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CRIMINAL LAW—DREAMING OF A DRUG WAR RECKONING

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Day after day, government officials across the United States make public statements celebrating various “victories” in our never-ending War on Drugs. These shallow statements overlook the true cost of this “war” and perpetuate the binary idea that there will eventually be a winner and a loser. If we continue down the path of war, nobody wins. The following article assesses the impact of this war by imagining a public official having a moment of contrition and acknowledging the errors of our ways.

INTRODUCTION

On June 17, 1971, President Richard Nixon declared that drug use was “public enemy number one.”¹ The “war on drugs” was launched, resulting in a militarized police force responsible for decades of death and destruction. Fifty years later, this approach itself has proven to be the real enemy. The following fictionalized statement references empirical evidence to highlight the community impact of this war on drugs and the financial cost. The war is a key mechanism in perpetuating systemic racism.² This article recognizes the impact that drug raids have on children and families who are often witnesses to the brutality and carry those traumatic scars through life. There has been anecdotal evidence that seized drugs are not always properly discarded but instead pilfered by law enforcement. Finally, if there are any winners in this war on drugs, it

1. President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), <https://prhome.defense.gov/Portals/52/Documents/RFM/Readiness/DDRP/docs/41%20Nixon%20Remarks%20Intensified%20Program%20for%20Drug%20Abuse.pdf>.

2. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

would be the drug cartels who have designed their business model reliant on the illegal designation of their products.

We write this fantasy piece as two criminal defense attorneys who have stood next to powerless people hoping that those with power will show mercy and compassion. Our optimism has allowed us, at times, to imagine what it would look like if those with the ability to make significant changes actually did that. What if the soldiers in this drug war made conscientious objections to being used as tools to perpetuate racial disparities, tear apart communities, and make drug lords obscenely wealthy? We follow the tradition of the earliest revolutionary patriots who made the radical choice to challenge what was not working. We do not know how the new system should operate but are certain that fifty years of this is more than enough.

Dear Residents of [*Neighborhood*]:

Last night, as many of you know, officers executed a search warrant at [*Address*] and seized [*Name and Quantity of Narcotics*] and [*Name and Quantity of firearms*], as well as [*Amount of Money*] in cash. [*#*] people were arrested, including [*#*] individuals believed to be members of [*Name of Gang*]. At times like this, it is customary for persons in my position to hold a press conference, point to contraband carefully arranged next to the podium, and proclaim the streets safer.³

I am afraid I can no longer take part in this ritual. Study after study has shown that the streets are never more dangerous than in the immediate aftermath of a “successful” drug raid.⁴ Indeed, at this very moment, we must assume our destabilization of [*Name of Gang*] has unleashed violence within this criminal organization and caused its members to become the targets of one or more rival gangs.⁵

We know from many decades of experience that eradicating a source

3. See, e.g., SoupduJour13, *The Wire Dope on the Table*, YOUTUBE.COM (Oct.17, 2013) <https://www.youtube.com/watch?v=-wS09hOrDPQ> [<https://perma.cc/A9ND-S6RH>].

4. See Dan Werb et al., *Effect of Drug Law Enforcement on Drug Market Violence: A Systematic Review*, INT’L J. POL’Y (Feb. 3, 2011), https://www.hri.global/files/2011/03/25/ICSDP_Violence_and_Enforcement_Report_March_2011.pdf; see also Christopher Moraff, *El Chapo’s Trial Solves Nothing: The ‘Freelancer Effect’ Applies Everywhere*, FILTER (Nov. 20, 2018), <https://filtermag.org/el-chapos-trial-solves-nothing-the-freelancer-effect-applies-wherever-you-look/amp/> [<https://perma.cc/ZHQ4-PYNC>]; Neil Woods & JS Rafaeli, *Drug War Photo-Op Policing Is a Betrayal of Law Enforcement’s Principles*, FILTER (May 16, 2019), <https://filtermag.org/drug-war-photo-op-policing-is-a-betrayal-of-law-enforcements-principles/amp/> [<https://perma.cc/PN7B-GVJC>].

5. See *Against Drug Prohibition*, ACLU, <https://www.aclu.org/other/against-drug-prohibition> [<https://perma.cc/2CED-46AL>] (last visited October 2020) (citing a government study that found 87% of “cocaine-related” killings in New York City “grew out of rivalries and disagreements related to doing business in an illegal market”).

of drugs in [*Neighborhood*] will have little impact on supply or demand.⁶ Recreational users and individuals with substance use disorders will still flock to the same corners in search of [*Name of Illicit Substance(s)*].⁷ Now that [*Names of Gang Members*] are in custody, control of the corner of [*Street Name #1*] and [*Street Name #2*] is suddenly up for grabs. Drive-by shootings and other acts of gratuitous and indiscriminate violence are to be expected. If citizens hope to avoid becoming collateral damage in the forthcoming turf war, those who live, work, and travel in and around this location must be especially cautious.

Of course, an uptick in short-term chaos is hardly the only cost of last night's law enforcement. The financial cost of penetrating this criminal enterprise required paying the salaries and overtime of [*# Narcotics Detectives and/or DEA Agents*]. It also necessitated cash payments to [*#*] confidential informants. These are drug users and dealers we compensate in exchange for information that can help us catch other drug users and dealers.⁸ The price tag can be pretty steep since the DEA paid \$237 million to approximately 9,000 confidential informants across the United States from October 2010 through September 2015.⁹

Prosecuting these new drug cases will now require the services of attorneys and administrative staff at the [*Office of the District Attorney or United States Attorney*]. Processing and adjudicating the cases will be the jobs of clerks, court officers, and judges. Protecting the rights of indigent defendants will fall to public defenders. Administering punishment will be done by personnel at the [*Department of Corrections or Bureau of Prisons*]. Of course, with all of these new entrants into the criminal legal system, there will be an increased burden on our probation and parole officers. Because none of these public servants work for free, we will need to consider budget cuts in other departments to accommodate these increases.

If all goes according to plan, last night's arrests will end up costing hundreds of thousands, if not millions, of tax dollars.¹⁰ To put these

6. *The State of Opioids*, VERA INST. JUST., <https://www.vera.org/state-of-justice-reform/2017/the-state-of-opioids> [<https://perma.cc/D2VC-BFJN>] (last visited Sept. 2020).

7. Christopher Contreras & John R. Hipp, *Drugs, Crime, Space, and Time: A Spatiotemporal Examination of Drug Activity and Crime Rates*, 37 JUST. Q. 2 (2020), <https://escholarship.org/content/qt7b50958z/qt7b50958z.pdf> [<https://perma.cc/V4K3-9QF2>] (it is well-settled that "certain locations are ecologically advantageous for drug offenders").

8. See Ryan Devereaux, *DEA's Army of 18,000 Informants Pocketed \$237 Million Over Five Years*, THE INTERCEPT (Sept. 30, 2016, 2:08 PM), <https://theintercept.com/2016/09/30/deas-army-of-18000-informants-pocketed-237-million-over-five-years/> [<https://perma.cc/7QAJ-B4PR>].

9. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MANAGEMENT AND OVERSIGHT OF ITS CONFIDENTIAL SOURCE PROGRAM 42 (2016), <https://oig.justice.gov/reports/2016/a1633.pdf>.

10. Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46957 (July

expenditures in perspective, in 2015 the price tag for incarcerating just one defendant in Massachusetts was \$55,170.¹¹ This was almost triple the annual gross income of a minimum wage earner in Massachusetts during the same year.¹²

While it is impossible to predict the outcomes of these new cases, chances are they will exacerbate the shameful racial disparities produced by our legal system. At each stage of the process, from arraignment to sentencing, Black, Indigenous, and people of color (BIPOC) defendants are statistically more likely to receive harsher treatment than their white counterparts.¹³

Every individual detained last night will eventually return to [*Neighborhood*]. Many will reluctantly resume their lives of crime once they realize their drug convictions have made them practically unemployable.¹⁴ Those committed to resisting the pull of the street will almost certainly need considerable public assistance to get back on their feet.¹⁵

As you may have heard, there were several children present at [*Address*] during the execution of the search warrant. Watching a paramilitary force obliterate the door to their home with a battering ram, as flash-bang grenades shattered their windows, was undoubtedly yet another traumatic moment in their young lives.¹⁶ Now that their parents have been taken into custody, it will be the taxpayers' burden to incur the costs of caring for children statistically likely to experience behavioral and mental health problems.¹⁷

19, 2016).

11. *The Price of Prisons*, VERA INST. JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/7CHQ-NUPM>].

12. Mass. Gen. Laws ch. 151 §§ 1–2 (2021).

13. See generally, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/CUV5-47VL>].

14. Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. L. PROJECT (Mar. 23, 2011), <https://www.nelp.org/publication/65-million-need-not-apply-the-case-for-reforming-criminal-background-checks-for-employment/> [<https://perma.cc/FAX8-KCBL>].

15. Michael Pittaro, *Why Ex-Prisoners Struggle to Successfully Reintegrate into Society*, IN PUB. SAFETY (May 4, 2018), <https://inpublicsafety.com/2018/05/why-ex-prisoners-struggle-to-successfully-reintegrate-into-society/> [<https://perma.cc/2HCU-ZMMS>].

16. See Romeo Vitelli Ph.D., *How Traumatic Are Law Enforcement Raids?*, PSYCH. TODAY (Sept. 13, 2018), <https://www.psychologytoday.com/us/blog/media-spotlight/201809/how-traumatic-are-law-enforcement-raids> [<https://perma.cc/ZJH4-XXVR>].

17. Yvonne Humenay Roberts et al., *Children Exposed to the Arrest of a Family Member: Associations with Mental Health*, 23 J. CHILD FAM. STUD. 214 (Jan. 19, 2013).

I used to think when drug dealers and users went to jail, it gave the communities they left behind a chance to thrive (or at least to heal). That is not what studies show.¹⁸ According to one recent study,

The deleterious health effects of incarceration are not merely confined to the family members of incarcerated individuals High levels of incarceration in neighborhoods can alter the social ecology of communities by eroding social capital and disrupting the kinds of social and family networks and relationships that are necessary for sustaining individuals' mental health as well as the well-being of communities Just as family members experience stigma when their loved ones are incarcerated, recent research . . . suggests that the stigmatization process may also affix to neighborhoods with high levels of incarceration.¹⁹

The only good news I can report is that the narcotics we seized last night will eventually be destroyed (if not pilfered and consumed, or sold for profit, by a member of the prosecution team).²⁰ The cash found at [Address] will be used to finance future law enforcement activities²¹ (if it is not stolen by one or more of the Department's officers,²² or misappropriated for "employee bonuses, staff parties" or "a margarita machine").²³

What about the drug cartels whose products we confiscated? Does

18. See, e.g., *id.*

19. Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, AM J PUB. HEALTH (Jan. 2015) (footnote omitted), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4265900/> [<https://perma.cc/D93A-8M67>].

20. See, e.g., Laura Wagner, *Ex-Chemist In Massachusetts Was High On Drugs At Work For 8 Years*, NPR (May 4, 2016), <https://www.npr.org/sections/thetwo-way/2016/05/04/476755684/ex-chemist-in-massachusetts-was-high-on-drugs-at-work-for-8-years> [<https://perma.cc/Z9PZ-VWLL>]; Michael L. Owens, *Former Marion Police Chief Sentenced to Six Years in Federal Prison*, BRISTOL HERALD COURIER (Oct. 9, 2013), https://heraldcourier.com/news/local/former-marion-police-chief-sentenced-to-six-years-in-federal-prison/article_3acf5d3a-30f8-11e3-b920-001a4bcf6878.html [<https://perma.cc/73UJ-L8ZP>].

21. Christopher Ingraham, *Law Enforcement Took More Stuff From People Than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/> [<https://perma.cc/N9M8-SLXT>].

22. See, e.g., Buffy Spencer, *Retired Springfield police officer Kevin Burnham accused of stealing money seized in more than 170 drug cases*, MASS. LIVE (Mar. 24, 2019), https://www.masslive.com/news/2016/01/indictment_charging_retired_sp.html [<https://perma.cc/Z74T-VZRN>].

23. Renée C. Lee, *Montgomery DA Says Funds Used for Liquor at Cook-Off*, HOUST. CHRON., <https://www.chron.com/neighborhood/humble-news/article/Montgomery-DA-says-funds-used-for-liquor-at-1757341.php> [<https://perma.cc/G5GP-BLC6>] (Aug. 7, 2011, 11:26 PM).

this loss in profits not hit them where it hurts? According to the United Nations, “worldwide proceeds from drug trafficking and other transnational organized crime were equivalent to 1.5 percent of global GDP, or \$870 billion in 2009.”²⁴ Raids, like last night’s, are a cost of doing business the cartels are only too happy to pay. Like the bootleggers of the Prohibition Era, drug lords depend on a single black market to ply their trade.²⁵ The greatest threat to their empires is not law enforcement, but the legalization and regulation of the substances they have made fortunes peddling.²⁶

The counterproductive nature of supply-side drug control is no secret.²⁷ For the last half century, we have spent over a trillion dollars²⁸ cutting off the heads of a hydra. Unless we find the courage to follow the example of Portugal²⁹ and quit our misguided quest for a drug-free world, we are destined to keep winning battles in a war we have already lost.

Fifty years is enough. It is time to address the disproportionate impact that the war of drugs has had on people of color, eroding community cohesion, and making the streets more dangerous. We are no longer willing to bear the financial cost under the illusion that the best way to deal with a health crisis is to criminalize it. And the bravest thing that we can do in this situation is to admit that this is a senseless war, which made drug cartels rich and everyone else impoverished. The drug “war” has

24. Salvador Rizzo, *Do Mexican Drug Cartels Make \$500 Billion a Year?*, WASHINGTON POST (June 24, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/06/24/do-mexican-drug-cartels-make-billion-year/> [<https://perma.cc/YJ6U-GFB7>].

25. PHILIP WALLACH & JONATHAN RAUCH, *BOOTLEGGERS, BAPTISTS, BUREAUCRATS, AND BONGS: HOW SPECIAL INTERESTS WILL SHAPE MARIJUANA LEGALIZATION* 7 (Elizabeth Sablich ed., Brookings 2016), <https://www.brookings.edu/wp-content/uploads/2016/07/bootleggers.pdf> [<https://perma.cc/5RTM-4BRD>] (noting how bootleggers “used private influence, secured mostly through bribery, to prolong and manipulate the enforcement regime that outlawed potential above-board competitors.”).

26. See Elliot Smith, *Legalization of Drugs Is The Way to Combat Cartels, Former Mexican President Says*, CNBC, <https://www.cnbc.com/2019/10/22/vicente-fox-legalizing-drugs-is-the-way-to-combat-cartels.html> [<https://perma.cc/37L9-TDCY>] (Oct. 23, 2019, 7:09 PM); Fresh Air, *‘Narconomics’: How The Drug Cartels Operate Like Wal-Mart And McDonald’s*, NPR (Feb. 15, 2016, 1:05 PM) <https://www.npr.org/2016/02/15/466491812/narconomics-how-the-drug-cartels-operate-like-wal-mart-and-mcdonalds> [<https://perma.cc/3MVM-WDZA>].

27. See generally PETER REUTER, *THE LIMITS OF SUPPLY-SIDE DRUG CONTROL* (Rand Corp., RP-942, 2001).

28. Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. AM. PROGRESS (June 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/> [<https://perma.cc/MS4N-X5QB>].

29. See Naina Bajekal, *Want to Win the War on Drugs? Portugal Might Have the Answer*, TIME (Aug. 1, 2018, 6:09 AM), <https://time.com/longform/portugal-drug-use-decriminalization/> [<https://perma.cc/FMX9-C577>].

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become public enemy number one.