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DECONSTRUCTING CARMONA: THE U.S. WAR ON DRUGS AND BLACK MEN AS NON- CITIZENS

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I. COLONIAL CITIZENS AND THE U.S. WAR ON DRUGS

The Negritude movement poet, Aimé Césaire of Martinique, wrote in his book, *Discourse on Colonialism*, “A civilization that proves incapable of solving the problems it creates is a decadent civilization.”¹ Césaire, at the time, was critiquing colonial rule of Europe over developing societies all over the world and had declared that Europe was “stricken” and “dying” as a civilization due to its tactics to maintain that rule.² Europe’s problem was the working class (the workers) of these nations and the inability and unwillingness to resolve the issue.³

For purposes of our discussion below, Césaire’s analysis is relevant because of the current criminal justice system policy that has incarcerated over one million black men at the present time and over two million citizens overall.⁴ While some contend that these black men violated federal and state controlled substances laws and should be incarcerated, this viewpoint lacks thoughtful analysis.

* Clinical Associate Professor of Law at Michigan State University College of Law and poet. I would like to personally thank my co-author and fellow poet Reginald Dwayne Betts for his contribution to this Article. I would like to also thank the Valparaiso University Law School for the opportunity to participate in a unique and very important symposium. Finally, I especially would like to thank my colleagues at MSU: Professor Brian C. Kalt, Professor Michael Lawrence, Professor Glen Staszewski, and all the other participants from the faculty and teaching staff who attended the MSU COL Summer Research workshop 2013 for a final presentation of this Article and who offered comments.

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¹ AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* 31 (Joan Pinkham trans., Monthly Review Press 2000) (1955).

² *Id.*

³ See *id.* (“‘Western’ civilization . . . as it has been shaped by two centuries of bourgeois rule, is incapable of solving two major problems to which its existence has given rise: the problem of the proletariat and the colonial problem . . .”).

⁴ See *infra* Parts II–IV (analyzing the effects of the criminal justice system on African-American males); see, e.g., Jeanne Bishop, *Where the Rubber Meets the Road: Injecting Mercy into a System of Justice*, 47 VAL. U. L. REV. 819 (2013) (discussing the disparate impact of the war on drugs on African Americans as illustrated by her experiences as a public defender in Cook County, Illinois).

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In this Article, we present a fresh analysis of the current U.S. drug sentencing policy and the possible solutions to dismantling the institution with or without significant governmental commitment. Yet, our goal is not to propose policies that will address the controlled substance abuse problem in the United States. Our goal is to bring the current drug war to an end with or without the dismantling of the policies that have perpetuated the “war on drugs” for the last forty years.

We present our analysis and our recommendations for action in the spirit of the poet Aimé Césaire’s statement on colonialism, because the war on drugs has again rendered many black men “colonial” citizens within their own country. Their basic rights as U.S. citizens are diminished, their desire to live a constructive existence is perhaps forever challenged, and rights that were fought for over the centuries are removed as a result of a conviction for possession of controlled substances.

By focusing upon current drug enforcement policy and a failed federal habeas corpus challenge, known as *Carmona v. Ward*, it is our intent to demonstrate the destructive nature of the war and how it should have been avoided. In Part II, this Article discusses the war on drugs and how it has been executed over the past forty years.⁵ Specifically, Part II addresses the war on drugs and its effect on African Americans and their communities.⁶ This includes a discussion of drug enforcement policy in New York—the legal template for many of the draconian laws across the nation.⁷ Part III examines the holding in *Carmona v. Ward*, as well as the political aspects of the case, in order to consider what might have happened had the policy of the last forty years not been pursued.⁸ Finally, in light of the continuing failures to undo the laws and the policy, Parts IV and V of this Article consider the future and what needs to be done to reverse policies that have rendered black men as colonial citizens in their own country in the twenty-first century.⁹

II. THE WAR ON DRUGS

While this Article focuses on the case of *Carmona v. Ward* and the drug enforcement policy in New York that brought about that legal

⁵ See *infra* Part II (outlining the history and enforcement of the war on drugs).

⁶ See *infra* Part II.A (detailing the number of African Americans incarcerated for drug offenses).

⁷ See *infra* Part II.B (describing how Rockefeller implemented various drug programs to fight the war on drugs).

⁸ See *infra* Part III (commenting on the history and effects of *Carmona v. Ward*).

⁹ See *infra* Parts IV–V (detailing the authors’ views of needed changes to drug policies).

action, it is still important to place current U.S. drug enforcement policy in the proper context. This Article begins by providing a brief summary of the effects of overall drug enforcement policy in the United States. Much of this policy and its statistical outcomes are quite well known.

A. *The Persistent War on Drugs*

For starters, since 1914, the United States has for the most part promoted a prohibition approach to controlled substances. It was that year that the United States, motivated and influenced by Christianity, outlawed “cocaine, heroin, and related drugs.”¹⁰ The law, known as “the Harrison Act,” was a radical change in social policy in the United States towards controlled substances.¹¹ It was at this time as well that the government made a commitment to the enforcement of these laws by creating the Federal Bureau of Narcotics.¹²

In 1937, marijuana was added to this list of substances through the passage of the Marihuana Tax Act.¹³ Marijuana was not illegal, but it did require a tax for usage of the substance.¹⁴ Failure to pay the usage tax could result in a fine or even prison time.¹⁵ Since this original effort to curtail certain controlled substances, government policy has not wavered. Drug enforcement has focused on prohibition, incarceration, and punishment.

All U.S. Presidents since the time of the Harrison Act have maintained this initial effort. In 1971, President Richard Nixon declared “war” on drugs, and not much later President Ronald Reagan did the same. Mr. Reagan’s successor, his former Vice-President, George H.W. Bush, declared war on drugs on national television, and Bill Clinton, while he did not routinely engage in moments of dramatic rhetoric regarding drug enforcement policy, still pursued the same policy.¹⁶ Our final two presidents, George W. Bush and Barack Obama, maintained the same policies towards controlled substances, though Mr. Obama might

¹⁰ Harrison Narcotic Act of 1914, Pub. L. No. 63-223, 38 Stat. 785, *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (2006).

¹¹ *Id.*

¹² HOWARD PADWA & JACOB CUNNINGHAM, ADDICTION: A REFERENCE ENCYCLOPEDIA 74 (2010).

¹³ *Id.* at 75; *see* Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937), *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (2006).

¹⁴ PADWA & CUNNINGHAM, *supra* note 12, at 74-75, 107.

¹⁵ *Id.* at 107.

¹⁶ *Id.* at 77, 107, 113, 259-60.

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be the first administration to actually refer to illegal drugs as a public health issue.¹⁷

The by-product of the decades of prohibition is fairly predictable. The prisons are full of individuals arrested and convicted for low-level drug crimes.¹⁸ According to the Bureau of Justice Statistics, roughly 6.9 million individuals were under some type of supervision from the nation's correctional systems at the end of 2011.¹⁹ Of those 6.9 million, over 2.2 million were in prison or jail.²⁰ These statistics mean that nearly three percent of all adults in the United States were in prison, jail, or on probation or parole in 2011.²¹ Most of these individuals who are actually incarcerated are in state prisons and local jails, while a minority of this number is currently in federal prison. This is why the issue of prison populations and drug enforcement is more of a state issue as opposed to a federal issue, though we recognize the need for the federal government to address the issue as well.²² If there is any consolation, the prison population in the U.S. has decreased from 3.3 percent of the population ten years ago to approximately 2.9 percent in 2011.²³ However, the growth of the prison population during the years of the war on drugs is notable.

In 1980, less than a decade after President Nixon initially declared a war on drugs, there were 500,000 individuals in prison.²⁴ There were likewise 1.8 million people supervised by the nation's correctional system. Today, nearly seven million people are under correctional supervision and over two million are incarcerated.²⁵ This is nearly a four

¹⁷ Sam Hananel, *Obama Drug Policy Focuses on Prevention, Treatment*, HUFFINGTON POST (May 11, 2010, 12:22 AM), http://www.huffingtonpost.com/2010/05/10/obama-drug-policy-focuses_n_571087.html.

¹⁸ See, e.g., Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867 (2013) (discussing Indiana's growing problem with the incarceration of low-level drug offenders). But see Michael O'Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. U. L. REV. 709 (2013) (suggesting that violence—not low-level drug offenses—has given way to rising incarceration numbers based on his study of Wisconsin, Minnesota, and Indiana).

¹⁹ LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 1 (2011), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

²⁰ *Id.* at 8.

²¹ *Id.* at 1.

²² *Id.* at 8 (providing that in 2011 there were 214,774 federal prisoners as compared to 1,289,376 in state prisons and 735,601 in local prisons).

²³ *Id.* at 1, 8; see also Fareed Zakaria, *Incarceration Nation*, TIME, Apr. 2, 2012, at 18, available at <http://www.time.com/time/magazine/article/0,9171,2109777-1,00.html>.

²⁴ LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 1 (2009), <http://www.bjs.gov/content/pub/pdf/cpus09.pdf>; JUSTICE POL'Y INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1 graph 1 (2000).

²⁵ GLAZE & PARKS, *supra* note 19, at 3 tbl.2.

hundred percent increase in just over thirty years. A 2000 report released by the human rights organization, Human Rights Watch, revealed that the huge increase in prison population was due almost entirely to drug enforcement policy in the U.S.²⁶

Of course, African-American men are disproportionately represented in the criminal justice system as a result of the modern war on drugs. As a result of the policy that began aggressively in the 1970s, black men were quickly incarcerated at very high levels by 2000.²⁷ By 2000, one in twenty African-American men was under supervision of the criminal justice system, compared to one in 180 for their white counterparts.²⁸

In addition, although white men during this time used controlled substances five times more than black men, black men were thirteen times more likely to be incarcerated.²⁹ Moreover, in fifteen states, black men were twenty to fifty-seven times more likely to be incarcerated than white men, despite the fact that white men used controlled substances at a far higher rate.³⁰ Since the issuance of this report in 2000, the statistics have not changed. The following is a description today of the criminal justice system:

Despite that drug use and drug selling happens across all ethnic and racial groups, one in nine African-American children will see his or her parent behind bars.

Racial disparity in drug law enforcement is reflected on the U.S. inmate population: Blacks comprise 13 percent of the U.S. population, yet they make up more than 31 percent of those arrested for drug offenses and more than 50 percent of those imprisoned in state prison for the same offenses. One in nine young black men aged 20–34 are behind bars at this moment.³¹

²⁶ F. Finley McRae, *Drug War Targets Blacks, One-in-20 Black Men in Prison*, L.A. SENTINEL, June 21, 2000, at A-1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Robert Valencia, *The War Within: How the U.S. War on Drugs Casts a Shadow Over Communities of Color*, LA PRENSA SAN DIEGO, Oct. 12, 2012, available at <http://laprensa-sandiego.org/editorial-and-commentary/commentary/the-war-within-how-the-u-s-war-on-drugs-casts-a-shadow-over-communities-of-color/>. See generally Russell L Jones, *A More Perfect Nation: Ending Racial Profiling*, 41 VAL. U. L. REV. 621, 621 (2006) (“[O]ur country must abandon all the habits of racism, because we cannot carry the message of freedom and the baggage of bigotry at the same time.”) (footnote omitted).

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The war on drugs has also manifested itself in state budget policy. Prohibition is putting a strain on state budgets that cannot be ignored. Fareed Zakaria, writing in *Time* magazine this year, highlighted the issue of state budget expenditures on corrections in order to explain the overall problem.³² Zakaria reported that overall state spending for prisons “has risen at six times the rate of spending on higher education in the past 20 years.”³³ In 2011, Zakaria noted, “California spent \$9.6 billion on prisons” but only \$5.7 billion on state higher education.³⁴ In addition, since 1980, “California has built one college campus and 21 prisons.”³⁵

As for the African-American community, the war on drugs is quite destructive. It isn’t just about the long sentences for non-violent drug offenses. As stated in the introduction, the real damage occurs when the men are disenfranchised as citizens and are not productive members of society with civic responsibilities and rights to assert. As a result, many are “colonial” citizens in their own country, even after fundamental civic equality on a legal basis was obtained for them decades ago.

As an example, many African-American men have lost the right to vote as a result of their conviction for felonies, many of which were non-violent drug crimes.³⁶ According to a report released by the Sentencing Project in 2012, 5.85 million Americans have lost the right to vote as a result of felony convictions.³⁷ Of those disenfranchised, one in thirteen African Americans fall into this category, and 7.7 percent of the African-American population (mostly men) is disenfranchised.³⁸ These numbers are significantly higher than the rest of the population, particularly white men. Sarah Massey of Project Vote, a voting advocacy organization, asserts that the policies “paint[] a picture to me that one population doesn’t deserve to have the same rights as the others It’s all in the

³² Zakaria, *supra* note 23.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Alanne Orjoux, *NAACP Pushes to Reinstate Former Felons’ Voting Rights*, CNN.COM (Oct. 2, 2012, 3:54 PM), www.cnn.com/2012/10/02/politics/ex-felon-voting-rights. African Americans comprise thirty-eight percent of those disenfranchised due to felony convictions. *Id.* (citing JEFF MANZA, CHRISTOPHER UGGEN & SARAH SHANNON, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 (2012), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=400&id=131).

³⁷ MANZA ET AL., *supra* note 36, at 1.

³⁸ *Id.* at 1-2.

numbers of people in jail, and let's be real, it's also about the races of the people in jail."³⁹

According to Christopher Reinhart, a civil rights attorney, statistics also indicate that felony convictions, such as those under statutes for controlled substances, impact African-American men in obtaining employment, housing, professional licenses, parental rights, and educational opportunities.⁴⁰ Professor Brian C. Kalt notes that millions of black men have lost the right to serve on juries across the nation.⁴¹ In total, thirteen million men have lost the right, according to Professor Kalt, thirty percent of which are black men simply because they have been convicted of a felony.⁴² Kalt describes this "felony exclusion" as "unwise" and stresses that jury service is a key part of citizenship.⁴³ Considering that, historically, "citizenship has been a tool of exclusion,"⁴⁴ Kalt's observation towards all men—black men as well—cannot be ignored. Today's arrangements in the United States during the war on drugs era and the colonial status (under colonialism) for these individuals (black men) are hauntingly similar.

B. Rockefeller and the New York Model

The New York state controlled substance laws (usually referred to as "Rockefeller drug laws," because they were the policy choice of New York Governor Nelson Rockefeller) set the standard for punitive responses to what has come to be known as the war on drugs.⁴⁵ These laws have been the standard for most of the punitive drug legislation over the past forty years.

Numerous studies have examined the Rockefeller drug laws, with research looking specifically at the effects of mandatory minimum

³⁹ Trymaine Lee, *States Deny Millions of Ex-Felons Voting Rights*, HUFFINGTON POST (Oct. 8, 2012, 3:02 PM), http://www.huffingtonpost.com/2012/10/08/felon-voting-rights_n_1924535.html (quoting Sarah Massey of Project Vote).

⁴⁰ CHRISTOPHER REINHART, OFFICE OF LEGISLATIVE RESEARCH REPORT, CONSEQUENCES OF A FELONY CONVICTION (2003), available at <http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0333.htm>.

⁴¹ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 47, 47–49 (2003).

⁴² *Id.*

⁴³ *Id.* at 118.

⁴⁴ E. Earl Parson & Monique McLaughlin, *Citizenship in Name Only: The Coloring of Democracy While Redefining Rights, Liberties, and Self Determination for the 21st Century*, 3:1 COLUM. J. RACE & L. 103, 104 (2013).

⁴⁵ See *Rockefeller Drug Laws*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/subjects/d/drug_abuse_and_traffic/rockefeller_drug_laws/index.html (last visited Apr. 17, 2013) (providing an online summary of drug laws enacted in New York under Governor Nelson Rockefeller).

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sentences on incarceration rates,⁴⁶ the disproportionate impact of the legislation on the black community,⁴⁷ and the legislation's role influencing both the scope and severity of punishments for drug offenses.⁴⁸ However, the Rockefeller drug laws have rarely been discussed as principally the extension of earlier policy failures. This discussion would acknowledge the historical importance of New York in shaping national drug policy since the early 1960s and demonstrate how the Rockefeller drug laws were an outgrowth of years of failed policy and not simply a misguided attempt to curtail drug addiction with mass incarceration. Such an analysis likely has been avoided because the impact of the Rockefeller drug laws renders the laws an inescapable target. The many men and women incarcerated under the legislation and the lengthy sentences that they have received have long been the focus of studies on the Rockefeller drug laws.

But a brief examination of legislation from the decade preceding the Rockefeller drug laws offers insight into how politics and misguided expectations led to the legislation that changed the face of incarceration in the United States. Nelson Rockefeller was governor of New York for fifteen years (1959–1974).⁴⁹ He is widely considered a liberal Republican whose use of methadone treatment advancements and a rehabilitation-centered approach to the drug addiction problem in New York was quite progressive at the time.⁵⁰ Eventually, Rockefeller would give up on his treatment and rehabilitation approach to the problem of controlled substances and drug addiction.⁵¹

Explanations for Rockefeller's shift to harsher sentencing measures overestimate both the suddenness and degree of change in the 1973 legislation from earlier measures. Moreover, arguments that the latter legislation was a by-product of Rockefeller's ambition for the vice presidency overlook the degree to which New York politics had already pushed Rockefeller to a stronger stance on drugs.⁵² While the two

⁴⁶ *Id.*; Edward J. Maggio, *New York's Rockefeller Drug Laws, Then and Now*, N.Y. ST. B.J., Sept. 2006, at 30, 30–31.

⁴⁷ See Maggio, *supra* note 46, at 32 (“Another disturbing result of the Rockefeller Drug Laws is the disproportionate effect on minorities.”).

⁴⁸ *Id.* at 30.

⁴⁹ See ROBERT H. CONNERY & GERALD BENJAMIN, *ROCKEFELLER OF NEW YORK: EXECUTIVE POWER IN THE STATEHOUSE* 17 (1979); *Hall of Governors*, N.Y. STATE, <http://www.hallofgovernors.ny.gov/NelsonRockefeller> (last visited Apr. 4, 2013).

⁵⁰ CONNERY & BENJAMIN, *supra* note 49, at 266. In 1962, New York passed major legislation that sought to provide treatment alternatives to those addicted to controlled substances such as heroin. *Id.*

⁵¹ *Id.*

⁵² The NYCLU report on the Rockefeller drug laws attributes the harshness of the legislation to Rockefeller seeking office. LOREN SIEGEL, ROBERT A. PERRY & CORINNE

approaches to the drug problem seem to represent a significant ideological shift by Rockefeller, a close examination demonstrates how the latter laws were an extension of earlier legislation. The cumulative failure of Rockefeller's earlier policies, which focused upon treatment and rehabilitation, is the primary factor in the policy change.⁵³

In the 1974 U.S. House of Representatives Committee Report, *Analysis of the Philosophy and Public Record of Nelson A. Rockefeller, Nominee for Vice President of the United States*, there is a discussion of Rockefeller's drug enforcement policy in New York.⁵⁴ This report reveals that Rockefeller, in the early years of his administration, sought solutions to the drug problems that are now advocated by organizations like the New York Civil Liberties Union.⁵⁵ Over the span of eight years, Rockefeller took several drastic measures to curtail drug use that demonstrate his emphasis on rehabilitation.⁵⁶ Of primary note in the report is the policy direction that allowed those arrested with small amounts of heroin to be afforded treatment for their drug addiction problems and later have their records expunged of all involvement with the criminal justice system.⁵⁷ While governor, Rockefeller increased expenditures for rehabilitation by more than \$80 million dollars.⁵⁸ Rockefeller's Narcotics Control Act of 1966 was deemed a "war on narcotics," increasing the state's ability to mandate treatment for addicts

CAREY, N.Y. CIVIL LIBERTIES UNION, THE ROCKEFELLER DRUG LAWS: UNJUST, IRRATIONAL, INEFFECTIVE 5 (2009), available at <http://www.nyclu.org/publications/rockefeller-drug-laws-unjust-irrational-ineffective-2009>. Such an argument ignores the gradual progression to more punitive legislation that followed a decade of failed rehabilitative treatment plans. More importantly, such an argument ignores Rockefeller's tendency to rely on commitment as a means of treating drug addicts.

⁵³ See *The Facts About Drug Abuse*, SCHAFFER LIBR. OF DRUG POL'Y, <http://www.druglibrary.org/schaffer/library/studies/fada/fadafin.htm> (last visited Apr. 17, 2013). The council was put together after a 1972 Ford Foundation report asserted that public policy "was found to be unrealistic and unresponsive to cultural, social, psychological, and economic factors underlying the widespread use of drugs." *Id.* The recommendations of this report are worth considering still and highlight how little legislators seemed to have consulted available studies before proposing draconian sentencing measures.

⁵⁴ STAFF ON H. COMM. ON THE JUDICIARY, 93D CONG., ANALYSIS OF THE PHILOSOPHY AND PUBLIC RECORD OF NELSON A. ROCKEFELLER, NOMINEE FOR VICE PRESIDENT OF THE UNITED STATES 49-52 (Comm. Print 1974).

⁵⁵ NYCLU Announces Findings About Statewide Impact of Rockefeller Drug Laws, NEW YORK AMERICAN CIVIL LIBERTIES UNION, available at <http://www.nyclu.org/news/nyclu-announces-findings-about-statewide-impact-of-rockefeller-drug-laws> (last visited May 10, 2013).

⁵⁶ See CONNERY & BENJAMIN, *supra* note 49, at 266-69.

⁵⁷ See *id.* at 266 (discussing Rockefeller's initial support of the Metcalf-Volker Act, which focused on rehabilitation as compared to incarceration).

⁵⁸ *Id.* at 267.

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and expanding commitment procedures to include anyone acting in good faith.⁵⁹ Rockefeller's war on narcotics was followed by a "declaration of total war" against drug use by people under the age of sixteen. This war included the creation of an educational curriculum on drug use for teachers and funding to train ten thousand teachers in the use of the curriculum.⁶⁰

Rockefeller's initial approach to the problem of substance abuse did have detractors. One key area of controversy in the Narcotics Control Act was the use of compulsory commitment to extend treatment to those addicted to narcotics.⁶¹ The American Civil Liberties Union challenged this section of the law.⁶² Ultimately, the New York Supreme Court upheld the constitutionality of the provision.⁶³ But, despite the controversy over various provisions of the law and allegations that the policy was too liberal and lenient, Rockefeller's willingness to rely on compulsory commitments as a means to solve the drug problem reflects his belief that it was possible to solve a crime problem by reducing the number of those addicted to controlled substances in society. Compulsory commitment is, in effect, a means to reduce incarceration and crime associated with drug use and abuse. Drug addiction, in other words, is crime. Unfortunately, this approach is the real problem with drug enforcement policy today and has been throughout the history of the United States.

The crime associated with drug addiction is connected to the illegal nature of the substances in society.⁶⁴ The illegality removes the substances from the marketplace and from the realm of legal commerce and significantly increases the prices of the substances. Thus, the

⁵⁹ See Spiros A. Tsimbinos, *Is It Time to Change the Rockefeller Drug Laws?*, 13 ST. JOHN'S J. OF LEGAL COMMENT. 613, 615 (1999) ("[I]n 1966 the Narcotics Control Act recognized drug addiction as a disease and the addict as a sick person in need of treatment and established a comprehensive program of drug treatment facilities with the aim of rehabilitation rather than incarceration.") (footnotes omitted).

⁶⁰ Peter Goldberg & Erik J. Meyers, *The Influence of Public Understanding and Attitudes on Drug Education and Prevention*, in THE FACTS ABOUT DRUG ABUSE 126, 126-32 (Drug Abuse Council ed., 1980). See generally CONNERY & BENJAMIN, *supra* note 49, at 267.

⁶¹ See Richard B. Allen, *What's New in the Law*, 54 A.B.A. J. 1216, 1218 (1968) (providing an update regarding a New York Court of Appeals case in which the state's Narcotic Control Act of 1966, authorizing civil commitment for rehabilitation of people guilty of narcotic offenses, was found to be valid).

⁶² JAMES E. UNDERWOOD & WILLIAM J. DANIELS, GOVERNOR ROCKEFELLER IN NEW YORK: THE APEX OF PRAGMATIC LIBERALISM IN THE UNITED STATES 139 (1982).

⁶³ See Allen, *supra* note 61, at 1218 (describing a holding in a New York Court of Appeals case in which the court held the legislature could compel an 'addict' to be rehabilitated).

⁶⁴ See CONNERY & BENJAMIN, *supra* note 49, at 266 (describing the detrimental effect that narcotics trafficking had on New York previous to the enactment of the Metcalf-Volker law of 1962).

products are expensive, and this leads to criminal activity. In contrast, drugs such as nicotine and caffeine, both legal and readily available to the public, cause little if any criminal activity. Nevertheless, Governor Rockefeller pursued his policies based upon this flawed approach from the very beginning.

Eventually, Rockefeller's more liberal approach to drug enforcement did change as a result of his alleged frustration with this approach's lack of success. In 1966, Rockefeller became convinced that the early approach focusing upon treatment and compulsory commitment "was not working."⁶⁵ It also did not help that the federal government in 1966 had yet to definitively shift its own approach to the drug problem with harsher sentences as Rockefeller began to urge.⁶⁶ According to Rockefeller, the choice in the more liberal Metcalf-Volker Act for those addicted to serve short prison sentences in lieu of treatment was a major flaw in the law.⁶⁷ Data from New York at the time revealed that over ninety percent of those arrested for narcotics refused the treatment options offered, and eighty percent of those arrested who served sentences were re-arrested.⁶⁸

The treatment approach, at least according to Rockefeller, wasn't even being implemented because the punishments were too lenient.⁶⁹ Rockefeller argued for a new approach: compulsory hospital treatment of up to three years for addicts would now be required. The basis of this approach was the underlying crime problem associated with the drug culture.⁷⁰ The law that was eventually passed, the Narcotics Control Act, also failed to reduce drug addiction and crime in New York.⁷¹

Despite criticism of the law for its shortcomings, Rockefeller maintained that the drug treatment approach would not reduce crime, and he would not allow "addicts . . . to be free to roam the streets: to mug, to purse-snatch, to steal, and even to murder."⁷² But the law was also important because it altered the definition of success in drug enforcement. As long as elected officials were focusing upon the dealers, those selling the illegal narcotics, they would always have public

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 266-67.

⁶⁸ *Id.* at 267.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 269.

⁷² Note, *Civil Commitment of Narcotics Addicts*, 76 *YALE L.J.* 1160, 1177 n.56 (1967) (citing *N.Y. TIMES*, Oct. 29, 1966, at 23, col. 3).

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support.⁷³ Even black people in New York came out in support of an approach that would remove the drug dealers from their neighborhoods.⁷⁴ Harlem residents (at least some of them) supported the governor's hard line approach, as long as the laws protected them against "blood-thirsty, money-hungry, death-dealing animals."⁷⁵

Eventually, Rockefeller's frustration with a demand side approach to drug enforcement gave way to a supply side approach. Motivated by "political, moral, and emotional" ideals, Rockefeller urged "tougher" laws in 1973. He denounced plea bargaining in the court system and suspended sentences, and added that the police were frustrated because "all the laws we now have on the books won't deter the pusher." Rockefeller called for a "truly effective deterrent to the *pushing* of drugs so that innocent people will not fall victim to the pusher's tactics or be robbed, mugged, or murdered . . ."⁷⁶

The now famous and infamous Rockefeller drug laws were finally passed with some compromises on May 8, 1973.⁷⁷ In signing the law, Rockefeller described it as the "toughest anti-drug program in the country" and urged the police and the judicial system to enforce the law effectively.⁷⁸ The law, among other things, called for mandatory life sentences for selling or conspiring to sell any quantity of hard drugs; the elimination of plea bargaining and suspended sentences; the possibility of parole for all persons; and the elimination of treatment under "youthful offender" laws for those between the ages of sixteen and nineteen.⁷⁹ The law also called for mandatory life sentences for those found to have committed serious crimes after taking drugs and mandatory life sentences for those possessing or conspiring to possess more than an ounce of one of the "big four" drugs (heroin, cocaine, opium, and morphine).⁸⁰

The opposition to the law had been fierce, but it was mostly opposed by legislators, judges, lawyers, prosecutors, court administrators, and the American Civil Liberties Union.⁸¹ The public overwhelmingly supported

⁷³ See generally Mark Osler, *Amoral Numbers and Narcotics Sentencing*, 47 VAL. U. L. REV. 755 (2013).

⁷⁴ CONNERY & BENJAMIN, *supra* note 49, at 271.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 272.

⁷⁸ *Id.*

⁷⁹ UNDERWOOD & DANIELS, *supra* note 62, at 139.

⁸⁰ *Id.*

⁸¹ *Id.*

the law.⁸² In a 1973 *New York Times* article on the law, Rockefeller's new approach was well expressed and was directed at the public:

[W]e have tried every possible approach to stop addiction and save the addict through education and treatment

We have allocated over \$1 billion

But let's be frank—let's "tell it like it is":

We have achieved very little permanent rehabilitation—and have found no cure.

. . .

The crime, the muggings, the robberies, the murders associated with addiction continue to spread a reign of terror.⁸³

Rockefeller's approach found the public quite receptive, including African Americans.⁸⁴ Calls to his office during the time of the legislation were ten to one in favor of passing these draconian drug laws.⁸⁵ The ramifications of the Rockefeller drug laws were far reaching. Drug addicts, once considered potential criminals by Nelson Rockefeller in need of treatment, were now no different from the major drug dealers. Drug users and small-time dealers were as doomed to arrest and long sentences as bigger illegal drug merchants.

Attorney and Law Professor Mark Osler refers to the incarceration of these small-time dealers as a strategy that was doomed to fail.⁸⁶ Osler noted that small-time drug dealers living in impoverished areas could always be replaced; therefore, the system couldn't possibly arrest them all.⁸⁷ The New York prison population specifically, and the U.S. prison population in general, increased in the 1980s, in part, because of harsh drug and sentencing laws and the racial profiling of blacks. Overall, as a

⁸² *Id.*

⁸³ Francis X. Clines, *Governor Asks Life Term for Hard-Drugs Pushers and for Violent Addicts*, N.Y. TIMES, Jan. 4, 1973, at 1, 28-29.

⁸⁴ UNDERWOOD & DANIELS, *supra* note 62, at 140-41; *see also* CONNERY & BENJAMIN, *supra* note 49, at 271.

⁸⁵ CONNERY & BENJAMIN, *supra* note 49, at 272.

⁸⁶ *See generally* Mark Osler, *What Would It Look Like if We Cared About Narcotics Trafficking? An Argument to Attack Narcotics Capital Rather than Labor* (Mar. 31, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800370 (describing the law enforcement tactic of incarcerating low-wage workers in response to the illegal narcotics problem in the United States and discussing why this tactic is a failure).

⁸⁷ *See id.* at 3-6 ("The problem, of course, is that the number of people you incarcerate does not necessarily mean that you are solving a problem").

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result of the Rockefeller drug laws, New York incarcerated 375 people for every 100,000 in the population—the largest rate of incarceration in the state’s history. However, the real damage was yet to come. States across the nation would emulate the New York model and also pass mandatory minimum drug laws. The prison populations of the nation exploded, state budgets were compromised, and the African-American community across the nation watched as black men began to go to prison like never before.

III. CARMONA V. WARD

If there was an opportunity for the nation to reconsider how our current war on drugs policy would be implemented, it was the late 1970s habeas corpus action *Carmona v. Ward*.⁸⁸ This case is a classic morality versus practicality decision amidst the developing war on drugs. It also placed the traditional civil rights establishment and its ideals against conservative political ideals, which were gaining strength and influence. The decision itself is important, because a different decision could have altered how the war on drugs was implemented.

A. U.S. District Court

Arthur L. Liman, the renowned and legendary New York-based attorney, wrote in his autobiography, *Lawyer*, that he once argued a case on appeal where “the defendant received a maximum life sentence . . . for possessing a \$20 bag of cocaine.”⁸⁹ Liman, who was working with an advocacy organization known as the “Legal Action Center of New York,” is referring to *Carmona*, a New York City drug sentencing appeal case. *Carmona* perhaps could have saved the United States billions of dollars and could have saved millions of individuals the dishonor and burden of a long prison sentence. It is central to understanding the war on drugs. In this respect, there are many reasons why the case is noteworthy.

First, while it was not a case involving black men or even men being incarcerated for possession of controlled substances, it was a case that challenged the basic war on drugs policies, which has led to the huge increase in state and federal prison populations. Second, it was a case that attempted to challenge New York’s Rockefeller drug laws, the laws that became the model for many of the nation’s wasteful and destructive war on drugs sentencing laws.

⁸⁸ *Carmona v. Ward*, 436 F. Supp. 1153 (S.D.N.Y. 1977).

⁸⁹ ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* 193 (1998).

Yet, *Carmona* is also important for several other not so obvious reasons. First, two judges with solid civil rights credentials identified the case as problematic as the case completed its path through the federal judicial system. Both Judge Constance Baker Motley and Supreme Court Justice Thurgood Marshall expressed serious concerns with the facts and legislative philosophy at work in *Carmona*.⁹⁰ The failure to make note of their concerns and change course on a policy level, with or without knowledge of *Carmona*, by officials executing our nation's war on drugs has only exacerbated the problems presented by the policies underlying the case.

In addition, *Carmona* was a challenge to the Rockefeller drug laws and was not a criminal trial. Lawyers for the women (petitioners) in the case had identified the drug sentencing policy set forth in *Carmona* as troubling as well, even though the disparate racial statistics, well known today by advocates, politicians, and many other observers, had yet to be realized. But, most importantly, *Carmona* is significant because it was a case brought to the court by the Legal Action Center of New York City in 1973. Arthur L. Liman, mentioned above, was on the board of the Center from the very beginning, and it was for this reason that Liman argued the case.⁹¹

The Legal Action Center is a public interest legal advocacy organization that was founded to address many of the problems accompanying substance abuse and how those issues interact with the criminal justice system.⁹² It is an organization that was perhaps before its time, judging by the work in the *Carmona* case. According to Elizabeth Bartholet, one of the original founders of the Legal Action Center, the organization was created specifically to address the issues that would eventually be perpetuated by the war on drug laws and, in particular, the Rockefeller drug laws passed in 1973.⁹³ Its initial focus was to assist ex-offenders with "barriers to employment," according to Bartholet, and to also assist them with "substance abuse issues." With the rise of New York's anti-narcotics laws in 1973, the organization immediately increased its legal activity and advocacy to challenge the laws. Bartholet describes the Rockefeller drug laws of 1973 as "outrageous" and an "atrocious" and recalls that the Legal Action Center "wanted to challenge the laws in whatever way" it could.⁹⁴ It is also

⁹⁰ *Carmona v. Ward*, 439 U.S. 1091 (1979).

⁹¹ Telephone Interview with Elizabeth Bartholet, The Legal Action Center founding director and president (Oct. 2012).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

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notable that Bartholet and her colleagues also considered the long-term ramifications of the law when they began to develop their strategies in various cases and in *Carmona*.

"In a general way," she states, "we anticipated that lots of people would end up caught up because there were huge criminal penalties."⁹⁵ Interestingly, New York's Rockefeller drug laws, the statutes that would become the focus in *Carmona*, initially resulted in a sharp reduction in drug arrests.⁹⁶ This, by chance, led some to believe that the alleged deterrent factors inherent in the Rockefeller laws were successful immediately. For example, in the first month after passage of the laws, only 252 arrests were made for violation of the drug laws in New York City.⁹⁷ In the year prior to the enactment of the Rockefeller laws, New York City had an average of 950 arrests.⁹⁸

However, one year later the reality of an impending vast expansion of the prison population and activity in the criminal justice system that the Rockefeller laws would produce, as well as what such an approach would produce nationally, was self-evident. In the fourteen months following passage of the law, 209 people were convicted and given life sentences for violations of the law.⁹⁹ In addition, 18,409 people were arrested under the law, an increase of roughly 1,000 people from the fourteen months that preceded the law.¹⁰⁰ Moreover, just one year into the mandatory sentencing law in New York, officials in that state were already contemplating a need for flexibility in sentencing as a result of the severe and mandatory penalties.¹⁰¹ Needless to say, the laws were not amended to address the obvious problems; and soon thereafter the filing of the case now known as *Carmona v. Ward* was commenced to attempt to undo the misguided policies of the New York legislature and Governor Rockefeller.

The important facts of *Carmona* are as follows: Martha Carmona and Donna Foggie instituted a habeas corpus petition through their counsel, the Legal Action Center of New York City, challenging their confinement under New York's penal laws relating to narcotics.¹⁰² Eventually, Roberta Fowler, another state prisoner, and two other individuals petitioned to intervene in the case. Ms. Fowler was allowed to intervene,

⁹⁵ *Id.*

⁹⁶ M.A. Farber, *Narcotics Arrests Drop 75% in City*, N.Y. TIMES, Oct. 1, 1973, at 1.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Peter Kihss, *209 Convicted Under Strict Drug Law*, N.Y. TIMES, Nov. 10, 1974, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Carmona v. Ward*, 436 F. Supp. 1153, 1156 (S.D.N.Y. 1977).

and the case proceeded forward on the writs filed by Ms. Carmona, Ms. Foggie, and Ms. Fowler.

Constance Baker Motley, U.S. District Court Judge for the Southern District of New York, was the presiding judge in *Carmona*. Judge Motley stated the summary of the writs as follows, as presented by the various petitioners: “[s]pecifically, they attack, root and branch, the constitutionality of certain sections of the New York Penal Law, Criminal Procedure Law, and Correction Law, as amended in 1973, which govern the treatment of class A felony drug offenders, and pursuant to which they have been sentenced.”¹⁰³

The argument presented was simple: the Rockefeller drug laws passed in 1973 by New York, which dramatically increased the sentences for all narcotics violations, were unconstitutional under the U.S. Constitution’s prohibition against cruel and unusual punishment. Considering the history of cruel and unusual punishment, as rooted in English law, and how it developed constitutionally in the United States, the strategy was credible.

One of the main motivations for including the Eighth Amendment’s ban against cruel and unusual punishment was historical in nature, stemming from abuses by the state in fashioning punishments in England for particular criminal offenses.¹⁰⁴ In the 1991 Michigan drug sentencing case that interpreted cruel and unusual punishment, *Harmelin v. Michigan*, the U.S. Supreme Court noted the origins of the ban to English law and also identified the legislature as the target of the ban in U.S. constitutional law.¹⁰⁵ Therefore, despite various disagreements on the interpretation of the clause over the years, the challenge to the Rockefeller laws, which sentenced individuals to life in prison for the possession of harmless quantities of controlled substances, was consistent with the history of the provision.

It should be noted that judicial interpretations and applications of the Eighth Amendment have been inconsistent over the years and have produced a wide swath of legal holdings.¹⁰⁶ The U.S. Supreme Court has had great difficulty with issues such as the proportionate nature of sentences and whether an original view (narrow) of that concept should be applied (in other words, look at English law and legal custom and

¹⁰³ *Id.* at 1156 (footnote omitted).

¹⁰⁴ Geoffrey G. Hemphill, Note, *The Administrative Search Doctrine: Isn’t This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 255–56 (1995).

¹⁰⁵ *Harmelin v. Michigan*, 501 U.S. 957, 975–76 (1991).

¹⁰⁶ See generally John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) (providing an explanation of various opinions and comments regarding the Court’s treatment of the cruel and unusual punishment clause throughout the past few decades and today).

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identify the punishments deemed cruel and unusual in 17th century English society).¹⁰⁷ On the other hand, the Court has also had to confront the reality of the modern era in sentencing, where society has expanded in population, and determine how to maintain a society that is safe and orderly, but also humane and fair (the broader view of the law).¹⁰⁸

Judge Motley embraced a broad interpretation of the ban in rendering her decision in *Carmona* as opposed to a narrow view. A broader interpretation of the cruel and unusual punishment doctrine allows for a much more intensive analysis and considers the excessive nature of the sentence for the offense and whether the sentence is proportionate to the offense. Motley held that the sentences imposed upon the three women in the case were “so disproportionately severe in relation to the gravity of the offenses charged as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.”¹⁰⁹ The decision, issued August 4, 1977, released Martha Carmona and Roberta Flower. The women were incarcerated at the time in New York. The third petitioner, Donna Foggie, was discharged from parole custody as a result of Motley’s order. The key portion of her opinion reads as follows:

Petitioners have attacked the 1973 drug law in numerous respects, notably (1) the mandatory indeterminate life sentences for all class A drug offenders; (2) the preclusion of plea bargaining for A-III felony offenders (which has been eliminated during the pendency of this action); (3) the mandatory lifetime parole provision without possibility of discharge (which has also been altered during the pendency of this action to permit class A drug felons to be discharged from parole on the same basis as all other parolees); (4) the predication of probation, in part, upon a recommendation from the prosecutor due to the

¹⁰⁷ See generally John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011) (discussing the use of proportionality review in determining cases dealing with the cruel and unusual punishments clause and discussing the Court’s ability to expand the proportionality review to a larger class of cases).

¹⁰⁸ See generally Stephen E. Meltzer, *Harmelin v. Michigan: Contemporary Morality and Constitutional Objectivity*, 27 NEW ENG. L. REV. 749 (1993).

¹⁰⁹ *Carmona v. Ward*, 436 F. Supp. 1153, 1156 (S.D.N.Y. 1977).

defendant's cooperation; and (5) the denial of bail pending appeal.¹¹⁰

The basis for Judge Motley's decision was the fact that all three women received quite severe sentences in comparison to the acts that led to their incarceration.¹¹¹ The three women, Carmona, Foggie, and Fowler, were not violent offenders, and none of the women had a long history of criminal convictions for any offense.¹¹² Defendant Fowler had only been arrested once prior to her arrest for the charge for which she was incarcerated at the time of the habeas corpus proceeding.¹¹³ Ms. Fowler was incarcerated for the twenty dollar purchase of cocaine and for delivering the purchase to an informant.¹¹⁴

Judge Motley's opinion also reflected early opposition to the new drug laws passed to aggressively attack the nation's problem of substance abuse.¹¹⁵ No matter how the state sought to pursue its arguments, lengthy sentences for such incidental amounts of illegal narcotics without a history of criminal activity or convictions discredited the application of the law in Motley's view. Motley asserted that "the treatment of A felony drug offenders [was] unique in its severity among non-capital crimes in New York, . . . but [was] also virtually unique among all the States of the Union."¹¹⁶ Based on this analysis, Motley held that the sentences of the three women in *Carmona* were "grossly disproportionate" to their offenses, and this constituted a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.¹¹⁷

While it would seem that the larger public did not take note of Motley's decision at the time, this is untrue. In a 1977 *Chicago Tribune* article on Judge Motley, the case was highlighted as part of a feature on Motley as a "rights advocate."¹¹⁸ In an additional article on the case by the *Amsterdam News* immediately following the decision, Mark C. Morrill, one of the lawyers in the case for Martha Carmona, described the decision as casting "serious doubt on the continued validity of

¹¹⁰ *Id.* at 1161-62 (footnotes omitted). See generally Harvey Gee, *Weighing Prosecutorial Power and Discretion: Fixing the Imbalance*, 44 VAL. U. L. REV. 379 (2010) (reviewing ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007)).

¹¹¹ *Carmona*, 436 F. Supp. at 1157-60.

¹¹² *Id.*

¹¹³ *Id.* at 1159-60.

¹¹⁴ *Id.* at 1159.

¹¹⁵ *Id.* at 1160.

¹¹⁶ *Id.* at 1166.

¹¹⁷ *Id.* at 1172.

¹¹⁸ Anne Quindlen, *Judge Motley, Rights Advocate, at the Right Time*, CHI. TRIB., Sept. 5, 1977, at A8.

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sentences imposed under the Rockefeller law.”¹¹⁹ This again suggests that early on many believed that the policy represented by the severe sentences for routine drug violations presented a serious problem to the nation.

Indeed, the Rockefeller drug laws of New York represented the path that the remainder of the nation would take in seeking to address substance abuse issues. More financial resources would be devoted to arresting, prosecuting, and incarcerating individuals for possession of illegal drugs; yet, substance abuse and illegal drug activity would remain unchallenged. On this basis alone, Judge Motley’s opinion served quite a useful purpose as it highlighted problems with the law – even though the most serious problems with these kinds of laws had not yet been realized.

B. U.S. Court of Appeals

Carmona was overturned on appeal.¹²⁰ The case was argued before the U.S. Court of Appeals for the Second Circuit on December 13, 1977.¹²¹ The three-judge panel that heard the case consisted of Judges William H. Mulligan,¹²² James L. Oakes,¹²³ and Ellsworth Van Graafeiland.¹²⁴ Mulligan and Oakes were appointees of President Richard Nixon, while Van Graafeiland was appointed by President Gerald Ford. The opinion was written by Judge Mulligan, in which Van Graafeiland joined. Judge Oakes wrote a dissenting opinion.¹²⁵

Initially, Judge Mulligan’s opinion is notable because of its focus upon the alleged lavish lifestyle of Martha Carmona (“without any known legal means of support”) and on Roberta Fowler’s “extensive first-hand experience with the criminal justice system.”¹²⁶ These facts, even if true, have little to do with whether the sentence violated the Eighth Amendment. These facts also do not justify the Rockefeller drug

¹¹⁹ *Court Rules Rockefeller Laws Unconstitutional*, THE AMSTERDAM NEWS, Aug. 30, 1977, at B8 (on file with author).

¹²⁰ *Carmona v. Ward*, 576 F.2d 405, 405-06 (2d Cir. 1978).

¹²¹ *Id.* at 405.

¹²² See Wolfgang Saxon, *William Hughes Mulligan, 78, Judge and Dean of Law School*, N.Y. TIMES, May 14, 1996, <http://www.nytimes.com/1996/05/14/nyregion/william-hughes-mulligan-78-judge-and-dean-of-law-school.html>.

¹²³ See Adam Liptak, *James L. Oakes Dies at 83; Nixon Choice for Federal Bench*, N.Y. TIMES, Oct. 16, 2007, http://www.nytimes.com/2007/10/16/nyregion/16oakes.html?_r=0.

¹²⁴ See Wolfgang Saxon, *Ellsworth Van Graafeiland, 89, Appellate Judge, Dies*, N.Y. TIMES, Nov. 25, 2004, http://www.nytimes.com/2004/11/25/obituaries/25graafeiland.html?_r=0.

¹²⁵ See generally *Carmona*, 576 F.2d at 405 (providing an elaborate opinion and strong dissenting argument regarding the applicability of the Eighth Amendment).

¹²⁶ *Id.* at 407.

laws, considering the history that is known now of the effectiveness of the laws to eradicate drug abuse from society.

Judge Mulligan did not discuss the origins of the Eighth Amendment in his opinion, but he did admit that the focus of the review was upon the legislature.¹²⁷ Mulligan framed his review with the following question: “whether the New York State Legislature’s assessment of the dangerousness of the crimes of selling and of possessing cocaine with an intent to sell it, as reflected in the punishment imposed, is so unreasonable that it violates the constitution by allotting an excessively severe penalty for the crime.”¹²⁸

Considering the history of the performance of the Rockefeller drug laws, it is apparent now that the answer to Mulligan’s question is that the laws have proven to be unreasonable, though it was perhaps difficult to reach such a conclusion in the *Carmona* case. The laws, as explained previously, do not result in less danger but, in fact, render drug trafficking much more dangerous by creating a global “black market” for sale and distribution.¹²⁹ Judge Mulligan states the case for this early in his opinion when he refers to “crime” spawned by illegal drug activity.¹³⁰ He asserts that it is an industry where

[a]ddicts turn to prostitution, larceny, robbery, burglary and assault to support their habits. The profits are so lucrative that police and law enforcement agents have become corrupted. . . . How could any responsible legislative body in determining the gravity of drug selling fail to take into consideration the contagious, epidemic menace to the health, safety and welfare of the citizenry that it poses?¹³¹

This discussion provides an entry point into the overall flawed reasoning surrounding laws currently used to combat controlled substances in the United States. The crime historically surrounding controlled substances relates to the treatment of the substances by the criminal justice system. The black market surrounding the substances, petty crime, violence, etc., relates to the economy created by the government’s treatment of the substances.

¹²⁷ *Id.* at 408–09.

¹²⁸ *Id.* at 410.

¹²⁹ Prohibition has never curtailed the sale or use of controlled substances. If anything, it is just the opposite. See generally John R. Pekkanen, *Drug-Law Enforcement Efforts*, in THE FACTS ABOUT DRUG ABUSE, *supra* note 60, at 63–64.

¹³⁰ *Carmona*, 576 F.2d at 412.

¹³¹ *Id.* (footnote omitted).

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Jeffrey A. Miron, a Professor of Economics at Boston University, explains in his book, *Drug War Crimes*, that the level of enforcement towards controlled substances is what induces violence in the drug trade.¹³² Due to the fact that the substances are illegal, those engaged in the trade have no mechanism for resolving disputes.¹³³ Their only avenue for resolving disputes is violence against those involved in the trade. This is what increases the price of the product and leads to violence and death. Mulligan's opinion, as expected, reflects the flawed trappings of this approach to controlled substances.

In the end, Mulligan's decision in *Carmona* is just a narrow interpretation of Eighth Amendment jurisprudence. In defense of his reversal of Motley's decision, Mulligan concluded that drug trafficking in New York was an "extraordinary crisis," and the punishments received by the petitioners in *Carmona* were not "constitutionally defective."¹³⁴ "No decision of the Supreme Court, this court or the highest court of the State of New York has ever found a sentence of imprisonment to transgress the Eighth Amendment merely because of its length[.]" he wrote. Later he added, "There may well be such a case but this is surely not it."¹³⁵ The problem with Mulligan's narrow view of the cruel and unusual punishment doctrine in this case is that even he admitted that the success or effectiveness of the drug laws being challenged was not established.¹³⁶ At a minimum, considering the specifics of the laws and why they were implemented, some success or some connection between a severe sentencing approach and eradication of drug abuse is needed. Mulligan offered no such analysis.

Mulligan casually admitted that the case was about the Rockefeller drug laws overall, as he devoted considerable space in the opinion to the moral and legal challenges to the law.¹³⁷ He also cited statistics from New York demonstrating that substance abuse treatment programs (the often preferred alternative to harsh punishment) had been a failure in New York and a Gallup poll indicating that most Americans supported harsher drug penalties.¹³⁸ Mulligan's decision also avoided the difficult questions presented by traditional Eighth Amendment analysis, because if Judge Mulligan had followed the accepted judicial standard at the time, the decision likely would have been different.

¹³² JEFFREY A. MIRON, *DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION* 44 (2004).

¹³³ *Id.* at 12.

¹³⁴ *Carmona*, 576 F.2d at 417.

¹³⁵ *Id.*

¹³⁶ *Id.* at 416 n.18.

¹³⁷ *Id.* at 413.

¹³⁸ *Id.*

While Judge Mulligan “accept[ed] the proposition that . . . a severe sentence imposed for a minor offense could, solely because of its length, be a cruel and unusual punishment,” he rejected the facts in *Carmona* as not meeting the proportionality standard.¹³⁹ The problem with the rejection is the legal analysis provides a very weak argument to support his position. The three part test for proportionality at the time of *Carmona*, as adopted from *Hart v. Coiner*, reviewed the following three factors:

- 1) a judgment on the seriousness of the offense; 2) a comparison of the punishment imposed with that fixed for other crimes within the jurisdiction; and 3) a comparison of the sentence under review with those authorized in other jurisdictions for the same crime.¹⁴⁰

Judge Mulligan casually dismissed the test in *Hart* by asserting that “individual judges” might substitute their own policy views for the legislature when rendering sentences.¹⁴¹ Concluding that it was the legislature whose opinion and view that mattered most, Judge Mulligan imposed an impossible standard on sentence review by essentially holding that all punishments passed by a democratically elected legislature are presumed to be valid.¹⁴² This analysis was a complete avoidance of the history of cruel and unusual punishment as it had evolved from the English system and become part of U.S. constitutional jurisprudence. Indeed, it was the legislature that the principle wanted to curtail.

The remaining sections of the decision did not add any cogent arguments to this broad analysis. Judge Mulligan was content to advance the basic argument that nothing else really mattered except the fact that the legislature was supreme with respect to criminal punishments. Needless to say, such an analysis, as noted in the dissent, avoided the fundamental issues raised by *Carmona*: the proportionality of the sentence. Judge Mulligan simply concluded that “[i]t is not our

¹³⁹ *Id.* at 409.

¹⁴⁰ *Id.* (citing *Hart v Coiner*, 483 F.2d 136 (4th Cir. 1973)); *In re Lynch*, 503 P.2d 921 (Cal. 1972); *People v. Broadie*, 332 N.E.2d 100 (N.Y. 1975); David W. Worrell, *Recent Developments*, 44 FORDHAM L. REV. 637 (1975); Charles P. Graupner, *Constitutional Law – Eighth Amendment – Appellate Sentence Review*, 1976 WIS. L. REV. 655 (1976).

¹⁴¹ *Carmona*, 576 F.2d at 409.

¹⁴² *Id.* (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820); *Gore v. United States*, 357 U.S. 386, 393 (1958)).

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function” nor should we “judge” the New York legislature’s wisdom in enacting the 1973 laws.¹⁴³

In the dissent in the *Carmona* appeal, Judge Oakes took the broader view, as presented by Judge Motley, and noted that there was evidence that by 1977 the Rockefeller drug laws were failing and were now subject to revision.¹⁴⁴ As expected, Judge Oakes’ dissent followed Judge Motley’s Eighth Amendment argument.¹⁴⁵ Initially, Judge Oakes stated the obvious issue at stake in *Carmona*—the Rockefeller drug laws. Considering the history of cruel and unusual punishment and its legal evolution, Oakes’s observation is quite important:

The Joint Committee of the Association of the Bar of the City of New York and the Drug Abuse Council have concluded that the operation of the 1973 New York drug law has had no real deterrent effect on drug abuse or on resulting felonious property crimes. If anything, the Committee found, the law has caused a reduction in the number of drug convictions obtained and has made no measurable contribution to acceptable goals of punishment.¹⁴⁶

Oakes’s initial statement was a conclusion that the laws had failed in implementation and substance. The laws were not only the wrong approach, but they weren’t even successful for the reasons often advanced by proponents. But, more importantly, in his dissent, Judge Oakes pointed out that Judge Mulligan had failed to apply the proper standards in justifying his decision.¹⁴⁷ This section of the dissent is most important, because it again asserted that a severe sentence can be set aside for being disproportionate with a crime, as in *Carmona*. Considering the fact that New York would become the prototype jurisdiction for war on drugs era sentencing, the stakes could not have been higher. State after state, Judge Oakes noted, has concluded that severe sentences disproportionate with the crime can be set aside by the courts and should be set aside. An excerpt from Judge Oakes’s dissent exposed the flaw from the majority opinion:

It fails first to focus on the actual crimes of these two appellees, emphasizing instead the general evils of

¹⁴³ *Id.* at 416.

¹⁴⁴ *Id.* at 417.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (citations omitted).

¹⁴⁷ *Id.* at 422.

drugs and drug trafficking. Second, in comparing the sentences imposed by the legislature in connection with other New York crimes, the majority does not mention more serious crimes which carry lesser sentences in New York State. Finally, the majority makes no real comparison with the sentences imposed by other states for drug crimes, conclusorily stating instead that the problems created by drugs are greater in the state of New York than in other states, a matter of which the majority takes judicial notice.¹⁴⁸

Judge Oakes initial statement, that Judge Mulligan focused too much upon “the general evils of drugs and drug trafficking,” was the crux of his criticism of the opinion.¹⁴⁹ Judge Mulligan’s decision, in Judge Oakes’s view, was more about his displeasure with drugs in general rather than whether this sentencing scheme should be validated. The fact that the majority validated the sentencing framework makes this decision arguably one of the most costly opinions in U.S. history.

C. U.S. Supreme Court

The case was appealed to the U.S. Supreme Court. While certiorari was denied by the High Court, Justice Thurgood Marshall issued a dissent from the denial of certiorari.¹⁵⁰ This is quite unusual because the case was not accepted for review or argument; yet, Justice Marshall was compelled to write a dissent from the denial of review. Justice Lewis Powell joined the opinion.¹⁵¹ Justice Marshall’s dissent, like Judge Oakes’s dissent in the reversal, focused on the principle of proportionality, the ideal that Judge Mulligan ignored in his decision.¹⁵² Marshall noted that “[f]ew legal principles are more firmly rooted in the Bill of Rights and its common-law antecedents than the requirement of proportionality between a crime and its punishment.”¹⁵³ Marshall also made note of the connection to the principle from English legal traditions by invoking the “Magna Carta and the English Bill of Rights.”¹⁵⁴ This again makes reference to the actual origins of cruel and unusual punishment in the U.S. Constitution. This is why the sentencing analysis

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Carmona v. Ward*, 439 U.S. 1091 (1979).

¹⁵¹ *Id.*

¹⁵² *Id.* at 1093–94.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1094. (footnote omitted).

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rendered by the Second Circuit in the reversal lacks legal integrity and is more of a personal policy statement by Judge Mulligan.

Marshall also made it clear that proportionality is a principle that the U.S. Supreme Court has embraced by discussing *Weems v. United States*, a decision of the High Court in 1910.¹⁵⁵ On numerous occasions, as a result of the *Weems* decision, the Court, according to Marshall, had used the principles of proportionality to review criminal punishments in several states and involving various kinds of criminal offenses.¹⁵⁶ In so noting, Marshall also recognized the legislature as possessing the “power to prescribe punishments” and stressed the responsibility of those in the judiciary to not “abdicate[] our constitutional function to draw a meaning from the Eighth Amendment consonant with ‘the evolving standards of decency that mark the progress of a maturing society.’”¹⁵⁷ This was something that Judge Mulligan did not do: consider the role of the judiciary’s traditional function of making a proportionality analysis in sentencing that is severe.

Indeed, in *Coker v. Georgia*,¹⁵⁸ a 1977 decision, Marshall again made clear the Court’s standard of proportionality, refining the test by holding that if a punishment “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or is grossly out of proportion to the severity of the crime,”¹⁵⁹ it is unconstitutional. Marshall reminded the reader that Judge Mulligan, in reversing, did allege that a *Weems* analysis and a *Coker* analysis was used, but Marshall believed that the analysis lacked meaningful support.¹⁶⁰ Mulligan, as Marshall and Oakes both noted, focused upon the general evils associated with illegal drugs in society in reversing Judge Motley’s decision.¹⁶¹ Marshall’s overall analysis of the Mulligan decision is summed up by the following passage:

To rationalize petitioners’ sentences by invoking all evils attendant on or attributable to widespread drug trafficking is simply not compatible with a fundamental premise of the criminal justice system, that individuals are accountable only for their own criminal acts. Nor is

¹⁵⁵ *Id.* (citing *Weems v. United States*, 217 U.S. 349 (1910)).

¹⁵⁶ *Id.* at 1094–95.

¹⁵⁷ *Id.* at 1095 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁵⁸ 433 U.S. 584 (1977).

¹⁵⁹ *Carmona*, 439 U.S. at 1095 (citing *Coker*, 433 U.S. at 592).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1096.

it consistent with the proportionality principle implicit in the Eighth Amendment.¹⁶²

The remaining portions of the opinion by Justice Marshall continue in this vein. Marshall described the Rockefeller laws as “unique in . . . severity” and explained that the defendants in *Carmona* would have received just one year in prison under federal law, not life as in *Carmona*.¹⁶³ Marshall also challenged Judge Mulligan’s use of New York City’s severe drug problems as justification for the sentencing schemes he upheld by noting that the facts presented by Judge Mulligan were not accurate.¹⁶⁴ In fact, numerous other jurisdictions were experiencing high levels of drug addiction at the time of *Carmona*, according to Judge Marshall.¹⁶⁵ For all of these reasons, Justice Marshall refused to join the Court’s rejection of the *Carmona* decision on review, believing that while courts must defer to the legislatures when reviewing their laws, the judiciary still must not abdicate its responsibility under historical precedent related to the Eighth Amendment.¹⁶⁶

In closing, it is important to note that Justice Marshall has offered his own viewpoint on federal drug war policy in opinions before the Court. His viewpoint overall has been mixed, as he has frowned upon constitutional violations but has never indicated disdain for the more severe approach by lawmakers in executing the war. This, more than anything, renders his dissent as quite credible considering he is not calling for a destruction of the sentences, just a review of the sentences under established proportionality guidelines.

D. *Beyond Carmona*

The aftermath of *Carmona* is well known. The country was already on a path to expanding the war on drugs, and the validation of the severe penalties for drug possession, as in *Carmona*, provided the country an easy path to that expansion. *Carmona* was an opportunity to alter policy and not pursue forty years of failed war on drugs policy. If the warnings by Motley, Marshall, and Oakes, regarding the severe nature of the sentences, had been heeded, billions of dollars might have been saved, and millions of lives would not have been ruined in pursuit of a drug free society. However, as stated in our introduction, our intent with this Article is not to resolve the nation’s problem by seeking to

¹⁶² *Id.*

¹⁶³ *Id.* at 1100.

¹⁶⁴ *Id.* at 1101.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1102.

regulate controlled substances, such as marijuana, cocaine, and heroin. The focus of this Article throughout has been to address the problem of African Americans' (mainly men) involvement in the criminal justice system under the guise of the war on drugs. This issue, not the use of prohibited controlled substances in society, is what is most important.

The goal of a drug-free society is misguided and has proven to be more destructive than useful despite the moral foundation of the policy. Many black men, as stated in the introduction and in other portions of this Article, are colonial citizens now in many respects. Upon release from prison, they are unable to find gainful employment, cannot obtain housing, cannot vote in some states' elections, and have lost time to develop and grow as individuals and as members of society. In today's fast developing and high-tech society, their lives have been dramatically changed, and re-entry as full citizens is problematic without an aggressive, sustained effort at reversing the effects of their involvement with the criminal justice system.

Nevertheless, despite the missed opportunity in *Carmona* and after decades of misguided policy in drug sentencing, there is still an opportunity to address the issue of the many African-American men currently incarcerated, or on their way to incarceration, and their colonial status in the United States.

IV. AFTER THE WAR ON DRUGS

The reconfigured goal, in our opinion, should not be to rid society of illegal substances or controlled substances. This is one of the big mistakes of the war on drugs and controlled substance policy in the United States since 1914, when prohibition was first implemented. Our goal is to address the issue of the war on drugs and how it impacts the lives of African-American men with legal and/or sociopolitical advocacy and direct assistance on a variety of levels. It is our contention that African-American men, entangled in the criminal justice system under the auspices of the war on drugs, have been rendered colonial citizens in their own country. This assertion is made by the evidence presented in the number of black men who are incarcerated and who continue to be incarcerated under the current criminal justice policy in the United States.¹⁶⁷

¹⁶⁷ See *McRae*, *supra* note 26 (noting that one in twenty black men were in prison in 2000); see also *Criminal Justice Fact Sheet*, NAACP, available at <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Feb. 19, 2013) (citing racial disparities in incarceration rates). See generally Lynn Adelman, *The Adverse Impact of Truth-in-Sentencing on Wisconsin's Efforts to Deal with Low-Level Drug Offenders*, 47 VAL. U. L. REV. 689 (2013) (discussing and criticizing the effects that Wisconsin's truth-in-sentencing laws have had in

While the efforts to address substance abuse in the United States might actually have a good foundation, the results state otherwise. As the poet Aimé Césaire might have noted: what has happened to a segment of the African-American population is neither “evangelization,” a “philanthropic enterprise,” a “desire to push back the frontiers of ignorance, disease, and tyranny,” “a project undertaken for the greater glory of God,” nor is it “an attempt to extend the rule of law.”¹⁶⁸ The system, despite its professed intent, is a very destructive program of criminal justice and social digression for a significant subset of the population, which has both direct and indirect links to racial oppression.

A. *Alexander's New Jim Crow*

If one accepts Michelle Alexander's notion that the war on drugs is the “New Jim Crow,”¹⁶⁹ as she posits in her book of the same name, then one reasonable solution is another anti-Jim Crow-like approach, as the country witnessed in the 1960s. This would be an effort to destroy the system. Racial segregation (America's racial apartheid system—the first Jim Crow) was dismantled with direct legal action, political agitation and lobbying, community organizing, civil disobedience, and fervent and constant protest.¹⁷⁰ The system (Jim Crow) also required entry components after the legal system was dismantled. This provided an opportunity for those once denied access to the system. Affirmative action is an example of an effort by the government that provided blacks with entry into the system, which was long denied to them by their own country through public and private repression. Thus, just as black Americans required the dismantling of the Jim Crow system, they also required a path to true citizenship through entry programming.

Unfortunately, a Jim Crow solution is not likely forthcoming with respect to the many African-American men and women incarcerated by the war on drugs. First, it is not likely that African Americans on a mass scale will collectively and passionately embrace this cause as *the* cause of the moment as they did the quest of civic equality in the twentieth century. While there is disappointment and growing opposition to the war on drugs and what it is doing to African Americans, it does not

Wisconsin and the disparate impact that they have had on the African-American community). African Americans and Hispanics make up a quarter of the population but account for fifty-eight percent of the prison population. *Criminal Justice Fact Sheet, supra*. African Americans are six times more likely to be incarcerated than whites. *Id.*

¹⁶⁸ CÉSAIRE, *supra* note 1, at 32.

¹⁶⁹ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (explaining that the war on drugs is targeting black men and functioning as a contemporary system of racial control—relegating millions to a permanent second-class citizen status).

¹⁷⁰ *Id.* at 122.

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produce the same anger and desire to protest as the struggle against racial discrimination and segregation did in the twentieth century. As stated above in reference to the Rockefeller drug laws, many blacks were in support of Rockefeller's call for a new approach to drug enforcement.

There will be no marches, protests, or righteous indignation because millions of African-American men are incarcerated on drug charges. Perhaps millions more are on the way to prison if the war on drugs is not changed, but the idea that a groundswell of civil disobedience, advocacy, and political organizing is looming is not likely. In addition, even with protests and struggle, the government would have to acknowledge the mistake of its war on drugs policy and take ownership of the problems it has created. This, in our opinion, is also unlikely to occur. There is no evidence that the United States has the will to decriminalize narcotics (marijuana, heroin, and cocaine for starters), release millions of individuals from prison quickly or immediately, or devote billions of taxpayer revenue to implementing re-entry programs for those who have gone to prison in the war on drugs. In our opinion, only outright documented evidence of an intentional racial motive in the execution of the war on drugs would bring about bold action on the part of the United States collectively to assist African Americans in this manner. Such evidence, if it exists or is revealed, could also have some impact on the status of many non-African Americans incarcerated in the system.¹⁷¹

B. *Human Rights Watch*

Even though it is unlikely that a Jim Crow-like movement will germinate, terminating the war on drugs through public pressure, protest, and organizing, it is notable that a program to end the war on drugs in the United States has already been proposed. It is also quite credible in content.

Human Rights Watch, an international non-governmental organization financed by George Soros for purposes of global research, provides a potential shift in policy that could form the foundation for a new post-war on drugs policy. Their report, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, released in 2008, is a comprehensive approach to the problem detailed in this Article, namely the fate of African-American men in the criminal justice system.¹⁷² If a

¹⁷¹ See *Criminal Justice Fact Sheet*, *supra* note 167 (discussing minority incarceration statistics). Hispanic-American men also comprise a significant segment of the nation's prison population. *Id.*

¹⁷² See generally HUMAN RIGHTS WATCH, *TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES* (2008), <http://www.hrw.org/sites/default/files/reports/>

program were to be implemented, the proposals of Human Rights Watch are ideal for our goals.

According to the report, African-American men in 2006 were 53.5% of those incarcerated for drug crimes.¹⁷³ They were 11.8 times more likely to enter prison for drug offenses than white men, and of all African-American men in prison, nearly forty percent were in prison for drug crimes.¹⁷⁴ These statistics are especially troubling considering that whites comprise six times the drug offenders as blacks, yet black men are the individuals who are finding themselves incarcerated.¹⁷⁵

The recommendations of Human Rights Watch are designed to address the destructive results of the drug wars and to stop the destructive cycle for blacks as a result of so many men being removed from their communities and being underdeveloped. Prison time, in other words, is for the most part a time of underdevelopment. Human Rights Watch recommends the adoption of “community based sanctions and other alternatives to incarceration for low-level drug offenders,” as well as “more resources [for] substance abuse treatment” and “outreach” related to prevention of drug addiction.¹⁷⁶ Most importantly, Human Rights Watch calls for the “eliminat[ion of] mandatory minimum sentences for all drug offenses,” a proposal that forms the core of any logical program of reform.¹⁷⁷ The report also recommends “investments in community, educational, health, and social programs” and the adoption of “public health based strategies” to address drug abuse.¹⁷⁸ The report by Human Rights Watch also seeks to address racial discrimination in conjunction with the war on drugs. A comprehensive analysis of racial disparities in drug enforcement from arrest through incarceration is recommended first.¹⁷⁹ Second, all stakeholders involved should work together to ensure that the policies implemented do not burden communities traditionally affected by the policies in a racially disproportionate manner.¹⁸⁰

These recommendations are important because they seek to uncover any racial intent in policy making. In addition, these policies recognize the potential long-term damage that current drug enforcement policy is

us0508_1.pdf (detailing a comprehensive study on the impact of harsh drug sentencing in African-American communities).

¹⁷³ *Id.* at 3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 4.

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

causing and can cause. The report also recommends the enactment of policies that do not result in racial bias or racial discrimination. This recommendation is based upon the United Nations' human rights law, specifically, the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹⁸¹ This recommendation would prohibit laws that would restrict human rights and fundamental freedoms.¹⁸² Considering the "colonial" status of many black men as a result of convictions under current drug enforcement policy, this proposal would counteract policies that repress basic rights and privileges in the United States.

To supplement these race-based proposals, Human Rights Watch also recommends the elimination of any policies that, in fact, promote racial discrimination against blacks. In theory, if accepted this final recommendation would likely eliminate many of the drug enforcement laws throughout the country considering the statistical disparities that exist now in the system towards black men.

C. Re-entry

With incarceration and the eventual release from incarceration arises the need for re-entry into society. Re-entry is more of an issue now because of the huge increase in the prison population over the past forty years. Any scenario that results in the end of current drug enforcement policy and/or the release of many of the incarcerated from prison would require significant efforts at re-entry. Eumi K Lee, Associate Clinical Professor of Law, explains the importance of re-entry in general in the following manner:

Given this incredibly high recidivism rate, successful prisoner reentry is of the utmost importance in unraveling this crisis.

Indeed, the failure to integrate back into society is part of the self-reinforcing cycle that underlies the crisis. Prisoners enter the correctional institution, often with existing mental health or substance abuse issues, which are left untreated.¹⁸³

The challenges faced by black men leaving incarceration and entering communities are numerous. They include the general stigma of

¹⁸¹ See generally *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195.

¹⁸² *Id.* at art.1, para. 1.

¹⁸³ Eumi K. Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 244 (2010) (footnotes omitted).

being incarcerated and racial attitudes, difficulties earning income or obtaining gainful employment, little if any access to financial credit, deteriorated social bonds and connections, and limited access to housing, health care, and education.¹⁸⁴ The fact that many black men are challenged in all of these areas upon their release from incarceration is precisely how they become non-citizens. Some have their parental rights challenged, while their voting rights, right to sit on juries, ability to receive loans for education, and certain types of employment are denied. Military service, driver's licenses, passports, and many other basic indicators of real citizenship are also negatively affected.¹⁸⁵ To release the formerly incarcerated into the community without a personalized plan for transition, as well as an overall effort to prevent disenfranchisement, is part of the destruction of current drug enforcement policy as well as the path to recidivism. If anything, the end of current drug enforcement policy should entail an end to many of these barriers. While states differ on how they treat these various issues, this does not mean that coordinated efforts to address these post-release barriers are impossible.

D. No Entry

Considering that overall we have doubts that there will be a concentrated effort to alter drug enforcement policy, there is no other alternative but for African Americans, if they are committed to addressing this policy issue, to try to alter the effects of it on their own. In sum, it is largely the task of African Americans to reduce the number of African-American men entering the criminal justice system.

As stated previously, the federal government is not likely to decriminalize marijuana, heroin, or cocaine. It is also unlikely that the federal and state governments will begin to release those who are imprisoned on drug charges in mass quantities. It is also questionable whether there will be a concerted effort to provide for re-entry into the community and restore individuals convicted of drug crimes to full citizenship status. Considering all of these problems, African Americans have no choice but to address the problems presented by controlled substances and the policy towards controlled substances themselves. This includes both re-entry efforts and efforts to prevent incarceration in

¹⁸⁴ Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269-83 (2009) (describing the various results of racially disparate drug sentencing laws).

¹⁸⁵ *Id.* at 267-68.

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the first place.¹⁸⁶ If this task appears difficult, this is true. However, it is not impossible. Self-help organizing amongst African Americans is part of their history.

1. Self-Help Tradition

The problems presented by drug use, abuse, addiction, and the enforcement of laws prohibiting possession can be addressed through self-help efforts. In other words, it was not always the case that the challenges of social, political, and economic policy and status in the United States were addressed by government efforts. African Americans, as a result of their status as second-class citizens in the United States, were forced to address many issues on their own.

In William Pollard's doctoral study, *Study of Black Self Help*,¹⁸⁷ a brief history of this tradition is revealed and examined. According to Pollard, in the period from the 1890s to the early twentieth century, the fate of many African Americans would have been tragic but for the persistence of the many black men and women who chose to assist other blacks ("uplifting the race," Pollard calls it) as opposed to pursuing personal gratification.¹⁸⁸ Pollard states that the work of blacks engaged in self-help activities included work with "delinquents." Some of the self-help efforts at the time centered on race pride, but much of the work involved the young, the aged, and those too ill to care for themselves.¹⁸⁹ There were various institutions involved in self-help efforts in black communities, including churches, social welfare organizations, clubs, fraternal organizations, secret societies, and educational institutions.¹⁹⁰ There were, according to Pollard, specific efforts to address the lack of reformatories for black youth, demonstrating again some degree of focus upon those African Americans who had strayed into illegal activities.

2. Organizations

Historically, African Americans have formed organizations to assist with problems associated with African Americans in times of great strife. These organizations have had dedicated missions and have been quite successful. In the early twentieth century, major organizations were

¹⁸⁶ See, e.g., Donna K. Axel & David M. Rosen, *Putting Two Drug Courts to the Top Ten Test: Comparing Essex and Denver Drug Courts with "The Carey Team's" Best Practices*, 47 VAL. U. L. REV. 839 (2013) (critiquing the effectiveness of drug courts in Denver and Essex county with regard to rehabilitation of drug users).

¹⁸⁷ See WILLIAM L. POLLARD, A STUDY OF BLACK SELF HELP 49-63 (1978).

¹⁸⁸ *Id.* at 49.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 53-61.

formed due to the fact that African Americans were denied civic equality and citizenship rights in the United States. The current problem where many African-American men have been (or will be in the future) rendered colonial citizens in their own country due to drug enforcement policy presents a similar but more complex problem.

However, in the last century, the National Association for the Advancement of Colored People (“NAACP”) was formed in 1909 during the Progressive Era to seek racial equality in the United States for the nation’s blacks.¹⁹¹ While the NAACP wasn’t a pure black self-help organization (whites initially ran the organization), its formation can be traced to a black self-help organization known as the Afro-American League.

T. Thomas Fortune, a New York-based newspaper editor and publisher, is largely responsible for the creation of the National Afro-American League. In 1887, using the editorial pages of his newspaper, *The Freeman*, Fortune called upon African Americans to “form an organization to fight for the rights denied them.”¹⁹² The organization’s goal was to address racial equality and racial oppression, issues that were quite prevalent at the time.¹⁹³ While the organization was unsuccessful, it led to the formation of a successor organization—the National Afro-American Council, an entity dedicated to the same goals.¹⁹⁴ While these organizations evolved into multiracial organizations, African Americans created these organizations.

The National Afro-American Council was more successful than its predecessor.¹⁹⁵ It benefited first of all by the involvement of Booker T. Washington, who attended meetings of the council.¹⁹⁶ Washington, the so-called leader of black Americans in his day, was always closely associated with self-help causes in Black America historically.¹⁹⁷ He was often described as a “conservative” and a “compromiser,” but, despite his outwardly expressed views, he also worked behind the scenes to oppose racial inequality and segregation.¹⁹⁸

¹⁹¹ August Meier & John H. Bracey, Jr., *The NAACP as a Reform Movement, 1909–1965: “To Reach the Conscience of America”*, 59 J. S. HIST. 3, 3 (1993).

¹⁹² Emma Lou Thornbrough, *The National Afro-American League, 1887–1908*, 27 J. S. HIST. 494, 495 (1961).

¹⁹³ *Id.* at 494–512.

¹⁹⁴ *See id.* at 509–10.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See generally* REBECCA CARROL, UNCLE TOM OR NEW NEGRO? AFRICAN AMERICANS REFLECT ON BOOKER T. WASHINGTON AND *UP FROM SLAVERY* 100 YEARS LATER (2006).

¹⁹⁸ *Id.*

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In contrast, T. Thomas Fortune, the official leader of the council, was far more militant and impatient with racial progress.¹⁹⁹ Fortune, who became a close confidant of Washington, did not necessarily agree with Washington's views but did agree with Washington as to the final goal that needed to be achieved: racial equality for blacks in the United States.²⁰⁰

There are also less known self-help efforts by African Americans historically worth noting that are likely more applicable. One such effort occurred because of late nineteenth century and early twentieth century efforts by blacks in the city of Buffalo, New York, who sought to address education for their children when the city of Buffalo refused to take the necessary steps.²⁰¹ The black community of Buffalo had already taken steps earlier in the century regarding reading and writing with their children when racial segregation denied their children educational opportunities.²⁰² By 1837, the blacks in Buffalo formed the Young Ladies Literary Society and the Debating Society to address their concerns regarding reading and writing with their children.²⁰³ The blacks in Buffalo also formed other organizations to address the lack of black history educational outlets in the city and to educate the public on "heated political issues."²⁰⁴ The educational efforts in Buffalo organized within the black community were started due to racial prejudice and demand for the services.²⁰⁵ These services also included vocational training, self improvement, and efforts to assist black students locate jobs. Overall, the blacks in Buffalo were attempting to uplift the community on their own, "politically, socially, and economically."²⁰⁶

There were other cities where problems in the black community were addressed within the community by blacks. Chicago, during the Progressive Era of the early twentieth century, also found blacks attempting to deal with serious problems on their own by forming self-help organizations.²⁰⁷ Black charity organizations began to appear more

¹⁹⁹ Fortune, T. Thomas, in *AFRICAN AMERICAN LIVES* 306, 306-07 (Henry Louis Gates Jr. & Evelyn Brooks Higginbotham eds., 2004).

²⁰⁰ *Id.*

²⁰¹ Lillian S. Williams, *Community Educational Activities and the Liberation of Black Buffalo, 1900-1930*, 54 *J. NEGRO HIST.* 174, 174-77 (1985).

²⁰² See *id.* at 176-77 (explaining that when Negroes were segregated from white schools, Negroes protested, formed their own schools, and entered legal battles).

²⁰³ *Id.* at 178.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 180.

²⁰⁶ *Id.* at 185.

²⁰⁷ Phillip Jackson, *Black Charity in Progressive Era Chicago*, 52 *SOC. SERV. REV.* 400, 400 (1978).

and more during the Progressive Era.²⁰⁸ The influx of blacks to urban areas, the growth of a black middle class, and lack of access to other services forced blacks to form their own service organizations in Chicago to address issues of concern to blacks at the time.²⁰⁹ One example of an organization formed during the Progressive Era by blacks to address a specific problem among blacks in Chicago was the Chicago Home for the Aged and Infirm Colored People in 1898.²¹⁰ It was the first of the charitable organizations formed by blacks at this time.²¹¹

In Chicago, blacks also formed the Louise Juvenile Home for the Dependent and Neglected Children in 1907 and the National League for the Protection of Colored Women in 1906 to assist young women arriving to the city seeking employment and a new start.²¹² This latter organization was created with the specific purpose of stopping the exploitation of young women. This was yet another example of African Americans deciding to address problems within their community on their own.

E. The Power of Governors and States

When his second term as President was reaching an end, President Bill Clinton pardoned a twenty-nine year old African-American woman named Kemba Smith.²¹³ Smith was entering her seventh year in prison, set to serve twenty-four years as a result of a conviction on a conspiracy charge to distribute crack cocaine.²¹⁴ Smith was in college when she pled guilty and had no criminal record.²¹⁵ Smith was, to a certain degree, the perfect prisoner in the nation's flawed drug enforcement policy. Her crimes were non-violent and indirect; yet, as a result of her desire to take responsibility for her mistakes, she was sentenced to twenty-four years in prison.

President Clinton's decision to pardon Smith was both appropriate and symbolic. But, more importantly, his decision is representative of another tool at the disposal of society to weaken current drug enforcement policy: executive clemency and pardon power. This power is mostly available to governors of the various states in the current drug enforcement environment. While there is no large usage of the tactic,

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 406-09.

²¹⁰ *Id.* at 406

²¹¹ *Id.*

²¹² *Id.* at 408.

²¹³ Kevin Hall, *With Clinton's Pardon, Kemba Smith Home for the Holidays . . . Finally*, WASH. INFORMER, Jan. 3, 2001, at 2.

²¹⁴ *Id.*

²¹⁵ *Id.*

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some instances are notable. This power is especially noteworthy considering the fact that states continue to face budget problems stemming from over-incarceration and related state correctional services.²¹⁶ Numerous states have taken steps to reduce their correctional budgets, and seeking to reduce prison populations is one tactic. Pardons and clemency are not a major part of such an effort, but they do send a symbolic message regarding outdated and failed drug enforcement policy from those who understand it first-hand.

For example, in his first twelve years in office, Governor George Pataki of New York pardoned numerous individuals.²¹⁷ Nearly all of the individuals pardoned had been convicted under the state's drug enforcement laws passed by Rockefeller.²¹⁸ In December 2002, Governor Pataki granted clemency to four individuals incarcerated under the state's Rockefeller drug laws.²¹⁹ By 2005 Pataki had granted clemency to thirty-one individuals; twenty-seven of those individuals had been incarcerated as a result of the Rockefeller drug laws.²²⁰

Just recently, Governor Jerry Brown of California pardoned seventy-nine individuals in one day, many for minor drug crimes.²²¹ This decision by Governor Brown is the kind of concerted effort that is needed from more governors. In order to begin to address the problems stemming from drug-related laws, governors should pardon or offer clemency to more individuals, especially if they are in prison for non-violent drug possession offenses.

While the actions of governors on this issue might be a small contribution to the effort to change drug enforcement policy, governors across the country have the potential to impact and express a symbolic message by using their pardon and clemency power much more in

²¹⁶ See generally NAT'L GOVERNORS ASS'N: CTR. FOR BEST PRACTICES, STATE EFFORTS IN SENTENCING AND CORRECTIONS REFORM (2011), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/1110SENTENCINGREFORM.PDF> (describing the various reform efforts taken by states to drive down correctional costs).

²¹⁷ See William Glaberson, *Pataki Grants Clemency to 4 in Prison*, N.Y. TIMES, Dec. 25, 2002, <http://www.nytimes.com/2002/12/25/nyregion/pataki-grants-clemency-to-4-in-prison.html?src=pm>; see also A. G. Sulzberger, *The Tradition of Granting Clemency, and Second-Guessing It*, N.Y. TIMES, Dec. 2, 2009, <http://cityroom.blogs.nytimes.com/2009/12/02/clemency/> (discussing the legacy of granting pardons).

²¹⁸ Glaberson, *supra* note 217.

²¹⁹ *Id.*

²²⁰ Christopher Reinhart, *Pardon Statistics from Other States*, OLR RES. REP. (Jan. 14, 2005), <http://cga.ct.gov/2005/rpt/2005-R-0065.htm>.

²²¹ Wyatt Buchanan, *79 Pardoned by California Gov. Brown*, S.F. CHRON., Dec. 24, 2012, <http://www.sfgate.com/crime/article/79-pardoned-by-California-Gov-Brown-4144096.php>.

situations where individuals have received long sentences for non-violent drug offenses.

V. CONCLUSION

The website Think Progress listed the issue of “Mass Incarceration and the Drug War” as the number one issue ignored in the 2012 Presidential campaign.²²² Ted Galen Carpenter, a senior fellow at the Cato Institute, also identified the issue as being ignored by the presidential candidates. He wrote the following in September 2012 in *The Huffington Post*:

One of the least discussed issues in the presidential campaign is the war on drugs. That’s unfortunate, because that crusade has been an expensive catastrophe both domestically and internationally. During the decades since Richard Nixon declared a “war” on illegal drugs in 1971, the United States has spent nearly one trillion dollars trying to eradicate the drug trade, filled America’s prisons with nonviolent drug offenders, ruined millions of lives and undermined the Bill of Rights—especially the Fourth Amendment’s protections against unreasonable searches and seizures.²²³

Despite the importance assigned to the issue, there is little dialogue or discussion relating to changing drug enforcement policy. Most articles or discussions associated with the war on drugs relate to the legalization of marijuana by various states. While this would be an important development, there is no real purpose behind its legalization as it relates to African-American men.

Nevertheless, drug enforcement policy, as outlined in this Article, is destructive to African Americans and for the nation. It is likely that the underdevelopment of a significant portion of the population will have an impact upon the entire nation’s well-being. While personal failings can be accepted, the cost of incarceration is impossible to maintain. It currently costs, on average, \$29,000 to incarcerate one person for one

²²² Zack Beauchamp, *Ten Huge Issues Being Ignored in the Presidential Campaign*, THINK PROGRESS (Sept. 19, 2012, 9:42 AM), <http://thinkprogress.org/election/2012/09/19/857971/ten-huge-issues-being-ignored-in-the-presidential-campaign/>.

²²³ Ted Galen Carpenter, *Romney and Obama Foolishly Ignore the War on Drugs*, HUFFINGTON POST. (Sept. 4, 2012, 8:38 AM), http://www.huffingtonpost.com/ted-galen-carpenter/romney-and-obama-ignore-war-on-drugs_b_1832155.html.

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year, according to the National Governors Association.²²⁴ In some states, such as New Jersey, incarceration is even more expensive.²²⁵

However, a solution from the federal government is not likely available. Even if there is a shift in policy away from incarceration to treatment and rehabilitation, re-entry and re-development of those imprisoned is still a formidable task. It might be necessary to accept some damage incurred and focus upon those who have yet to enter the prison system as a result of drug enforcement policy. Using self-help tactics from within the community to provide such support and to advocate for a keen focus upon keeping individuals out of the system is the best path to reform within Black America. For the past forty years, the government has provided its response to the drug addiction crisis in the United States, and it has been quite destructive.

If anything, the federal government should encourage and support financially, directly and indirectly, community-based self-help efforts to: (1) prevent drug abuse; (2) provide treatment for drug abuse and addiction, as well as support those addicted and their families; and (3) assist individuals re-entering society with employment, housing, education and training, and personal development. With this in mind, it would be wise to adopt all of the changes presented by Human Rights Watch, outlined above. A recent statement from Senator Patrick Leahy of Vermont regarding ending all mandatory minimums at the state and federal level is encouraging.²²⁶ Although Senator Leahy, the chairman of the Senate's Judiciary Committee, does not have the power to change the policy, his statement alone provides a solid foundation.

However, the eradication of state and federal mandatory minimums alone is not sufficient. The United States's first step should be to end the futile obsession with eradicating all controlled substances from society. Instead, the policy of the nation should focus on and acknowledge the co-existence of the presence and use of these substances with providing assistance to those who become dangerously addicted to hard narcotics, such as heroin and cocaine. Marijuana should be effectively legalized by

²²⁴ NAT'L GOVERNORS ASS'N: CTR. FOR BEST PRACTICES, *supra* note 216, at 1.

²²⁵ Michael Massing, *The War We Aren't Debating*, N.Y. REV. OF BOOKS BLOG (Oct. 22, 2012, 5:32 PM), <http://www.nybooks.com/blogs/nyrblog/2012/oct/22/war-we-arent-debating/>.

²²⁶ Stephen Dinan, *Leahy: Abolish Mandatory Minimum Sentences*, WASH. TIMES, Jan. 16, 2013, <http://www.washingtontimes.com/news/2013/jan/16/leahy-abolish-mandatory-minimum-sentences/> ("I think at the federal level and at the state level, get rid of these mandatory minimum sentences. Let judges act as judges and make up their own mind what should be done The idea that we protect society by one size fits all, or the idea that we can do this kind of symbolism to make us safer—it just does not work in the real world.").

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the nation through state laws and with the federal government slowly terminating all prosecutions for possession of the substance.

The well-being of black men, the millions in prison at the present time, and the many who are likely on their way to prison must become the responsibility of self-help organizations and public institutions designed to develop human beings to their highest potential. It can no longer be expected that somehow *government policy* will change and re-direct the lives of these men; rather, their lives must be re-directed with *community based efforts*, which will begin from the very beginning of their lives. This will likely include public education, but will also require early intervention in the lives of the young with ambitious goals for their survival and success.