

## The War on Drugs

Shortly after American citizens voted President Obama into office, Richard Gil Kerlikowske, President Obama's Drug Czar, called for an end to the term, "war on drugs." Citing fears that "people see a war as a war on them," Kerlikowske stated, "we are not at war with people in this country." The facts beg to differ. Not only has the war on drugs had a tremendous impact on individuals, families, and the United States economy, this so-called war has impacted the lives and economies of individuals and foreign nations. Ending the term does not change this fact or call for celebration.

Choosing to end the term "war on drugs" also does not suggest that the war is over or that lawmakers should entertain the idea that the war should come to an official end through treaty or any other celebratory ceremony. Arguing a treaty is a necessary component of ending the war on drugs only gives credence to the idea that the state can actually declare war on drugs. Like the term "war on terror" or any other war on an idea or ambiguous term, responding in like terms ignores underlying issues.

Rather than calling for an end to the war on drugs as the Obama administration suggested or addressing "post-war" plans as this assignment encourages, lawmakers should come to terms with the fact that the war on drugs was and is a justification to incarcerate minorities and poor citizens. This war only ends when we have an honest conversation about the disparate impact the war has on black and poor communities.

Many scholars have written, debated and discussed the government's failed war on drugs and how the war on drugs began as a proxy for systematic segregation of blacks in America. Yet, as a nation we remain indifferent to the plight of those home and abroad who have been negatively affected by over forty years of discrimination.

To be fair, the Obama administration has pushed for legislation and Congress has passed legislation dealing with current drug policy. For example, in 2010, Congress passed the Fair Sentencing Act that reduced the disparity between penalties for the possession of certain amounts of crack cocaine and powder cocaine. The Act reduced the amounts from a 100:1 weight ratio to an 18:1 ratio. This Act was in response to criticisms that the old ratios disparately impacted poor and black communities because those members in those communities were addicted to or could purchase crack cocaine while members of wealthier white communities were addicted to or could purchase powder cocaine.

Lawmakers can do more. One of the best guides lawmakers could read and study is the Drug Policy Alliance's *An Exit Strategy for the Failed War on Drugs*.<sup>1</sup> Although the title responds to Nixon's war terminology, the reader should analyze the substance of their recommendations. Broad recommendations include "Require racial, fiscal and health impact assessments before passing new drug legislation," "Reduce the militarization of domestic law enforcement" and "Raise threshold amounts for what constitutes a federal drug law violation and focus resources on big cases." These policies, among others, can truly respond to underlying issues of the intersection between race and the War on Drugs.

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<sup>1</sup>[https://www.drugpolicy.org/sites/default/files/DPA\\_Exit%20Strategy\\_Federal%20Legislative%20Guide.pdf](https://www.drugpolicy.org/sites/default/files/DPA_Exit%20Strategy_Federal%20Legislative%20Guide.pdf)

Some key terms to be included in the post-drug war era should address expungement and sealing of records, shrinking the prison population to its pre-drug war size and scope, and increasing access to employment, housing, and public resources for those impacted by the drug war.

Addressing criminal records is key to any agreement. Broadening expungement and sealing laws—along with addressing online access issues—is a more passive way for legislatures to address collateral consequences in both public and private sectors. However, unless these laws are joined with considerations such as future sentence enhancements and resource access, the overall impact of these reforms will be disjointed.

Another key to an effective agreement—and likely a more tension-filled discussion—will be decreasing the prison population. This process will be difficult because of America’s current dependence on the prison industry for jobs, but will free up funding for suffering areas such as education and public resources, fundamental to the success of the agreement. The scope of this area of reform should focus on the pre-drug war inmate profile, and work to identify all types of offenders—from nonviolent possession to convictions involving weapons and trafficking—to ensure that disparate treatment does not result based on potentially irrelevant factors.

Most importantly, any agreement must address the provision of tangible and intangible resources to those affected by the drug war. This should include an increase in funding and broadening access to community resources, as well as—and in tandem with the public awareness campaigns discussed below—fiscal encouragement (and mandatory enforcement if ultimately necessary) to institutions such as private employers and landlords.

A special commission with a holistic membership is arguably the most effective grouping of interests to design the post-drug war treaty. This design will effectively incorporate multiple perspectives, but will also need to design procedures to ensure productivity and avoid consequences of deadlock. Some of the main difficulties facing reparations advocates, whether in the war on drugs or slavery—or both—overlap as functions of labeling, a-historical storytelling, and parochial legitimacy-seeking communication tactics. To encourage collaboration and assist coalitions in saving face with constituents, comparisons to similar contemporary efforts would need to be included. Addressing the scope of injury is an important, and often insurmountable obstacle in defining the terms of reparations agreements. In the case of the drug war, it will likely be more productive—although counterintuitive, especially in regards to future discussions—to limit the scope to the immediate families of those impacted by the drug war, and to separate the concept of including slavery reparations from the discussion. It will quite possibly be reparations advocates that will be hesitant—if not outright reject—any agreement that doesn’t

incorporate slavery reparations. While their concerns are legitimate, inflexibility in this area will likely be an insuperable obstacle to final agreement.

Key to implementation will be effective strategies in building public awareness. Shifting perceptions of the drug war and the fallacy of the “American Dream” for the poor and minority members of this country is paramount to the effective implementation of any reform. The decisionmakers in this area would be wise to take cues from the wisdom of Justice Marshall,<sup>1</sup> Judge Bennett,<sup>2</sup> and specifically research such as that from the Sentencing Advisory Council in Canada.<sup>3</sup>

In addressing public perceptions, current marijuana reforms provide helpful insight and opportunity for stakeholders and decisionmakers to frame the discussion around reparations. Sadly, this discussion has not taken place. Rather, discourse and control of profit-seeking ventures has even become—whether intentionally or not—a perpetuation of many of the problems caused by the drug war, if not continuing it in a different form. Those who seek to profit from marijuana legalization have chosen to expressly or implicitly cut out those impacted by the drug war from participating in their “green rush.” In this way, they are erecting barriers that preserve and entrench current wealth disparities.

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<sup>1</sup> DEMLEITNER ET AL., SENTENCING LAW AND POLICY 232 (2013).

<sup>2</sup> *Id.* at 340.

<sup>3</sup> *Id.* at 71–77.

A post drug war treaty would be a significant step towards repairing the very broken relationship between law enforcement and the general public. Enforcement of drug laws has caused, among other things, draconian prison sentences and an increased use of warrantless searches of homes, vehicles, and persons. Additionally, this “war” is counterproductive against the goal of getting drug users help, because it deregulates usage entirely, and discourages people from getting help for addiction, for fear of being prosecuted.

The two primary but perhaps countervailing concerns of ending the drug war are giving all possible reparations to the victims of poor policy, and maintaining government legitimacy.

The post-drug war treaty must be drafted in a way that begins to repair the relationship between law enforcement and the public. First, the drafters must account for three populations of “drug criminals”: those who have already been convicted of and served time for drug sentences (CS), those who have been convicted of but not yet fully served time for drug sentences (CPS), and those who have been or are in the process of being convicted of drug crimes but have not yet faced sentencing (CO).

A solution requires sensitivity to the issues involved in dealing with these three groups. Those in the CS group, for instance, may be the hardest to please, as their lives have already been damaged and they have already served their time. They may be the most eligible for reparations as a result. On the other hand, assuming they are not victim of a false conviction, there is an argument to be made

that they do not deserve reparations because they broke the law, however bad that law turned out to be.

There is difficulty accommodating both the concern to keep the legitimacy of the law intact, and to right a previous wrong. However, expungement seems like the absolute bare minimum accommodation that could be made to the CS group.

Those in the CPS group are likely accommodated the easiest, assuming they still have some time on their sentence left. These people may be released early based on revised standards, which would allow a natural compromise between punishing someone who broke the law and lightening a very harsh previous sentence.

Finally, the last group, CO, may be difficult to address, as they actively broke a law, have not been punished for said violation, and yet their punishment would seem illegitimate if the law had just been disbanded.

I believe that the treaty should be drafted by the legislature with the heavy guidance of the sentencing commissions. While I have very little faith in both the legitimacy and productivity of the legislature, I believe that the legislature would be the only legal body with enough public legitimacy to ensure that the public would understand and respect the political and criminal change. I would hope that the legislature would be able to accept the guidance and expertise of the sentencing commission to ensure as seamless a transition as possible.

## **Post-Drug War Treaty:**

### **Dealing with the Collateral Consequences of the Marijuana Movement**

There are two competing policy concerns with regards to the aftermath of the marijuana movement. First, any initiated statute should take into account the fact that a criminal record can drastically affect the life of an individual and that studies show that the war on drugs has been disproportionately administered by race. Second, the initiated statute should also take into account the sentiments of those individuals who are not in favor of the legalization of marijuana. If legalization occurs in Ohio, it is likely that this statute could pass as well. However, the goal of any initiated statute should not just be passage but also acceptance. In order to keep this experience controversial but friendly, the statute for 2016 should still take into account the broader penal concerns of citizens not in favor of the legalization. This short paper addresses policy considerations and new potential sanctions for marijuana crimes, by category.

#### **Basics**

The following suggestions combine many current penalties found in other portions of the O.R.C., so a separate statute establishing marijuana crimes should be established. Its placement within the normal drug statutes would no longer be logistically appropriate, nor would it make logical sense with the legalization of the substance.

#### **Penalties to Minors**

Like alcohol, marijuana use should only be legal for those 21 and older. Minors caught possessing or using marijuana should be subjected to the same penalties as minors caught with alcohol. However, permitted use of marijuana by minors should be more restricted than alcohol use by minors. Minors should have to acquire doctor approval in addition to being in the presence of a parent or guardian before their use of the substance would be appropriate. Marijuana use appears to have more psychological effects than alcohol. Therefore, this higher burden should be imposed for permitted use by children.

#### **Operating a Vehicle under the Influence and Corrupting Another with Drugs**

Neither one of these crimes is limited to any particular substance but has been created as a response to the inherent danger to the public that these activities create. Therefore, both crimes should still apply to marijuana as they do for other legal substances like alcohol.

#### **Possession within 1,000 Feet of a School**

The new penalty scheme should still categorize possession of marijuana within 1,000 feet of a school as a crime. The current statutory definition for the crime can still be imposed, but the penalties should be greatly decreased to decrease disparity. An appropriate penalty scheme might make a first offense a fourth degree misdemeanor. This severity takes into account the protection of our children from these substances, but by categorizing this as the least severe misdemeanor, this statute would recognize that this is a strict liability crime. A second occurrence, however,

should be a fifth degree felony. This increase in penalty again signals the severity of the crime but recognizes that, without a knowing requirement, this could again be unintentional. However, after having been convicted of the crime once before, the law should assume that the criminal should have been more vigilant.

### **Possession, Drug Paraphernalia, and Drug Trafficking**

These should no longer be crimes and should be stricken from criminals' records. If a small amount will now be legal for individual possession, paraphernalia will certainly follow. Additionally, one should not have a criminal sanction for a now legal substance. Removing all of these convictions from an individual's record will start to repair the damage done. Other crimes, however, such as drug trafficking should remain on an individual's record. These crimes punish the dangerous nature of the act of trafficking. It is not just a penalty based on the particular substance being trafficked. This will remain a public safety concern even after legalization, if not with marijuana, than with other illegal drugs. Individuals engaging in these acts should not be able to scrub this dangerous behavior completely from their records. Leaving these convictions intact will make this legislation more palatable to those opposed to legalization.

### **Cultivation and Sale**

Marijuana should be reduced in the O.R.C. to a Schedule III substance on the Drug Enforcement Agency Schedule Chart. This lowers the severity of the penalties to be imposed, but also recognizes that this substance has many characteristics more similar to prescription drugs than alcohol. Unlike alcohol, marijuana will still be used for medicinal purposes and will not be sold in regular stores. That distinction should be recognized. Following on with this theme, the current penalties for cultivation and sale should no longer apply. Illegal cultivation and sale should be regulated under the same statutes as the illegal sale of prescription drugs. That way the marijuana industry can remain intact and regulation of the substance's purity can also be better achieved.

For the sake of sentencing simplicity, the mandatory minimums of these sanctions should not apply in the instance of marijuana. By ridding the sentencing process of mandatory minimums, judges can sentence all individuals illegally cultivating and selling marijuana under the same statute. But, since the possible sentence range will be greater, a judge can distinguish the white collar, unlicensed commercial sales from more traditional drug trafficking in his or her sentencing. These penalties should be subject to possible firearms enhancements as well. That way the system is still able to adequately punish any remaining drug trafficking.

