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## Moral Panic and the War on Drugs

Phil Lord

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Phil Lord

## Moral Panic and the War on Drugs

20 U.N.H. L. REV. 407 (2022)

**ABSTRACT.** This Article analyzes the War on Drugs as a social phenomenon. It argues that such an analysis, which rejects the assumption that collective, institutionalized behavior is generally rational, can help us understand key aspects of why we continue to marginalize disadvantaged individuals. If the War on Drugs is a war and wars are won or lost, there is no question we lost. Whatever drug-related evil that war sought to eradicate, whether drug consumption, trafficking, or addiction, the data clearly shows that “drugs won.” Along the way, we nonetheless persisted – and largely still do. We filled prisons, lost lives, and shattered hopes and dreams. Those we hurt the most were already marginalized. To state that we lost is unhelpful and insufficient. Of course, we did. And we can draw obvious lessons that medicine and psychology work better than carceral institutions and that no one benefits from marginalizing already marginalized and often sick individuals. If the War on Drugs never worked, more salient questions are to be asked about why we fought it. This Article posits that the War on Drugs is not about drugs, crime, or addiction: it is about us. It is about why we cede to fear, anxiety, and irrationality. It is about why we stigmatize and hurt the most vulnerable. Like other irrational and counterproductive policies, the War on Drugs is not an anomaly. It bears close resemblance to other wars we fought (and fight) against the disempowered: witches, gays, Muslims, and others.

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## INTRODUCTION

People do weird things. At times, they behave irrationally and counterproductively – against their own best interest. They get driven by fear, anger, or anxiety. They hurt themselves, and they hurt others. In other words, they are human.

As an example, millennials shun romantic commitment significantly more than their parents and grandparents.<sup>1</sup> They fear the vulnerability and risk inherent to long-term relationships, and this fear outweighs the potential benefits of such relationships.<sup>2</sup> That is both irrational and counterproductive. Research consistently shows that romantic and other close relationships are key to living a happy and fulfilling life. The benefits of these relationships significantly outweigh the risks they involve and pain they can cause.<sup>3</sup>

The behavior of millennials can teach us something important about the human experience. We would never think of their behavior as rational or productive. We know it is not. Neither would we be satisfied with noticing that their behavior is counterproductive. That would not help much. Instead, we are interested in why millennials act this way, in what their behavior tells us about contemporary society and the human experience.<sup>4</sup> This interest is important in itself, and it is also key to understanding how behavior can change.

Somehow, though, we ascribe far more faith and many fewer flaws to our behavior as groups. We quickly assume that institutions such as legal systems and governments transcend our humanity and embody a level of rationality and objectivity that eludes individuals. This assumption is unsettled by fact and common sense. Legislative enactments and legal systems are not substantially different from the individuals who shape and constitute them. Or, at the very least, they are neither fully rational nor objective. Laws and policies are, at times, underlain by shared fear, anger, and anxiety. When they are, they fail to meet their stated purpose – and are often counterproductive. Irrational and counterproductive laws are not an anomaly. They are a natural and inevitable product of imperfect, human-made systems.

If the War on Drugs is a war and wars are won or lost, there is no question we

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<sup>1</sup> See Louisa Scheling & David Richter, *Generation Y: Do Millennials Need a Partner to be Happy?*, 90 J. ADOLESCENCE 23, 23 (2021). See generally VARDA KONSTAM, *THE ROMANTIC LIVES OF EMERGING ADULTS: GETTING FROM I TO WE* (Oxford, 2019).

<sup>2</sup> See Scheling & Richter, *supra* note 1, at 27. See generally KONSTAM, *supra* note 1.

<sup>3</sup> See Jessica Kansky, *What's Love Got to Do With It?: Romantic Relationships and Well-Being*, in *HANDBOOK OF WELL-BEING* 619, 619 (Ed Diener, Shigehiro Oishi & Louis Tay, eds., 2018).

<sup>4</sup> See Scheling & Richter, *supra* note 1, at 27. See generally KONSTAM, *supra* note 1.

lost. Whatever drug-related evil that war sought to eradicate, whether drug consumption, trafficking, or addiction, the data clearly shows that “drugs won.”<sup>5</sup> Along the way, we nonetheless persisted – and often still do. We filled prisons, lost lives, and shattered hopes and dreams.<sup>6</sup> Those we hurt the most were already marginalized.<sup>7</sup> To state that we lost is unhelpful and insufficient. Of course, we did. And we can draw obvious lessons that medicine and psychology work better than carceral institutions, and that no one benefits from marginalizing already marginalized and often sick individuals.

If the War on Drugs never worked, more salient questions are to be asked about why we fought it. This Article posits that the War on Drugs is not about drugs, crime, or addiction: it is about us. It is about why we cede to fear, anxiety, and irrationality. It is about why we stigmatize and hurt the most vulnerable. Like other irrational and counterproductive policies, the War on Drugs is not an anomaly. It bears close resemblance to other wars we fought (and fight) against the disempowered: witches, gays, and Muslims. If we are to ever tame our irrational impulses, we must first acknowledge them.

This Article proceeds in three parts. Part I provides general background on the War on Drugs and its impact. Part II defines the central concept of moral panic. Part III situates the War on Drugs as an instance of moral panic. It draws analogies to prior moral panics. Arguing that moral panics are inherently rhetorical and constitutive events, it also draws significantly upon a speech by then-First Lady of the United States Hillary Rodham Clinton.

## I. THE WAR ON DRUGS

In the 1970s, the Nixon administration developed a conviction that drugs had become a significant problem. That problem had to be addressed with public law, using the strongest tools in the arsenal, and to their fullest extent. The offensive would target the production, distribution, and consumption of these substances. A *Washington Post* journalist describes the War on Drugs’ onset as follows:

As declarations of war go, it was pretty low key. On June 17, 1971, President Richard M.

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<sup>5</sup> Mark William Osler, *What We Got Wrong in the War on Drugs*, ST. THOMAS L. REV. (forthcoming 2021) (manuscript at 2) (preprint online); see *infra* Part I.

<sup>6</sup> See *infra* Part I; see also Osler, *supra* note 5, at 2.

<sup>7</sup> See *infra* Part I. See generally Julian Buchanan & Lee Young, *The War on Drugs – A War on Drug Users?*, 7 DRUGS: EDUC., PREVENTION & POL’Y 409 (2000); Lisa D. Moore & Amy Elkavitch, *Who’s Using and Who’s Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782 (2008); Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41 (2011).

Nixon held a news briefing in the West Wing of the White House. In his usual dark suit and striped tie, speaking comfortably from notes, the president branded Americans' rising tide of drug abuse "public enemy number one." He continued: "In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive. . . . This will be a worldwide offensive. . . . It will be government-wide . . . and it will be nationwide." To fund this new war, Nixon declared, he would ask Congress to appropriate a minimum of \$350 million. (In 1969, when Nixon first took the oath of office, the nation's entire federal drug budget was just \$81 million.)<sup>8</sup>

As drugs became more popular, especially with younger Americans, over 80 percent of Americans also developed a conviction that even possession of lower-level drugs should be criminalized.<sup>9</sup> Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>10</sup> which rescheduled certain ("harder") drugs. Just over a decade later, as the offensive intensified, Congress passed the Anti-Drug Abuse Act of 1986,<sup>11</sup> which introduced mandatory minimum criminal sentences (including for lower-level drugs) and generally targeted drug dealers.

The War on Drugs – in a way typical of moral panics, as defined in the next Part – exemplifies a social consensus that drugs were a threat and that the threat had to be addressed through public law. It is a product of several presidential administrations and congresses, made up of politicians from across the political spectrum. The same *Washington Post* journalist emphasizes this point by quoting President Joe Biden:

Two years later, then-Sen. Joe Biden (D-Del.) tore into the George H.W. Bush administration, declaring, "We need another D-Day. Instead, you're giving us another Vietnam: a limited war, fought on the cheap, financed on the sly, with no clear objectives, and ultimately destined for stalemate and human tragedy." Mainstream politicians vied with one another to be seen as the toughest of the drug warriors. Harsh drug laws did not end with Reagan. Both Bush and Bill Clinton further escalated the War on Drugs, passing federal laws that increased imprisonment and provided massive resources for local and state enforcement.<sup>12</sup>

The key aspect of the War on Drugs is, of course, that it hasn't worked. That is

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<sup>8</sup> David Farber, *The War on Drugs Turns 50 Today. It's Time to Make Peace.*, WASH. POST. (June 17, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/> [https://perma.cc/A9UF-M8ZQ].

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

<sup>10</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

<sup>11</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

<sup>12</sup> Farber, *supra* note 8.

especially true of the criminalization of drug possession.<sup>13</sup> Although the United States is estimated to have spent over one trillion dollars on this effort,<sup>14</sup> it has failed to affect *any* drug-related outcome – whether drug consumption, trafficking, or addiction. Between 1980 and 2019, while the number of arrests in the United States remained roughly the same, the number of arrests on the basis of drug-related charges almost tripled.<sup>15</sup> Of the estimated drug-related 1,155,610 arrests in 2020, 86.7% were for possession of a controlled substance, and only 13.3% were for the sale or manufacture of a controlled substance.<sup>16</sup> In spite of the rhetoric of successive

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<sup>13</sup> See Desmond Manderson, *Possessed: Drug Policy, Witchcraft and Belief*, 19 CULTURAL STUD. 36, 38 (2005) [hereinafter Manderson, *Possessed*]; James C. Weissman, *Drug Control Principles: Instrumentalism and Symbolism*, 11 J. Psychedelic Drugs 203, 203 (1979). Regarding this data, I have noted: “Statistics ... suggest that the criminalisation of possession for personal consumption of all types of drugs does not decrease consumption rates, leads to the overincarceration of certain marginalised groups, and may even indirectly cause an increase in crime rates. In contrast, decriminalisation does not appear to cause an increase in consumption rates. Where it has been enacted, mortality rates related to drug consumption and drug use by vulnerable segments of the population (such as teenagers) have decreased,” Phil Lord, *“It Doesn’t Work!”: The Symbolic Aspect of Law, From the Criminal Law to Bill 21*, 9 DIRECTIONS 1, 8 (2020). See generally Brian Stauffer, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUMAN RIGHTS WATCH (Oct. 12, 2016), <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states> [<https://perma.cc/4HGC-9HM8>] (a recent, detailed report which catalogs the relevant data).

<sup>14</sup> See Farber, *supra* note 8; CHRISTOPHER J. COYNE & ABIGAIL R. HALL, *FOUR DECADES AND COUNTING: THE CONTINUED FAILURE OF THE WAR ON DRUGS*, 811 POLICY ANALYSIS 1, 2–3 (2017) (which also estimates that “[s]pending on the war continues to cost U.S. taxpayers more than \$51 billion annually.”).

<sup>15</sup> See FEDERAL BUREAU OF INVESTIGATION UNIF. CRIME REPORTING PROGRAM, *Total Annual Arrests in the US by Year and Type of Offense*, DRUG POLICY FACTS [hereinafter FBI, *Total Annual Arrests*], [https://www.drugpolicyfacts.org/chapter/crime\\_arrests#overlay=table/total\\_arrests](https://www.drugpolicyfacts.org/chapter/crime_arrests#overlay=table/total_arrests) [<https://perma.cc/D9EU-E8W7>]. In 1980, 580,900 individuals (out of 10,441,000 arrests) were arrested on drug-related charges. *Id.* In 2019, 1,558,862 individuals (out of 10,085,207 arrests) were arrested on drug-related charges. *Id.*

<sup>16</sup> See FEDERAL BUREAU OF INVESTIGATION UNIF. CRIME REPORTING PROGRAM, *Total Annual Drug Arrests in The United States by Offense Type*, DRUG POLICY FACTS, [https://www.drugpolicyfacts.org/chapter/crime\\_arrests#](https://www.drugpolicyfacts.org/chapter/crime_arrests#) [<https://perma.cc/R3N8-6RLG>]; see also FBI, *Total Annual Arrests*, *supra* note 15; PEW CHARITABLE TRS., *MORE IMPRISONMENT DOES NOT REDUCE STATE DRUG PROBLEMS: DATA SHOW NO RELATIONSHIP BETWEEN PRISON TERMS AND DRUG MISUSE 2* (Mar. 2018), [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_more\\_imprisonment\\_does\\_not\\_reduce\\_state\\_drug\\_problems.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf) [<https://perma.cc/HP5U-2P2P>], which also notes: “[N]early half of those sentenced for federal drug crimes in 2009 were lower-level actors, such as street dealers, couriers, and mules. Research indicates that the public safety

governments, neither the legislative enactments nor their enforcement appear to have targeted harder drugs or drug trafficking. Instead, the data suggests that use, possession, and trafficking of all types of drugs was criminalized (and targeted).<sup>17</sup> As a result, the War on Drugs disproportionately criminalized those who engage in more common activities, such as the use of lower-level drugs.<sup>18</sup>

Unsurprisingly, deterrence does not seem to work for drug use.<sup>19</sup> In other words, criminalization reduces neither drug use nor related issues, such as addiction and overdose deaths.<sup>20</sup> (In fact, more recently, drug use and the

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impact of incapacitating these offenders is essentially nullified because they are rapidly replaced.” *Id.* at 2.

<sup>17</sup> See sources cited *supra* note 16.

<sup>18</sup> See *id.*

<sup>19</sup> See PEW CHARITABLE TRS., *supra* note 16; see also Stauffer, *supra* note 13; Lord, *supra* note 13, at 8. Deterrence is a significant objective in the criminal law, see *infra* Part II.

<sup>20</sup> See PEW CHARITABLE TRS., *supra* note 16. The Pew Research Center is a nonpartisan organization. It finds no statistically significant relationship between these factors (on the one hand, criminalization; on the other, drug use, drug overdose deaths, and drug arrests), even when controlling for inter-state differences in population makeup (through factors such as race, unemployment, education, and income). See *id.* at 1, 5. The report adds illustrative examples: “For instance, Tennessee imprisons drug offenders at more than three times the rate of New Jersey, but the states’ rates of self-reported drug use are virtually the same. Conversely, Indiana and Iowa have nearly identical rates of drug imprisonment, but Indiana ranks 27th among states in self-reported drug use and 18th in overdose deaths compared with 44th and 47th, respectively, for Iowa.” *Id.* at 5. The report also notes that recidivism has not decreased over the same period. See *id.* at 2. The National Research Council has collected strong evidence that mandatory minimum sentences, a significant aspect of the strategy of successive governments in the War on Drugs, have virtually no deterrent effects on drug-related criminality. See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE 347, 347 (The National Academies Press, 2014); see also Letter from Eric H. Holder Jr., Att’y Gen., U.S., to U.S. Attorneys and Assistant Att’y Gen. for the Criminal Division (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> [<https://perma.cc/DMD9-H5W5>] (“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.”). On the other hand, significant federal and state reform reducing (or commuting) sentences for drug-related offenses did not cause an increase in criminality or recidivism. See *id.* at 6–7. As an example, the report notes: “In 2007, the Sentencing Commission retroactively cut the sentences of thousands of crack cocaine offenders, and a seven-year follow-up study found no increase in recidivism among offenders whose sentences were shortened compared with those whose were not. In 2010, Congress followed the commission’s actions with a broader statutory decrease in penalties for



availability of certain harder drugs has increased.)<sup>21</sup> If there were ever some people who elected to refrain from engaging in criminal activity out of fear of incarceration, they would likely be those who can *choose* to refrain from engaging in these activities, such as drug dealers. In contrast, individuals whose use of drugs is criminalized are often, and by definition, addicted. They cannot freely respond to incentives.<sup>22</sup> Much can be said regarding the shift in public opinion regarding the criminalization of drug use. As noted, when the War on Drugs was first proposed, public opinion strongly supported the criminalization of possession of nominal quantities of lower-level drugs.<sup>23</sup> In contrast, most people now take it as a given that those struggling with a drug addiction are a threat to themselves, not others, and should be offered treatment, not punished.<sup>24</sup>

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crack cocaine offenders.” *Id.* at 6; *see also* Stauffer, *supra* note 13 (“In 2001, Portugal decriminalized the acquisition, use, and possession of illicit drugs in quantities up to a 10-day supply. ... According to a 2010 evaluation, rates of overall use in the population have stayed low—below the European average, and far lower than rates in the United States—while use by adolescents and use by people deemed to be drug dependent or who inject has declined. ... The number of people receiving drug treatment jumped by more than 60 percent after decriminalization. ... Decriminalization has also not triggered so-called “drug tourism,” a 2009 UN study found.”). Other, more partisan sources have noted that the War on Drugs is closely related to the spread of certain diseases and to violent crimes, including homicides. *See* COYNE & HALL, *supra* note 14, at 7–8. U.S. efforts aimed at curbing the supply of drugs from foreign countries have also largely failed. *See id.* at 14–15 (“The Department of Defense, for example, more than tripled its operating budget for counter-narcotics in Afghanistan from \$72 million in 2004 to \$225 million in 2005. ... Counter-drug policies in Afghanistan have not curtailed the drug market domestically and have been counterproductive to other U.S. policy goals. In fact, cultivation of opium poppy nearly tripled between 2002 and 2013, from 76,000 hectares in 2002 to a record 209,000 hectares. According to the United Nations, Afghanistan now produces some 80 percent of the world’s illicit opium.”).

<sup>21</sup> *See* PEW CHARITABLE TRS., *supra* note 16, at 2 (“self-reported use of illegal drugs increased between 1990 and 2014, as has the availability of heroin, cocaine, and methamphetamine as indicated by falling prices and a rise in purity” [references omitted]).

<sup>22</sup> Some have noted that low-level drug dealers have very low incomes, *see* STEPHEN J. DUBNER & STEVEN LEVITT, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 79–105 (HarperCollins, 2009). We could therefore also question the assumption that most drug dealers respond to incentives. *See generally* RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE: THE FINAL EDITION* (Penguin, 2021).

<sup>23</sup> *See* Farber, *supra* note 8 (“Already in 1969, 84 percent of Americans said anyone caught with even the smallest amount of marijuana should go to prison.”).

<sup>24</sup> *See* PEW CHARITABLE TRS., *supra* note 16, at 8; Letter from Danny Franklin, Partner, Bully Pulpit Interactive, to Interested Parties (June 9, 2021) [hereinafter Letter from Danny Franklin], <https://www.aclu.org/other/poll-results-american-attitudes-toward-war-drugs>

Significantly, the impact of the War on Drugs has been deeply heterogeneous. Those who bore the brunt of it were already marginalized. Traditionally marginalized groups, such as African Americans, are disproportionately likelier to be targeted, arrested, and sentenced for drug-related offences. While African Americans represent some 12 percent of the United States population, they represent 62 percent of drug offenders in state prison systems.<sup>25</sup> (Drug use rates are very similar amongst African Americans and the rest of the population.)<sup>26</sup> Persons of color already make up 60 percent of the prison population – for all offences.<sup>27</sup> Persons of color make up an even greater proportion of those convicted of charges involving a mandatory minimum sentence.<sup>28</sup> For drug-related offences, a mandatory minimum sentence is more likely to be sought, and post-sentencing relief is less likely to be granted.<sup>29</sup>

Wealth and other factors which make individuals vulnerable to overlapping forms of discrimination are intimately intertwined. African Americans own significantly fewer assets than other racial groups.<sup>30</sup> Their incomes are lower, and

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[<https://perma.cc/7XH8-K2BG>]; cf. Stauffer, *supra* note 13 (discussing the experience of U.S. states and foreign jurisdictions with decriminalization).

<sup>25</sup> See COYNE & HALL, *supra* note 14, at 12 (which also notes that the War on Drug intensified these gaps); see also Moore & Elkavitch, *supra* note 7, at 784 (“In 1996, Blacks constituted 62.6% of drug offenders in state prisons. Nationwide, the rate of persons admitted to prison on drug charges for Black men is 13 times that for White men, and in 10 states, the rates are 26 to 57 times those for White men” [references omitted]); Jamie Fellner, *Punishment and Prejudice: Racial Disparities in the War on Drugs – Racially Disproportionate Incarceration of Drug Offenders*, HUMAN RIGHTS WATCH (May 2000), [https://www.hrw.org/reports/2000/usa/Rcedrg00-04.htm#P289\\_60230](https://www.hrw.org/reports/2000/usa/Rcedrg00-04.htm#P289_60230) [<https://perma.cc/K8SU-VZRH>]. For more recent statistics, see E. Ann Carson, *Prisoners in 2016*, U.S. DEPT. OF JUST.: BUREAU OF JUST. STAT. 1, 7 (Jan. 2018), <https://bjs.ojp.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/5FGU-CD2W>].

<sup>26</sup> See Moore & Elkavitch, *supra* note 7, at 783.

<sup>27</sup> See *id.*; Carson, *supra* note 25, at 7.

<sup>28</sup> See Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR FOR AM. PROGRESS (June 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/> [<https://perma.cc/U55E-CC4T>]; U.S. SENT’G COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2017) [hereinafter U.S. Sent’g Comm’n], [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Mand\\_Mins\\_FY17.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY17.pdf) [<https://perma.cc/K544-FGNK>].

<sup>29</sup> See Pearl, *supra* note 28; U.S. SENT’G COMM’N, *supra* note 28.

<sup>30</sup> See, e.g., Melvin L. Oliver & Thomas M. Shapiro, *Disrupting the Racial Wealth Gap*, 18 CONTEXTS 16, 18 (2019) (finding that the average African-American family owns a tenth of the wealth of the average White family); Lisa A. Keister, *Race and Wealth Inequality: The Impact of Racial*

they are disproportionately less likely to see them grow.<sup>31</sup> The War on Drugs has contributed, and continues to contribute, to the marginalization of African Americans and other groups that were already marginalized and overincarcerated. And criminalization significantly contributes to a cycle of marginalization.<sup>32</sup> Those with a criminal record will find it almost impossible to gain employment, especially in lower-paying industries.<sup>33</sup> Prof. Lisa Moore has noted that the impacts of criminalization can be wider ranging:

The challenges that lead a person to prison – drug addition, alcoholism, untreated mental illnesses, lack of employment opportunities – are not abated by incarceration; they are often worsened. Former inmates may have lost family and social ties. . . . Zero tolerance laws prohibit people with drug-related felonies from using government assistance such as public housing and federal financial aid to attend college. However, violent felons are not excluded from these programs.<sup>34</sup>

The next Part defines the concept of moral panic. The following Part draws upon the history of the War on Drugs and the data regarding its disproportionate impact on marginalized groups, as laid out in this Part, to argue that the War on Drugs is best conceptualized as an instance of moral panic.

## II. MORAL PANIC

Over the past five decades, moral panic has emerged as a textured and nuanced

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*Differences in Asset Ownership on the Distribution of Household Wealth*, 29 SOC. SCI. RSCH. 477, 478 (2000).

<sup>31</sup> See, e.g., Randall Akee et al., *Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races*, 56 DEMOGRAPHY 999, 1002 (2019).

<sup>32</sup> See generally MARIE-EVE SYLVESTRE, NICHOLAS BLOMLEY & CÉLINE BELLOT, *RED ZONES CRIMINAL LAW AND THE TERRITORIAL GOVERNANCE OF MARGINALIZED PEOPLE* (Cambridge, 2020); BARBARA EHRENREICH, *NICKEL AND DIMED ON (NOT) GETTING BY IN AMERICA* (Picador, 2011).

<sup>33</sup> See Moore & Elkavitch, *supra* note 7, at 784; COYNE & HALL, *supra* note 14, at 2. See generally Patricia M. Harris & Kimberly S. Keller, *Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions*, 21 J. CONTEMP. CRIM. JUST. 6 (2005); EHRENREICH, *supra* note 32. This is particularly problematic given the overrepresentation of criminalized and marginalized groups in these lower-paying positions.

<sup>34</sup> Moore & Elkavitch, *supra* note 7, at 784; see also COYNE & HALL, *supra* note 14, at 2 (“Approximately 50,000–60,000 students are denied financial aid every year due to past drug convictions.”). These issues are likely to make the majority of Americans increasingly uncomfortable. Indeed, 2020 marked an inflexion point in public opinion regarding the significance of racial disparities in various aspects of American society, and the urgency to address them. See generally Phil Lord, *Black Lives Matter: On Challenging the Soul of Legal Education*, 54 TEX. TECH. L. REV. 89 (2022).

sociological concept. While it may have been (mis)used by politicians and others as a rhetorical device, it is still rigorously used, applied, and debated in sociology and other disciplines.<sup>35</sup> The phrase was first coined in Stanley Cohen's monograph *Folk Devils and Moral Panics*.<sup>36</sup> In the first chapter of his monograph, Cohen introduces the concept as follows:

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way the society conceives itself.<sup>37</sup>

The phrase moral panic implies both a collective component in the reaction to an actual or perceived threat, and the disproportionality and reactionary nature of the reaction. Stuart Hall and others add to Cohen's definition:

When the official reaction to a person, groups of persons or series of events is *out of all proportion* to the actual threat offered, when 'experts', in the form of police chiefs, the judiciary, politicians and editors *perceive* the threat in all but identical terms, and appear to talk 'with one voice' of rates, diagnoses, prognoses and solutions, when the media representations universally stress 'sudden and dramatic' increases (in numbers involved or events) and 'novelty', above and beyond that which a sober, realistic appraisal could

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<sup>35</sup> See David Garland, *On the Concept of Moral Panic*, 4 CRIME, MEDIA, CULTURE: INT'L J. 9, 9 (2008).

<sup>36</sup> See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS 1* (MacGibbon and Kee, 1972). The monograph has been republished and reprinted several times. The latest edition is STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (Routledge, 2011) [hereinafter COHEN, *FOLK DEVILS AND MORAL PANICS* (2011)]. Cohen subsequently further developed his analytical and theoretical framework. See, e.g., STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 170* (Wiley, 1991); Stanley Cohen, *Whose Side Were We On? The Undeclared Politics of Moral Panic Theory*, 7 CRIME, MEDIA, CULTURE: INT'L J. 237, 238 (2011).

<sup>37</sup> COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36, at 1; see also David L. Altheide, *Moral Panic: From Sociological Concept to Public Discourse*, 5 CRIME, MEDIA, CULTURE: INT'L J. 79, 80 (2009); Sheldon Ungar, *Moral Panic Versus the Risk Society: The Implications of the Changing Sites of Social Anxiety*, 52 BRIT. J. SOC. 271, 271 (2001); Amanda Rohloff & Sarah Wright, *Moral Panic and Social Theory: Beyond the Heuristic*, 58 CURRENT SOC. 403, 403 (2010).

sustain, then we believe it is appropriate to speak of . . . a *moral panic*.<sup>38</sup>

These early accounts of moral panics emerged in the 1970s, yet they remain highly influential to contemporary conceptualization. In more recent research, moral panic has been helpfully reduced to the following constitutive factors: (i) concern (anxiety – as a result of a real or perceived threat); (ii) hostility (vilification of a group, labelled in research as “folk devils”); (iii) consensus (collective aspect of the reaction); (iv) disproportionality (again, of the reaction); (v) volatility (moral panics often emerge, propagate, and subside quickly);<sup>39</sup> (vi) a *moral* dimension; and (vii) the shared conviction that the deviant conduct is symptomatic.<sup>40</sup>

I must emphasize and draw out three aspects of moral panics, which will be of particular assistance to my discussion of the War on Drugs. First, as noted by Cohen and others, the (mass) media has played a key role in the emergence and intensification of contemporary instances of moral panic.<sup>41</sup> Likely as a result, the media’s role has been noted in most theoretical frameworks. While the same social phenomena *can* be observed in earlier societies,<sup>42</sup> contemporary moral panics are intricately tied to the rise of the mass media, incentivized to draw and monetize attention,<sup>43</sup> and the erosion of historical barriers to access to information.<sup>44</sup>

Second, as noted, moral panics involve the stigmatization of a particular group.<sup>45</sup> Significantly, this group is often already marginalized: the “folk devils,” or

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<sup>38</sup> STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE AND LAW AND ORDER* 20 (Red Globe Press, 2nd ed. 2013) (emphasis in original).

<sup>39</sup> On the first five elements, see ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 37–43 (Wiley, 2nd ed., 2008). See also Garland, *supra* note 35, at 10–11; Rohloff & Wright, *supra* note 37, at 416; Ungar, *supra* note 37, at 275.

<sup>40</sup> On the latter two elements, see Garland, *supra* note 35, at 11.

<sup>41</sup> See generally COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36; HALL ET AL., *supra* note 38; GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35; Ungar, *supra* note 37; Altheide, *supra* note 37.

<sup>42</sup> See, e.g., Manderson, *supra* note 13, at 41; Issac Ariail Reed, *Deep Culture in Action: Resignification, Synecdoche, and Metanarrative in the Moral Panic of the Salem Witch Trials*, 44 *THEORY & SOC’Y* 65, 78 (2015). The sources discuss moral panic regarding witches and witchcraft.

<sup>43</sup> See generally Kenneth R. Ahern & Denis Sosyura, *Rumor Has It: Sensationalism in Financial Media*, 28 *REV. FIN. STUD.* 2050 (2015); Scott Gehlbach & Konstantin Sonin, *Government Control of the Media*, 118 *J. PUB. ECON.* 163 (2014).

<sup>44</sup> See CASS R. SUNSTEIN, *LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION* (Oxford, 2021). See generally Narcyz Roztocki, *The Role of Information and Communication Technologies in Socioeconomic Development: Towards a Multi-Dimensional Framework*, 25 *INFO. TECH. DEV.* 171 (2019).

<sup>45</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

scapegoats, tend to be those who are already singled out – perhaps because they are different.<sup>46</sup> This point is further discussed in the next Part.

Third, contemporary moral panics often involve the criminal law. The behavior labelled as deviant, which society seeks to eradicate, is often criminalized.<sup>47</sup> This is likely a result both of the criminal law's unique characteristics and its intrinsic familiarity with the "moral" aspect of moral panics. Of course, the disproportionality of reactions in a moral panic makes the criminal law a uniquely fit tool.<sup>48</sup> With its stark punishments and more systematic application, it is our strongest legal tool.<sup>49</sup> More importantly, the criminal law has long served non-instrumental functions, which are not legitimized beyond the criminal law. Behavior is at times criminalized because it is perceived to be wrong: this denunciation of the immorality of the behavior is in itself valued, regardless of whether criminalization serves more instrumental outcomes like deterrence.<sup>50</sup> This symbolic aspect of law, often labelled denunciation, is found in criminal codes and statutes – most predominantly in sentencing provisions.<sup>51</sup> It is a way for a society

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<sup>46</sup> See, e.g., Garland, *supra* note 35, at 14 (not directly stating as much but listing as examples of folk devils "welfare claimants, single mothers, illegal immigrants, HIV sufferers, gay men"); COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36, at xxi (also indirectly supporting the claim and listing as folk devils "welfare cheats" and "unmarried mothers"); Ungar, *supra* note 37, at 283–84; see also *infra* Part III.

<sup>47</sup> See, e.g., Manderson, *Possessed*, *supra* note 13, at 43; Reed, *supra* note 42, at 69; Robert Leckey, 'Repugnant': Homosexuality and Criminal Family Law, 70 U. TORONTO L.J. 225, 225–26 (2020) (referring to fear and anxiety – without a mention of moral panics – in the criminalization of homosexuality); COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36, at 1; Altheide, *supra* note 37, at 79.

<sup>48</sup> On disproportionality, see generally GOODE & BEN-YEHUDA, *supra* note 39.

<sup>49</sup> See Lord, *supra* note 13, at 7. The application of the criminal law can lead to the loss of one's fundamental freedom. Its application is more systematic because it is a public law tool. The application of the criminal law is not as subject to cost and other constraints inherent to private law rights and remedies. One might also speculate that incarceration is uniquely relevant to protecting society from the real or perceived threat of a particular group, as it isolates offenders from society.

<sup>50</sup> See generally Lord, *supra* note 13; Richard Dubé & Sébastien Labonté, *La dénonciation, la rétribution et la dissuasion : repenser trois obstacles à l'évolution du droit criminel moderne*, 57 CAHIERS DE DROIT 685 (2016); Bill Wringer, *Rethinking Expressive Theories of Punishment: Why Denunciation is a Better Bet than Communication or Pure Expression*, 174 PHIL. STUD. 681 (2016); Lisa L. Sample et al., *Sex Offender Community Notification Laws: Are Their Effects Symbolic or Instrumental in Nature?*, 22 CRIM. JUST. POL'Y REV. 27 (2011).

<sup>51</sup> See Lord, *supra* note 13, at 6–7 (noting that the Canada's Criminal Code (R.S.C. 1985, c. C-46) includes denunciation as a factor in sentencing and that "[a]lthough many have criticised the

to “communicate” the significance of deviant behavior, as well as the ways in which it infringes upon key values or convictions shared by community members<sup>52</sup> – what I have termed “[at times] repugnant situations which shock the public conscience.”<sup>53</sup> Implicit in such criminalization is a shared, collective anxiety (as invoked in the above definition of a moral panic)<sup>54</sup>: the behavior we criminalize is a threat, a threat to these values and convictions and thereby to the shared identity they define.<sup>55</sup>

### III. FROM WITCHES TO SUPERPREDATORS

This Part draws upon the factual background and theoretical framework laid out in the previous Parts to argue that the War on Drugs is an instance of moral panic. Its methodology is eclectic because moral panics are not objects of rational, deliberate human endeavor. They are instead products of deep, dark, inherent human emotions: fear, hate, and anxiety.<sup>56</sup> As objects of human psychology, they are rhetorical and constitutive events. While they are sparked by fear and anxiety, they propagate and intensify through rhetoric. This rhetoric is in turn (re)constitutive. The canonical authors note the “volatility” of moral panics: they emerge, propagate, and subside quickly.<sup>57</sup> They quickly become collective events, as fear spreads within a community. Fear spreads through the rhetoric of those who express it and vilify the “folk devils” who are deemed dangerous or responsible.<sup>58</sup> As noted, the mass media has played a key role in the development of contemporary moral panics:<sup>59</sup> it is the metaphorical megaphone to this rhetoric. James Boyd

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relevance of denunciation in sentencing, its importance does not seem to have waned over time. Many recent amendments to the Criminal Code further entrench its importance when certain crimes have been committed. This is true regarding offenses against children, peace officers and other justice system participants.” [references omitted]; see also MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 84 (Oxford, 2010).

<sup>52</sup> Dubé & Labonté, *supra* note 50, at 691–92.

<sup>53</sup> Lord, *supra* note 13, at 8.

<sup>54</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39.

<sup>55</sup> See generally Lord, *supra* note 13.

<sup>56</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>57</sup> See GOODE & BEN-YEHUDA, *supra* note 39, at 41; Garland, *supra* note 35, at 10–11.

<sup>58</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>59</sup> See SUNSTEIN, *supra* note 44. See generally COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36; HALL ET AL., *supra* note 38; GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35.

White spoke of the “law as rhetoric.”<sup>60</sup> The law, he argued, is best understood as “a branch of rhetoric.”<sup>61</sup> It formed and reshaped through rhetoric: we argue that certain statutes do or do not apply, should or should not apply, and we engage in fundamental debates about what the law should or should not be, about how it ought to be changed.<sup>62</sup> Rhetoric is therefore constitutive of the law. More importantly, this process presupposes a shared language and an audience.<sup>63</sup> Both are indicative of a community (albeit a fluid one), which the law shapes.<sup>64</sup> In that sense, rhetoric on the War on Drugs is not merely a lens into the War on Drugs, as it is not “exogenous.”<sup>65</sup> It is the War on Drugs. Rhetoric spreads and redefines the fear and anxiety that drive moral panics. It legitimates – and therefore constitutes – the legislative enactments which have defined the War on Drugs.<sup>66</sup> And these legislative enactments are, in turn, constitutive. They fuel the underlying moral panic and define a shared identity. As noted in the previous Part, criminalizing certain behavior denounces it (a communicative act) and consolidates a shared identity rejecting it.<sup>67</sup>

In keeping with the unique significance of rhetoric to the War on Drugs (and moral panics more broadly), I draw almost equally upon the statistics I highlighted above and a speech by Hillary Rodham Clinton. This speech, where Clinton introduces the term “superpredators,” was significant both in the War on Drugs and in the subsequent wholesale shift in public opinion regarding the overcriminalization of marginalized groups.<sup>68</sup>

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<sup>60</sup> James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

<sup>61</sup> *See id.* at 684.

<sup>62</sup> *See id.* at 688–91.

<sup>63</sup> *See id.* at 690–92.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 698. By lens, I essentially mean an instructive and microcosmic example.

<sup>66</sup> *See, e.g.*, Comprehensive Drug Abuse Prevention and Control Act of 1970, *supra* note 10; Anti-Drug Abuse Act of 1986, *supra* note 11; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (discussed *infra*).

<sup>67</sup> *See supra* Part II. *See generally* Lord, *supra* note 13.

<sup>68</sup> *See, e.g.*, Allison Grave, *Did Hillary Clinton Call African-American Youth ‘Superpredators?’*, POLITIFACT (Aug. 28, 2016), <https://www.politifact.com/factchecks/2016/aug/28/reince-priebus/did-hillary-clinton-call-african-american-youth-su/> [<https://perma.cc/72XH-NMMC>]; Reena Flores, *Bernie Sanders Slams Clinton’s “Racist” 1996 Super Predators Comment*, CBS NEWS (Apr. 14, 2016, 10:56 PM), <https://www.cbsnews.com/news/bernie-sanders-slams-clintons-racist-1996-super-predators-comment/> [<https://perma.cc/4LVQ-YFVL>]; Jessie Hellmann, *Trump: ‘How Quickly People Forget’ Clinton ‘Superpredator’ Remark*, THE HILL (Aug. 26, 2016, 2:13 PM), <https://thehill.com/>



On January 25, 1996, Hillary Rodham Clinton, then First Lady of the United States, was campaigning for her husband's re-election in Keene, New Hampshire.<sup>69</sup> Over her life and career, Clinton has sought to defend children's rights.<sup>70</sup> She has highlighted this experience throughout her political career, most notably during election campaigns.<sup>71</sup> It is unsurprising, then, that she chose to focus on children on that January afternoon. Her speech began with her thoughts on the challenge to "cherish our children and strengthen the American family."<sup>72</sup> She invoked the importance of ensuring that each child "grows up with two parents" (later defined as parents of opposite sexes) in a "stable, dependable home."<sup>73</sup> Quickly, though, she shifted attention to the risks facing American children. "We also have to protect our children," she said, referring to "little children as potential consumers for cigarettes," "teen pregnancy," and "out-of-wedlock births."<sup>74</sup> The challenges, she argued, come "at them from every direction."<sup>75</sup> Parents are "the first line of defense."<sup>76</sup> Later in the speech, she addressed the need to "take back our street from

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blogs/ballot-box/presidential-races/293477-trump-how-quickly-people-forget-clinton-super-predator [https://perma.cc/7V53-2K3U]. On the shift in public opinion, see PEW CHARITABLE TRS., *supra* note 16, at 8; Letter from Danny Franklin, *supra* note 24.

<sup>69</sup> See First Lady Hillary Clinton, Campaign Speech at Keene State College, C-SPAN (Jan. 25, 1996), <https://www.c-span.org/video/?69606-1/hillary-clinton-campaign-speech> [https://perma.cc/696C-XJNW].

<sup>70</sup> See, e.g., The Office of Hillary Rodham Clinton, *About Hillary*, <https://www.hillaryclinton.com/about/> [https://perma.cc/CNL9-JW3J] (last visited Oct. 19, 2021) ("Her mother's experience inspired Hillary to fight for the needs of children everywhere. . . . After law school, Hillary didn't join a big law firm in Washington or New York. Instead, she went to work for the Children's Defense Fund, going door-to-door in New Bedford, Massachusetts, gathering stories about the lack of schooling for children with disabilities. These testimonials contributed to the passage of historic legislation that required the state to provide quality education for students with disabilities. This commitment to public service and fighting for others—especially children and families—has stayed with her throughout her life. . . . She [later] worked with Republicans and Democrats to help create the successful Children's Health Insurance Program, which provides health coverage to more than 8 million children and has helped cut the uninsured rate for children in half.").

<sup>71</sup> See, e.g., *id.*; About, HILLARY FOR AMERICA (Nov. 8, 2016), <https://web.archive.org/web/20161108201232/https://www.hillaryclinton.com/about/hillary/> [https://perma.cc/8K6G-3VGY] (highlighting this experience during the 2016 United States presidential election).

<sup>72</sup> See First Lady Hillary Clinton, Campaign Speech at Keene State College, *supra* note 69.

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

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

crime, gangs, and drugs.”<sup>77</sup> She spoke favorably of the Violent Crime Control and Law Enforcement Act of 1994,<sup>78</sup> which her husband championed as President, noting:

We need to take these people on. They are often connected to big drug cartels. They are not just gangs of kids anymore. They are often the kinds of kids that are called superpredators. No conscience. No empathy. We can talk about why they ended up that way but first we have to bring them to heel.<sup>79</sup>

Clinton’s words are interesting both substantively and rhetorically. Her position on drugs is first indicative of the social and political consensus which underlaid the War on Drugs (one of the key characteristics of moral panics).<sup>80</sup> The Violent Crime Control and Law Enforcement Act of 1994<sup>81</sup> she refers to finds its genesis in Bill Clinton’s 1992 campaign policy proposals.<sup>82</sup> It was sponsored by (among others) then-Senator Joe Biden,<sup>83</sup> who, as noted above, also criticized George H. W. Bush for not dedicating sufficient resources to the War on Drugs.<sup>84</sup> In other words, the War on Drugs unified – and was shaped by – a former American President, a 2016 presidential candidate, and the current American President (all members of the Democratic Party). As noted, it was a product of several successive presidential administrations, spanning the political spectrum.<sup>85</sup> An overwhelming majority of Americans – over 80% – quickly shared the concern and, more importantly, supported the increasingly severe criminalization of a range of drug-

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<sup>77</sup> See *id.*

<sup>78</sup> Violent Crime Control and Law Enforcement Act of 1994, *supra* note 66.

<sup>79</sup> See First Lady Hillary Clinton, Campaign Speech at Keene State College, *supra* note 69. Interestingly, another first lady, Nancy Reagan, was significantly involved in the War on Drugs. See *Mrs. Reagan’s Crusade*, THE RONALD REAGAN PRESIDENTIAL LIBR. & FOUND. (Apr. 27, 2006), [https://web.archive.org/web/20060427235046/http://www.reaganfoundation.org/reagan/nancy/just\\_say\\_no.asp](https://web.archive.org/web/20060427235046/http://www.reaganfoundation.org/reagan/nancy/just_say_no.asp) [<https://perma.cc/7AXT-UJCT>].

<sup>80</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>81</sup> Violent Crime Control and Law Enforcement Act of 1994, *supra* note 64.

<sup>82</sup> See, e.g., Governor Bill Clinton, *Putting People First: A National Economic Strategy for America* (June 21, 1992), <https://www.ibiblio.org/pub/academic/political-science/speeches/clinton.dir/c20.txt> [<https://perma.cc/XTU5-P7YV>].

<sup>83</sup> See Michael Kranish, *Joe Biden Let Police Groups Write His Crime Bill. Now, His Agenda Has Changed.*, WASH. POST (June 8, 2020), [https://www.washingtonpost.com/politics/joe-biden-let-police-groups-write-his-crime-bill-now-his-agenda-has-changed/2020/06/08/82ab969e-a434-11ea-8681-7d471bf20207\\_story.html](https://www.washingtonpost.com/politics/joe-biden-let-police-groups-write-his-crime-bill-now-his-agenda-has-changed/2020/06/08/82ab969e-a434-11ea-8681-7d471bf20207_story.html) [<https://perma.cc/GT5N-KU5W>].

<sup>84</sup> See Farber, *supra* note 8.

<sup>85</sup> See *id.*

related conduct, including drug possession.<sup>86</sup>

Rhetorically, Clinton’s speech concisely encapsulates the salient characteristics of moral panics described in the previous Part. First, her words convey, and instill, fear.<sup>87</sup> Our kids are in grave danger. We need to “take back our streets” from these “superpredators.”<sup>88</sup> There is also a sense of urgency.<sup>89</sup> Those who want to corrupt and harm our kids “[come] at them from every direction.”<sup>90</sup> The significance and urgency of these threats are highlighted by the reference to children – symbols of innocence and vulnerability often used in rhetorical appeals.<sup>91</sup> The personalization of the victim makes us empathetic to prospective victims and, as a result, more afraid of the threat. As a result of cognitive biases, we respond to anecdotal evidence far more than to (more relevant) statistical evidence.<sup>92</sup> Clinton’s rhetoric is analogous to that of other politicians throughout the War on Drugs – whose labelling as a war itself instills fear and urgency. As noted above, President Nixon launched the offensive by labelling drugs “public enemy number one.”<sup>93</sup> He added: “In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive. . . . This will be a worldwide offensive. . . . It will be government-wide . . . and it will be nationwide.”<sup>94</sup> Similarly, in criticizing then-President George H. W. Bush, Joe Biden invoked the same metaphor, stating: “We need another D-Day. Instead, you’re giving us another Vietnam: a limited war, fought on the cheap, financed on the sly, with no clear objectives, and ultimately destined for stalemate

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<sup>86</sup> See *id.* (noting that over 80 percent of Americans agreed that even possession of lower-level drugs should be criminalized).

<sup>87</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>88</sup> See First Lady Hillary Clinton, Campaign Speech at Keene State College, *supra* note 69.

<sup>89</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>90</sup> See First Lady Hillary Clinton, Campaign Speech at Keene State College, *supra* note 69.

<sup>91</sup> See Farber, *supra* note 8 (arguing that widespread support for the criminalization of drug possession was sparked by the increasing popularity of drugs with younger Americans – and the associated anxiety of older Americans). See generally Jenny Kitzinger, *Who Are You Kidding? Children, Power, and the Struggle Against Sexual Abuse*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD 165 (Allison James & Alan Prout eds., 2015); KAREN BROOKS, CONSUMING INNOCENCE: POPULAR CULTURE AND OUR CHILDREN (Queensland, 2008).

<sup>92</sup> See generally Maya Bar-Hillel, *The Base-Rate Fallacy in Probability Judgments*, 44 ACTA PSYCH. 211 (1980); Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCH. REV. 237 (1973); Daniel Bergan & Heysung Lee, *Media Credibility and the Base Rate Fallacy*, 63 J. BROAD. & ELEC. MEDIA 195 (2019). This is known as the base-rate fallacy. When presented with relevant statistical data, individuals will often ignore it if provided with individuating information of a specific case.

<sup>93</sup> See Farber, *supra* note 8.

<sup>94</sup> See *id.*

and human tragedy.”<sup>95</sup>

Prof. Desmond Manderson has extensively analyzed the criminalization of drug possession.<sup>96</sup> He notes that criminalizing possession of a substance implies a fear of it.<sup>97</sup> We are criminalizing potential harm before it materializes, outlawing “the fact of one’s proximity to an object.”<sup>98</sup> He notes the longstanding prohibition of drug use, contrasted to the regulation of alcohol use.<sup>99</sup> He also notes that most drugs are not inherently dangerous.<sup>100</sup> As a result, he argues, our fear relates to the drug *user*. Focusing on opium, he argues that the metonymical drug user was Chinese and that “settler societies that led the rush to prohibition had large and poorly assimilated Chinese minorities.”<sup>101</sup> I will further describe this metaphor below in arguing that the War on Drugs is also racially charged.

Fear, anxiety, and a sense of urgency are all related to the disproportionality that defines moral panics.<sup>102</sup> We overreact precisely because we are afraid and feel a sense of urgency. And we persist when faced with failure for the same reasons. As noted, the War on Drugs united politicians across the political spectrum and over several decades, as well a significant majority of the American public.<sup>103</sup> All

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<sup>95</sup> See *id.* Interestingly, the same metaphor has recently been used regarding the COVID-19 pandemic. See, e.g., Jesse McKinley and Luis Ferré-Sadurní, *With State in Crisis, Cuomo Outlines Plan to ‘Win the Covid War’*, N.Y. TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/11/nyregion/cuomo-state-coronavirus-budget.html> [<https://perma.cc/HA4C-H3B4>] (quoting former New York Governor Andrew Cuomo).

<sup>96</sup> See Manderson, *Possessed*, *supra* note 13; Desmond Manderson, *Like Men Possessed: What are Illicit Drug Laws Really For?*, CONVERSATION (Nov. 2, 2014, 2:21 PM) [hereinafter Manderson, *Like Men Possessed*], <https://theconversation.com/like-men-possessed-what-are-illicit-drug-laws-really-for-31739> [<https://perma.cc/WD4C-FJFX>]; Desmond Manderson, *Symbolism and Racism in Drug History Policy*, 18 DRUG & ALCOHOL REV. 179 (1999) [hereinafter Manderson, *Symbolism and Racism*]; Desmond Manderson, *Metamorphoses: Clashing Symbols in the Social Construction of Drugs*, 25 J. DRUG ISSUES 799 (1995) [hereinafter Manderson, *Metamorphoses*]; DESMOND MANDERSON, *FROM MR. SIN TO MR. BIG: A HISTORY OF AUSTRALIAN DRUG LAWS* (Oxford, 1994) [hereinafter MANDERSON, *MR. SIN TO MR. BIG*].

<sup>97</sup> See Manderson, *Possessed*, *supra* note 13, at 37.

<sup>98</sup> See *id.* at 36–37.

<sup>99</sup> See *id.* at 37–38.

<sup>100</sup> See *id.* at 37.

<sup>101</sup> See *id.*; see also MANDERSON, *MR. SIN TO MR. BIG*, *supra* note 96; Manderson, *Symbolism and Racism*, *supra* note 96; Manderson, *Metamorphoses*, *supra* note 96.

<sup>102</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>103</sup> See Farber, *supra* note 8; see also Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. ST. L. REV. 441 (2021) (arguing that the Supreme Court of the United States

persisted in spite of the fact that the War on Drugs has failed to affect *any* drug-related outcome – whether drug consumption, trafficking, or addiction.<sup>104</sup>

Hillary Clinton's words also exemplify the "othering" that defines moral panics.<sup>105</sup> Her speech is an especially useful example because both groups are children: on the one hand, there are "our children," the "little children [who are] potential consumers for cigarettes"; on the other, there are the "kids" (notice the word choice), the "superpredators" who have neither "conscience" nor "empathy."<sup>106</sup> There is no halfway point.<sup>107</sup> There are those who are innocent and vulnerable. And those who lost all humanity, to such an extent that they are no longer truly children.

This is as disturbing as it is unsurprising. The dehumanization of the "other" is an inherently human exercise. It is also one that is often channeled through the criminal law.<sup>108</sup> As noted, the criminal law allows us to draw lines between what we accept and what we do not accept. It often serves to denounce behavior we find abhorrent.<sup>109</sup> The criminals are the "other." The very labelling we use indicates as much. We do not speak of persons who commit crimes or, more helpfully, of persons with children and futures who encountered significant barriers at all stages of their lives and eventually committed a crime.<sup>110</sup> Instead, we speak of criminals.

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upheld excessive sentences because it agreed with the societal consensus that drugs had become a significant national problem).

<sup>104</sup> See Stauffer, *supra* note 13; PEW CHARITABLE TRS., *supra* note 16; NAT'L RESEARCH COUNCIL, *supra* note 20.

<sup>105</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11. The authors cited in Part II alternatively write of "folk devils" and scapegoats. Cf. Manderson, *Metamorphoses*, *supra* note 96 (discussing how drug use results in a rejection from the mainstream community and acceptance into a community of drug users).

<sup>106</sup> See First Lady Hillary Clinton, Campaign Speech at Keene State College, *supra* note 69.

<sup>107</sup> See Manderson, *Possessed*, *supra* note 13, at 52 ("So too one would not expect the witch-hunters of the sixteenth century to have countenanced any tolerance of witches. It was the health of their soul and not their body that concerned the inquisitors, and only a complete elimination of witchcraft could have counted as successful. It would not have made sense to argue that there was a continuum between witchcraft and other practices, because it was precisely the distinction that was most important and that dramatized the impossibility of any kind of relativism or agnosticism where the Devil was concerned.").

<sup>108</sup> See, e.g., *id.*; Reed, *supra* note 42, at 69; Leckey, *supra* note 47; COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36; Altheide, *supra* note 37.

<sup>109</sup> See, e.g., Lord, *supra* note 13; Dubé & Labonté, *supra* note 50; Wringe, *supra* note 50; Sample, Evans & Anderson, *supra* note 50. Denunciation is undoubtedly related to White's conception of the law as rhetoric. See White, *supra* note 60.

<sup>110</sup> On the relationship between socioeconomic status (social determinants) and criminality, see, e.g., Mikko Aaltonen et al., *Social Determinants of Crime in a Welfare State: Do They Still Matter?*, 54

In a powerful rhetorical and constitutive exercise,<sup>111</sup> the individual's identity is subsumed into the crime.

This exercise arguably transcends “othering,” though. As noted, criminalizing certain behavior is as much about the other as it is about us. In (mis)defining the other, we reassure ourselves that we are fundamentally different. Speaking of the aforementioned “persons with children and futures who encountered significant barriers at all stages of their lives and eventually committed a crime” would risk eliciting empathy and, more importantly, highlighting what we have in common with the criminal. Worse yet, it risks blurring the line, unsettling our conviction that we would have made different choices in the same circumstances because we are fundamentally different. Prof. Manderson has extensively written of the parallels between witchcraft and drugs.<sup>112</sup> Let me draw out the analogy and suggest that “othering” is analogous to exorcism. It is about getting the evil out of ourselves. Because it is there to start with. There is a bit of evil in each of us, and we are a few choices or challenges away from becoming criminals. That is not something we can easily live with. By labelling and punishing the criminal, often through the legitimating power of the law, we deny that aspect of our identity. We draw distinctions and ignore shared characteristics. By “othering” the other, we un-other ourselves.

This aspect of the human identity is as dark as it is inherent. It manifests itself throughout human history and, as the many contemporary instances of moral panic suggest, with the same prevalence in developed societies. If we can ever seek to do better, we must recognize it first.

A yet darker aspect of this “othering” is that it seems to almost invariably marginalize the already marginalized.<sup>113</sup> It might be easier to target as “others” those who are different from us. More importantly, the dispossessed often lack the voice and ability<sup>114</sup> to defend themselves. I have previously written regarding Quebec's secularism law, Bill 21. Although Bill 21 is not a criminal law, I argue that

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ACTA SOCIOLOGICA 161 (2011); Karin Hederos Eriksson et al., *The Importance of Family Background and Neighborhood Effects as Determinants of Crime*, 29 J. POPULATION ECON. 219 (2016).

<sup>111</sup> See White, *supra* note 60; see also Reed, *supra* note 42.

<sup>112</sup> See Manderson, *Possessed*, *supra* note 13; Manderson, *Symbolism and Racism*, *supra* note 96; Manderson, *Metamorphoses*, *supra* note 96.

<sup>113</sup> See, e.g., Garland, *supra* note 35, at 14; COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36, at xxi; Ungar, *supra* note 39.

<sup>114</sup> I use this word in its academic sense, referring to undue and unnecessary barriers which disempower certain individuals. See, e.g., SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 1–16 (New York University Press, 1998).

it is essentially denunciatory.<sup>115</sup> Bill 21 prevents public servants in positions of authority from wearing religious “symbols.”<sup>116</sup> The definition of such public servants is very broad, for instance encompassing teachers.<sup>117</sup> While others have argued that it denotes an anxiety regarding Muslims,<sup>118</sup> I argue that Bill 21 is a way for Quebec to break free from an oppressive legacy of the confluence of church and state – shaped by the influence of the Catholic Church.<sup>119</sup> Drawing upon a similar theoretical framework, I argue that Bill 21 is really underlain by a shared anxiety regarding a multiculturalism pushed too far, driven by the outsize influence of a particular religious group.<sup>120</sup> As in the criminal law, denunciation has a cost. I offer the analogy of sentencing. Where denunciation is an objective in sentencing, it leads to a more significant sentence for the offender – one that has no instrumental value and may even often have counterproductive consequences (such as increasing recidivism).<sup>121</sup> With Bill 21, these consequences are borne by Muslim women and other minority groups. To the extent that their religious “symbols” are an essential part of their faith,<sup>122</sup> Bill 21 may prevent them from seeking or maintaining employment in the public service.<sup>123</sup> The cost of denunciation is not merely that we abandon more instrumental goals; it is often that we impact marginalized groups such as Muslim women.

Similarly, Prof. Robert Leckey has analyzed the decriminalization of homosexuality in Canada.<sup>124</sup> Needless to say, sexual relations between consenting adults are not an intrinsically dangerous activity (as is other criminalized conduct). We can therefore understand that criminalizing sodomy was directed at denouncing and eradicating homosexual relations, an activity which society

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<sup>115</sup> See Lord, *supra* note 13.

<sup>116</sup> An Act Respecting the Laicity of the State, S.Q. 2019, c. 12, s. 6 (Can.).

<sup>117</sup> See *id.*, Schedule II, s. 10.

<sup>118</sup> See RICHARD MOON, FREEDOM OF CONSCIENCE AND RELIGION 121 (Irwin, 2014). SEE GENERALLY NATASHA BAKHT, IN YOUR FACE LAW, JUSTICE, AND NIQAB-WEARING WOMEN IN CANADA (Irwin, 2020).

<sup>119</sup> See Lord, *supra* note 13.

<sup>120</sup> See *id.* at 13.

<sup>121</sup> See *id.* at 8.

<sup>122</sup> As I and others have noted, the bill is underlain by paradigmatically Christian assumptions. Religious “symbols” have far less significance in the majority Christian religion than in other religions such as Islam and Sikhism (where the religious obligation to wear certain religious dress may be central and inflexible). See generally Lord, *supra* note 13; MOON, *supra* note 118, at 120–124.

<sup>123</sup> See Lord, *supra* note 13, at 14.

<sup>124</sup> See Leckey, *supra* note 47.

abhorred. Leckey notes that legislators were careful to reiterate their opposition to homosexual relations when homosexuality was decriminalized: they were careful to prevent the framing of decriminalization as public assent of condonation. He notes:

The Parliament of Canada partially decriminalized homosexual conduct in 1969. Keeping buggery and gross indecency as offences, the reform carved an exception for consensual acts committed in private by husband and wife or by two persons twenty-one years of age or older. . . . As rapidly becomes plain, the reform's opponents wore their homophobia on their sleeves. They expressed a sense of insecurity, anxiety, and even panic: Canadian society was under threat; heterosexuality and the family were fragile. Strikingly, though, even the leading reformers insisted that homosexuality would remain illegal, laboriously affirming their disgust for it.<sup>125</sup>

Again, the criminalization of certain conduct advanced no instrumental goal. Its cost was born by persons of differing sexual orientations, who were similarly already marginalized.

I mentioned above that Clinton's speech was "significant both in the War on Drugs and in the subsequent wholesale shift in public opinion regarding the overcriminalization of marginalized groups." The subsequent backlash regards her use of the term "superpredators." However, critics have highlighted the racial undertones to her use of the word (race is not directly mentioned in her speech). They have conflated the two, essentially arguing that she called *African American* youth superpredators.<sup>126</sup> This is less surprising given the statistics cited in Part I. The War on Drugs has disproportionately targeted African Americans (and, to a lesser extent, other marginalized groups) at all stages of criminalization: stops, arrests, and sentencing.<sup>127</sup> These racial disparities have contributed to the already problematic overincarceration and marginalization of marginalized groups.<sup>128</sup>

To state that African Americans and other marginalized groups were disproportionately affected by the War on Drugs is not to say that they are the "folk devils" or "others" within the moral panic framework.<sup>129</sup> Indeed, this disproportionate impact could be due to broader racism in society. However, many

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<sup>125</sup> See *id.* at 225–26. The quotation also notes anxiety, another characteristic of moral panics, see generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.

<sup>126</sup> See, e.g., Grave, *supra* note 68; Flores, *supra* note 68; Hellmann, *supra* note 68.

<sup>127</sup> See COYNE & HALL, *supra* note 14, at 12; Moore & Elkavitch, *supra* note 7, at 784; Fellner et al., *supra* note 25; Carson, *supra* note 25; Pearl, *supra* note 28; U.S. SENT'G COMM'N, *supra* note 28. As noted in Part I, these groups do not consume drugs to a greater extent than other groups. See Moore & Elkavitch, *supra* note 7, at 783.

<sup>128</sup> See generally SYLVESTRE, BLOMLEY & BELLOT, *supra* note 32; Harris & Keller, *supra* note 33; Moore & Elkavitch, *supra* note 7, at 783.

<sup>129</sup> See generally GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35, at 10–11.



authors have specifically suggested that racism more broadly imbues the War on Drugs.<sup>130</sup> The backlash regarding Clinton's words certainly suggests some degree of intentionality. Recall Prof. Manderson's above hypothesis that outlawing opium was driven by racial animus in "settler societies that . . . had large and poorly assimilated Chinese minorities."<sup>131</sup> Manderson notes that drugs are not generally feared in themselves, that we instead fear the drug user.<sup>132</sup> We can hypothesize that the same was true of African Americans. The superpredators Clinton refers to could be African American men seeking to convince vulnerable White children to consume drugs. The disproportionate impact of the War on Drugs would then directly result from the conviction of actors tasked with the enforcement of drug laws that African Americans are indeed the problem. This hypothesis is supported by coverage and analysis of the opioid crisis.<sup>133</sup> (As mentioned the media is often a key actor in contemporary moral panics.)<sup>134</sup> An extensive analysis of news sources has shown that Black victims of the crisis have been depicted as engaging in criminalized conduct, while White victims have been depicted as sick, blameless, and sympathetic victims.<sup>135</sup> On the latter, the authors of the study note:

Some might argue that such stories have the potential to de-mystify addiction across the board, to prove that "anyone can become an addict," showing addiction to be a blameless disorder "that does not discriminate." Looking at the differences in media coverage of opioid addiction by race, however, we argue that these white opioid images are resetting the terms of drugs and race in popular culture in ways that insidiously further distinguish white from black (and brown) suffering, white from black culpability, and white from black deservingness. Arising in tandem with, rather than in

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<sup>130</sup> See, e.g., Vitiello, *supra* note 102; Osler, *supra* note 5; Beverly Yuen Thompson, "Good Moral Characters": How Drug Felons are Impacted Under State Marijuana Legalization Laws, 20 CONTEMP. JUST. REV. 211 (2017); Provine, *supra* note 7.

<sup>131</sup> See Manderson, *Possessed*, *supra* note 13, at 38. Manderson also notes the race of the victim: the fear of drugs was of the harm it could do to vulnerable White women. *Id.*

<sup>132</sup> See *id.*

<sup>133</sup> On the crisis, see generally Lenny Bernstein & Joel Achenbach, *Drug Overdose Deaths Soared to a Record 93,000 Last Year*, WASH. POST (July 14, 2021, 10:00 AM), <https://www.washingtonpost.com/health/2021/07/14/drug-overdoses-pandemic-2020/> [<https://perma.cc/Q4YG-SW4J>]; Erin D Spaniol et al., *Addressing the Opioid Crisis: Social and Behavioural Research Contributions at the National Institutes of Health*, 10 TRANSLATIONAL BEHAV. MED. 482 (2020).

<sup>134</sup> See generally COHEN, *FOLK DEVILS AND MORAL PANICS* (2011), *supra* note 36; HALL ET AL., *supra* note 38; GOODE & BEN-YEHUDA, *supra* note 39; Garland, *supra* note 35; Ungar, *supra* note 39; Altheide, *supra* note 37.

<sup>135</sup> See Julie Netherland & Helena B. Hansen, *The War on Drugs that Wasn't: Wasted Whiteness, "Dirty Doctors," and Race Coverage of Prescription Opioid Misuse*, 40 CULTURE, MED. & PSYCHIATRY 664 (2016).

tension with, the official “War on Drugs” and its mass incarceration of blacks and Latinos, white opioid images have helped to carve out a separate space for white opioid use in the popular American imagination, one that leads to racially stratified therapeutic intervention and works to further insulate white communities from black and brown drug threats, leaving intact law enforcement crackdowns on black and brown urban residents in the name of public safety.<sup>136</sup>

The authors further note that Black victims are less likely to be offered “addiction treatment, counseling or tools for prevention of overdose and injection related infections.”<sup>137</sup>

## CONCLUSION

This Article has analyzed the War on Drugs as a social phenomenon. It argued that such an analysis, which rejects the assumption that collective, institutionalized behavior is generally rational, can help us understand key aspects of why we continue to marginalize disadvantaged individuals. If the War on Drugs is a war and wars are won or lost, there is no question we lost. Whatever drug-related evil it sought to eradicate, the data clearly shows that “drugs won.” Along the way, we nonetheless persisted – and largely still do. To state that we lost is unhelpful and insufficient. If the War on Drugs never worked, more salient questions are to be asked about why we fought it. This Article has posited that the War on Drugs is not about drugs, crime, or addiction: it is about us. It is about why we cede to fear, anxiety, and irrationality. It is about why we stigmatize and hurt the most vulnerable. Like other irrational and counterproductive policies, the War on Drugs is not an anomaly. It bears close resemblance to other wars we fought (and fight) against the disempowered: witches, gays, Muslims, and others.

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<sup>136</sup> See *id.* at 665–66.

<sup>137</sup> See *id.* at 669.