 (2007) ("[C]onsistent with the cultural cognition of harm, proponents of regulation have always rested their case on (or at least amply fortified it with) the contribution such laws make to avoiding secular harms. It is said, for example, that drug use generates crime . . ."). *See generally* KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (describing the effects of American politicians' efforts to create a link between drugs and violence over the past fifty years).

193. *See infra* notes 269–281 and accompanying text.

194. *See infra* Part IV.A.

195. *See infra* Part IV.E.

196. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509, 554 (2001) (discussing how politics has turned criminal law into a one-way ratchet in which voters demand harsher treatment for felons and politicians acquiesce, and observing that—with regard to hate crimes, for example—"there may be no organized interest group on the other side [as] no one is likely to lobby against a statute that ratchets up sentences for violent bigots").

197. *See infra* notes 199–212 and accompanying text.

198. *E.g.*, *Rizk v. Prelesnik*, No. 2:08-12737, 2010 U.S. Dist. LEXIS 4128, at \*14–15 (E.D. Mich. Jan. 20, 2010), *aff'd* 487 F. App'x 285 (6th Cir. 2012). In *Rizk*, the court considered whether evidence

This is not to say that individuals caught with drugs do not at times have a potential for violent behavior, but that this should be an individualized determination in each case rather than a blanket presumption. Thus, the drug-violence connection acts as a one-way ratchet to reduce rights for defendants.

For instance, in cases in which the defendant wishes to claim self-defense because he assumed the opposing party carried a firearm due to their known status as a drug dealer, the correlation between drugs and violence is not strong enough. In other words, despite the supposed strong connection between drugs and violent behavior, a previous drug conviction, without more, is not likely enough to be probative of the victim's propensity to be violent.<sup>199</sup> Federal and state statutes, however, commonly give much greater sentences to individuals who deal drugs while carrying a firearm.<sup>200</sup> So federal statutes are allowed to assume that drug dealers are more dangerous when armed, but individuals are not allowed to assume that drug dealers they encounter are armed. In this context, then, the drug-violence connection only works as a one-way ratchet to reduce rights.

Also, in cases in which a defendant's drug use is raised as a causative "excuse" for his violent behavior, courts typically first look at whether there is evidence of the actual presence of the drug at the time of the incident. Unless there is sufficient evidence to demonstrate that the defendant's drug intake levels were high enough to show that he was affected by the drug, the relationship is considered mere speculation.<sup>201</sup>

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regarding the correlation between drug dealing, violent crime, and shootings in the area should have been allowed to be introduced at trial. The court recognized that there could possibly be a correlation between drug dealing and gun violence, but said that the specific exclusion of evidence that took place did not bear enough weight for it to have made a difference in the outcome of the case. *Id.*

199. *See, e.g., State v. Abreu*, 941 A.2d 974, 979 (Conn. App. Ct. 2008). In *Abreu*, the court reviewed a case in which the defendant made an effort to plead self-defense and claimed he was scared of the victim and his violent nature. He thought the victim was about to use deadly force against him and based his thought-process on the fact that the victim was a convicted drug dealer. The court held that this was an improper inference that was made, regardless of the correlation between drugs and violent behavior, and the evidence was therefore excluded from being introduced to the jury. *Id.*

200. *See supra* note 183 and accompanying text.

201. *See Turner v. Wong*, 641 F. Supp. 2d 1010, 1074 (E.D. Cal. 2009) ("[T]here would be no way to determine empirically the amount of PCP, if any, that was in [the defendant's] body on the day of the crime."). In *Turner*, the court reviewed a case in which the defendant was charged and convicted of a gruesome murder in which he had stabbed a man forty to fifty times, and then ran off with his car and some of his belongings. *Id.* at 1014. Afterwards, he claimed that he had been using multiple drugs, and that after the decedent made sexual advances on him, he went into a violent rage due to the drugs in his system. *Id.* at 1014–15. The expert witness, Dr. Howard B. Terrell, was aware of extensive medical literature that PCP, alcohol, marijuana and methamphetamine could cause severe behavioral changes, especially with regard to the distortion of reality, paranoia, and violent behavior. *Id.* at 1071. However, it was found to be too difficult to trace whether there could have been a cause and effect relationship,

This kind of careful inquiry is not required when a defendant is suspected of having drugs and is searched without a warrant or when police violate other individual rights.<sup>202</sup> For instance, where there is a probable cause inquiry, courts assume the presence of a gun when a person is suspected of possessing drugs. When courts seek to justify the reasonableness of an investigatory search in a case involving drugs, they allow police to assume that firearms or weapons are present due to the allegedly strong connection between drugs and violence.<sup>203</sup> Indeed, in some circumstances where there

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especially without recent blood tests within a certain amount of time after the murder. *Id.* at 1080. *See also* State v. Thornton, 800 A.2d 1016, 1041–42 (R.I. 2002) (“In asserting his diminished capacity defense, [the defendant] was asserting that his mental capacity on the day of the incident had been substantially diminished by his use of cocaine and alcohol, and other factors, and was, in effect, a concession of his practical responsibility, rather than culpability.”). In *Thornton*, the court reviewed a case in which a husband held his ex-spouse hostage at her home for about fourteen hours while the police waited outside. *Id.* at 1020–21. During the time he was holding her hostage, he physically abused her and stabbed her with a knife four times in front of their daughter. *Id.* at 1021. At trial, the defendant elected to represent himself and brought an expert witness to testify as to why he behaved as he did. *Id.* at 1023–24. The expert testified that the acts were abhorrent and resulted from cocaine, alcohol, a head injury, and lack of sleep. *Id.* at 1040–42. However, as the expert’s opinion was based exclusively on information provided by the defendant himself, who failed to mention that he had been sober during past instances of violent domestic assaults, the prosecution was able to effectively challenge this testimony. *Id.* at 1042. In other words, as there was not sufficient evidence that the drugs were the cause, the prosecution was allowed to bring in bad prior acts to go against the testimony being provided by the defendant. *Id.*

202. *But see* Bennett v. Madakasira, 821 So. 2d 794, 796, 806–07 (Miss. 2002) (reversing a grant of summary judgment, which found defendant drug manufacturers and psychiatrists to have not been negligent in their failure to adequately warn of the drugs’ propensity to cause violent behavior, and remanding), *abrogated by* Hutzler v. City of Jackson, 33 So. 3d 1116 (Miss. 2010). In *Bennett*, the court examined a case in which a husband was responsible for killing his wife. *Id.* at 796. The husband blamed the psychiatrists who prescribed him drugs and the manufacturer of said drugs, which allegedly caused his violent behavior. *Id.* The court reversed and remanded and required a careful inquiry to determine whether the drugs were related to the act of violence in this instance. *Id.*

203. *See, e.g.,* United States v. Wiener, 534 F.2d 15, 18 (2d Cir. 1976) (“Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment.”); United States v. Silva, No. 12-00275 SOM, 2012 U.S. Dist. LEXIS 118880, at \*21–22 (D. Haw. Aug. 21, 2012) (reviewing a case in which police made an investigatory stop on a vehicle during which they had reason to believe there was a drug crime being committed, and deeming it “reasonably necessary” for the police to approach the vehicle with their guns drawn due to the connection between drugs and violence); State v. Clark, 764 A.2d 1251, 1263 (Conn. 2001) (reviewing a case in which there was an appeal made regarding the constitutionality of a search and the methods used in obtaining certain drug and firearm evidence; confirming the constitutionality of the actions, given that it is entirely reasonable for suspicion to be raised further when an individual is caught or suspected of dealing drugs; noting that there is an extremely strong relationship between drugs being dealt and firearms being carried; and explaining further that this correlation is also indicative of the increased potential for violence); White v. State, 155 S.W.3d 927, 928 (Tex. Ct. App. 2005) (holding that because the police knew that the defendant was in the possession of “meth” and that there is a strong correlation between drugs, firearms, and the increased chance of ensuing violence, police were justified in executing a search warrant by forcibly entering the defendant’s home without

was an otherwise illegal search and seizure, courts have found the search valid due to the “strong” connection between drugs and violence.<sup>204</sup> Some courts have gone as far as saying that those who sell drugs are “dangerous criminals”<sup>205</sup> and guns should be seized in any drug investigation because guns are the “tools” in the trade of drug sales.<sup>206</sup> Again, in this instance, there is a one-way ratchet reducing rights for defendants based on the drug-violence connection rather than the dictates of the Constitution.

Similarly, in the context of no-knock warrants, courts assume that the safety of officers is threatened when drugs are involved. The U.S. Supreme Court has held that a no-knock warrant is constitutional if the officers have a reasonable suspicion that evidence would be destroyed or that safety of law enforcement would be in jeopardy if an announcement were made.<sup>207</sup> For example, in *United States v. Singer*, the U.S. Court of Appeals for the Seventh Circuit held that when an officer had a reasonable belief that a firearm was in the house when conducting a search warrant for drugs, a no-knock warrant was constitutional.<sup>208</sup> In *Singer*, the Seventh Circuit also recognized that persons in possession of drugs and of firearms pose a

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knocking or announcing their presence, as this was for their own protection and so the suspect would not be able to get rid of the drugs before they came in); *State v. Stevens*, 511 N.W.2d 591, 600–01 (Wis. 1994) (Abrahamson, J., concurring) (reasoning that no-knock warrants could reduce the risk of losing evidence, and due to violence associated with drugs, no-knock warrants could also lower violence toward officers), *overruled on other grounds by* *Richards v. Wisconsin*, 520 U.S. 385, 393–95 (1997) (rejecting “the Wisconsin court’s blanket exception to the knock-and-announce requirement” as articulated by the majority in *State v. Stevens*, in favor of a “reasonable suspicion” standard).

204. *State v. Mann*, 857 A.2d 329, 345–46 (2004) (considering a motion to suppress evidence gained after what the defendant argued was an unlawful search and seizure; examining how drug deals are linked with weapons and violence; and determining, due to this strong connection, that the police were justified in making the search and seizure).

205. *United States v. Korman*, 614 F.2d 541, 546 (6th Cir. 1980) (stating that drug dealers are known to be “dangerous criminals” and usually carry weapons, and holding that the district court did not err in denying the motion to suppress evidence, given the “emergency and exigent circumstances” of the case and the risk to officers).

206. *United States v. Ramirez*, 45 F.3d 1096, 1103 (7th Cir. 1995) (finding a gun admissible into evidence because weapons are “tools of the trade” in drug dealing). *See United States v. Grogins*, 163 F.3d 795, 796–98 (4th Cir. 1998) (holding that police did not need to knock and announce their presence before entering a “drug home,” and stating that “[t]he connection between illegal drug operations and guns in our society is a tight one”; citing different cases demonstrating that guns are extremely common in drug transactions, and that by knowing the nature of the criminal activity occurring, one can often infer that a target individual is armed and dangerous; and noting that there is an implied notion on the part of law enforcement, even before engaging with criminal conduct involving drugs, that violent means and behavior will be involved).

207. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (“In order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”).

208. *United States v. Singer*, 943 F.2d 758, 762–63 (7th Cir. 1991).

significant risk to law enforcement.<sup>209</sup> The Supreme Court acknowledged as much in *Richards v. Wisconsin* when the Court pointed out the link between “felony drug investigations” and “circumstances presenting a threat of physical violence” to officers.<sup>210</sup> Overall, in executing drug warrants, courts assume that drugs and violence are linked, allowing officers more leeway in violating individual rights.<sup>211</sup> Now, this is not to say that it is necessarily problematic or bad practice for courts to justify searches in individual cases in which there are guns and drugs involved. These cases simply show that courts draw a connection between drugs and guns and justify broader searches on this basis.

In general, there is no constitutional right for a drug user to carry a firearm due to the nexus between violent crime and illicit drug use.<sup>212</sup> In

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209. *Id.* (“Furthermore, it is a reasonable belief that a person in possession of both firearms and large quantities of drugs poses a threat to the safety of police officers attempting to seize the drugs. Indeed, the courts have recognized that a suspect’s propensity for violence can be inferred from the quantity of drugs involved.”).

210. *See Richards*, 520 U.S. at 391 & n.2 (“[T]he knock-and-announce requirement could give way ‘under circumstances presenting a threat of physical violence,’ or ‘where police officers have reason to believe that evidence would likely be destroyed if advance notice were given.’ It is indisputable that felony drug investigations may frequently involve both of these circumstances.” (quoting *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995))).

211. An argument exists that this assumption has support where there is evidence that the target of the search is in possession of large amounts of drugs, as such persons face very harsh sentences if caught and convicted; thus, the individual’s fear of such harsh sentencing, combined with the fact that large caches of drugs are very valuable, would provide strong motivation for the individual to use violence against police. However, without evidence of this occurring, such circular logic cannot be used to justify searches based on probable cause or reasonable suspicion.

212. *United States v. Yancey*, 621 F.3d 681, 683, 686–87 (7th Cir. 2010) (per curiam) (holding that a federal statute prohibiting unlawful users of drugs from possessing firearms was constitutional, as academic research had demonstrated a strong connection between drugs and violence; positing that habitual drug users, like the mentally ill, are much more likely to have difficulty exercising self-control and are therefore more dangerous when possessing firearms; in essence, creating a broad class of individuals that are “presumptively risky people” and considering drug users a part of that class). *See also United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (holding the same federal statute to be constitutional); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (same); *United States v. Carter*, No. 2:09-00055, 2012 U.S. Dist. LEXIS 168011, at \*5–20 (S.D. W. Va. Nov. 27, 2012) (determining the same federal statute prohibiting unlawful users of drugs from possessing firearms to be constitutional after referencing a variety of literature discussing the correlation between drugs and violence and statistical information regarding large percentages of violent crimes committed by individuals who have confessed to using drugs during the time they committed the acts), *aff’d*, 750 F.3d 462, 467 (4th Cir. 2014) (“We have little trouble concluding that the studies . . . indicate a strong link between drug use and violence.”), *cert. denied sub nom. Carter v. United States*, 135 S. Ct. 273 (2014); *United States v. Emond*, No. 2:12-cr-00044-NT, 2012 U.S. Dist. LEXIS 149295, at \*9–15 (D. Me. Oct. 17, 2012) (holding that there is a demonstrable link between unlawful drug use and violence; submitting that all of the presented studies, case law, legislative history, and common sense support the conclusion that the government wants to reduce gun violence, or violence in general, by keeping firearms out of the hands of drug users; and finding the statute restricting drug users from possessing firearms to be

*United States v. Yancey*, for example, the Seventh Circuit stated that keeping guns away from drug users that have been convicted was similar to withholding the right to firearms from felons, thus implying that drug users are violent.<sup>213</sup> The court used several indirect sources to confirm its claim that drug use was connected to violent crime and that keeping firearms from drug abusers served its goal of reducing violent crime.<sup>214</sup> Also, in *United States v. Carter (Carter I)*, the U.S. Court of Appeals for the Fourth Circuit, without relying on any evidence, found merit in the argument that drug users do not have the right to bear arms.<sup>215</sup> Examples that the government used to justify this restriction included that: drug users tend to be involved in illegal activities that would cause violent run-ins with the police; they deal in a black market; the inflated price of drugs causes desperation, thus resulting in a higher likelihood of user involvement in other illegal activity; and illegal drugs impair mental functions, causing irrational behavior.<sup>216</sup> None of these arguments were based on empirical or social science data—or more importantly, individualized data regarding each defendant—instead, bare assumptions about the drug-violence connection resulted in a remand of the case. When the Fourth Circuit again took up the matter, it upheld that the use of “common sense” and empirical studies provided support for the drug-violence connection and joined four other circuits in holding that drug users do not have the right to bear arms.<sup>217</sup>

Particularly during the height of the war on drugs, the Supreme Court emphasized flexibility for law enforcement and allowed a reduction in individual rights since drugs were one of the most serious problems for the “welfare of our population.”<sup>218</sup> And some lower courts have specifically

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constitutional based on the evidence and reasoning supporting its cause).

213. *Yancey*, 621 F.3d at 684–85 (analogizing that in the same way “someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use,” a person who is convicted of a drug offense is more likely than someone without a drug conviction to engage in violence).

214. *Id.* at 686.

215. *United States v. Carter (Carter I)*, 669 F.3d 411, 419–20 (4th Cir. 2012) (providing several arguments the government could use to satisfy its burden of “justify[ing] . . . that drug users and addicts possessing firearms are sufficiently dangerous to require disarming them,” while acknowledging that the government presented “no empirical evidence or data to substantiate them”), *remanded to 2012 U.S. Dist. LEXIS 168011* (S.D. W. Va. Nov. 27, 2012), *aff’d*, 750 F.3d 462 (4th Cir. 2014), *cert. denied sub nom. Carter v. United States*, 135 S. Ct. 273 (2014).

216. *Id.*

217. *United States v. Carter (Carter II)*, 750 F.3d 462, 470 (4th Cir. 2014), *cert. denied sub nom. Carter v. United States*, 135 S. Ct. 273 (2014).

218. *United States v. Mendenhall*, 446 U.S. 544, 561–62 (1980) (Powell, J., concurring) (discussing the need for flexibility while searching for drugs).

supported the war on drugs rhetoric and supported lengthy sentences to send a message to the community.<sup>219</sup> Indeed, courts in cases dealing with large quantities of drugs have inferred that a large amount of drugs leads to such a degree of violence and crime that a sentence of life without parole is warranted.<sup>220</sup> Thus, the war on drugs ratcheted down rights for defendants, increasing sentences and the ease with which officers could search individuals.

Courts certainly assume a connection between drugs and violence.<sup>221</sup> These cases together demonstrate that there is a lower level of constitutional protection for defendants when drugs are involved, based on the assumption of a link between drugs and violence. These cases also demonstrate that the level of evidence required for a search in a drug case is lower, given the fear of violence. This may not necessarily be problematic. Courts must decide matters dealing with individual drug defendants based on the standards for those cases, which may justify searches in many instances. The broader points they should recognize in doing so are that: (1) it is not justifiable to assume a causal link between drugs and violence, and (2) each determination of constitutional rights should still meet the standard at hand.

The next part demonstrates that despite connections made by the media, politicians, judges, and legislatures, the assertion that drugs cause

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219. *See, e.g.*, *United States v. Carbonell*, 737 F. Supp. 186, 187 (E.D.N.Y. 1990) (“Because during this period of the ‘war on drugs,’ it is desirable to send a message to the community in which defendant lives that any association with drugs, no matter what the motivation, will lead to prison, a term of imprisonment is imposed.”); *Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009) (allowing the prosecutor to urge the jury to send a message during the sentencing phase, and stating that “[d]eterrence is clearly not intended for that defendant alone, but rather his sentence sends the message to all others so inclined that their crimes will be punished, and that a jury made up of local citizens will not tolerate such offenses”); *State v. Mays*, 884 S.W.2d 405, 409 (Mo. Ct. App. 1994) (holding that a prosecutor’s statement, encouraging a jury to “punish [the defendant], and . . . send a message to people that they cannot operate these drug houses,” was valid because a prosecutor “may legitimately argue that the jury should ‘send a message’ that criminal conduct will not be tolerated or should be severely punished” during his closing argument (internal quotation marks omitted)).

220. *See, e.g.*, *Wigglesworth v. Mauldin*, 990 P.2d 26, 31 (Ariz. Ct. App. 1999) (dismissing a complaint alleging the defendant’s sentence was grossly disproportionate and stating that the length of the sentence was adequate based on the public interest in keeping individuals who have been arrested with significant amounts of drugs from coming back into society, for such large amounts of drugs are linked with violent crime and adverse economic effects, and therefore, they merit longer and more severe punishments from the government); *TURNER & BUNTING*, *supra* note 12, at 38–181 (surveying several cases involving large drug deals resulting in life without parole sentencing regardless of the minor roles of offenders). *But see* *People v. Crespo*, 734 N.Y.S.2d 316, 317 (App. Div. 2001) (finding that dealing drugs at the lowest level with no violence was not enough to cause the sentences to be consecutive).

221. *See supra* Part III.A.

violence is flawed.

#### IV. DEBUNKING VIOLENT DRUGS

Many media reports<sup>222</sup> and government accounts,<sup>223</sup> as well as cases<sup>224</sup> and statutes,<sup>225</sup> assert a causal link between drugs and violence.<sup>226</sup> The perception that drug use causes violent crime is not supported by the evidence,<sup>227</sup> and upon closer look the relationship appears to be very complicated.<sup>228</sup> There is no proof that drugs pharmacologically cause

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222. See, e.g., Michael Norman, *Our Towns*, N.Y. TIMES (July 12, 1984), <http://www.nytimes.com/1984/07/12/nyregion/our-towns.html> (covering the story of youths involved in a violent murder “motivated in part by a dispute over a drug theft”); *Teen-ager Indicted on L.I. in Ritual Slaying of Youth*, N.Y. TIMES (July 12, 1984), <http://www.nytimes.com/1984/07/12/nyregion/teen-ager-indicted-on-li-in-ritual-slaying-of-youth.html> (discussing teen who confessed to a violent murder due to a belief that the other youth had stolen PCP from him).

223. See, e.g., Attorney General Janet Reno, *Fighting Youth Violence: The Future Is Now*, CRIM. JUST., Summer 1996, at 30, 31 (“Drug abuse at any level has become one of the primary catalysts for youth violence. For many young offenders, drugs take away their sense of right and wrong, destroy their inhibitions against violence, and replace the process of growing and maturing with a dependency on dangerous and illegal substances. Moreover, drugs provide the fuel and the daily rationale for many of the violent gangs that lead young people into crime.”).

224. See *supra* Part III.A.

225. See *supra* Part III.B.

226. Margaret A. Zahn & Mark Bencivengo, *Violent Death: A Comparison Between Drug Users and Non-drug Users*, 1 ADDICTIVE DISEASES 283, 284 (1974) (finding that in Philadelphia in 1972, homicide was “the leading cause of death among drug users, higher even than deaths due to the adverse effects of drugs” and that drugs accounted for nearly 31 percent of homicides).

227. See, e.g., N. MORRIS & G. HAWKING, *THE HONEST POLITICIANS GUIDE TO CRIME CONTROL* 2–28 (1970), *reprinted in* 1 CRIME: CRITICAL CONCEPTS IN SOCIOLOGY 21, 24–27 (Philip Bean ed., 2003) (“[T]he evidence of a causal connection between drug use and crime is slight and suspect.”); Jan M. Chaiken & Marcia R. Chaiken, *Drugs and Predatory Crime*, 13 CRIME & JUST. 203, 216 (1990) (noting that several studies have shown that drug users are not more likely to commit predatory crimes).

228. Richard J. Gelles & Mary M. Cavanaugh, *Association Is Not Causation: Alcohol and Other Drugs Do Not Cause Violence*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 175, 180 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2d ed. 2005) (“The issue of a possible link between drug use and abuse and violence is emotion laden, and fact often is mixed with myth.”). There are various problems with the link between drugs and violence, including that (1) in most studies, all illicit drugs are grouped together, making it difficult to make an empirical “distinction between specific illicit drugs and violent behavior”; and (2) each drug has different pharmacological effects. *Id.* Furthermore, there is evidence against the link, including research showing that (1) “the higher the dose of marijuana, the lower the likelihood of violent behavior”; (2) hallucinogens, including LSD, may aggravate effects of preexisting psychopathy, but do not actually trigger violent behavior; (3) crime rates often affiliated with opiate use such as heroin may be linked to crimes to pay for the drugs rather than pharmacological effects; and (4) there appears to be a lack of evidence showing a causal relation between cocaine or crack to violence. *Id.* at 180–81 (citing Stuart P. Taylor & Kenneth E. Leonard, *Alcohol and Human Physical Aggression*, in 2 AGGRESSION: THEORETICAL AND EMPIRICAL REVIEWS 77, 85 (Russell G. Geen & Edward I. Donnerstein eds., 1983); UNDERSTANDING AND PREVENTING VIOLENCE 191–92 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993); Edward C. Senay, *Opioids: Methadone Maintenance*, in TEXTBOOK OF SUBSTANCE TREATMENT 271, 271 (Marc Galanter & Herbert D. Kleber eds., 2d ed. 1999); Michael M. Miller & Ronald T. Potter-Efron, *Aggression and*

violence.<sup>229</sup> Indeed, most drug offenders commit nonviolent offenses and at low rates.<sup>230</sup> Studies do not support the commonly held belief that drug use results in the user's involvement in predatory crime.<sup>231</sup> Though certainly drug addicts commit more crimes,<sup>232</sup> the connection between drugs and violent crime is complex and not conclusive.<sup>233</sup> In fact, empirical evidence that I collected with economist Frank McIntyre actually shows that drug defendants commit less violent crimes on pretrial release than any other group of defendants.<sup>234</sup>

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*Violence Associated with Substance Abuse, in AGGRESSION, FAMILY VIOLENCE AND CHEMICAL DEPENDENCY* 1, 9–10 (Ronald T. Potter-Efron & Patricia S. Potter-Efron eds., 1990).

229. Further, the drug trade itself does not necessarily cause violence, but aggressive police enforcement of drug laws may cause violence associated with drugs. Also, there is evidence that individuals who sell and use drugs do not commit violent crimes in order to maintain their drug habits, as I show with my own empirical evidence. However, there is a claim that *sometimes* a causal link exists between drugs and violence.

230. Chaiken & Chaiken, *supra* note 227, at 211.

231. *Id.* at 219 (“Further, continued criminality is more predictive of future drug use than is drug use predictive of criminality. Although over two-thirds of youthful users of drugs are likely to continue use as adults, as they approach their late teens and early twenties, half of juveniles who commit crimes stop.” (citation omitted)); Denise Kandel, Ora Simcha-Fagan & Mark Davies, *Risk Factors for Delinquency and Illicit Drug Use from Adolescence to Young Adulthood*, 16 J. DRUG ISSUES 67, 67–68 (1986) (“[A]mong adolescents who had participated both in delinquency and illicit drug use, delinquent activities preceded experimentation with illicit drugs in half the cases, with the other half evenly divided among young people who initiated both behaviors in the same year and those who initiated use prior to delinquency.” (citation omitted)).

232. Richard Dembo et al., *The Relationship Between Cocaine Use, Drug Sales, and Other Delinquency Among a Cohort of High-Risk Youths Over Time*, in NAT'L INST. ON DRUG ABUSE, RESEARCH MONOGRAPH 103—DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES 112, 112 (Mario De La Rosa, Elizabeth Y. Lambert & Bernard Gropper eds., 1990) [hereinafter DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES] (concluding that involvement in dealing drugs was largely related to violent and nonviolent crimes); W. David Watts & Loyd S. Wright, *The Drug Use-Violent Delinquency Link Among Adolescent Mexican-Americans*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra*, at 136, 151 (positing that for adolescents there is a relationship between illicit drug use and violence against persons and property).

233. James J. Collins, *Summary Thoughts about Drugs and Violence*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 265, 273 (“[T]he most appropriate conceptual model for understanding the drug and violence relationship is one that incorporates multiple factors including social, economic, and cultural variables.”); Javier Fernández-Montalvo, José J. López-Goñi & Alfonso Arteaga, *Violent Behaviors in Drug Addiction: Differential Profiles of Drug-Addicted Patients with and Without Violent Problems*, 27 J. INTERPERSONAL VIOLENCE 142, 144 (2012) (“Although there is some evidence about the influence of certain drugs in the development of violence behaviors, the connection between substance use and violent behavior is complex and is suggestive rather than conclusive.” (citation omitted)). See also Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 393–94 (1998) (comparing community violence among people with and without mental illness and summarizing that “[s]ubstance abuse symptoms significantly raised the rate of violence in both the patient and the comparison groups” (though seemingly grouping alcohol with drugs)).

234. See *supra* note 23 and *infra* Part IV.G.

## A. CONNECTION BETWEEN DRUGS AND VIOLENCE IS UNCLEAR

As an empirical matter, criminal activity—and violent crime particularly—is not an unavoidable consequence of drug use—nor is drug use necessarily a component of criminal activity.<sup>235</sup> Approximately half of federal prisoners incarcerated for drug offenses in 1992, for example, were low-level offenders.<sup>236</sup> They had only “one criminal history point or less, no weapons involvement, and no organizational or supervisory role in their offense.”<sup>237</sup> They were merely drug users.<sup>238</sup> By 2009, about four out of every five arrests stemming from a drug abuse violation was for possession or use.<sup>239</sup> This may help explain why the incarceration of drug users has failed to actually diminish drug abuse rates.<sup>240</sup> Further, crime rates have fallen and violent crime today is at its lowest point since the 1970s, while incarceration rates remain historically high.<sup>241</sup> Violence rates have remained stable, if not lowered, as drug use rates have increased. The empirical connection between drugs and violence is not strong, and at the very least is not clear. Figures 1–4 illustrate this point.<sup>242</sup>

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235. Arthur J. Lurigio & James A. Swartz, *The Nexus Between Drugs and Crime: Theory, Research, and Practice*, FED. PROBATION, June 1999, at 67, 69 (“The literature generally suggests that criminal activity is neither an inevitable consequence of illicit drug use (apart from the illegal nature of drug use itself) nor a necessary or sufficient condition for criminal behavior. Many illegal drug users commit no other kinds of crimes, and many persons who commit crimes never use illegal drugs. Furthermore, even when people commit crimes while using illegal drugs, there may not be a causal connection between the two.” (citation omitted)).

236. Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 CRIMINOLOGY & PUB. POL’Y 401, 404 (2004).

237. *Id.*

238. *Id.*

239. HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 234319, ARREST IN THE UNITED STATES, 1980–2009, at 12 (2011), available at <http://www.bjs.gov/content/pub/pdf/aus8009.pdf>.

240. See Harry Hermans, *War on Drugs*, DRUG TEXT (Apr. 7, 2010), <http://www.drugtext.org/International-national-drug-policy/war-on-drugs.html> (comparing the war on drugs to the failures of the prohibition era).

241. Ian Simpson, *Violent U.S. Crime Drops Again, Reaches 1970s Level: FBI*, REUTERS (Nov. 10, 2014), <http://www.reuters.com/article/2014/11/10/us-usa-crime-fbi-idUSKCN0IU1UM20141110>.

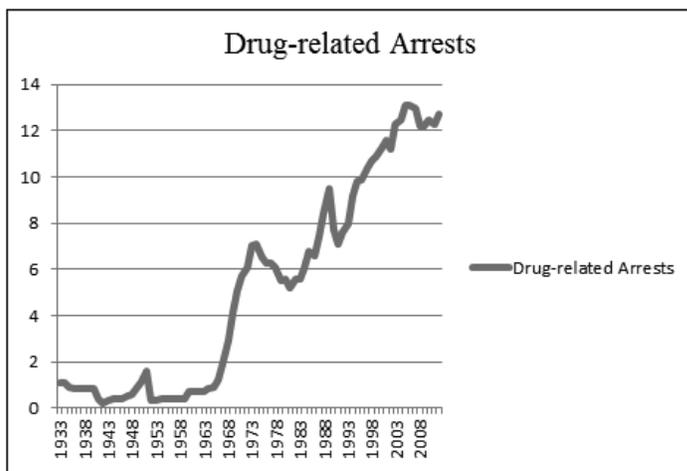
242. For drug-related arrests and violent crimes data, see *Uniform Crime Reports*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Jan. 18, 2014). For illicit drug use data, see generally SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2013), available at <http://media.samhsa.gov/data/NSDUH/2012SummNatFindDefTables/NationalFindings/NSDUHresults2012.pdf>.

FIGURE 1. National Survey on Drug Use (Current Illicit Drug Use—Percentage by U.S. Region)



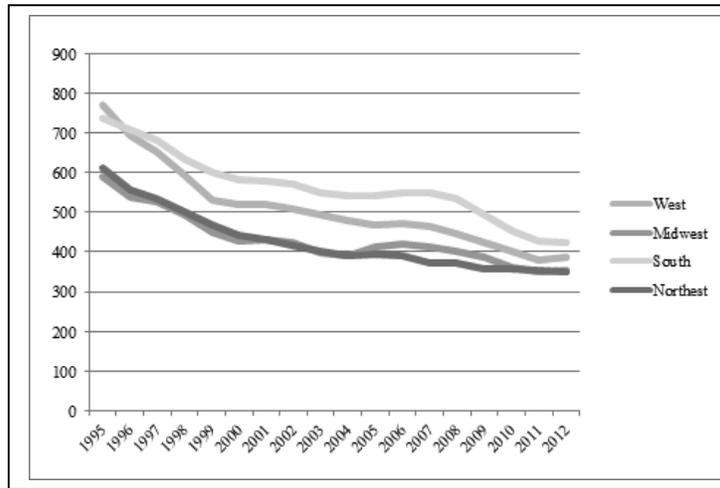
Source: *Uniform Crime Reports*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Jan. 18, 2014) (original dataset on file with author).

FIGURE 2. National Percentage of Drug-Related Arrests



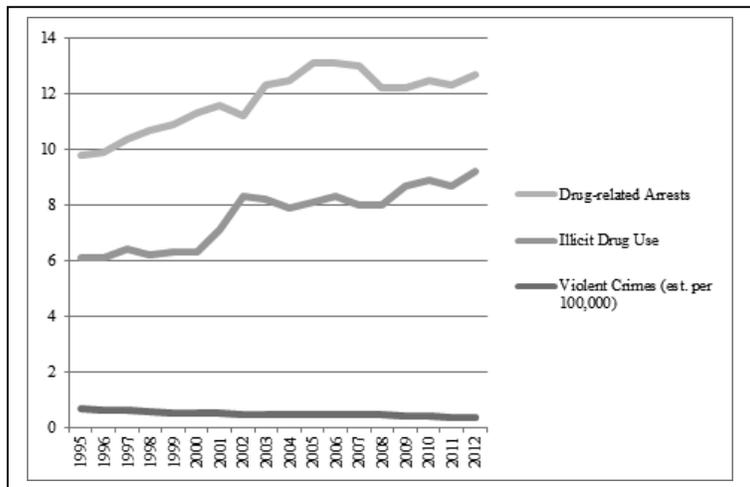
Source: *Uniform Crime Reports*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Jan. 18, 2014) (original dataset on file with author).

FIGURE 3. FBI Uniform Crime Reports—Violent Crimes Regionally (Per 100,000 inhabitants)



Source: *Uniform Crime Reports*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Jan. 18, 2014) (original dataset on file with author).

FIGURE 4. National Comparison of Drug-Related Arrests, Illicit Drug Use, and Violent Crimes (Percentages)



Source: *Uniform Crime Reports*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (last visited Jan. 18, 2014) (original dataset on file with author).

From the figures above, it is clear that in the period 1995–2012, drug use has slightly increased or stayed the same in all four regions of the United States.<sup>243</sup> Also, during this same period, drug arrests have increased,<sup>244</sup> while violent crime has steadily decreased.<sup>245</sup> By putting these first three datasets together, Figure 4 demonstrates that there may not be a relationship between drug-related arrests, drug use, and violent crime.<sup>246</sup> If the drug-violence connection existed, the figures should indicate that, as drug use increases, violent crime also increases; instead, Figure 4 shows a steady decline in violent crime over this period. Although it might be argued that the increase in drug arrests has caused the steady decline in violent crime, this assertion cannot be easily evaluated. At best, the arrest data is inconclusive on a drug-violence connection.<sup>247</sup>

#### B. EMPIRICAL ASSOCIATION OF DRUGS AND VIOLENCE

Although a proper study of the interrelatedness between illicit drug use and violence is difficult with the lack of national-level data linking drugs and violence, Paul Goldstein laid the theoretical foundation on this topic. In a much-cited article on drugs and violence, Goldstein asserts that drug use is related to violence in three ways.<sup>248</sup> These are the same three arguments that the media and politicians historically have used to support the drug-violence connection, as discussed in Part II above.<sup>249</sup> First, he suggests that some individuals demonstrate violent behavior as a result of ingesting drugs.<sup>250</sup> However, he admits that this cause of violence is “impossible to assess.”<sup>251</sup> Second, Goldstein proposes that drug use and violence are connected economically, in that drug users engage in crimes to support drug use.<sup>252</sup> However, here, he also admits that there is little data to demonstrate what violent economic crimes are committed for drug-related

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243. See FIGURE 1.

244. See FIGURE 2.

245. See FIGURE 3.

246. See FIGURE 4.

247. For a great discussion of an example of drugs not being tightly connected to violent crime, see generally FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2012). The New York City data in this book demonstrates that although drug overdoses remained stable, drug availability remained stable (or increased), drug prices declined, and crime—specifically drug crime—plummeted in New York City. *Id.* at x, 89–99, 191–93.

248. Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 15 J. DRUG ISSUES 493, 494–502 (1985) (admitting that rigorously collected data on this subject is lacking).

249. See *supra* Part II.

250. Goldstein, *supra* note 248, at 494 (discussing that under the “psychopharmacological model” drug users “may become excitable, irrational, and may exhibit violent behavior”).

251. *Id.* at 496.

252. *Id.* (noting “robbery, in order to support costly drug use,” as one example).

reasons.<sup>253</sup> Finally, he asserts that drug use and violence are linked due to the “traditionally aggressive patterns” involved in the distribution and use of drugs, or essentially that the drug trade tends to be violent.<sup>254</sup> Goldstein’s work formed a theoretical foundation for the drug-violence link, but it was nothing new: it echoed what the media and politicians had been reporting in support of drug prohibitions since the early twentieth century.

Goldstein’s framework addressed pharmacological effects of drug use, the systemic effects of drug distribution, and the economic connection between drugs and violent acts in supporting drug use.<sup>255</sup> Since his initial work on the subject was published, many researchers have made attempts to prove or disprove a causal link between drug use and violence.<sup>256</sup> No researchers have been able to prove that drugs have a direct influence on the use of violence, though there is some limited support for a correlation between or common causes underlying drug use and violent behavior.<sup>257</sup> This limited success is not for a lack of trying, as many researchers have attempted to disentangle the relationship between drugs and violence.<sup>258</sup> In

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253. *Id.*

254. *Id.* at 497.

255. *Id.* at 494–502.

256. *See infra* notes 258–271.

257. *See, e.g.,* AMANDA ATKINSON ET AL., CTR. FOR PUB. HEALTH, LIVERPOOL JOHN MOORES UNIV., WORLD HEALTH ORG. COLLABORATING CTR. FOR VIOLENCE PREVENTION, INTERPERSONAL VIOLENCE AND ILLICIT DRUG USE 1, 3–5 (2009), available at <http://www.cph.org.uk/wp-content/uploads/2012/08/interpersonal-violence-and-illicit-drugs.pdf> (discussing studies performed worldwide which have shown a strong correlation between drug use and the perpetration of violence and which confirm Goldstein’s theory that the nature of illegal drug markets increases the use of violence); Goldstein, *supra* note 96, at 22–23 (citing localized studies performed in Philadelphia, Michigan, East Harlem, Miami, Baltimore, New York City, and Washington D.C. that support the drug-violence connection); Hattie Rутtenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1898–99 (1994) (“Although the extent of the connection between youth violence and these two categories [pharmacological and financial] of heightened risk is unclear, the connection itself is undeniable.”); Helene Raskin White et al., *Developmental Associations Between Substance Use and Violence*, 11 DEV. & PSYCHOPATHOLOGY 785, 799 (1999) (“Although we believe that our findings do not support a causal association between drug use and violence, they also do not support a spurious, common cause model. That is, the relationships remained strong even when common risk factors were controlled. Therefore, there is a relationship between drug use and violence that transcends their common risk factors.”).

258. *See* Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 756 (2000) (stating that the final report of a task force established to study the drug-violence nexus “concluded that drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting the drug laws”); Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, HEALTH AFFAIRS, Winter 1993, at 65, 75 (finding that despite the accumulating evidence on the validity of the drugs-violence relationship, persistent difficulty in establishing causal linkages remains); Michelle Torok et al., *Conduct Disorder as a Risk*

fact, researchers have found that although there is a link between drug use and violence, it is a rather weak and attenuated one.<sup>259</sup> To properly examine the three arguments Goldstein made requires three separate careful analyses. Certainly there is separate literature that determines whether and which drugs cause violent behavior in individual defendants, whether drug users commit crimes to obtain drug money, and which users do this most often. It is a wholly different question to unpack how illegal markets, like drugs, impact violent crime. This Article examines whether any of these arguments are supported by the social science data in a brief manner, but all three of these questions should be explored further by other researchers.

There is no solid empirical support for a direct relationship between drugs and violence, but because the data on this topic contradicts common perception, it is slighted.<sup>260</sup> Indeed, scholars have adopted a wide variety of positions on the topic,<sup>261</sup> including that drugs cause violent behavior;<sup>262</sup> that

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*Factor for Violent Victimization and Offending Among Regular Illicit Drug Users*, 41 J. DRUG ISSUES 25, 25–26 (2011) (“Despite the available evidence, little is actually known about the causal mechanisms associating substance use and violence.”).

259. See, e.g., Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 294 (1998) (“In general, little evidence suggests that illicit drugs are uniquely associated with the occurrence of violent crime.”); White et al., *supra* note 257, at 786 (“It remains to be demonstrated [whether individual, family, or environmental circumstances] and other factors are ‘necessary’ causes for both substance use and violence and whether the relationship between substance use and violence is weakened when these risk factors are controlled.”); Eric J. Workowski, *Criminal Violence and Drug Use: An Exploratory Study Among Substance Abusers in Residential Treatment*, 37 J. OFFENDER REHABILITATION 109, 118 (2003) (“These findings reveal a weak relationship between substance abuse and violence among this addict population and, clearly, not all addicts are violent. In fact, most of this population is not.”).

260. See, e.g., ATKINSON ET AL., *supra* note 257, at 1 (stating that violence and illicit drug use are strongly linked; however, whether the relationship is an association or causal is still debated); Francisco E. Thoumi, *The Relationship Between Illegal Drugs and Violence: Is There a Cause and Effect?*, 5 PORTAL: LLILAS ANN. REV. 38, 38 (2010), available at <http://lanic.utexas.edu/project/etext/llilas/portal/portal109/portal109.pdf> (“The empirical evidence shows clearly that there is no direct ‘cause and effect’ relationship between drugs and violence.”).

261. For an overview of the four explanatory models for the relationship between violence and drug use, see Helene Raskin White, *Alcohol, Illicit Drugs, and Violence*, in HANDBOOK OF ANTISOCIAL BEHAVIOR 511, 512–13 (David M. Stoff et al. eds., 1997) (describing the paradigms that “substance use causes violent behavior,” “violence leads to drug use,” “the relationship is reciprocal,” and “the relationship is spurious”).

262. See, e.g., Chaiken & Chaiken, *supra* note 227, at 235 (“[T]here is strong evidence that predatory offenders who persistently and frequently use large amounts of multiple types of drugs commit crimes at significantly higher rates over longer periods than do less drug-involved offenders . . . .”); James J. Collins, *The Relationship of Problem Drinking to Individual Offending Sequences*, in 2 CRIMINAL CAREERS AND “CAREER CRIMINALS” 89, 110–11 (Alfred Blumstein et al. eds., 1986) (finding an empirical association between problem drinking and the development of criminal behavior); James J. Collins, Robert L. Hubbard & J. Valley Rachal, *Expensive Drug Use and Illegal Income: A Test of Explanatory Hypotheses*, 23 CRIMINOLOGY 743, 743–44 (1985) (“[A] strong relationship exists between an expensive drug habit and income-generating crime. . . . Frequent use of

drugs do not lead to violent behavior;<sup>263</sup> that violence leads to substance abuse and the relationship is reciprocal (drug use causes violence and violence causes drug use);<sup>264</sup> and that the relationship is coincidental and has common causes.<sup>265</sup> It may be that violent people are attracted to drugs, for instance.<sup>266</sup> However, the link between drugs and violence is complicated and the studies do not support any clear links.<sup>267</sup> Thus, the studies cannot support the claim that drug use causes criminally violent behavior.<sup>268</sup> A new study reveals empirical evidence that there are actually very few injuries that occur during drug crimes.<sup>269</sup> And indeed some have

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expensive drugs such as heroin or cocaine logically implies the need to supplement income by illegal means.”); Goldstein, *supra* note 248, at 503 (finding that substance abuse leads to violence).

263. E.g., Gelles & Cavanaugh, *supra* note 228, at 177 (“[T]here is little scientific evidence to support the theory that alcohol and drugs such as cocaine and crack have chemical and pharmacological properties that directly produce violent and abusive behavior.”).

264. See, e.g., Edward J. Khantzian, *The Self-Medication Hypothesis of Addictive Disorders: Focus on Heroin and Cocaine Dependence*, 142 AM. J. PSYCHIATRY 1259, 1262 (1985) (explaining that the relationship between drugs and violence is reciprocal); White et al., *supra* note 257, at 785 (finding “more support for a reciprocal than for a unidirectional association between substance use and violence”).

265. Jeffrey Fagan & Ko-lin Chin, *Violence as Regulation and Social Control in the Distribution of Crack*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 8, 24 (“The empirical evidence of causal directions between drug involvement and violence consistently has yielded contradictory results. . . . [and therefore has] uncertain causal mechanisms . . . .” (citation omitted)); D. M. Gorman & Helene Raskin White, *You Can Choose Your Friends, But Do They Choose Your Crime? Implications of Differential Association Theories for Crime Prevention Policy*, in CRIME AND PUBLIC POLICY: PUTTING THEORY TO WORK 131, 148–49 (Hugh D. Barlow ed., 1995) (finding the relationship between drugs and delinquency in adolescence is coincidental and has common causes); Susan P. Stuart, *A New Sheriff in Town: Armistice in the War on Drugs and Students’ Civil Rights*, 13 FLA. COASTAL L. REV. 335, 358–59 (2012) (“Perhaps the best that can be said is that adolescent drug use and violence are ‘mutually reinforcing.’”); White, *supra* note 261, at 519 (“[D]ata . . . indicate that substance use and violence are related both causally and spuriously.”).

266. White et al., *supra* note 257, at 786.

267. Gelles & Cavanaugh, *supra* note 228, at 188 (“The relationship between substance abuse and violence is complex and mediated by a myriad of individual, situational, and social factors.”); Peter N.S. Hoaken & Sherry H. Stewart, *Drugs of Abuse and the Elicitation of Human Aggressive Behavior*, 28 ADDICTIVE BEHAV. 1533, 1547 (2003) (“The one thing that can be said unequivocally about the drug-aggression relationship: We do not know enough about it.”); Parker & Auerhahn, *supra* note 259, at 291 (“[D]espite a number of published statements to the contrary, we find no significant evidence suggesting that drug use is associated with violence.”). See also Avelardo Valdez, Charles D. Kaplan & Alice Cepeda, *The Drugs-Violence Nexus Among Mexican-American Gang Members*, 38 J. PSYCHOACTIVE DRUGS 109, 120 (2006) (“While drugs therefore can be said to have an influence on violence, the study also concludes that they cannot be viewed in isolation.”).

268. See David Boaz, *A Drug-Free America—or A Free America?*, 24 U.C. DAVIS L. REV. 617, 629 (1991) (“Drug use does not cause violence.”); Lurigio & Swartz, *supra* note 235, at 68–69 (summarizing the research about the connection between drug use and crime and finding that “[t]he literature generally suggests that criminal activity is neither an inevitable consequence of illicit drug use (apart from the illegal nature of drug use itself) nor a necessary or sufficient condition for criminal behavior”); *supra* note 263 and accompanying text.

269. Evan Tsen Lee, Lynn A. Addington & Stephen D. Rushin, *Which Felonies Pose a “Serious*

recognized that the media and political figures are responsible for the perception of a strong link between drugs and violence.<sup>270</sup> This is the case when considering both violence in the drug distribution system, and the pharmacological link between drugs and violence.

For instance, there is very little research considering how drugs are actually related to violent crime, like murder for instance.<sup>271</sup> One study of over a hundred drug-related homicide cases found that the relationship between drugs and homicide was complex and identified ten different types of drug-related homicide.<sup>272</sup> In some studies where drugs were used during a violent crime, the crimes were systemic rather than related to the use of drugs.<sup>273</sup> Another study demonstrated that drug users were actually more likely to exhibit *less* violent criminal behavior after using drugs.<sup>274</sup> Other studies showed that it may not be obvious whether prohibiting alcohol and drugs reduces or increases violence<sup>275</sup> and that, at a minimum, prohibition

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*Potential Risk of Injury” for Federal Sentencing Purposes?*, 26 FED. SENT’G REP. 116, 119 tbl.1 (2013) (demonstrating that drug felonies result in very few injuries compared to other felonies).

270. James A. Inciardi, *The Crack-Violence Connection Within a Population of Hard-Core Adolescent Offenders*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 92, 105 (“[M]uch of the current focus on crack-related violence may be more the result of a media event than an emergent trend.”); Joan Moore, *Gangs, Drugs, and Violence*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 160, 161 (“Together, the police and media help create what one author calls ‘moral panics.’ Moral panics usually center on fears and outrage about the behavior of the young—and, in our country, especially about the behavior of poor and racially distinctive young men.” (citations omitted)); Parker & Auerhahn, *supra* note 259, at 292 (“In addition to the mostly misguided attention in mass media and in political circles to the relationship between illegal drugs and violence, a number of empirical studies have attempted to disentangle the associations between alcohol, drugs, and violence.”).

271. Henry H. Brownstein & Paul J. Goldstein, *A Typology of Drug-Related Homicides*, in DRUGS, CRIME AND THE CRIMINAL JUSTICE SYSTEM 171, 173–75 (Ralph Weisheit ed., 1990) (“[E]fforts to identify types of drug-related homicide have been limited by their focus of study.”).

272. *Id.* at 177–86, 188 (suggesting that multifaceted strategies are needed to appropriately understand the problem of drug related homicide, as sometimes homicide may be related to ingestion of drugs, sometimes the killing is incidental to drugs, sometimes the killing is related to the illicit drug market, and other times there are many reasons).

273. Parker & Auerhahn, *supra* note 259, at 305 (discussing a study in which although close to 90 percent of drug-related homicides in the sample group involved some form of cocaine, most (74.3 percent) were classified as systemic).

274. Duane C. McBride, *Drugs and Violence*, in THE DRUGS-CRIME CONNECTION 105, 119 (James A. Inciardi ed., 1981) (“[A]fter the initiation of drug use, the user is likely to reduce violent crimes . . .”).

275. Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL’Y REV. 293, 350–51 (2009) (“Despite drug use among persons arrested for other criminal activity, however, drug policy reform advocates stress that: (1) most research testing the drugs-cause-crimes argument actually implies that there is only a loose connection between drug use and criminal activity, if there is one at all; and (2) substantial research also demonstrates that much (most) of the so-called drug-related violence actually results from the systemic factors arising because of drug prohibition, not from drug use itself.” (citations omitted)) See also David W. Rasmussen & Bruce L.

of drugs does not reduce violence.<sup>276</sup> A final study illustrated that the violence associated with drugs has more to do with conflict among groups of people than with the drug trade itself.<sup>277</sup>

Even in the area of drug trafficking, in which courts assume a strong link to violence, research shows that there is actually not as much violence as is perceived.<sup>278</sup> In addition, to the extent drug trafficking is associated with violence, it may have little to do with the drugs and more to do with the illicit nature of the trade, as illicit markets in general are more prone to violence.<sup>279</sup> Those who have studied this violence have shown it is targeted and selective rather than random or gratuitous,<sup>280</sup> and sometimes it is actually associated with crackdowns on the drug market by police.<sup>281</sup>

Overall, the drug-violence link is at the very least over-exaggerated and lacks reliable empirical support.

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Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 710 n.123 (2003) (discussing a study which found “no important relationships between drug use and violence, but as drug enforcement increases, violent crime also increases”).

276. Jeffrey A. Miron, *Violence and the U.S. Prohibitions of Drugs and Alcohol*, 1 AM. L. & ECON. REV. 78, 79 (1999) (arguing that increased homicide rates over the past one hundred years are due in part to the influence of prohibition enforcement). Miron asserts that “[a]ssuming the estimated relation is causal, the estimates . . . suggest the homicide rate is currently [25 percent to 75 percent] higher than it would be in the absence of drug prohibition.” *Id.* As he notes, such “evidence fails to make a prima facie case that such prohibitions reduce violence by reducing alcohol or drug consumption . . .” *Id.* at 109. See also John T. Schuler & Arthur McBride, *Notes from the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893, 901–03 (1990) (“The violence related to illegal drug trafficking is an inescapable consequence of prohibition.”).

277. See Moore, *supra* note 270, at 171 (finding that gang-related violence is more frequently related to conflicts within the gang than to drug trade functions).

278. Peter Andreas & Joel Wallman, *Illicit Markets and Violence: What Is the Relationship?*, 52 CRIME L. & SOC. CHANGE 225, 226–27 (2009) (discussing selection bias in the association of violence and drug markets, given that episodes of violence draw the most attention—for example, that the violent drug trade in Columbia receives more focus than the trade in Bolivia, a country with a higher drug trade per capita but less violence; noting that high violence in U.S. drug markets is often a topic of discussion while the lower violence in Japanese drug markets is seldom discussed). See also DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 20–58 (1992) (noting that in Japan there is evidence that organized criminals who run the drug trade try to avoid violent confrontation).

279. Andreas & Wallman, *supra* note 278, at 225–26 (“Moreover, violence deployed for economic end, as well as to redress violations of the moral order, is more common among groups of people whose social status limits their access to legal resources, and it is such lower-status groups from which illicit markets disproportionately recruit their participants.”).

280. *Id.* at 227.

281. *Id.* at 227–28 (explaining that high-profile crackdowns often fuel the violence rather than stifle it and that many times it causes violence to spike); Reuter, *supra* note 129, at 281–82 (noting that violence associated with U.S. crack markets in the late 1980s may be attributable to the replacement of incarcerated adult drug sellers by younger men, who are less likely to consider the future consequences of their behavior and may be more prone to violence).

## C. BLAMING DRUGS FOR OTHER CAUSES OF VIOLENCE

Several studies that connect drugs and violence may be missing the true causes of violence, which are often unrelated to drugs. Crime participation is weakly related to drug use and is more often linked to underlying factors like “irregular employment or weak attachment to school or parents.”<sup>282</sup> Even among youth in whom the drug-violence connection is perceived to be strong, researchers have shown that link is often spurious and may be based on the age of the individual<sup>283</sup> or associated with other problems like delinquency.<sup>284</sup> Even a few judges have recognized these multifaceted reasons for violence, including: money,<sup>285</sup> family violence, employment problems, and other environmental issues.<sup>286</sup> For instance, in a study of drugs conducted with rats, researchers found that the rats that kept pressing a lever for cocaine were the ones “raised in solitary environments with no other options.”<sup>287</sup> Those who were living in a more enriched environment—with other rats to play with and access to sweets—stopped pressing the lever.<sup>288</sup> Researchers concluded that the addictiveness of crack cocaine had more to do with environmental

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282. Chaiken & Chaiken, *supra* note 227, at 234 (citing the underlying causative factors of drug use and crime as “irregular employment or weak attachment to school or parents”). See ATKINSON ET AL., *supra* note 257, at 6–9 (describing a number of shared risk factors for illegal drug use and violence, including individual-, relationship-, community-, and societal-level factors).

283. Scott Menard, Sharon Mihalic & David Huizinga, *Drugs and Crime Revisited*, 18 JUST. Q. 269, 295 (2001) (concluding that the drug-crime nexus is different depending on ages and levels of involvement in illicit drug use and crime, and finding a closer relationship between illicit drugs and crime in younger age groups). *But see* Steven L. Brody, *Violence Associated with Acute Cocaine Use in Patients Admitted to a Medical Emergency Department*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 44, 55 (“The association of acute cocaine intoxication and violent behavior appears to be primarily related to a state of intense cocaine intoxication. Several potential neurotransmitter mechanisms may link cocaine with violent and aggressive behavior.”).

284. Phyllis Ellickson, Hilary Saner & Kimberly A. McGuigan, *Profiles of Violent Youth: Substance Use and Other Concurrent Problems*, 87 AM. J. PUB. HEALTH 985, 987–88, tbl.3 (1997) (assessing that the drugs and violence nexus among adolescents may be spurious and is often associated with other concurrent problems such as poor mental health, school dropout, and delinquency); White et al., *supra* note 257, at 786 (suggesting that violent persons are attracted to the illegal drug market rather than that the drug market causes people to become violent).

285. See, e.g., *Young v. County of Cook*, 616 F. Supp. 2d 834, 838, 846–47 (N.D. Ill. 2009) (finding that possession of money by a detainee could lead to violence in jail).

286. *United States v. Caro*, 597 F.3d 608, 641 (4th Cir. 2010) (Gregory, J., dissenting) (stating that a drug offense is only one of many factors, including family conflict, poverty, community disorganization, and others, deemed to be “associated with violence”).

287. John Tierney, *The Rational Choices of Crack Addicts*, N.Y. TIMES (Sept. 16, 2013), <http://www.nytimes.com/2013/09/17/science/the-rational-choices-of-crack-addicts.html>.

288. *Id.*

conditions than the actual influence of the drug.<sup>289</sup> Extrapolating these results to humans, it seems that blaming drugs for an individual's violent behavior may not be fair when there are likely many other factors at play. Thus, it is possible that an important factor in the drug-violence link may be the environment of the individual, not drugs themselves.

Indeed, studies have pointed out that violence may arise out of economic hardship, poor intellectual capacity,<sup>290</sup> an individual's aggressive temperament,<sup>291</sup> or other personality disorders,<sup>292</sup> which has little to do with drug abuse.<sup>293</sup> Indeed, a study that separated the effects of drug use from a personality disorder determined that the disorder was more likely to

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289. *Id.* But see Fox Butterfield, *Drop in Homicide Rate Linked to Crack's Decline*, N.Y. TIMES (Oct. 27, 1997), <http://www.nytimes.com/1997/10/27/us/drop-in-homicide-rate-linked-to-crack-s-decline.html> (describing a U.S. Department of Justice report suggesting that "the close link between crack and homicide may be a fundamental dynamic that explains why homicide rates have declined" in many U.S. cities).

290. See Karen M. Abram & Linda A. Teplin, *Drug Disorder, Mental Illness, and Violence*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 222, 222–23, 231 ("Poor education was a very strong predictor of both past and future violent arrest. Poor intellectual ability has consistently been found to be predictive of violence.").

291. Torok et al., *supra* note 258, at 27–28 (finding that a history of childhood Conduct Disorder ("CD")—a childhood disorder diagnosed via "mild antisocial behaviors such as truancy, lying, and shoplifting, to serious criminal behaviors such as physical assault, arson and sexual assault"—was associated with an increased lifetime and past [twelve] month risk of violent" offending of drug users and a predictor of both substance misuse and violent criminal behavior; noting that "[t]he significant temporal stability between childhood conduct disorder and later violent behavior among this sample highlights that drug users' risk of violence is not strictly dependent upon their drug use, but that individual psychopathology also moderates the risk of becoming a victim and offender of violence"). "It is estimated that between [40 percent to 80 percent] of drug users have been diagnosed with a childhood history of CD." *Id.* at 27 (citations omitted). Another study analyzed violent behaviors found in drug addicts using a sample of 252 patients. Fernández-Montalvo, López-Goñi & Arteaga, *supra* note 233, at 145. This study concluded that 39.68 percent of the sample group exhibited violent behaviors. *Id.* at 147. However, it also found significant differences between those people who were associated with violence and those who were not. *Id.* For example, those exhibiting violence were younger and more likely to have reported being victims of abuse. *Id.* Also, they were more likely to have overdosed at some time, exhibiting more severe addiction. *Id.*

292. Abram & Teplin, *supra* note 290, at 232–33 (explaining that individuals with drug or alcohol problems who did not suffer from antisocial personality disorder were less likely to be involved in violent crimes than individuals with personality disorders, regardless of whether they had drug use problems, and concluding that having a substance abuse problem does not necessarily create a higher likelihood of committing violent crimes); Hoaken & Stewart, *supra* note 267, at 1533 (finding that studies concerning various other drugs—including benzodiazepines, opiates, psychostimulants, and PCP—suggest that the importance of personality factors may be equal to or greater than that of pharmacological factors); Torok et al., *supra* note 258, at 26–27 ("Given the equivalence of their drug use histories, it appears that the presence of a personality disorder does to some extent affect both the likelihood of committing violence, and the nature of violence committed, comorbidly with other factors directly related to drug use.").

293. White, *supra* note 261, at 520 ("[M]ost crimes result from a variety of factors. Even when drugs are a cause, they are likely to be one among many causes." (citation omitted)).

cause violent crimes than the drug use.<sup>294</sup>

As it turns out, research demonstrates that violence related to drugs may stem more from environment, personality, or age than from the drugs themselves.

#### D. SOME DRUGS ARE LINKED TO VIOLENCE. OTHERS ARE NOT.

Pharmacologically, as well as intuitively, some drugs can make an individual more violent, and others have the opposite effect.<sup>295</sup> While certainly some drugs have been linked to aggressive and violent behavior,<sup>296</sup> other drugs may be linked to the likelihood of violence during withdrawal,<sup>297</sup> and others are not associated with violence.<sup>298</sup> Indeed, one study directly suggests that asking whether drugs in general are linked to violence is a mistaken approach; rather, the researchers suggest that drugs must be considered individually to determine their level of effect.<sup>299</sup> Interestingly, studies show that many legal drugs, including antidepressants, ADHD drugs, and anti-smoking medications, are all disproportionately linked with violent behavior.<sup>300</sup> Also, a link between alcohol and violence is much more supported by the data than a link between drugs and violence.<sup>301</sup> And studies demonstrate that alcohol is a

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294. Abram & Teplin, *supra* note 290, at 232–33.

295. See Parker & Auerhahn, *supra* note 259, at 293–98. There are difficulties with making empirical distinctions between the association of particular illicit drug use and violent behavior because studies usually group all illicit drugs together and discuss the use of various drugs individually. *Id.* at 293, 295. For example, some drugs, such as amphetamines and cocaine, have a slight influence on violent behavior, while other drugs, such as heroin and PCP, do not. *Id.* at 293–98. Additionally, marijuana is generally classified as producing a euphoric feeling as opposed to violent tendencies. Gelles & Cavanaugh, *supra* note 228, at 181.

296. ATKINSON ET AL., *supra* note 257, at 1–3 (summarizing studies demonstrating links between illicit drug use and violence). See generally Valdez, Kaplan & Cepeda, *supra* note 267 (concluding that “drug use, specifically cocaine and heroin, interacts with an individual gang member’s risk for violence to affect violent behavior outcomes”).

297. See ATKINSON ET AL., *supra* note 257, at 5 (referencing studies suggesting that withdrawal after long-term use is associated with aggression).

298. See, e.g., Gelles & Cavanaugh, *supra* note 228, at 181 (finding that marijuana, rather than having an impact on a person’s violent behavior, gives users a euphoric feeling and may “reduce the potential for violent behavior”).

299. Parker & Auerhahn, *supra* note 259, at 293–98 (discussing various studies that have found that some drugs, such as amphetamines and cocaine, have a slight influence on violent behavior while other drugs, such as heroin and PCP, do not).

300. E.g., Thomas J. Moore, Joseph Glenmullen & Curt D. Furberg, *Prescription Drugs Associated with Reports of Violence*, 5 PLOS ONE 1, 2–3 (2010), available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0015337>.

301. See James J. Collins, *The Relationship of Problem Drinking to Individual Offending Sequences*, in 2 CRIMINAL CAREERS AND “CAREER CRIMINALS” 89, 110–11 (Alfred Blumstein et al. eds., 1986) (finding an empirical association between problem drinking and the development of

much bigger risk factor than drugs for violence,<sup>302</sup> and even that drug use in the presence of alcohol mitigated the violent effects of the alcohol.<sup>303</sup> Moreover, there are other legal activities linked to delinquency, including tobacco use, which is more significantly related to crime than alcohol or drugs.<sup>304</sup>

Overall, the majority of illegal drug users do not become addicted, and the vast majority never harm themselves or others.<sup>305</sup> There is even evidence that crack cocaine—which according to a recent study is connected with violence<sup>306</sup>—is not as closely linked to violent crime as some have assumed.<sup>307</sup> For example, “[i]n 2000, almost three-quarters

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criminal behavior); Mario De La Rosa, Elizabeth Y. Lambert & Bernard Gropper, *Introduction: Exploring the Substance Abuse-Violence Connection*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 1, 2 (“From research spanning the late 1960s to today, the primary substance implicated in violent crimes has been alcohol, far more often than illicit drugs. Alcohol abuse and violence are endemic to America’s culture, dating back to the days of Prohibition, with violent rivalries between bootleggers, and existing as intensely today, with high rates of alcohol-mediated domestic violence, homicides, vehicular accidents, and traumatic injuries.”); Jerry P. Flanzer, *Alcohol and Other Drugs Are Key Causal Agents of Violence*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 228, at 163, 163–64, 171–72 (finding that the connection between alcohol use and family violence is strong); Hoaken & Stewart, *supra* note 267, at 1547 (“First, the drug we know to be most likely to induce aggressive behavior is not only readily and legally available, it is often sold by the state for profit.”); Watts & Wright, *supra* note 232, at 156 (“The findings that alcohol, marijuana, and tobacco use contribute to both illegal drug use and violent delinquency is instructive.”). *See generally* DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR (James J. Collins, Jr. ed., 1981) (exploring the relationship between alcohol and violence within various contexts). For purposes of this paper, alcohol is not considered a drug, but treated separately. *See supra* note 8.

302. Brenda A. Miller, *The Interrelationships Between Alcohol and Drugs and Family Violence*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES, *supra* note 232, at 177, 178 (focusing part of a study on male parolees and their spouses to show that alcohol abuse is a greater risk factor for violence than is illicit drug abuse).

303. *Id.* at 185 (finding that alcohol abuse in the absence of drug abuse heightened risks of spousal abuse among parolees, but that when drug abuse was present, alcohol abuse decreased violence). “Combined alcohol and drug abuse may produce a situation in which the individual is incapable of responding aggressively.” *Id.* at 187. Additionally, this study indicates that child abuse is more likely connected to alcohol rather than drug use. *Id.* at 195.

304. *See, e.g.*, Parker & Auerhahn, *supra* note 259, at 304 (“[T]hese researchers found that tobacco use was significantly related to violent delinquency, while the use of alcohol and illicit drugs was not found to be so related.”); Watts & Wright, *supra* note 232, at 152 (“Apart from possible psychobiological effects of tobacco use on young people’s orientation to violent delinquency, tobacco products are the most readily available form of psychopharmacologically active drugs in our society.”).

305. JACOB SULLUM, SAYING YES: IN DEFENSE OF DRUG USE 23 (2003).

306. Felix Henrique Paim Kessler et al., *Crack Users Show High Rates of Antisocial Personality Disorder, Engagement in Illegal Activities and Other Psychosocial Problems*, 21 AM. J. ON ADDICTIONS 370, 378 (2012) (corroborating findings of other studies showing an “association between crack/cocaine, violence, and legal problems”).

307. *See* U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 92 (2002), available at

(74.5%) of federal crack cocaine offenders had no weapon involvement,” and, “[e]ven when weapons were present, rarely were they actively used (2.3% of crack cocaine offenders).”<sup>308</sup> There is also data showing that crack cocaine and even methamphetamines are not as addictive as once believed, as 80 to 90 percent of people who use these drugs do not become addicted.<sup>309</sup>

At the very least, different drugs must be treated individually as they do not have the same relationship with violent behavior.<sup>310</sup> The federal sentencing guidelines and courts do not disentangle the violent tendencies of individual drugs, but rather simply make the assumption that drugs are linked to violent behavior. If drug policy is based on the assumption that drugs cause violence, at the very least policy makers should carefully consider which drugs actually cause violent behavior and which do not.

#### E. DRUG DEFENDANTS ARE NOT NECESSARILY VIOLENT

Only a small percentage of drug defendants commit violent crimes. There are certainly statistics supporting the fact that individuals under the influence of drugs commit crime,<sup>311</sup> and drug users are more likely than

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[http://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](http://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) (“Anecdotal evidence and Commission sentencing data indicate, however, that the violence [Congress initially perceived to be associated with crack cocaine] has abated considerably.”). *But see* Tom Mieczkowski, *The Operational Styles of Crack Houses in Detroit*, in *DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES*, *supra* note 232, at 60, 89–90 (“This violence comes from multiple sources, but some prominent ones appear to be the businesslike operations of crack distribution, the personal disorganization that surrounds and characterizes the crack-consuming environment, and the distortions of character that crack users describe as often accompanying significant binges of crack consumption. Distributors use violence to control situations. Violence is most prominently used for security at the point of retail sale, to periodically resolve conflicts with rivals, and to discipline employees when necessary. Insofar as it is described by this group of informants, crack as a social phenomenon is tied to violent and abusive behavior.”).

However, it may be the case that consumption of crack has also abated considerably. *Cocaine: What is the Scope of Cocaine Use in the United States?*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/research-reports/cocaine/what-scope-cocaine-use-in-united-states> (last updated Sept. 2010) (“The National Survey on Drug Use and Health . . . estimates that in 2008 there were 1.9 million current (past-month) cocaine users, of which approximately 359,000 were current crack users.”).

308. U.S. SENTENCING COMM’N, *supra* note 307, at 91 (emphasis removed).

309. Tierney, *supra* note 287.

310. Parker & Auerhahn, *supra* note 259, at 293, 295–98 (surveying literature on the relationship between specific illicit drugs and violence, and concluding that evidence of a link between various illicit drugs and violence is absent; indeed, “[a]t best, we can characterize the available results as inconclusive”).

311. *See, e.g.*, HOME OFFICE, HOME OFFICE STATISTICAL BULLETIN: CRIME IN ENGLAND AND WALES 2007/08 86 tbl.3.10 (Chris Kershaw et al. eds., 2008) (showing victims of violent crime

non-drug users to be involved in violence both as perpetrators and victims.<sup>312</sup> However, only a small percentage of those committing violent crimes were under the influence of drugs at the time.<sup>313</sup> Indeed, as Donald Dripps points out, “[a]n estimated 5 percent of the U.S. population uses illegal drugs every year. . . . [and] the U.S. prison population has swelled to 1 percent of the population.”<sup>314</sup> Most of these users “can—and do—refrain from extrinsic crime.”<sup>315</sup>

Strict drug crime policies purport to protect citizens from drug-related violence.<sup>316</sup> Yet, most inmates incarcerated for drug offenses do not have a violent record.<sup>317</sup> A 2004 study of state and federal inmates revealed that 22.4 percent of state drug offenders had a prior violent conviction, while 16.3 percent of state inmates reported that all prior sentences were drug offenses,<sup>318</sup> demonstrating that almost the same number of drug defendants had prior violent offenses as prior drug offenses. A 1997 survey of prisoners also indicated “only 12% of federal and 24% of state drug offenders were ever convicted of a violent” crime.<sup>319</sup> It is thus not

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believed the offender to be under the influence of drugs in 19 percent of cases); Arielle Baskin-Sommers & Ira Sommers, *Methamphetamine Use and Violence Among Young Adults*, 34 J. CRIM. JUST. 661, 669 (2006) (discussing the results of a study finding that nearly 35 percent of methamphetamine users between eighteen and twenty-five years of age had committed violence while under the influence of the drug). See also *supra* notes 247–254 and accompanying text.

312. White et al., *supra* note 257, at 787.

313. *Drugs and Crime Facts: Victim’s Perception of the Use of Alcohol and Drugs by the Violent Offender*, 2007, U.S. DEP’T OF JUSTICE, BUREAU OF JUST. STAT. (2007), <http://www.bjs.gov/content/DCF/tables/percepti.cfm> (data collection reporting that, in 2007, victims of violent crimes perceived the criminal to be under the influence of either “drugs” or “alcohol and drugs” only 10 percent of the time).

314. Donald A. Dripps, *Recreational Drug Regulation: A Plea for Responsibility*, 2009 UTAH L. REV. 117, 148–49 (footnotes omitted).

315. *Id.* at 149.

316. For example, in *United States v. Meirovitz*, the U.S. Court of Appeals for the Eighth Circuit discussed how possession and distribution of illegal drugs was one of the gravest problems that face the nation. *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990). The Eighth Circuit went on to quote the Fifth Circuit in *Terrebonne v. Butler*:

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

*Id.* (quoting *Terrebonne v. Butler*, 848 F.2d 500, 504 (5th Cir. 1998) (en banc)).

317. This might be explained by the fact that crimes result from a variety of personal, cultural, economic and situational factors, with drug use being merely one of many potential contributors. Lurigio & Swartz, *supra* note 235, at 69.

318. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 213530, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 4 (revised Jan. 19, 2007), available at <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>.

319. Seigny & Caulkins, *supra* note 236, at 413.

surprising that only 3.9 percent of homicides as of 2007, according to the Federal Bureau of Investigation, were drug-related.<sup>320</sup>

Against common perception and social science theories,<sup>321</sup> prisoners incarcerated for violent offenses do not generally commit violent crimes for drug money.<sup>322</sup> In 2002, only 8 percent of violent offenders and 5.2 percent of public-order offenders in the jail population claimed to have committed their crimes for drug money.<sup>323</sup> The pattern was similar in 2004 among state prisoners, with 10 percent of violent offenders and 7 percent of public-order offenders admitting to committing their crimes for drug money.<sup>324</sup> Additionally, most drug offenders do not report having used firearms in the commission of a drug crime.<sup>325</sup> Despite the fact that most individuals do not use firearms in drug crimes, and even though most drug users do not commit violent crime, case law and statutes still include these presumptions, as was discussed in Part IV.

Overall, and against the grain of public opinion, those convicted of drug crimes do not tend to commit violent crimes due to the influence of drugs, have a violent crime record, or commit violent crimes for drug money.

#### F. VIOLENCE OFTEN STEMS FROM ENFORCEMENT

Drug-related violence may actually result from enforcement of drug laws, not actual drug use. Studies confirm that many drugs may not actually be linked to violence, or that the link comes more directly as a result of the illegal drug market, and not the properties of drugs

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320. TINA L. DORSEY & PRISCILLA MIDDLETON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 165148, DRUGS AND CRIME FACTS, *available at* <http://www.bjs.gov/content/pub/pdf/DCF.pdf> (last visited Jan. 19, 2015).

321. *See* Goldstein, *supra* note 248, at 494, 496 (asserting that there are various ways drug use could be related to violence, including an economically compulsive model in which drug users engage in crime to support drug use).

322. *But see id.* at 497–502 (noting that it is possible that victims and perpetrators of violent crimes often cover up drug involvement, potentially skewing this connection).

323. JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 209588, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 7 (2005), *available at* <http://www.bjs.gov/content/pub/pdf/sdatji02.pdf>.

324. MUMOLA & KARBERG, *supra* note 318, at 6.

325. Sevigny & Caulkins, *supra* note 236, at 413 (“Only about one-quarter of federal and one-fifth of state drug offenders reported firearms involvement, defined as receiving a firearms sentence enhancement or ever being armed during a crime. Proportionally, more state offenders reported previous use of a firearm during a crime (17.9% vs. 13.6%) and more federal offenders acknowledged receiving a sentence enhancement for firearms (15.9% vs. 4.0%). Thus, although firearms activity plays a nontrivial role in characterizing drug offender dangerousness, most offenders do not self-report a connection to firearms.”).

themselves.<sup>326</sup> Indeed, when drug crimes do involve violence, the violence often results from competition among drug traffickers to establish their territory,<sup>327</sup> which has more to do with the illegality of drugs than anything else. Those involved in manufacturing, selling, money laundering, debt collecting, or providing bodyguard services have higher violence rates than other drug criminals.<sup>328</sup> That is, courts and scholars assume that drug crime may lead to at least two forms of violence: (1) violence associated with substance intoxication, and (2) violence arising from the transportation and sale of drugs. Violence arising from the transportation and sale of drugs is significantly more common, though still less common than assumed.<sup>329</sup>

However, drug trafficking is not necessarily associated with violence. Even without protection of the state or courts, illegal drug markets generally run without violence.<sup>330</sup> For instance, Mexico has had drugs being trafficked in it for a century but has only seen an extreme rise in violence in the illegal drug industry within the last decade.<sup>331</sup> Indeed, there is evidence that strong criminal organizations do not necessarily cause high rates of violence; in fact, these organizations try to reduce violence to avoid government focus on them.<sup>332</sup> Accordingly, violence may result largely from the prohibition of drugs rather than drug use or even the nature of the drug industry.<sup>333</sup>

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326. White, *supra* note 261, at 511.

327. Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 307 (2010) (“At the same time, drug traffickers have an economic incentive to suppress competition in order to enhance their market position, and one would hardly expect that norms of law-abidingness would be likely to restrain them. This theoretical conjecture is borne out by empirical evidence suggesting that drug traffickers use violence in an effort to suppress competition.”)

328. Sevigny & Caulkins, *supra* note 236, at 413–14.

329. For example, when crack cocaine became a serious problem in the 1980s, violent and well-armed drug dealers struggled to protect and gain control of lucrative and unstable drug markets. Drug violence might thus be reduced by legalizing narcotics, providing drug dealers an open market in which to conduct business. Lurigio & Swartz, *supra* note 235, at 68–69.

330. Thoumi, *supra* note 260, at 38–39 (noting that “illegal drug markets are generally peaceable” but the lack of formal social and economic controls in these markets facilitates the spread of violence (citation omitted)).

331. *Id.* at 38.

332. *Id.* at 39. *But see* Goldstein, *supra* note 248, at 497–500 (exploring potential ways drugs could still be connected to violence under the systemic violence paradigm); Merrill Singer, *Drugs and Development: The Global Impact of Drug Abuse and Trafficking on Social and Economic Development*, 19 INT’L J. DRUG POL’Y 467, 475 (2007) (noting that drugs often have a violent effect on social and economic development).

333. See JUNE S. BEITTEL, CONG. RESEARCH SERV., R40582, MEXICO’S DRUG-RELATED VIOLENCE 3 (2009), available at <http://fas.org/sgp/crs/row/R40582.pdf> (discussing the escalation in violence throughout the country after Mexican President Felipe Calderón prioritized a crackdown on drug cartels); Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 617 (2001) (“In a black market, participants cannot resolve commercial disputes using lawsuits or

A comprehensive review of over fifteen studies demonstrates that increasing drug law enforcement actually does not reduce drug market violence; however, gun violence and high homicide rates may be an inevitable result of the illegal drug market, and disrupting drug markets can actually increase violence levels.<sup>334</sup> In addition, criminalization of drugs can increase prices because the supply of drugs is limited. As prices increase, criminals have a greater incentive to engage in illegal activity and utilize violence to maintain their share of the market.<sup>335</sup> In other words, drug violence is exaggerated and may be attributable to drug law enforcement and prohibition rather than drug use or the nature of the industry. At the very least, it is unclear whether drug use or trafficking themselves cause violence, or whether the illicit nature of the business and police crackdowns on drug markets cause violence. But yet, this assumption is an important part of U.S. case law and statutes.

G. INDEPENDENT EMPIRICAL DATA THAT DRUG DEFENDANTS ARE  
AMONG THE LEAST VIOLENT

My own empirical analysis demonstrates that drug defendants are actually among the safest defendants to release pretrial.<sup>336</sup> In an independent analysis of the largest dataset to examine the issue of drugs and violence, economist Frank McIntyre and I examined the arrest and charging records of over 100,000 defendants pretrial, and discovered that drug defendants were less likely to commit a violent crime when released before trial than almost any of the other defendants.<sup>337</sup>

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battle over market share using advertising; they are thus likely to use violence instead. This means that the prohibition of drugs potentially causes increased levels of violence, even if prohibition reduces drug use and drug use itself causes violence. . . . [T]he elevated rate of violence in the United States compared with Europe is perhaps due to greater drug prohibition enforcement.”); Reuter, *supra* note 129, at 283 (“[E]nforcement itself has been a major factor in the surge of violence in Mexico . . .”).

334. Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, 22 INT’L J. DRUG POL’Y 87, 92 (2011) (“[T]he existing scientific evidence suggests drug law enforcement contributes to gun violence and high homicide rates and that increasingly sophisticated methods of disrupting organizations involved in drug distribution could paradoxically increase violence.”).

335. Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008) (describing Jeremy Bentham’s theory of “hedonistic calculus,” which consists of a potential criminal’s weighing the risks of punishment against the rewards of performing a crime to determine whether the criminal act is worth performing); Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons from Economics*, 1994 U. CHI. LEGAL F. 207, 223 (“[I]ncentive to use violent means of self-protection will grow as the value of each sale increases.”).

336. Baradaran & McIntyre, *supra* note 23, at 561.

337. *Id.*

Drug defendants were likely to be rearrested pretrial, but not likely to commit any violent crimes. Those who were charged with drug sales had the highest pretrial rearrest rates—21 percent, tied with robbery—but they were very unlikely to be charged with violent crimes.<sup>338</sup> For instance, defendants with an initial murder charge were about six times more likely than defendants charged with drug possession to be arrested on violent crime charges (6.4 percent versus 1.1 percent).<sup>339</sup> Further, those brought in on violent charges were two to three times more dangerous than those brought in on drug crimes.<sup>340</sup> In fact, people charged with drug felonies are about as likely to be rearrested as those brought in on driving-related offenses, like speeding.<sup>341</sup> This completely contradicts presumptions in federal and state detention statutes that the more drugs a person possesses, the more likely that person is to be violent.<sup>342</sup> Overall, we showed that “though defendants with drug felonies are presumed to be dangerous under both state and federal statutes, they are among the *least* likely to be rearrested for a violent crime.”<sup>343</sup> Thus, we demonstrated through independent empirical evidence that, at least pretrial, drug defendants are the least violent defendants of all.

Unfortunately, despite this empirical evidence and other studies debunking the drug-violence connection and demonstrating that, at the very least, drug crime defendants’ propensity for violence should be analyzed individually, the perception of a drug-violence connection persists,<sup>344</sup> and has had some of the negative results discussed in Part V.

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338. *Id.* at 528, 536, 561 (showing that the likelihood that a defendant arrested for selling drugs would be rearrested pretrial for a violent felony was 1.6 percent).

339. *Id.* at 561.

340. *Id.*

341. *Id.* (finding drug sales and possession felonies at between 11 percent and 14 percent, while driving-related crimes come in at 13 percent).

342. *See supra* notes 182–184.

343. Baradaran & McIntyre, *supra* note 23, at 558.

344. Ristorph, *supra* note 189, at 615 (“In the 1990s, the United States Sentencing Commission established a ‘Drugs[] Violence Task Force’ to study the relationship between drug offenses and violence. . . . And the task force found no evidence that long prison sentences for drug offenders decreased either drug use or violence; indeed, some evidence suggested that these policies may increase violence. Notwithstanding these findings, some members of the task force resisted the implications of this research, finding that to concede that the punitive approach to drug use was ‘misguided’ would be ‘simply too politically risky . . . .’ In other words, the drugs-violence connection is a political truth in the United States, even if not an empirical one.”(footnotes omitted)). *See also* Denno, *supra* note 258, at 755–58 (providing an account of the same task force from the perspective of a task force member, and noting that “drug-crime relationships were not nearly as clear or as strong as politicians and legislatures ha[ve] presumed based upon the motivations for enacting the drug laws”).

## V. RESULTS OF CONNECTING DRUGS TO VIOLENCE

The overwhelming result of connecting drugs to violence is mass incarceration. Other impacts include criminal justice policies that have been ineffective in curbing either drug use or violence. Strict drug laws have punished individuals harshly for small roles in drug operations due to the fear of violence and other crimes. As a result, there has been a dramatic misuse of resources, with a large proportion of funding targeting drugs when alcohol is much more directly linked to violence. Additionally, minorities have been unjustly treated, resulting in a reduction in constitutional rights. Much of this stems from statutes and cases blaming drugs for violence caused by other social ills.<sup>345</sup>

### A. INEFFECTIVENESS

U.S. drug policy has consistently failed to reduce drug use or violence. The drug confiscation “success rate” of state and federal drug enforcement agencies has consistently hovered around 10 percent since the 1960s, regardless of how much additional funding is poured into the war on drugs.<sup>346</sup> Incarceration has proven ineffective in lowering recidivism rates for nonviolent drug offenders and in lowering the U.S. crime rate overall.<sup>347</sup> Record increases in homicide rates and gang violence, which lawmakers attributed to drug trafficking, prompted Congress to establish and strengthen mandatory minimum provisions during the 1980s.<sup>348</sup> Mandatory sentencing schemes, starting with the Rockefeller drug laws in New York, have simply increased arrests without decreasing drug use or sales.<sup>349</sup>

Federal sentencing guidelines are ineffective in reducing drug crimes or targeting violent criminals. The guidelines have been ineffective in that

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345. I do not attribute all of the results in this part to the drug war’s connection of drugs and violence. However, there are many unsupported claims, particularly of violence and a parade of horrors, which have supported unnecessarily harsh laws against drug users.

346. Hermans, *supra* note 240.

347. See Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1230 (2002) (“Incarceration as a means of reducing the rate of crime in this country has failed. From 1980 to 1990, incarceration in state and federal prisons doubled, yet there was still an increase in violent crime during this period.” (footnote omitted)).

348. William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 306–07 (1993).

349. Madison Gray, *A Brief History of New York’s Rockefeller Drug Laws*, TIME (Apr. 2, 2009), <http://www.time.com/time/nation/article/0,8599,1888864,00.html> (“The laws almost immediately led to an increase in drug convictions, but no measurable decrease in overall crime.”); Sayegh, *supra* note 119 (“The laws drove an unprecedented explosion of the prison population. . . . Over the years study after study concluded that the Rockefeller Drug Laws failed to reduce drug use or sales . . .”).

low-level drug defendants receive harsh sentences while leaders receive lesser terms.<sup>350</sup> Also, under the sentencing guidelines, sentences for nonviolent drug crimes are as high as—or even higher than—sentences for violent offenses,<sup>351</sup> which contradicts the justifications for harsh guidelines that were aimed at reducing violence.<sup>352</sup> Judges have also famously opposed the crack-cocaine disparities, which were unfair and racially discriminatory.<sup>353</sup> Some judges have specifically pointed out that they are mostly sentencing drug addicts—not dangerous drug kingpins—to lengthy terms, which further contravenes the intent of the guidelines.<sup>354</sup>

Another major impediment to supply-side drug control has been the “replacement effect,” under which incarcerated drug dealers are easily

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350. *E.g.*, *United States v. Brigham*, 977 F.2d 317, 318–19 (7th Cir. 1992) (affirming a 120-month prison sentence of a drug organization’s low-level driver, despite the organization’s kingpin receiving only an 84-month sentence because of his “valuable assistance”); *United States v. Evans*, 970 F.2d 663, 676–78 & n.19 (10th Cir. 1992) (giving underlings terms of 210 months, 292 months, 295 months and life, while more responsible organizers received sentences of mere probation or supervised release based on their testimony against the lesser participants). *Cf.* *United States v. Chambers*, 885 F. Supp. 12, 13 (D.D.C. 1995) (“Justice is not served by placing a 34 year old mother of two children, ages 9 and 12, in jail for over fifteen years for allowing drugs to be stored in her apartment, while the main perpetrator is allowed to go free.”).

351. *See, e.g.*, *United States v. Delgado*, 318 F. App’x 380, 386 (6th Cir. 2009) (“[Defendant] is a first offender of a nonviolent crime and received a sentence of [twenty] years less five months. . . [which] is unreasonable.”); *United States v. Ahrendt*, 560 F.3d 69, 80–81 (1st Cir. 2009) (Merritt, J., dissenting) (“I am under a duty as an appellate judge to review the length and reasonableness of sentences, and I regard the [eighteen]-year sentence here for this nonviolent crime as unreasonably long and not sufficiently explained by the District Court.”); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230, 1263 (D. Utah 2004) (finding that a mandatory minimum fifty-five-year sentence for a first offender whose acts resulted in no actual violence was “unjust, cruel, and irrational,” but not unconstitutional, and requesting legislative reform); *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998) (“To treat [the defendant] as if he were only a point on a grid . . . would do violence to the purposes of the Sentencing Guidelines. It would treat someone convicted of Felon in Possession of a Firearm [the defendant’s conviction] with a minor record, solely because he had a few sentences in [a certain range within the Guidelines], the same as someone with multiple violent crimes, and multiple ten to fifteen year sentences. It would create a new form of disparity, treating offenders that are completely different in a like way.”).

352. *See supra* Part III.B.

353. *See, e.g.*, *United States v. Blewett*, 719 F.3d 482, 485 (6th Cir. 2013) (“The old 100-to-1 crack cocaine ratio has led to the mass incarceration of thousands of nonviolent prisoners under a law widely acknowledged as racially discriminatory.”), *vacated & reh’g granted en banc*, 746 F.3d 647 (6th Cir. 2013) *cert. denied*, 134 S. Ct. 1779 (2014); *United States v. Reina*, 905 F.2d 638, 638, 640 (2d Cir. 1990) (reversing the court below for departing downward because “penalties for cocaine base . . . are unduly harsh when compared to those for cocaine,” and noting that “the guidelines have a laudable objective but, in specific instances, great injustices have become apparent”); *United States v. Hargrove*, 628 F. Supp. 2d 241, 245 (D. Mass. 2009) (“The crack cocaine guidelines have been widely criticized as being fundamentally unfair.”).

354. *See, e.g.*, *United States v. Saenz*, 429 F. Supp. 2d 1081, 1084 (N.D. Iowa 2006) (“First, I wish to point out the simple truth that most of the individuals I sentence in drug cases are drug addicts. . . . They are almost never drug ‘kingpins.’”).

replaced by others on the street and regulated drugs are replaced by other drugs.<sup>355</sup> Some law enforcement efforts in the 1980s enjoyed more success in controlling substances like heroin and marijuana than others like cocaine.<sup>356</sup> Yet, success in controlling certain drugs led to an increase in the supply of others.<sup>357</sup> Interdiction efforts designed to cut off narcotics supplies encouraged dealers to focus on alternative drugs, increasing the supply on the street.<sup>358</sup> In Miami, for example, efforts to intercept marijuana led to an increase in cocaine, as cocaine was less difficult to conceal than marijuana.<sup>359</sup> Also, as efforts to thwart marijuana-growing operations increased, drug dealers became younger and more fungible because punishment for juveniles was expected to be less severe.<sup>360</sup> Most leading researchers now agree that incarcerating foot soldiers and drug users in gangs has a negligible impact on crime.<sup>361</sup> It merely creates job openings in drug-dealing organizations.<sup>362</sup> Indeed, drug regulation seems to have had a negligible effect on reducing drug use or drug-related violence. And drug enforcement may actually create more social harm and violence than good.<sup>363</sup>

## B. ESCALATING INCARCERATION RATES

Incarceration and arrest rates have soared to all-time highs in the past

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355. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 19 (2009), available at <http://www.pewstates.org/research/reports/one-in-31-85899371887>; *People Sentenced for Drug Offenses in the U.S. Correctional System*, DRUGWARFACTS.ORG, [http://drugwarfacts.org/cms/Prisons\\_and\\_Drugs#sthash.TyRXOWkg.dpuf](http://drugwarfacts.org/cms/Prisons_and_Drugs#sthash.TyRXOWkg.dpuf) (last visited Jan. 19, 2015).

356. Rasmussen & Benson, *supra* note 275, at 700 (“The U.S. drug war of 1984–1989 was more successful against marijuana than cocaine . . .” (footnote omitted)).

357. *See id.* (stating that with more successful regulation of marijuana than cocaine in the late 1980s came “the expected result of increased supply of cocaine”).

358. *Id.* at 699–700 (“Smugglers did not change their occupation. Instead they simply changed the product being smuggled, shifting to a lower risk commodity, cocaine. Successful interdiction of marijuana thus increased the supply of cocaine, and youth correspondingly reported that this drug was more readily available.” (footnotes omitted)).

359. *Id.* at 699 (“Efforts to intercept drugs in the Miami area in 1984 were highly successful against the importation of marijuana, no doubt because this product is bulky and relatively difficult to conceal.”).

360. *See id.* at 698 (noting that lengthening the distribution chain by bringing in youthful dealers also further insulated adult drug kingpins, lessening any potential sentences they may face as they no longer dealt drugs directly).

361. *See id.* at 705 (“[T]he evidence suggests that most drug offenders are not active participants in non-drug related crime.”).

362. *Id.* at 698.

363. Tracey L. Meares, *It’s a Question of Connections*, 31 VAL. U. L. REV. 579, 589 (1997) (“High levels of drug-law enforcement, as currently implemented . . . are likely to generate negative consequences for community social organization—family disruption, unemployment, and low socioeconomic status.”).

thirty years, partially due to misguided drug policy.<sup>364</sup> Indeed, the overwhelming majority of drug offenders in both federal and state prisons are nonviolent.<sup>365</sup> By 1997, drug offenders made up 60 percent of the federal prison population and 21 percent of the state prison population.<sup>366</sup> By 2005, “[m]ore than half (55%) of federal prisoners [were] serving time for a drug offense, while only 11% [were] incarcerated for a violent offense.”<sup>367</sup> Despite this data, many individuals serve long sentences, including life without parole, for drug crimes. The overwhelming majority of individuals serving life without parole sentences for nonviolent crimes are serving for drug offenses.<sup>368</sup>

We as a nation incarcerate large numbers of people for nonviolent drug offenses.<sup>369</sup> About one in every thirty-four U.S. residents in 2011 were under some form of correctional supervision.<sup>370</sup> By the end of 2011, 6.98 million offenders were under some sort of state or federal correctional supervision.<sup>371</sup> Nearly 1.6 million of these were currently incarcerated in jails or prisons.<sup>372</sup>

The war on drugs more than doubled America’s prison population between 1981 and 1990, from 344,283 to 755,425 inmates.<sup>373</sup> Between

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364. Zakaria, *supra* note 5 (“Over all, there are now more people under ‘correctional supervision’ in America . . . than were in the Gulag Archipelago under Stalin at its height.” (quoting Adam Gopnik, *The Caging of America: Why Do We Lock up So Many People?*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>)).

365. Sheila M. Murphy, *Drug Courts: An Effective, Efficient Weapon in the War on Drugs*, 85 ILL. B.J. 474, 475 (1997) (“[T]he drug offenders taking up prison space are often nonviolent. Just 21 percent of drug prisoners admitted to state prisons in 1991 had even a single incidence of criminal violence in their background, and only 30 percent of federal drug prisoners have a record of violence.” (footnotes omitted)). *See also* TURNER & BUNTING, *supra* note 12, at 2 (estimating that 79 percent of prisoners serving life without parole sentences in the federal and state systems surveyed are in for nonviolent drug offenses).

366. Rosenblum, *supra* note 347, at 1230–31.

367. THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH 1 (2006), *available at* [http://www.sentencingproject.org/doc/publications/inc\\_newfigures.pdf](http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf).

368. TURNER & BUNTING, *supra* note 12, at 22–23 & tbl.2. As of 2012, there are 3278 prisoners serving life without parole (“LWOP”) sentences for nonviolent crimes in the United States. *Id.* This is over 12 percent of the total LWOP population. *Id.* Almost two-thirds of these, 2074, are in the federal system. *Id.* Of those, an overwhelming majority (1989 prisoners) are serving for nonviolent drug offenses. *Id.* at 23 tbl.3.

369. *See* GRAY, *supra* note 6, at 29–30 (“More people are behind bars for drug offenses in the United States—about 400,000—than are incarcerated in England, France, Germany and Japan for *all crimes combined*.”).

370. GLAZE & PARKS, *supra* note 13, at 2.

371. *Id.* at 1.

372. CARSON & SABOL, *supra* note 15, at 1.

373. *Number of Inmates in U.S. Reaches Record*, N.Y. TIMES (Oct. 8, 1990),

1980 and the mid-1990s, the percentage of drug offenders who made up the state prison population increased from 6 percent to nearly 25 percent, and from 25 percent to 60 percent of the overall federal inmate population.<sup>374</sup> While the number of arrests for all crimes rose by 45 percent in the 1980s and 1990s, the number of arrests for drug offenses rose a staggering 160 percent.<sup>375</sup> The arrest rate for sale or manufacture of drugs specifically rose even more between 1980 and 1989,<sup>376</sup> increasing 210 percent.<sup>377</sup> Arrests for use or possession alone increased 89 percent between 1980 and 1989.<sup>378</sup> Indeed, drug convictions account for much of the rise in incarceration rates.<sup>379</sup>

Arrest rates peaked in the 2000s. More persons were arrested for drug-related offenses than for any other crime category.<sup>380</sup> The overall U.S. prison population reached a record high in 2009, when 1,615,487 persons were incarcerated in either state or federal prison.<sup>381</sup> By comparison, approximately 196,000 prisoners were incarcerated throughout the United States in 1972.<sup>382</sup> This number had increased 650 percent by 2009, even though the general U.S. population had only risen 68 percent,<sup>383</sup> and even though crime rates had been dropping since the early 1990s.<sup>384</sup> Courts<sup>385</sup>

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<http://www.nytimes.com/1990/10/08/us/number-of-inmates-in-us-reaches-record.html>; *U.S. Prison Population Sets Record for a Year, in Six Months*, N.Y. TIMES (Sept. 11, 1989), <http://www.nytimes.com/1989/09/11/us/us-prison-population-sets-record-for-a-year-in-six-months.html>.

374. Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 289 (2010).

375. *Id.* at 288–89. See also JAMES AUSTIN & AARON DAVID MCVEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, NCCD FOCUS: THE 1989 NCCD PRISON POPULATION FORECAST: THE IMPACT OF THE WAR ON DRUGS (1989).

376. SNYDER, *supra* note 239, at 12.

377. *Id.*

378. *Id.*

379. Certainly, the increase in incarceration rates could be attributing to the decrease in overall crime rates.

380. SNYDER, *supra* note 239, at 2 tbl.1.

381. CARSON & SABOL, *supra* note 15, at 2.

382. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS 1925–81, at 2 tbl.1 (1982), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p2581.pdf>.

383. *Compare Historical National Population Estimates: July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU, <http://www.census.gov/population/estimates/nation/popclockest.txt> (last modified June 28, 2000) (listing the U.S. population as approximately 210 million people as of July 1972), with *United States Population*, TRADING ECONOMICS, <http://www.tradingeconomics.com/united-states/population> (last visited Jan. 19, 2015) (listing the U.S. population as approximately 307 million people as of January 2010).

384. See *Uniform Crime Reports, Crime in the United States 2013*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table\\_1\\_crime\\_in\\_the\\_united\\_states\\_by\\_volume\\_and\\_rate\\_per\\_100000\\_inhabitants\\_1994-2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls) (last visited Jan. 19, 2015) (showing in Table 1 a steady decrease in

and scholars recognize that much of this increase is attributable to arrests for possession of a controlled substance.<sup>386</sup>

These staggering numbers have prompted government leaders at the federal and state level to take action to decrease the amount of punishment administered to low-level, nonviolent drug offenders.<sup>387</sup> For example, in 2010, Congress passed the Fair Sentencing Act of 2010, which eliminated mandatory minimum sentences for simple drug possession.<sup>388</sup> In both 2013 and 2014, a bipartisan group of senators proposed Smarter Sentencing Acts, which would have extended the guarantees of the Fair Sentencing Act retroactively to persons that were convicted of a drug crime prior to 2010.<sup>389</sup> President Obama and his administration have also taken strides toward limiting the incarceration rates of low-level, nonviolent drug offenders. In 2013, President Obama used his powers of clemency to commute the sentences—some of which were for a term of life—of eight persons convicted of nonviolent drug crimes.<sup>390</sup> Additionally, Attorney General Eric Holder sent a memorandum to all U.S. Attorneys instructing them to ensure that low-level, nonviolent drug offenders are not given unduly long sentences.<sup>391</sup> Many states—including those traditionally viewed as being very conservative, such as Texas—have also become involved in the effort to limit the punishments administered to such drug offenders.<sup>392</sup> Despite these recent efforts, incarceration rates in the United States remain unreasonably high and are not anticipated to drop to 1980

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crime from 1994–2013, and in Table 1A a steady percentage decrease over the past ten years for all crime).

385. *United States v. Leitch*, Nos. 11-CR-00609 (JG), 11-CR-00457 (JG), 11-CR-00039 (JG), 2013 U.S. Dist. LEXIS 27796, at \*4–7 (E.D.N.Y. Feb. 28, 2013) (attributing ballooning federal prison system costs to drug trafficking sentencing and discussing reform).

386. Boldt, *supra* note 374, at 287–90.

387. *See supra* note 17 and accompanying text.

388. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

389. Smarter Sentencing Act of 2014, S. 1410, 113th Cong.; Smarter Sentencing Act of 2013, S. 1410, 113th Cong.

390. Press Release, White House Office of the Press Sec’y, *supra* note 17.

391. *See* Memorandum from Att’y Gen. Eric Holder, *supra* note 17, at 1 (“We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.”).

392. Savage, *Trend to Lighten Harsh Sentences*, *supra* note 17 (discussing efforts to “reduc[e] prison time for low-level drug offenders or divert[] them into treatment; grant[] early release to well-behaved or elderly inmates; expand[] job training and re-entry programs; and institut[e] penalties other than a return to prison for technical violations of parole or probation, like missing a meeting”).

rates for another eighty-eight years.<sup>393</sup> Thus, drastic changes to the foundation of U.S. drug policy must be made in order to see any marked decrease in incarceration rates. One such change would be the de-linking of drugs and violence in legislation and case law.

### C. DISPARATE EFFECTS ON MINORITIES

U.S. drug policies and increased arrest rates have disproportionately affected minorities.<sup>394</sup> Some scholars even suggest the war on drugs is built on race.<sup>395</sup> In 1989, there were 4,747.5 white arrestees out of every 100,000 persons, while there were 14,184.0 black arrestees out of every 100,000 persons.<sup>396</sup> Black and white arrest rates for drug possession or use both increased overall between 1990 and 2010.<sup>397</sup> The white arrest rate for drug

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393. Mauer & Ghandnoosh, *supra* note 18.

394. DRUGS AND DRUG POLICY, *supra* note 42, at 334 (“One legacy of the ‘war on crack’ has been the huge growth in America’s prison population, with a disproportionate effect on minority groups.”). See also Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 167–68 (2013) (discussing how racial disparities for drug crimes are significantly higher than for other offenses (citing HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 3 (2008), available at [http://www.hrw.org/sites/default/files/reports/us0508\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0508_1.pdf))); Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1048 (2010) (noting the drug war’s clear discriminatory results, as “[i]n seven states, 80% to 90% of imprisoned drug offenders are black”); Chin, *supra* note 15, at 254 (“The War on Drugs, then, is a new occasion for the employment of traditional techniques of discriminating against racial minorities.”); Randall Kennedy, *Race and the Administration of Criminal Justice in the United States*, in CRIME AND PUBLIC POLICY 237, 241, 247 (James Q. Wilson & Joan Petersilia eds., 2011) (noting various views on the interplay between race and criminal justice, including the view that racial indifference or animus produced the mass incarceration resulting from the drug war).

395. See, e.g., LÓPEZ, *supra* note 11, at 51–52 (“To fulfill his campaign promises to crack down on threatening minorities, Reagan transformed the federal criminal justice system. . . . [and] made street crime its principal target, declaring a ‘War on Drugs.’”).

396. See Howard Snyder & Joseph Mulako-Wangota, *Arrest Data Analysis Tool: U.S. Arrest Estimates: Arrest Rates of Blacks/Whites for All Offenses*, BUREAU JUST. STATS., <http://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm> (select the “National Estimates” tab followed by the “Trend Graphs by Race” sub-tab; select “Black,” “Both age groups,” and “All offenses”; then select “Make Rates Graph”; then repeat steps, substituting “White” for “Black”) (last queried Feb. 25, 2015).

397. Compare Howard Snyder & Joseph Mulako-Wangota, *Arrest Data Analysis Tool: U.S. Arrest Estimates: Arrest Rates of Whites for Drug Possession*, BUREAU JUST. STATS., <http://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm> (select the “National Estimates” tab followed by the “Trend Tables by Race” sub-tab; select “White,” “Both Age Groups,” “Drug Abuse Violations—Possession SubTotal,” and then select “Make Rates Table”) (last queried Jan. 30, 2015) (showing the arrest rates of blacks for drug possession from 1980 to 2012), with Howard Snyder & Joseph Mulako-Wangota, *Arrest Data Analysis Tool: U.S. Arrest Estimates: Arrest Rates of Blacks for Drug Possession*, BUREAU JUST. STATS., <http://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm> (select the “National Estimates” tab followed by the “Trend Tables by Race” sub-tab; select “Black,” “Both Age Groups,” “Drug Abuse

possession or use doubled between 1980 and 2009, while the black arrest rate tripled for those crimes.<sup>398</sup> The black arrest rate for possession or use in 1980 was about double the white arrest rate.<sup>399</sup> By 2009, black arrests for possession or use were three times higher than white arrests.<sup>400</sup> Additionally, by the end of 2009, the black arrest rate was up 205 percent from its 1980 level and the white arrest rate was up 102 percent from its 1980 level.<sup>401</sup>

Racial discrepancies are even more pronounced in arrests for drug sale or manufacture.<sup>402</sup> The white arrest rate for sale or manufacture increased 127 percent between 1980 and 1989, while the black arrest rate increased 363 percent.<sup>403</sup> By the end of 2009, the black and white arrest rates for drug sale or manufacture had respectively increased 90 percent and 66 percent from their original 1980 rates.<sup>404</sup> In 1980, the black arrest rate for sale and manufacture was “about four times greater than the white arrest rate”;<sup>405</sup> three decades later, the black arrest rate for sale and manufacture remained about four times greater than the white arrest rate.<sup>406</sup>

Black and Hispanic men and women are also incarcerated at higher rates than whites, even though white drug offenders report higher levels of drug dependence.<sup>407</sup> In 2011, black and Hispanic prisoners were generally imprisoned at a higher rate than white prisoners and were younger than white prisoners.<sup>408</sup> Accordingly, U.S. prison populations do not racially represent the national population. More than 3 percent of all black males and 1.2 percent of Hispanic males were imprisoned in 2011, compared to only .05 percent of all white males.<sup>409</sup> The discrepancies are even greater when age is considered.<sup>410</sup> Approximately 7 percent of all black males between the ages of twenty-five and thirty-nine were imprisoned in

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Violations—Possession SubTotal,” and then select “Make Rates Table”) (last queried Jan. 30, 2015) (showing the arrest rates of whites for drug possession from 1980 to 2012).

398. SNYDER, *supra* note 239, at 13 (referencing Figure 40).

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.* (referencing Figure 44).

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. CARSON & SABOL, *supra* note 15, at 7; MUMOLA & KARBEG, *supra* note 318, at 7 tbl.6.

408. CARSON & SABOL, *supra* note 15, at 7.

409. *Id.* at 8.

410. *Id.*

2011.<sup>411</sup> And nearly 3 percent of all Hispanic males between the same ages were imprisoned in 2011.<sup>412</sup> Additionally, statistics across the states show that Hispanics are twice as likely as whites, and just as likely as blacks, to be imprisoned for a drug offense.<sup>413</sup>

Overall, increased drug targeting and arrests with the goal of reducing violence disproportionately affects minorities without any tangible effect on violent crime. And indeed, by some accounts, the U.S. war on drugs actually increases violence in bordering countries.<sup>414</sup>

#### D. MISUSE OF RESOURCES

The funding of drug policy and the focus on the link between drugs and violence is a misuse of government resources, given that, comparatively, alcohol and nicotine cause more harm and demonstrate a closer link with violent crime,<sup>415</sup> and such funding could be used for drug treatment or other alternatives to incarceration. The fear of the drug-violence connection has fueled much of the national attention toward and funding of drugs.<sup>416</sup> Not only the media, but also the government itself, has explicitly linked drug trafficking to violence.<sup>417</sup> The government's role in

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411. See *id.* (“Between 6.6% and 7.5% of all black males ages 25 to 39 were imprisoned in 2011 . . .”).

412. *Id.*

413. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 6 (1999), available at <http://bjs.gov/content/pub/pdf/tssp.pdf>. See also HISPANIC PRISONERS IN THE UNITED STATES, THE SENTENCING PROJECT 1 (2003), available at [http://www.sentencingproject.org/doc/publications/inc\\_hispanicprisoners.pdf](http://www.sentencingproject.org/doc/publications/inc_hispanicprisoners.pdf) (providing detailed statistics regarding Hispanic incarceration rates).

414. There are reports that the war on drugs has threatened the stability of foreign governments by creating devastating levels of violence, destruction, and corruption in countries south of the United States. RENSSELAER W. LEE III, THE WHITE LABYRINTH: COCAINE AND POLITICAL POWER 85–90 (1989) (detailing the role of the “U.S.-backed anti-cocaine drive” in Peru during the 1980s in creating “an atmosphere of continuing violence, terror, subversion, and peasant hostility”); Benson, *supra* note 275, at 294 (“There are many undesirable, and perhaps unintended, consequences of the escalating drug war, including serious threats to civil liberties, as well as the devastating levels of violence and corruption in Mexico and other parts of Latin America.”).

415. By “link” I do not necessarily mean a direct causation, but possibly a correlation.

416. Duane C. McBride & James A. Swartz, *Drugs and Violence in the Age of Crack Cocaine*, in DRUGS, CRIME AND THE CRIMINAL JUSTICE SYSTEM, *supra* note 271, at 141, 145–46 (suggesting that fear of violence spurred the establishment of the National Institute on Drug Abuse and the drug laws that imprisoned users); David B. Kopel & Trevor Burrus, *Reducing the Drug War's Damage to Government Budgets*, 35 HARV. J.L. & PUB. POL'Y 543, 544 (2012) (noting that “drug laws are the main cause of rising prison costs” and arguing for drug law reform to reduce costs of the war on drugs).

417. E.g., DRUG CONTROL STRATEGY, *supra* note 192, at 24 (“Drug trafficking and violence go hand in hand.”).

perpetuating the link between violence and drugs has been significant.<sup>418</sup> For instance, during the 1980s the media perception was that random middle class individuals were being affected by drug violence, when it was actually poor minorities who were affected, not members of the middle or upper class.<sup>419</sup> Police targeted these poor, urban, and often minority individuals by emphasizing random stops of drug users and traffickers, which may have actually exacerbated the violence in urban areas.<sup>420</sup>

The harm from drugs is grossly overestimated as compared to other substances. Each year, nicotine reportedly results in some 300,000 deaths, alcohol causes at least 30,000 deaths, and other drugs result in fewer than 3,000 deaths.<sup>421</sup> Nicotine and alcohol also may cause more harm to third parties who do not use them than illicit drugs,<sup>422</sup> and both nicotine and alcohol are strongly linked<sup>423</sup> to violence.<sup>424</sup> This results in the government funneling a disproportionate amount of money toward drug research than alcohol research based on a fear of violence, and even though the connection between alcohol and violence has been empirically substantiated.<sup>425</sup>

Finally, the focus on punishing the drug-violence connection distracts from finding and funding innovative alternatives that may actually be effective in reducing drug crime, such as drug treatment<sup>426</sup> or other

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418. Henry H. Brownstein, *The Media and the Construction of Random Drug Violence*, SOC. JUST., Winter 1991, at 85, 86–88 (detailing how New York officials in the mid-1980s called for a variety of programs to contain the “drug crisis” and the “media took the government’s notions about crack [and] pursued these themes”).

419. *Id.* at 94–96.

420. *Id.* at 96–97.

421. Morris, *supra* note 7, at 549.

422. *Id.*

423. *See supra* note 414.

424. James J. Collins, *The Relationship of Problem Drinking to Individual Offending Sequences*, in 2 CRIMINAL CAREERS AND “CAREER CRIMINALS” *supra* note 262, at 89, 110–11 (finding an empirical association between problem drinking and the development of criminal behavior). *See generally* DRINKING AND CRIME: PERSPECTIVES ON THE RELATIONSHIPS BETWEEN ALCOHOL CONSUMPTION AND CRIMINAL BEHAVIOR (James J. Collins, Jr. ed., 1981) (exploring the relationship between alcohol and violence within various contexts). For a discussion of the link between tobacco and violence, see *supra* note 304 and accompanying text. *But see* DUKE & GROSS, *supra* note 59, at 27–29 (noting that tobacco may lead to violence when a shortage is present, but discussing how history provides “little proof” of the allegations that tobacco use leads to criminality, especially pharmacologically).

425. *See supra* notes 301–303 and accompanying text.

426. *See, e.g.*, United States v. Ellefson, 419 F.3d 859, 868 (8th Cir. 2005) (Lay, J., concurring) (“Unfortunately, our inflexible federal criminal justice policy responds to the epidemic of drug crimes without adequately providing federal judges with the ability to address drug addiction—the root cause of this epidemic. In contrast, many states have created specialized drug courts that approach this

alternatives to incarceration,<sup>427</sup> which have proven to have the most dramatic results on the control of drug abuse.<sup>428</sup> In sum, the money spent on justifying and upholding the drug-violence connection could be better spent on alternatives and treatment for drug defendants or on combating the effects of substances like alcohol that have been directly linked to violence.

#### E. INJUSTICE AND PUNISHMENT SEVERITY

U.S. drug policy has also socially ostracized drug addicts, reduced their rights to privacy, and punished many who are undeserving of harsh sentences. Current drug laws have relegated drug defendants to society's lowest class, when historically drug users were an accepted part of middle class society.<sup>429</sup> Adult drug offenders tend to become ensnared in a "criminal subculture,"<sup>430</sup> resulting in their involvement with both drugs and crime when the two were not historically connected.<sup>431</sup>

As discussed in Part III.C, constitutional rights for drug defendants have been ratcheted down. Indeed, the Supreme Court adopted the view that the war on drugs creates special circumstances which warrant different rules.<sup>432</sup> Eric Luna has labeled this concept "drug exceptionalism" and documented cases where drug offenders receive a lower expectation of privacy under the Fourth Amendment and have been subjected to racial profiling based on the perception that drug use leads to more serious

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epidemic with much greater success. . . . [T]he federal criminal justice system offers no such alternatives for nonviolent, substance-abusing offenders.").

427. *United States v. Dossie*, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012) ("[L]engthy mandatory prison terms sweep reasonable, innovative, and promising alternatives to incarceration off the table at sentencing.").

428. David E. Smith, Gantt P. Galloway & Richard B. Seymour, *Methamphetamine Abuse, Violence and Appropriate Treatment*, 31 VAL. U. L. REV. 661, 663 (1997).

429. See LICIT AND ILLICIT DRUGS, *supra* note 25, at 22 ("By far the most serious deleterious effects of being a narcotics addict in the United States today are the risks of arrest and imprisonment, infectious disease, and impoverishment—all traceable to the narcotics laws, to vigorous enforcement of those laws, and to the resulting excessive black-market prices for narcotics." (footnote omitted)).

430. Criminal subculture theory, which posits that drugs and crime are part of a deviant lifestyle perpetuated by social problems, is one of the strongest theories explaining the connection between crime and drug use for adult offenders. Lurigio & Swartz, *supra* note 235, at 69.

431. *Id.*

432. For example, the majority opinion in *Board of Education v. Earls* held that drug testing of students participating in extracurricular activities was constitutional because the "drug epidemic makes the war against drugs a pressing concern in every school." *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002). In *Morse v. Frederick*, the Court held that there was no infringement of a student's right to free speech based upon his suspension for holding a banner reading "BONG HiTS 4 JESUS" due to Congress's decision to give unique status to the war on drugs. *Morse v. Frederick*, 551 U.S. 393, 397, 408–10 (2007).

harm.<sup>433</sup> Under current U.S. drug policy, applying a presumption of violence against defendants and a reduction of privacy rights in drug searches results in problematic losses of constitutional rights for drug defendants.<sup>434</sup>

Some courts have recognized that doling out harsh punishments for drug crimes is an injustice,<sup>435</sup> particularly in light of the fact that they are not sentencing dangerous kingpins but low-level drug sellers or users.<sup>436</sup> A line of cases indicates a long and continuing history of this opposition toward harsh narcotic laws and sentencing, with many judges begrudgingly enforcing the guidelines though finding the results too severe.<sup>437</sup> Some

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433. See Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 757–68 (2002) (documenting the exceptions to Fourth Amendment safeguards that courts afford law enforcement agents in the enforcement of drug laws).

434. See *supra* Part III.C.

435. See, e.g., *United States v. Gelinis*, 299 F.3d 978, 980 (8th Cir. 2002) (Bright, J., concurring) (“Here we have another example of an application of the Sentencing Guidelines resulting in an exceedingly lengthy sentence for a relatively minor player in a drug conspiracy.”); *United States v. Valencia-Aguirre*, 409 F. Supp. 2d 1358, 1367 (M.D. Fla. 2006) (discussing frustration over sentencing guidelines); *United States v. Jaber*, 362 F. Supp. 2d 365, 382 (D. Mass. 2005) (“While the government believes that the Guidelines are entirely adequate to reflect [the defendant’s] culpability and the appropriate sentence, I do not agree.”); *United States v. Williams*, 78 F. Supp. 2d 189, 191, 194 (S.D.N.Y. 1999) (deciding to depart from “the draconian range of the career offender guidelines”), *abrogated by* *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001); Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180, 184 (1999) (“My colleague, Justice Kennedy, along with most judges in the federal system, believes that mandatory minimums are ‘imprudent, unwise, and often an unjust mechanism for sentencing.’” (footnote omitted)).

436. See, e.g., *United States v. Newhouse*, 919 F. Supp. 2d 955, 974–75, 992 (N.D. Iowa 2013) (discussing in depth and rejecting a sentencing guideline for “a low-level, non-violent drug addict,” and stating that carrying out the guideline would be “a miscarriage of justice”); *United States v. Vasquez*, No. 09–CR–259 (JG), 2010 U.S. Dist. LEXIS 32293, at \*9, \*15 (E.D.N.Y. Mar. 30, 2010) (stating that because “prosecutors can decide that street-level defendants like [the defendant]—the low-hanging fruit for law enforcement—must receive the harsh sentences that Congress intended for kingpins and managers, no matter how many other factors weigh in favor of less severe sentences,” the court was obligated to impose the mandatory minimum sentence on the defendant, “supplant[ing] any effort to do justice”); *United States v. Wilkerson*, 773 F. Supp. 479, 481 (D.D.C. 1991) (“Here again, I want to point out that the government has not brought before this Court a drug kingpin. At some point I hope Congress will review its sentencing regime because cases like this demonstrate quite clearly that the law is requiring the imposition of unduly harsh sentences in no way commensurate with the offenses committed.”).

437. E.g., *United States v. Lara*, 47 F.3d 60, 67 (2d Cir. 1995) (“The departure authority is not a license for courts to restructure the Guidelines . . . .”); *United States v. Johnson*, 25 F.3d 1335, 1339 (6th Cir. 1994) (“With its transfer of sentencing discretion from judges to prosecutors who control charging decisions, the current scheme seems designed to produce ever longer sentences, even though such increases may be disproportionate and unwarranted.”), *post-conviction relief granted sub nom. Johnson v. United States*, 154 F.3d 569 (6th Cir. 1998), *rev’d*, *United States v. Johnson*, 529 U.S. 53 (2000); *United States v. Griffin*, 17 F.3d 269, 273 (8th Cir. 1994) (Bright, J., dissenting) (“First, this case graphically punctures a myth that mandatory minimums and guideline sentences in drug cases result in equal treatment for offenders.”); *United States v. Jones*, 997 F.2d 1475, 1476 (D.C. Cir. 1993)

judges specifically noted that sentences for “just” drugs do not deserve unnecessary harsh sentences,<sup>438</sup> some of which were designed to punish violent drug criminals. Other judges have complained that sentences vary by drug type and quantity rather than role in the crime.<sup>439</sup> Overall, many judges have complained that drug sentencing is too harsh and does not capture the violent criminals it was intended to incapacitate, further necessitating the de-linking of drugs and violence.

## VI. CONCLUSION

The link between drugs and violence forms the foundation of U.S. drug policy and underlies federal and state case law and statutes. Over

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(noting that the trial court judge found that the sentence the Guidelines would call for seemed “unduly harsh and unfair”); *United States v. Blarek*, 7 F. Supp. 2d 192, 204 (E.D.N.Y. 1998) (“Although the drafters of the Guidelines deviated from pre-Guidelines practices in some instances where they believed public policy dictated, for example in the creation of extraordinarily harsh penalties for drug offenses . . . the degree of severity does not appear to be fully supported by public sentiment.” (citations omitted)), *aff’d*, 166 F.3d 1202 (2d Cir. 1998); *United States v. Flowers*, 983 F. Supp. 159, 173 (E.D.N.Y. 1997) (“The law, particularly in light of the possibility of an unduly harsh sentence under the sentencing guidelines, encourages the discretionary action taken in the present case.”); *United States v. Shonubi*, 962 F. Supp. 370, 372 (E.D.N.Y. 1997) (“[D]rug offenses tables were unnecessarily pegged to high minimum statutory terms.”); *United States v. Carbonell*, 737 F. Supp. 186, 187 (E.D.N.Y. 1990) (noting that the Guidelines as formulated are unfair in not considering mitigating personal characteristics affected by socioeconomic status). *See also* *United States v. Schwarz*, 500 F.2d 1350, 1354 (2d Cir. 1974) (Moore, J., dissenting) (conceding that the sentence at hand “may appear to have been unduly harsh”); *United States v. Swapp*, 695 F. Supp. 1140, 1142, 1150 (D. Utah 1988) (declining to follow sentencing guidelines under the Sentencing Reform Act), *rev’d sub nom.* *United States v. Singer*, 868 F.2d 1201 (10th Cir. 1989).

However, in 2005 the Supreme Court held that judges are no longer bound by the guidelines, but can view them as advisory instead. *See United States v. Booker*, 543 U.S. 220, 246 (2005) (“The other approach, which we now adopt, would . . . make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”).

438. *See, e.g., United States v. Precely*, 628 F.3d 72, 83 (2d Cir. 2010) (Lynch, J., concurring) (stating that a prison term of sixteen years “almost exclusively tied to the possession and sale of narcotics . . . seem[ed] remarkably severe”); *United States v. Graham*, 622 F.3d 445, 470 (6th Cir. 2010) (Merritt, J., dissenting) (calling sentencing guidelines “a source of very harsh punishments in drug cases”); *United States v. Stonerock*, 363 F. App’x 338, 350 (6th Cir. 2010) (Merritt, J., concurring) (remarking that invoking a mandatory minimum in a nonviolent drug case seemed “unduly harsh”).

439. *E.g., United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 U.S. Dist. LEXIS 11386, at \*2–3 (E.D.N.Y. Jan. 28, 2013) (“The flaw is simply stated: the Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more. Instead, they are driven by drug type and quantity, which are poor proxies for culpability.”); *United States v. Williams*, 788 F. Supp. 2d 847, 892 (N.D. Iowa 2011) (in discussing the attempt to differentiate different forms of drugs, stating: “Can anyone imagine a sentence that is many times harsher for becoming legally intoxicated by drinking wine rather than beer? Of course not.”).

time, political and media rhetoric recounting horror stories of drugs and violent crime sprees have shaped the public's perception of drugs. Starting from the early twentieth century, legislation quickly followed rhetoric through several periods of U.S. history, with the latest and most lasting era constituting the war on drugs from the 1960s through the 1990s. Today, statutes and case law cement the causal link between drugs and violence, resulting in harsh punishments for state and federal drug offenders in an effort to reduce violence. This link between drugs and violence has become the basis for U.S. drug policy.

This Article demonstrates that the causal link between drugs and violence is flawed and conflicts with empirical data—particularly new data, like that uncovered by my work with economist Frank McIntyre—which shows that drug defendants are statistically the most nonviolent defendants a court can release before trial.<sup>440</sup> The link is also not supported by social science data that shows that most drug defendants are not violent, that drug possession and trafficking do not necessarily involve violence, and that the relationship between drugs and violence may be better explained by age, environment, and personality factors. However, although the drug-violence link lacks proper empirical support, it is rarely challenged and forms the backbone of much of U.S. drug policy. Countless U.S. cases and statutes continue to rely on this link to justify trumped-up mandatory sentences, presumptions favoring detention of state and federal defendants, and over time disproportionate increases in incarceration for nonviolent defendants who pose little threat to public safety.

In recent years, however, the public's perception of at least some drugs has shifted toward embracing a more nuanced approach to drug use. Many states now allow use of marijuana for a variety of legal uses.<sup>441</sup>

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440. See Baradaran & McIntyre, *supra* note 23, at 556–59 (“[T]hough defendants with drug felonies are presumed to be dangerous, they are among *the least* likely to be rearrested for a violent crime.”).

441. See *supra* notes 150–151 and accompanying text. In addition, the federal government has changed how it approaches the drug problem, and even classifies drug addiction as a treatable disease instead of a criminal activity. See, e.g., ALLISON C. COLKER, SHERI STEISEL & TIM WHITNEY, NAT'L CONFERENCE OF STATE LEGISLATURES, TREATMENT OF ALCOHOL AND OTHER SUBSTANCE USE DISORDERS: WHAT LEGISLATORS NEED TO KNOW 3 (2004) (“The goal of the National Institute on Drug Abuse . . . is to help the public replace its myths and long-held mistaken beliefs about alcohol and other substance use disorders with scientific evidence that addiction is a chronic, relapsing and treatable disease.”(footnote omitted)); Reuter, *supra* note 22, at 77 (“The idea that ‘addiction is a brain disease,’ promoted initially by the National Institute on Drug Abuse and now a part of federal government rhetoric generally, whatever its programmatic and conceptual weaknesses, at least has provided a basis for talking in a more therapeutic and less exclusively moralized frame about criminally active drug addicts.”); Linda Carter Batiste, *Accommodation and Compliance Series: Employees with Drug*

Scholars have advocated less severe punishments for nonviolent offenders.<sup>442</sup> These changes, however, have not been enough to make even a dent in the prison population growth we have faced due to the war on drugs. Rather, these changes demonstrate that the time may be ripe to reconsider the flawed causal link between drugs and violence. Indeed, the entire framework of federal and state drug statutes must be reworked to remove the many presumptions that drugs cause violence. Divorcing drugs and violence may be the key to saving U.S. drug policy.

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*Addiction*, JOB ACCOMMODATION NETWORK (March 11, 2013), <http://askjan.org/media/drugadd.html> (defining drug addiction as “a chronic, relapsing, and treatable disease” per the National Institute on Drug Abuse).

442. See generally A. David Mazzone, *The Sentencing Commission’s Drug Abuse and Violence Symposium*, 6 FED. SENT’G REP. 92 (1993).