

## The Trap Chronicles, Vol. 1, How U.S. Housing Policy Impairs Criminal Justice Reform

Lahny Silva

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**THE TRAP CHRONICLES, VOL. 1: HOW U.S. HOUSING POLICY  
IMPAIRS CRIMINAL JUSTICE REFORM**

LAHNY SILVA\*

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“We are all human, we all make mistakes and learn from them—especially 15 years later—and we all deserve second chances.”

– HUD Secretary Ben Carson<sup>1</sup>

Close to fifty years after President Richard Nixon’s 1971 declaration of a War on Drugs,<sup>2</sup> America is attempting to remedy the aftermath. Today, the War is generally considered a failure.<sup>3</sup> Despite all the arrests and prosecutions, the War has been unsuccessful in accomplishing its two touted objectives: eliminating drug trafficking and eliminating drug addiction in the United States.<sup>4</sup> America paid dearly; it was extremely expensive,<sup>5</sup> disproportionately impacted communities of color,<sup>6</sup> and took hundreds of

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\*Professor of Law, Indiana University Robert H. McKinney School of Law. I would like to extend a special thanks to my esteemed colleagues at McKinney who continue to inspire, encourage, and improve my scholarship. Thank you, Professor Eric Miller, for encouraging me to “just say it.” Thank you, Professors George Wright and Gerard Magliocca, for reviewing drafts of this Article. Thank you to my family, REACH Team, Thomas Lee Ridley, Professors Carrie Hagan and Joel Schumm, and all of my REACH kids for the movement. I owe a special debt of gratitude to my beloved colleague, Professor Florence Roisman. Thank you, Florence, for consistently emboldening my spirit. And thank you, Young Jeezy and Professor Wright, for the title.

1. Lola Fadulu & Glenn Thrush, *Democrats Angered by HUD’s Hiring of Trump Aide Who Quit After Racist Posts*, N.Y. TIMES (July 1, 2019), <https://www.nytimes.com/2019/07/01/us/politics/trump-aide-racism.html> (quoting HUD Secretary of State Ben Carson defending his hiring of former Consumer Financial Protection Bureau official Eric Blankenstein, who quickly resigned from the post when information was disclosed showing Blankenstein used racial slurs in blog posts in 2004).

2. *Thirty Years of America’s Drug War: A Chronology*, PBS FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited May 26, 2021); Am. Judicature Soc’y, *It Is Time to End the War on Drugs*, 93 JUDICATURE 48, 83 (2009); JILL JONNES, *HEP-CATS, NARCS, AND PIPE DREAMS: A HISTORY OF AMERICA’S ROMANCE WITH ILLEGAL DRUGS* 261 (1996); EDWARD JAY EPSTEIN, *AGENCY OF FEAR: OPIATES AND POLITICAL POWER IN AMERICA* 178 (1977).

3. Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. 2–3 (Apr. 12, 2017), <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs>; MATTHEW B. ROBINSON & RENEE G. SCHERLEN, *LIES, DAMNED LIES, AND DRUG WAR STATISTICS: A CRITICAL ANALYSIS OF CLAIMS MADE BY THE OFFICE OF NATIONAL DRUG CONTROL POLICY* 12 (2007); see Am. Judicature Soc’y, *supra* note 2; Michael Tonry, *Race and the War on Drugs*, 82 U. CHI. LEGAL F. 25, 26 (1994); Doug Bandow, *War on Drugs or War on America*, 3 STAN. L. & POL’Y REV. 242, 242 (1991).

4. Bruce Bullington & Alan A. Block, *A Trojan Horse: Anti-Communism and the War on Drugs*, 14 CONTEMP. CRISES 39 (1990).

5. Coyne & Hall, *supra* note 3, at 2–3.

6. MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 82 (1995); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST. 427, 431, 481 (2000).

thousands of prisoners. This final cost was highlighted when the “the land of the free” earned the number one spot for having the highest incarceration rate in the world.<sup>7</sup>

Recognizing the substantial costs associated with wartime criminal laws and sentencing practices, a criminal justice reform is currently sweeping through legislatures across the country.<sup>8</sup> In the spirit of fair sentencing and second chances, legislatures are commissioning studies of sentencing regimes and modifying criminal penalties with retroactive application.<sup>9</sup> The return of judicial discretion with the United Supreme Court’s decision in *United States v. Booker*<sup>10</sup> now allows punishments that deviate from otherwise strict determinate criminal sentences.<sup>11</sup> And clemency is making a comeback, with both Presidents Obama and Trump utilizing the executive power to commute overly punitive terms of imprisonment.<sup>12</sup> Over 100 days into his administration, President Biden has not yet made his views clear on clemency. Ex-offender reentry as a substantive and procedural legal issue is now considered a legitimate legislative concern, with Congress putting federal dollars behind evidence-based programs proven to reduce recidivism.<sup>13</sup> States are following suit.<sup>14</sup> Although this is a positive step in undoing decades of ineffective policy, other areas of law impacted by the Drug War must also be reviewed and modified if the damage caused is to be truly rectified.

Wartime legislation contributed to the proliferation of not only criminal statutes and sanctions, but also numerous civil penalties associated with drug-

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7. SENTENCIN’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1, 2 (last updated May 2021), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [hereinafter FACT SHEET].

8. Lucia Bragg, *Federal Criminal Justice Reform in 2018*, NAT’L CONFERENCE OF STATE LEGISLATURES (Mar. 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/federal-criminal-justice-reform-in-2018.aspx>.

9. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.); First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.); *see also* Bragg, *supra* note 8. Modifying criminal penalties with retroactive application allows individuals to be resentenced for past crimes according to the current sentencing schema, which changed the penalties associated with certain drug crimes.

10. 543 U.S. 220 (2005).

11. *Id.* at 245–46.

12. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 837 (2017); *Pardons Granted by President Donald J. Trump (2017–2021)*, U.S. DEP’T JUST. (last updated Apr. 28, 2021), <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021>.

13. First Step Act of 2018, *supra* note 9.

14. Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307, 1308 (2007).

related suspicion and/or conviction.<sup>15</sup> Drug war policies bled over into civil and administrative areas of law, manifesting in rules that work as a form of further government control—wreaking havoc on poor, mostly minority communities that already absorbed the bulk of the War’s attacks on the criminal front. Commonly referred to as the “collateral consequences of conviction” in the academic literature, these civil statutes and administrative regulations are pervasive and pernicious, hindering the transition from prison to society.<sup>16</sup> Collateral consequences affect almost every part of one’s life: areas that are essential to productive citizenship and socio-economic stability. As the War seems to be winding down on the criminal front, other rules continue to endure and serve as the predicate for intensive regulation and exclusion in civil and administrative matters such as voting, employment, and housing.

This Article contributes to the existing scholarship on the War on Drugs, collateral consequences, and offender reentry by reviewing federal criminal and housing laws in the aftermath of redemptive rhetoric that has been employed to pronounce a retreat from the War. It applies drug war criticisms to federal housing policy and argues that the ideological shift away from “tough on crime” to “second chances” in the criminal context must be extended to national housing policy. I argue that wartime costs associated with criminal law are mimicked in the federal housing policy context, a battleground during the War on Drugs. More specifically, I argue that with wartime policy deeply penetrating the national housing agenda, the drug laws continue to serve as a justification to inflict socio-economic violence on targeted groups. This violence takes the form of intensive regulation in federal housing programs and operates as an additional layer of criminalization and social control on an already powerless group.

In neglecting to review wartime policies beyond the criminal law, this Article contends that policymakers are creating an ideological schism that has manifested in an inconsistent legislative agenda. There are thus two systems: one where prisoners of the War are to be viewed as redeemed and worthy of a second chance, and the other where prisoners of the War continue

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15. Rabiah Alicia Burks, *Laws Keep Ex-Offenders from Finding Work, Experts Say*, LEGAL NEWS (Aug. 3, 2011), <http://www.legalnews.com/oakland/1030871>.

16. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1821–31 (2012); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 585, 594–99 (2006); see also Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 9, 19–20 (Christopher Mele & Teresa A. Miller eds., 2005); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 20–22 (Marc Mauer & Meda Chesney-Lind eds., 2002).

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to be demonized and excluded from mainstream society. In the criminal context, the government is pivoting from taking people out of their communities and incarcerating them to now releasing the legislative pressure valves to open the prison gates and release prisoners of the War. The question is: Where will they all live? Housing is identified as the primary barrier for those reintegrating.<sup>17</sup> During this reform movement, legislators are overlooking collateral consequences affecting housing prospects for criminal justice-involved individuals, especially drug offenders, thus continuing the War on the civil front. This Article reasons that the next natural step in the retreat from the War's policies is to review and modify Drug War legislation that transcends criminal law. This is a necessity if the proclaimed political promise of a second chance is to be truly fulfilled. If it is not, then the redemptive rhetoric is nothing but a trap—a political ploy used to pander to public opinion on the criminal justice front, while laying cover to the grave legislative mistakes made in the shadows on the civil front during the War.

This Article is divided into three primary parts: The Frame, the War, and the Aftershock. Part I will present a framework to analyze the costs associated with the War in both criminal law and federal housing policy.<sup>18</sup> This Part will present Drug War criticisms as the lens through which socio-economic violence caused by wartime federal housing rules ought to be viewed. In doing so, Part I will offer a new approach to understanding the breadth and depth of the War on Drugs. Instead of assessing the War as a battle waged only in the criminal sphere, it should be evaluated as an attack encompassing all law—the criminal law, as well as civil and administrative law. In understanding the War as a monolithic effort that bridged both criminal and civil law, I will evaluate the socio-economic assault on targeted groups in the housing context arguing that true reform must take a holistic view of the costs of wartime policy.

Part II will examine the War on Drugs' criminal law policies, pointing out signature pieces of legislation enacted during the 1980s,<sup>19</sup> to later demonstrate the recent government changes to this specific legislation.<sup>20</sup> This Part will also analyze the War's influence on federal housing policies through the review of various statutes that reflect the government's aggressive stance on drugs. More specifically, the public housing and Section 8 Housing Choice Voucher and Certificate ("HCV") programs will be examined. Housing policy was chosen as the case study because (a)

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17. DOUGLAS B. HALL & LISA KOLOVICH, EVALUATION OF THE PRISONER RE-ENTRY INITIATIVE: FINAL REPORT, DEP'T LABOR EMP'T & TRAINING ADMIN., 107, tbl IV.19 (2009).

18. *See infra* Part I.

19. *See infra* Part II.

20. *See infra* Part III.

federal subsidized housing was a targeted war zone in the War on Drugs<sup>21</sup> and (b) research demonstrates that housing currently presents the greatest barrier to reentry.<sup>22</sup> Each section in Part II also will offer an outcomes assessment of wartime policy in the criminal and housing contexts, with an emphasis on the failure of the War to accomplish its twin goals of eliminating drug trafficking and reducing drug abuse.

Part III will assess the retreat from the War on Drugs and the reform of anti-drug criminal law policies within each of the three branches of government.<sup>23</sup> Like the previous Part, Part III also will review the impact (or lack thereof) of the criminal justice reforms on housing policy, concluding that the ideological underpinnings of redemption have yet to penetrate the national housing agenda, leaving harsh, anti-drug housing legislation on the books. Finally, Part IV will provide a brief summary of the Article's thesis.<sup>24</sup> In doing so, Part IV reiterates the strong call for review and reform of national housing policy at all levels and within all branches of government.

## I. THE FRAME

“There’s a War goin’ on outside no man is safe from.”  
– Mobb Deep<sup>25</sup>

To appreciate the magnitude of the costs associated with the War on Drugs, it is important to grasp the full scope of the harms that flow from it. From the bar to the bench, law schools to prisons, and probation departments to mental health institutions—critics attack. They cite the harshness and inequality of the criminal laws and the enormous financial expenditures on prosecutions and corrections.<sup>26</sup> Critics also point to the unfairness of the collateral consequences of criminal convictions and the double tax or penalty that such rules impose on prisoners once they are released.<sup>27</sup> Scholars and practitioners alike have provided vital works on collateral consequences in

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21. Bernida Reagan, *The War on Drugs: A War Against Women*, 6 BERKELEY WOMEN'S L.J. 203, 207 (1990).

22. HALL & KOLOVICH, *supra* note 17, at 107, tbl IV.19.

23. *See infra* Part III.

24. *See infra* Part IV.

25. MOBB DEEP, *Survival of the Fittest*, on THE INFAMOUS (RCA Records 1995).

26. Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2176 (2016).

27. Pinard & Thompson, *supra* note 16, at 594–99; Mele & Miller, *supra* note 16, at 19–20; Travis, *supra* note 16, at 15, 22–23.

the areas of civil liberties,<sup>28</sup> employment,<sup>29</sup> and the receipt of public assistance<sup>30</sup> in a broad sense. These arguments together provide a strong foundation for understanding the need to reform wartime policy and the prison industrial complex. However, the call for reform must be extended to the entirety of the social carceral state so that the basic American normative principles of equality, fairness, and freedom are rewoven into the fabric of the social order in a way that is inclusive of those given a “second chance.” The criminal law story of the War is well-documented, voluminous, and, of course, critical. But the other story of the War—the civil side—offers a more insidious account and remains the status quo.

The frame that will be used in this Article is an amalgamation of Drug War critiques centered on the expansion of the enforcement power of the police and prosecutors. The Drug War critiques include a review of the economic, social, and racial repercussions associated with wartime policies. In addition, the concentration on enforcement is perhaps the most significant, as the greatest discretion in the criminal system is vested in prosecutors and the police. To show the changes in policy during the War, a review of legislation is required, followed by an analysis of its impact, which is to be driven by wartime critiques. To properly situate the housing discussion, this Article first provides a review of Drug War criminal policy. In applying the frame to housing policy, this Article examines the expansion of the drug enforcement powers in the housing context. Here, power was vested not only in the police but also the public housing authorities. Thus, the War on Drugs stretched far beyond the four corners of the criminal code and was launched just as aggressively in other areas of the law.

As will be discussed, the War on Drugs sparked the massive mobilization of resources against two demonized groups: the drug addict and the drug dealer. Through legislative fiat, Congress provided manpower, money, and military machinery to wage a total war against targeted groups

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28. See generally JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006); see also Chin, *supra* note 16, at 1821–31.

29. BRUCE WESTERN & BECKY PETTIT, *COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY*, PEW CHARITABLE TRUSTS 11 (2010); Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 165 (2010); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L. REV. 1705, 1719 (2003); JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, *FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY*, URBAN INST. JUSTICE POLIC'Y CTR. 32 (2001), [http://www.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urban.org/UploadedPDF/from_prison_to_home.pdf).

30. KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 35 (2011); Priscilla Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1564 (2012).



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and areas suspected of a drug infestation. Total war required that vast resources be mobilized in both the criminal and civil areas of law. While the criminal War on Drugs was blasted on television sets and Internet blogs, the civil War on Drugs was waged in the shadows, with the reverberations from the bombs felt only by those who lived in war zones. The War's armies did not only include law enforcement and prosecutors. They also included caseworkers and public housing authorities who were charged with holding the line on the civil and administrative fronts. The interlacing of criminal law with civil rules created an inescapable web of seemingly endless minefields that inflicted socio-economic violence on targeted groups through societal exclusions and denials. Despite the national trend away from the draconian criminal policies of the War on Drugs, Drug War civil sanctions continue to render prisoners of the War socially immobile and economically precarious, particularly in the context of housing.

I do not mean to suggest a direct comparison between criminal drug laws and federal housing legislation. Of course, there are many distinctions between the two areas of law. Drug laws and housing regulation trigger two very different sets of legal processes, with a different set of constitutional rights, and a different set of government expectations. Violations of drug laws occur in the form of a criminal prosecution where the government is an adversary, and the defendant has well-established constitutional rights and protections during the process. Violations of federal housing rules, by comparison, occur in an administrative context where the government actor is first expected to help, and only becomes an adversary when a violation of program rules occurs. Due process is the only constitutional safeguard in housing.<sup>31</sup> Constitutionally speaking, more is at stake in a drug prosecution—an individual's liberty or life. In the housing context, what is at stake is a government benefit—something an individual is not entitled to but is given by way of grant from the government. Moreover, the costs are not exactly parallel. Despite differences, Drug War critiques in the criminal context offer a set of tools to use in analyzing wartime policies in other substantive areas of law, such as here in the context of housing.

## II. THE WAR

“All warfare is based on deception.”

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31. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (explaining “that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process”).

Sun Tzu<sup>32</sup>

The War on Drugs is sometimes compared to the Vietnam War.<sup>33</sup> Like Vietnam, America made war, expended thousands of troops, spent millions, and lost.<sup>34</sup> The drug trafficking jungle was foreign territory where enemy troops engaged in guerilla warfare. And, as with Vietnam, the United States withdrew from the conflict economically bruised, domestically battered, and internationally embarrassed.

#### A. *Criminal Policy*

“They just tryin’ to jail and chain me, CCA tryin’ to trade me.”  
– Derek Minor featuring Tony Tillman & Thi’sl<sup>35</sup>

The War on Drugs directly targeted “drugs”—possession, use, sale, manufacture, distribution, and trafficking. The initial objective of drug policy focused on substantive criminal law and procedure, including the creation of new drug crimes,<sup>36</sup> new and longer criminal sentences for drug offenses,<sup>37</sup> and recidivist statutes that concentrated on prior drug crimes.<sup>38</sup>

##### 1. *Legislation*

In 1971, President Richard Nixon proclaimed drug abuse “public enemy number one” and declared a “[W]ar on [D]rugs.”<sup>39</sup> Despite the brief reprieve during the administrations of Presidents Ford and Carter,<sup>40</sup> President Reagan continued the War in the 1980s with a rejuvenated commitment to

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32. SUN TZU, *THE ART OF WAR* 6 (Lionel Giles trans., Luzac & Co. 1910).

33. Then-Senator Joe Biden also compared the War on Drugs to the Vietnam War. See W. John Moore, “*Ducking the Truth at Home*,” *NAT’L J.*, Sept. 16, 1998, at 2291.

34. *Id.*

35. DEREK MINOR, TONY TILLMAN & THI’S L., *God Bless the Trap*, on *THE TRAP* (Reach Records 2018).

36. 21 U.S.C. §§ 841(a), 960(b).

37. *Id.* § 841(b); Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *FORDHAM L. REV.* 2531, 2534 (2010); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 18 and 21 U.S.C.); DEBORAH J. VAGINS & JESSELYN MCCURDY, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW*, *AM. C.L. UNION* 11 (2006), [https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem\\_20061025.pdf](https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf).

38. Anti-Drug Abuse Act of 1988, *supra* note 37.

39. *Thirty Years of America’s Drug War: A Chronology*, *supra* note 2.

40. David Schultz, *Rethinking Drug Criminalization Policies*, 25 *TEX. TECH. L. REV.* 151, 165 (1993).

eliminating the twin enemies of drug addiction and drug trafficking.<sup>41</sup> In total, the War was fought for almost four decades<sup>42</sup> and, irrespective of partisan affiliation, every president has engaged in the War in some form or another.<sup>43</sup> To date, the War accomplished nothing; drug use and trafficking have remained constant since the 1970s.<sup>44</sup>

Three major pieces of anti-drug legislation were enacted during Reagan's presidency that formed the bedrock of the War on Drugs criminal policy: (1) the Comprehensive Crime Control Act of 1984, which included the Sentencing Reform Act of 1984,<sup>45</sup> (2) the Anti-Drug Abuse Act of 1986,<sup>46</sup> and (3) the Omnibus Anti-Drug Abuse Act of 1988.<sup>47</sup> The legislation was meant to reduce drug abuse and trafficking,<sup>48</sup> with the underlying justification being the protection of society and the individual.<sup>49</sup> But while the legislation was being drafted, "debated," and enacted, the data indicated that drug use peaked in the 1970s and decreased steadily through 1984.<sup>50</sup> Public officials and scholars alike were well aware of this decline when the War started,<sup>51</sup> and later a 1988 Pentagon report concluded that, "[i]ncreased drug interdiction efforts [were] not likely to greatly affect the availability of cocaine in the United States."<sup>52</sup> Despite this information, the War raged on and continued through the 2000s.

### *1.1. The Comprehensive Crime Control Act of 1984*

The Comprehensive Crime Control Act of 1984, enacted on October 12, 1984 with an eleventh hour Congressional move to overhaul the federal code,

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41. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 266 (3d ed. 1999).

42. Am. Judicature Soc'y., *supra* note 2, at 83.

43. ROBINSON & SCHERLEN, *supra* note 3, at 28.

44. Claire Suddath, *Brief History: The War on Drugs*, TIME (Mar. 25, 2009), <http://content.time.com/time/world/article/0,8599,1887488,00.html>.

45. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.).

46. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 and 21 U.S.C.).

47. Anti-Drug Abuse Act of 1988, *supra* note 37.

48. Tonry, *supra* note 3, at 26.

49. Bandow, *supra* note 3, at 244.

50. 132 CONG. REC. S26441 (daily ed. Sept. 26, 1986) (statement of Sen. Daniel J. Evans); BUREAU JUST. STATS., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, U.S. DEP'T JUST. 457 (1993); Tonry, *supra* note 3, at 26, 36 (citing OFFICE OF NATIONAL DRUG CONTROL POLICY ("ONDCP"), PRICE AND PURITY OF COCAINE 29 (1992)). See also Tonry, *supra* note 3, at 36.

51. Tonry, *supra* note 3, at 36.

52. PETER REUTER, GORDON CRAWFORD & JOHNATHAN CAVE, SEALING THE BORDERS: THE EFFECTS OF INCREASED MILITARY PARTICIPATION IN DRUG INTERDICTION, RAND xi (1988).

was the first major piece of anti-drug legislation.<sup>53</sup> The Sentencing Reform Act of 1984,<sup>54</sup> a major component of the new legislation, was one of the most prominent features of the new legislation—and it was harsh and pervasive.<sup>55</sup> The engineer of this new legislation was also its primary beneficiary: the United States Department of Justice (“DOJ”).<sup>56</sup>

The Act made a number of changes to the federal code. It created new federal penalties for possession of a controlled substance with the intent to distribute and distribution within 1,000 feet of a school zone,<sup>57</sup> as well as importation.<sup>58</sup> The U.S. Parole Commission and the federal parole system were also abolished.<sup>59</sup>

Congress statutorily authorized the use of civil forfeiture, allowing the government to “seize” and liquidate private property that was involved in or related to drug trafficking with the purpose of eliminating the profits of drug traffickers.<sup>60</sup> Prior to the enactment of the Crime Control Act, Title 21 authorized the use of civil forfeiture of real property, including leasehold interests, when that property was used to commit or facilitate criminal offenses.<sup>61</sup> The Act amended Title 21 to specifically and explicitly authorize the civil forfeiture of property used to facilitate drug transactions.<sup>62</sup>

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53. Comprehensive Crime Control Act of 1984, *supra* note 45; John C. Cleary & Alan Ellis, *An Overview of the Comprehensive Crime Control Act of 1984*, 31 PRAC. LAW. 31, 31–32 (1985).

54. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1 codified as amended in scattered sections of 18 and 28 U.S.C.). The provision creating the United States Sentencing Commission became effective on October 12, 1984. The United States Sentencing Commission was and remains comprised of seven voting members and one nonvoting member. After consulting with law enforcement and defense attorneys and with the approval of the Senate, the President will appoint the voting members of the Sentencing Commission, which will serve staggered six-year terms.

55. Cleary & Ellis, *supra* note 53, at 32.

56. *Id.*

57. 21 U.S.C. § 860(a). “”

58. *Id.* §§ 841(b), 960(b).

59. *See* Sentencing Reform Act of 1984, *supra* note 54, § 218(a)(5) (repealing 18 U.S.C. §§ 4201–218).

60. Comprehensive Crime Control Act of 1984, *supra* note 45, 1837 Stat. at 2047; Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 2040 (codified at amended at 18 U.S.C. § 1961). With civil forfeiture, the property vests in the United States at the time of the crime. Innocent bona fide purchasers may petition the court for relief. Forfeiture is mandatory upon conviction.

61. 21 U.S.C. § 881(a)(7) (providing for forfeiture of “real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation”).

62. Controlled Substance Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–904).

The Act also included a major overhaul to the federal criminal sentencing structure. With the Sentencing Reform Act of 1984 (“Sentencing Act”) embedded, the new legislation created the United States Sentencing Commission (“Sentencing Commission”), an independent commission within the Judicial Branch.<sup>63</sup> The Sentencing Commission was mandated to draft and file a set of sentencing guidelines (“Guidelines”) by April of 1986.<sup>64</sup> The Guidelines established specific parameters to determine criminal sentences in the federal courts and severely restricted the discretion of federal sentencing judges.<sup>65</sup>

### *1.2. The Anti-Drug Abuse Act of 1986*

In 1986, Congress enacted the Anti-Drug Abuse Act of 1986 (“1986 Act”), which is best known for its crack cocaine provision (alternatively known as the 100:1 powder to crack cocaine ratio). The 1986 Act amended the Controlled Substances Act of 1970<sup>66</sup>—the original legislation that established federal drug policy and more specifically laid out the controlled substances schedules.<sup>67</sup> The 1986 Act instructed federal courts to implement the 100:1 ratio at sentencing.<sup>68</sup> Thus, the same five-year mandatory minimum prison sentence was imposed for offenses involving five grams of crack or five hundred grams of cocaine.<sup>69</sup> The congressional justifications supporting the enactment of the ratio included the addictive properties of crack, the threat to children and the unborn in utero, as well as the low cost of the drug.<sup>70</sup> Ironically, as the government intensified law enforcement energies, more children became drug dealers, with some suggesting that the very “illegality of drugs makes them more attractive to children.”<sup>71</sup>

What has been secreted away is that Congress enacted this legislation based in large part on testimony from a well-known and well respected District of Columbia prosecutor, Johnny St. Valentine Brown, who was later convicted of perjury when a defense attorney exposed that Brown lied about

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63. Sentencing Reform Act of 1984, *supra* note 54.

64. 28 U.S.C. § 991 (1984); Cleary & Ellis, *supra* note 53, at 36.

65. 28 U.S.C. § 994(b) (1984). With this, the Sentencing Commission directed that there be no more than a twenty-five percent difference between the minimum and maximum criminal sentence for a particular offense. Only fifteen percent of the total incarceration term was allowed for “good time” credits and industrial credits were eliminated. *See* 18 U.S.C. § 3624(b).

66. Controlled Substances Act of 1970, *supra* note 62; *id.* § 202 (providing the controlled substances schedules).

67. Anti-Drug Abuse Act of 1986, *supra* note 46.

68. 21 U.S.C. § 841(b) (2006); Beaver, *supra* note 37, at 2533.

69. 21 U.S.C. § 841(b) (2006); Beaver, *supra* note 37, at 2533.

70. VAGINS & MCCURDY, *supra* note 37, at 2.

71. Bandow, *supra* note 3, at 248 (emphasis omitted).

his “expert” credentials.<sup>72</sup> Based on his “independent research,” Brown testified before Congress that, “possession of twenty grams of crack cocaine was just as dangerous as having one thousand grams of powder cocaine.”<sup>73</sup> Enter the 100:1 ratio<sup>74</sup> and exit Brown. After twenty years of testifying in various trials, Brown was indicted on perjury charges, pled guilty, and was sentenced to a one-year term of imprisonment.<sup>75</sup>

The 1986 Act further authorized enormous federal expenditures with \$1.1 billion allocated to law enforcement agencies.<sup>76</sup> Substance abuse treatment was assigned \$675 million for recovery programs.<sup>77</sup> Prevention initiatives were given \$80 million.<sup>78</sup> The budget demonstrated that the federal government was more dedicated to investigation, indictment, and incarceration and less committed to preventing and treating the disease of addiction. By the end of President Reagan’s tenure, only 3% of the population regarded drug use as the most important problem the country was facing.<sup>79</sup>

### *1.3. The Omnibus Anti-Drug Abuse Act of 1988*

The final piece of legislation was the Omnibus Anti-Drug Abuse Act of 1988 (“1988 Act”).<sup>80</sup> The 1988 Act formulated the policy for a drug free America and created the Office of Drug Control Policy.<sup>81</sup> The White House Office of National Drug Control Policy (“ONDCP”) stressed that law enforcement efforts should be given primary import and every year insisted that there be a 70-30 split of federal funding in favor of law enforcement.<sup>82</sup> By the time drug czar Bill Bennett was appointed by President George H.W. Bush in 1989, federal expenditures for “consequences and confrontation”

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72. Beaver, *supra* note 37, at, 2533–34.

73. *Id.* at 2534 (citing *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 110th Cong. 166–73 (2007) (statement of Eric. E. Sterling, President, Crim. Just. Pol’y Found.)).

74. *Id.*

75. *Id.* (citing Bill Miller, *Challenges Planned After ‘Expert’ Resigns*, WASH. POST, Oct. 11, 1999, at B2).

76. Joel Brinkley, *Anti-Drug Law: Words, Deed, Political Expediency*, N.Y. TIMES (Oct. 27, 1986), <https://www.nytimes.com/1986/10/27/us/anti-drug-law-words-deeds-political-expediency.html>.

77. 132 CONG. REC. S26461 (daily ed. Sept. 26, 1986) (statement of Sen. Broyhill).

78. *Id.* at 26451–52 (statement of Sen. Abdnor).

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

80. Anti-Drug Abuse Act of 1988, *supra* note 37; VAGINS & MCCURDY, *supra* note 37.

81. Anti-Drug Abuse Act of 1988, *supra* note 37, § 1002.

82. Tonry, *supra* note 3, at 25 (citing ONDCP 1990 NATIONAL DRUG CONTROL STRATEGY—BUDGET SUMMARY 100 (1990)).

was \$12 billion.<sup>83</sup> A chunk of this was spent on high-priced weaponry including fighter jets and Navy submarines.<sup>84</sup> With its laser focus on law enforcement, ONDCP consistently snubbed the treatment approach even though it was “known that tens of thousands of drug users in cities wanted but could not gain admission to treatment programs.”<sup>85</sup> In addition, Congress appropriated \$200 million to build and equip new prison facilities so as “to alleviate overcrowding in existing prisons and to meet the increased demand for prison space resulting from drug-related offenses.”<sup>86</sup> In the first ten years of its life, ONDCP failed to achieve drug war goals with studies demonstrating that expenditures outweighed any realized benefits.<sup>87</sup>

Perhaps more importantly, the 1988 Act mounted a further aggressive assault against crack offenders.<sup>88</sup> The legislation established a mandatory minimum term of imprisonment of five years for simple possession of five grams or more of crack.<sup>89</sup> The maximum penalty was set at a twenty-year term. In contrast, the maximum term of imprisonment authorized for all other drugs was one year.<sup>90</sup> Moreover, the 1988 Act authorized a term of life imprisonment for a three-time recidivist drug offender.<sup>91</sup> Individuals with two or more prior felony drug convictions were statutorily required to serve life imprisonment without the possibility of release.<sup>92</sup> Now, repeat drug offenders could be held prisoner forever—literally.

Finally, the Anti-Drug Abuse Act of 1988 revisited civil forfeiture and once again amended Title 21 to clarify that real property seized in connection with facilitating a drug transaction included leasehold interests.<sup>93</sup> This statute remains in effect. With this, civil forfeiture fell into three main categories: (1) the drugs may be forfeited, (2) the money or tangibles purchased with drug money may be forfeited, and (3) the real property and leasehold interests that are used in commission of the offense may be forfeited.<sup>94</sup> The

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83. Am. Judicature Soc’y., *supra* note 2, at 48, 83.

84. *Id.*

85. Tonry, *supra* note 3, at 25.

86. Anti-Drug Abuse Act of 1988, *supra* note 37, § 6157.

87. ROBINSON & SCHERLEN, *supra* note 3, at 202.

88. Brinkley, *supra* note 76.

89. Anti-Drug Abuse Act of 1988, *supra* note 37, § 6371.

90. *Id.*

91. *Id.* § 6452.

92. *Id.*

93. *Id.* § 5104 (amending 21 U.S.C. § 881(a)(7)).

94. Kevin Cole, *Civilizing Civil Forfeiture*, 7 J. CONTEMP. LEGAL ISSUES 249, 250 (1996). *See, e.g.*, Pamela Brown, *Parents’ house seized after son’s drug bust*, CNN (September 8, 2014, 10:45 AM) (detailing a situation where parents, never convicted of a crime, were forced out of their home in Philadelphia based on their son’s criminal drug charges (for having \$40 worth of heroin) and highlighting that over 500 homes and cars in Philadelphia were seized in a two-year period in

government is authorized to seize the property if issued a warrant pursuant to Federal Rule of Criminal Procedure 41, which requires an ex parte judicial determination of probable cause.<sup>95</sup> Law enforcement is thus permitted to seize assets and property from people who are not criminally prosecuted if the property itself is suspected of involvement in criminal activity.<sup>96</sup> This occurs even if the property owner is not charged with the predicate offense.<sup>97</sup> Moreover, there are no particular procedural rules governing the process.<sup>98</sup>

The use of civil forfeiture, as a practice in criminal prosecutions, evolved into a substantial component of drug enforcement strategy in the late 1990s.<sup>99</sup> Property was “seized and sold with the profits flowing to law enforcement budgets.”<sup>100</sup> The War integrated the confiscation of homes, including those of innocent people accused of having a substance-abusing relative.<sup>101</sup> Between September 2001 and September 2014, the DOJ’s equitable sharing program was responsible for nearly 62,000 seizures of cash without warrants or criminal indictments filed against owners. Of the \$2.5 billion forfeited as a result, state and local agencies received \$1.7 billion and federal agencies received \$800 million.<sup>102</sup> Aside from the arbitrariness of civil forfeiture, the deeper issue was and continues to be that the process incentivizes the practice without any accountability or oversight.<sup>103</sup> With the legal action considered “civil,” claimants are without a constitutional right to counsel. And without an attorney, indigent claimants are at a “severe disadvantage.”<sup>104</sup>

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forfeiture proceedings), <https://www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure>.

95. *United States v. 850 S. Maple*, 743 F. Supp. 505, 507 (E.D. Mich. 1990).

96. *See, e.g.*, 21 U.S.C. § 881; Rishi Batra, *Resolving Civil Forfeiture Disputes*, 66 U. KAN. L. REV. 399, 401 (2017).

97. Batra, *supra* note 96.

98. *850 S. Maple*, 743 F. Supp. at 507.

99. Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 889–94 (1987).

100. Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 842–43 (2002) (citing William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CALIF. L. REV. 1309, 1309–13 (1992)).

101. *United States v. \$46,588.00 in U.S. Currency and \$20.00 in Canadian Currency*, 103 F.3d 902, 903 (9th Cir. 1996).

102. Michael Sallah, Robert O’Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>. The DOJ’s program permits local enforcement to share in the proceeds of property seized through civil forfeiture.

103. Boyd, *supra* note 100.

104. Batra, *supra* note 96, at 412–13.



The War on Drugs overhaul to the federal criminal code culminated in a “no mercy” criminal justice policy for drug offenders—and only drug offenders. Hard-hitting law enforcement efforts were statutorily authorized not to just investigate suspected drug offenders, but to hunt them, especially if they were suspected crack offenders. Backed by billions of dollars in federal funding and resources, law enforcement officers attacked entire communities and social networks in search of the wicked drug offender. Despite studies reporting a decline in drug abuse and the ineffectiveness of supply-side enforcement, Congress continued its focus on drugs and drug offenders.<sup>105</sup> The law also placed federal judges in a sentencing straitjacket, providing little wiggle room to make appropriate adjustments where fairness and justice would otherwise require. The War on Drugs policies, coupled with the Federal Sentencing Guidelines, stripped judges of sufficient discretion to consider individual circumstances when sentencing federal defendants. With this, long and often unnecessary terms of imprisonment were imposed.

## 2. Repercussions

The War’s anti-drug criminal legislation offered, in vain, billions of dollars to support federal and state efforts to eradicate drugs. The supply-side approach, with its emphasis on aggressive drug enforcement, may have actually produced more social damage and violence than it helped.<sup>106</sup> With 2.2 million people in the nation’s prisons and jails, a 500% increase over the last forty years, the United States was named the world’s top jailer in 2009—imprisoning the greatest proportion of its population relative to every other country in the world.<sup>107</sup> Moreover, by 2011, approximately 6.98 million people in the United States were serving a term of federal or state correctional supervision.<sup>108</sup> Despite the recent decline in U.S. rates of imprisonment, incarceration rates are not slated to decline to 1980 levels for almost ninety years.<sup>109</sup> The War on Drugs was a legislative design meant to increase the

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105. Supply-side enforcement focuses on the drug supply by targeting the sources of supply (manufacturers, distributors, suppliers), compared to demand-side policies, which focus on the demand for the drugs by targeting addiction and treatment services.

106. Batra, *supra* note 96, at 412–13.

107. FACT SHEET, *supra* note 7, at 1, 2; E. Ann Carson & William J. Sabol, *Prisoners in 2011*, BUREAU JUST. STATS. 1 (2012), <https://www.bjs.gov/content/pub/pdf/p11.pdf>.

108. Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011*, BUREAU JUST. STATS. 1 (2012), <https://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

109. Marc Mauer & Nazgol Ghandnoosh, *Can We Wait 88 Years to End Mass Incarceration?* HUFFINGTON POST (last updated Dec. 6, 2017), [https://www.huffpost.com/entry/88-years-mass-incarceration\\_b\\_4474132](https://www.huffpost.com/entry/88-years-mass-incarceration_b_4474132).

power of the prosecutor and reduce the discretion of the courts. The result was a system of over-prosecution and mass incarceration.

Prosecutorial power over the criminal process grew during the War on Drugs, along with a 160% increase of people arrested for drug crimes between 1980 and 1989.<sup>110</sup> Mandatory minimums greatly expanded prosecutorial influence, thus changing the balance of power in drug prosecutions.<sup>111</sup> Plea bargains could be all but forced upon defendants.<sup>112</sup> With the threat of sentencing enhancements based on recidivist offender designations (such as armed career criminal) possibly resulting in a life sentence,<sup>113</sup> a plea was all but guaranteed.<sup>114</sup> Between 1980 and 1996, there was almost a tenfold increase in drug convictions nationwide.<sup>115</sup> In the federal system, there was almost a twentyfold increase of offenders imprisoned for drug offenses between 1980 and 2007.<sup>116</sup> The War on Drugs more than doubled the American prison population between 1981 and 1990.<sup>117</sup> In 1996, the prison population tripled, with research suggesting this was both due to a greater proclivity to arrest and the practice of imposing longer prison sentences.<sup>118</sup> By 1997, 60% of federal prisoners were drug offenders.<sup>119</sup>

The courts offered little relief to criminal defendants challenging the power of the drug enforcement machine. With the statutorily-sanctioned expansion of police power and increased prosecutorial control over the criminal process, the courts provided little constitutional cover for drug defendants. Instead, drug policy seemed to dictate not only criminal law and

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110. Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 288–89 (2010).

111. Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137–38 (1995).

112. *Id.*

113. See 18 U.S.C. § 924(e); T.J. Matthes, *The Armed Career Criminal Act: A Severe Implication Without Explanation*, 59 ST. LOUIS U. L.J. 591, 592–94 (2015).

114. Morvillo & Bohrer, *supra* note 111, at 137–38.

115. Fareed Zakaria, *Incarceration Nation: The war on drugs has succeeded only in putting millions of Americans in jail*, TIME (Apr. 2, 2012), <http://content.time.com/time/magazine/article/0,9171,2109777,00.html>.

116. See Sentencing Memorandum of Myles Haynes at 10, *United States v. Haynes*, 557 F. Supp. 2d 200 (D. Mass. 2008) (No. 06-10328), 2006 WL 5283198, at \*10.

117. *Number of Inmates in U.S. Reaches Record*, N.Y. TIMES (Oct. 8, 1990), <https://www.nytimes.com/1990/10/08/us/number-of-inmates-in-us-reaches-record.html> (reporting a jump from 344,283 inmates in 1981 to 755,425 inmates in 1990).

118. Alfred Blumstein & Allen J. Beck, *Population Growth in the U.S. Prisons 1980–1996*, in PRISONS 17, 43 (Michael Tonry & Joan Petersilia eds. 1999) (noting the breakdown as follows: 51% increase attributed to a proclivity to incarcerate upon arrest and 37% increase attributed to longer sentences of imprisonment).

119. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1230–31 (2002).

procedure but also the parameters of constitutional protections guaranteed to the American people.<sup>120</sup> Cases granted certiorari to the United States Supreme Court often pronounced rules departing from longstanding interpretations of Fourth, Fifth, and Fourteenth Amendment guarantees.<sup>121</sup> With the Burger and Rehnquist courts reigning during the height of the War, civil rights and freedoms were severely restricted.<sup>122</sup> In a series of drug cases, the Court gave the police great power and deference. Law enforcement was now constitutionally permitted to search your trash,<sup>123</sup> your farm,<sup>124</sup> and your car<sup>125</sup> without a warrant and sometimes without probable cause. As a detection tool, the police could use a drug dog in almost every circumstance,<sup>126</sup> and warrantless surveillance could be conducted via helicopter,<sup>127</sup> plane,<sup>128</sup> and beeper.<sup>129</sup> When criminal defendants levied race-based challenges, the Court all but looked away. In *Whren v. United States*,<sup>130</sup> the petitioner claimed racial profiling under the Fourth Amendment and the Court determined that the Fourth Amendment was the wrong

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120. *Id.* at 1228; *see also* *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

121. John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U. CAL. DAVIS L. REV. 557, 580–82 (1991).

122. Linda Greenhouse, *Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, (June 26, 1995), <https://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html>.

123. *California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding that there is no reasonable expectation of privacy in the contents of a discarded trash bag left at the curb for a third-party disposal).

124. *United States v. Dunn*, 480 U.S. 294, 301 (1987) (establishing a four-pronged test for curtilage and finding that a barn, fifty yards from the fence that enclosed the home, did not constitute curtilage for Fourth Amendment purposes); *Oliver v. United States*, 466 U.S. 170 (1984) (holding that there is no expectation of privacy in open fields).

125. *California v. Acevedo*, 500 U.S. 565, 580 (1991) (holding that where the police have probable cause to suspect the presence of contraband, police may search the containers in an automobile without a warrant).

126. *United States v. Place*, 462 U.S. 696, 698 (1983) (holding that a canine sniff of the exterior of a luggage bag did not constitute a search); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (holding that a canine sniff of a car during a lawful traffic stop, without a warrant, did not constitute a search).

127. *Florida v. Riley*, 488 U.S. 445, 449 (1989) (holding that there is no expectation of privacy in the warrantless observation by law enforcement that occurred in a helicopter flying at 400 feet by naked-eye observation and in a physically nonintrusive manner).

128. *California v. Ciarolo*, 476 U.S. 207, 214 (1986) (holding that there is no expectation of privacy in the warrantless observation by law enforcement that occurred in an airplane in public navigable airspace by naked-eye observation and in a physically nonintrusive manner).

129. *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding that the warrantless monitoring of an individual's movements with an electronic beeper was not a violation of the Fourth Amendment); *see also* *United States v. Karo*, 468 U.S. 705, 713 (1984) (holding that the warrantless monitoring of an individual's movements with an electronic beeper was not a search).

130. 517 U.S. 806 (1996).

constitutional vehicle to allege race-based complaints.<sup>131</sup> Instead, petitioners would have to make an equal protection claim.<sup>132</sup> When a race-based claim of selective prosecution was made in *United States v. Armstrong*,<sup>133</sup> the Court crafted an insurmountable test to make such a showing.<sup>134</sup> In handing down these opinions, the Court pushed the War agenda forward, thus giving the drug enforcement machine the green light to continue to attack and wreak havoc on communities of color.

The repercussions of wartime criminal policy on targeted groups are vast, however drug war critics focus primarily on three categories of costs: (1) financial expenditures, (2) social disruption, and (3) race-based targeting. In accordance with wartime legislation, drug enforcement efforts were fully funded. As mentioned above, Congress allocated billions of dollars annually to law enforcement agencies in its effort to combat drug use and trafficking. By 1991, federal expenditures were at \$10.5 billion, a 64% increase since the presidential administration of George H.W. Bush began in 1989.<sup>135</sup> Requests for funding continued to increase, with appeals for additional funding in 1992 coming in at \$11.7 billion.<sup>136</sup> In addition to financial expenditures, Congress authorized the transfer of excess military equipment to state and local law enforcement agencies.<sup>137</sup> And if the resources allocated were not enough, drug-related civil forfeiture actions offered an additional pool of funding. Armed with military-grade equipment and seemingly unlimited financial resources, the drug enforcement machine was able to launch a Spartan attack.

Corrections expenditures also skyrocketed. Between 1982 and 2001, state corrections expenditures increased annually from \$15 billion to \$53.5 billion, and fluctuated between 2002 and 2010.<sup>138</sup> The largest allocation of funding between 1982 and 2010 was for institutions, including prisons and work release facilities.<sup>139</sup> During this time, the operational expenditures per

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131. *Id.* at 813.

132. *Id.*

133. 517 U.S. 456 (1996).

134. *Id.* at 458. The Court required a high standard of proof to establish a prima facie showing entitling a defendant to discovery on the issue of selective prosecution. The test required a defendant make a “threshold showing . . . that the Government declined to prosecute similarly situated suspects of other races.” *Id.*

135. DRUGS AND DRUG POLICY IN AMERICA: A DOCUMENTARY HISTORY 329–30 (Steven R. Belenko ed., 2000) [hereinafter DRUGS AND DRUG POLICY IN AMERICA].

136. *Id.*

137. Peter J. Boettke, Christopher J. Coyne & Abigail R. Hall, *Keep off the Grass: The Economics of Prohibition and U.S. Drug Policy*, 91 OR. L. REV. 1069, 1087 (2013); see also RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES 242–308 (2013).

138. Tracey Kyckelhahn, *State Corrections Expenditures, FY 1982–2010*, BUREAU JUST. STATS., 1 (last updated Apr. 30, 2014), <https://www.bjs.gov/content/pub/pdf/scefy8210.pdf>.

139. *Id.*

inmate in a state or private prison at the 25th percentile was between \$21,243 and \$26,452, and between \$37,084 and \$43,178 at the 75th percentile.<sup>140</sup> However, expenditures started to dip under \$30,000 per inmate annually around 2004 and continue to decline.<sup>141</sup> Parole, probation, nonresidential halfway houses, and costs associated with administration (considered noninstitutional corrections) comprised 20.4% and 27.3% of total corrections outlays and ranged from \$3.8 billion to \$12.9 billion.<sup>142</sup>

The social costs associated with the incarceration aspect of the War are substantial.<sup>143</sup> Mass incarceration disrupts the social order<sup>144</sup> and destabilizes communities.<sup>145</sup> Such harms include family interruption, diminished socio-economic status, disenfranchisement, and increased risk of recidivism.<sup>146</sup>

Poverty and lack of opportunity are associated with higher crime rates; crime leads to arrest, a criminal record, and usually a jail or prison sentence; a history of past crimes lengthens those sentences; offenders released from prison or jail confront family and neighborhood dysfunction, increased risks of unemployment, and other-producing disadvantages; this makes them likelier to commit new crimes, and the cycle repeats itself.<sup>147</sup>

High rates of imprisonment are geographically clustered in “hot spots” that are predicted by social factors correlated to urban disadvantage—poverty, unemployment, family disruption, and racial seclusion.<sup>148</sup> These communities overwhelmingly bear the burdens associated with imprisonment and are not safer, with data suggesting a “tipping point when incarceration becomes so heavily concentrated in disadvantaged communities that it works against the safety and well-being of that community.”<sup>149</sup> Sociological studies report that these communities are

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140. *Id.* at 5.

141. *Id.*

142. *Id.* at 2.

143. JENNI GAINSBOROUGH & MARC MAUER, *THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S* 25 (2000).

144. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1285 (2004).

145. *Id.* at 1282; Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low Income Communities*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 181, 183 (Marc Mauer & Meda Chesney-Lind eds., 2002).

146. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 *HASTINGS L.J.* 423, 439 (2013).

147. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?*, 38 *CRIME & JUST.* 201, 263 (2009).

148. Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, 139 *DAEDALUS* 20, 21–22 (2010).

149. Traum, *supra* note 146, at 435.

considerably damaged when those released from prison return with reduced political, economic, and social opportunities and status.<sup>150</sup>

The racial impact of the War is very real and shown by the statistics. Arrest rates exploded, with minority populations bearing the brunt of the drug policies.<sup>151</sup> Between 1980 and 2009, the Black arrest rate rose 205% while the white arrest rate increased 102%.<sup>152</sup> More specifically, arrest rates for sale and/or manufacture for Black individuals rose 363% between 1980 and 1989, while the arrest rates for white individuals increased 127%.<sup>153</sup> The incarceration rate tells a similar story. More than 60% of the imprisoned population is comprised of people of color.<sup>154</sup> Black men are six times and Hispanic men are 2.7 times more likely than their white counterparts to be incarcerated.<sup>155</sup> On any given day, approximately one in every twelve Black men in his thirties is incarcerated.<sup>156</sup> America, the land of the free, is imprisoning “the same number of African-American men as were enslaved in 1820.”<sup>157</sup> For many Black men, the risk of incarceration is a normal event in one’s life.<sup>158</sup>

The researched explanation for the racial impact is also disheartening, with scholars concluding that the War was partially inspired by racism.<sup>159</sup> In 2010, James Unnever and Francis Cullen reported the “prominent reason” for the harshness of the United States justice system “is the belief that those disproportionately subject to these harsh sanctions are people they do not like: African American offenders.”<sup>160</sup> The very architecture of wartime

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150. *Id.* at 434–35 (“While one family can bear the strain of a family member’s imprisonment by relying on ‘networks of kin and friends,’ multiple families relying on the same network eventually strain and weaken the community.”) (citing Roberts, *supra* note 144, at 1282).

151. See DRUGS AND DRUG POLICY IN AMERICA, *supra* note 135, at 334.

152. Snyder, *supra* note 110 at 13 (referencing Figure 40).

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

154. FACT SHEET, *supra* note 7, at 5.

155. *Id.*

156. *Id.*

157. Boyd, *supra* note 100, at 846 (citing Jan M. Chaiken, *Crunching Numbers: Crime and Incarceration at the End of the Millennium*, NAT’L INST. JUST. J., 14 (2000)).

158. Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER 72 (Jan. 22, 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>. See also Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 231 (2009) (finding that one in eight Black men in their twenties is in prison or jail on any given day, and 69% of Black high school dropouts are imprisoned over their lifetime, compared with just 15% for white high school dropouts).

159. IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 51–52 (2014); James D. Unnever & Francis T. Cullen, *The Social Sources of Americas’ Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 119 (2010).

160. Unnever & Cullen, *supra* note 159, at 119.

policy suggests race-based policies. Take, for example, the crack-to-powder ratio.<sup>161</sup> Crack, a drug associated with poor Black people, was punished 100 times more harshly than powder cocaine, a drug associated with wealthy white people.<sup>162</sup> With this, Congress made a deliberate choice to punish Black defendants more harshly than white defendants.<sup>163</sup> Critics lament that the War's legislation, meant to eradicate drug abuse and trafficking, was used to control communities of color by removing the target: the men.<sup>164</sup> The wartime machine targeted, arrested, and imprisoned disproportionate numbers of Black and Latino men. The statistics bear out an incorrigible reality: the War on Drugs resulted in the creation of a separate "demographically distinct underclass" comprised primarily of men of color now excludable from mainstream society based on the drug felon label.<sup>165</sup> This societal exclusion has thus left this demographic vulnerable to the War's continued violence in the civil and administrative spheres.

The War on Drugs was a miserable failure. The strategy—attacking the supply side of the drug problem—was doomed from the start. The success rate of drug seizures at both the state and federal levels has remained constant since the 1960s—10%.<sup>166</sup> Despite the billions of dollars expended, the War did nothing to slow the flow of illegal narcotics in and around the United States.<sup>167</sup> The "replacement effect," where imprisoned drug dealers are replaced by others willing to assume the risk, proved to be a major impediment to the supply-side tactic.<sup>168</sup> Imprisoning "foot soldiers and drug users in gangs has a negligible impact on crime,"<sup>169</sup> particularly on drug use and associated violence.<sup>170</sup> In the end, the War on Drugs accomplished neither of its twin objectives of combatting drug abuse and ending drug trafficking.<sup>171</sup>

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161. Levin, *supra* note 26, at 2181.

162. *Id.*

163. *Id.*

164. *Id.* at 2183–84.

165. *Id.* at 2180.

166. See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 292 (2015) (citing Harry Hermans, *War on Drugs*, DRUG TEXT (Apr. 7, 2010), <http://www.drugtest.org/International-national-drug-policy/war-on-drugs.html>).

167. *Id.* at 273.

168. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 19 (2009), [https://www.pewtrusts.org/~media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](https://www.pewtrusts.org/~media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf); David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 698 (2003); Tonry, *supra* note 3, at 26.

169. Baradaran, *supra* note 166, at 294 (citing Rasmussen & Benson, *supra* note 168, at 705).

170. Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 587–89 (1997).

171. David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 36 (2011).

As the War on Drugs policies and practices swept across state criminal codes, other areas of law were reviewed, amended, and modified to reflect the anti-drug sentiment that captured the country. Drug policy crept into a number of state and federal statutes and regulations on employment, public benefit eligibility, and housing policy. The collateral consequences of being a prisoner of war was that you continued to be a target in the shadows where the War was being waged on the civil side.<sup>172</sup>

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172. Travis, *supra* note 16, at 15–19; *see also* Chin, *supra* note 16, at 1790–92.



*B. Housing Policy*

“Cops patrol projects  
Hatin’ the people livin’ in ‘em  
I was born an inmate  
Waitin’ to escape the prison”  
– Tupac & The Outlawz<sup>173</sup>

The extension of Drug War policy into civil and administrative law, dubbed the “New Jim Crow” by Michelle Alexander<sup>174</sup> and the “New Civil Death” by Gabriel Chin,<sup>175</sup> continued the War’s devastation on poor communities of color. The marriage of criminal drug policy with welfare during the War led to the expansion of legislatively demarcated war zones.<sup>176</sup> Beginning with Ronald Reagan, public assistance recipients were added to the list of targeted groups that eventually culminated in an all-out assault on poor minority communities.<sup>177</sup> In the context of housing, the War was particularly destructive, as it took more prisoners than just the individual offender. In crafting wartime strategy, policymakers took specific aim at poor housing communities, thus capturing a secondary group of prisoners in the drug enforcement net: the family, friends, and associates of those suspected of drug-related criminal activity. Housing subsidy recipients were targeted and criminalized.<sup>178</sup>

*1. Legislation*

To relieve the nation’s housing pressures and ensure “safe and affordable housing” during the Great Depression, the federal government intervened in the name of promoting the “general welfare.”<sup>179</sup> With this,

173. TUPAC & THE OUTLAWZ, *Black Jezuz, on STILL I RISE* (Death Row Records 1999).

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

175. Chin, *supra* note 16.

176. GUSTAFSON, *supra* note 30; Ocen, *supra* note 30, at 1564.

177. GUSTAFSON, *supra* note 30; Ocen, *supra* note 30, at 1564.

178. GUSTAFSON, *supra* note 30; Ocen, *supra* note 30, at 1564.

179. Alex Markels, *Comparing Today’s Housing Crisis with the 1930s: Home prices have fallen and construction stalled, but the Great Depression was twice as bad*, U.S. NEWS & WORLD RPT. (Feb. 28, 2008), <http://money.usnews.com/money/personal-finance/real-estate/articles/2008/02/28/comparing-todays-housing-crisis-with-the-1930s>. This includes The National Housing Act of 1934, Pub. L. No. 84–345, 48 Stat. 847, enacted June 28, 1934, also called the Capehart Act, and the United States Housing Act of 1937, Pub. L. No. 75–412, 50 Stat. 888, enacted September 1, 1937. “[T]he goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector.” 42

federal housing policy evolved into a system of federal subsidization.<sup>180</sup> It has since mutated from public housing to private market vouchers to an underfunded program with millions of federally subsidized units disappearing from the housing market.<sup>181</sup>

The War on Drugs' influence on federal housing policy resulted in the targeting of "drugs" in both admission and termination rules and procedure. Taken together, four pieces of legislation form the basis of the War's anti-drug policy in housing: (1) the Anti-Drug Abuse Act of 1988,<sup>182</sup> (2) the National Affordable Housing Act of 1990,<sup>183</sup> (3) the Housing Opportunity Program Extension Act of 1996,<sup>184</sup> and (4) the Quality Housing and Work Responsibility Act of 1998.<sup>185</sup> Despite the second chance revolution occurring in the criminal law context, federal housing policy remains entrenched in the strict exclusionary policies of the War.

The seeds that fused criminal drug policy with welfare reform were in the public imagination early in the War. But the foundation for this amalgamation was laid in the public consciousness generations prior and was woven throughout our nation's history. From the early days of the republic, crime and race have been definitively linked in the American psyche.<sup>186</sup> In the 1970s, a third prong gradually developed that merged welfare dependency with race and crime.

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U.S.C. § 1437(a)(4). This principle was reiterated in the 1990 Gonzalez National Affordable Housing Act. The Act stated that the housing goals of America continue to be committed "to decent, safe, and sanitary housing for every American." Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, § 503, 104 Stat. 4079, 4085.

180. United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended in scattered sections of 42 U.S.C.). "[T]he goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector." 42 U.S.C. § 1437(a)(4). This principle was reiterated in the 1990 Gonzalez National Affordable Housing Act. The Act stated that the housing goals of America continue to be committed "to decent, safe, and sanitary housing for every American." Cranston-Gonzalez National Affordable Housing Act of 1990, *supra* note 179, § 503.

181. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in scattered sections of 42 U.S.C.) (creating the "Section 8 Housing Certificate program" in 1974, which was the precursor to the current "Housing Choice Voucher Program" ("HCV")); JENNIFER WOLCH, MICHAEL DEAR, GARY BLASI, DAN FLAMING, PAUL TEPPER, PAUL KOEGEL & DANIEL WARSHAWSKY, *ENDING HOMELESSNESS IN LOS ANGELES* 6 (2007).

182. Anti-Drug Abuse Act of 1988, *supra* note 37.

183. Cranston-Gonzalez National Affordable Housing Act of 1990, *supra* note 179.

184. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended in scattered sections of 42 U.S.C.).

185. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, Title V (codified as amended in scattered sections of 42 U.S.C.).

186. PUBLIC HOUSING MYTHS: PERCEPTION, REALITY, AND SOCIAL POLICY 64-65 (Nicholas Dagen Bloom, Fritz Umbach & Lawrence J. Vale eds., 2015).

In the 1960s and 1970s, sociologists studying then existing social policies, such as William Julius Wilson, wrote about the swelling of “the underclass.”<sup>187</sup> Wilson defined the underclass as “the most disadvantaged segment[] of the black urban community.”<sup>188</sup> He further described this group as,

individuals who lack training and skills and either experience long-term unemployment or are not members of the labor force, individuals who are engaged in street crime and other forms of aberrant behavior, and families that experience long-term spells of poverty and/or welfare dependency.<sup>189</sup>

The unification of race, crime, and welfare in the sociological literature supported a conservative political agenda with evidence steeped in the behavioral sciences. To add fuel, the sociopolitical climate was becoming saturated with reactionary calls to civil rights progress. With this, welfare and federal housing programs became a natural focal point during the War. The presidential administrations of the 1980s and 1990s capitalized on this trifecta for campaign points and policy initiatives.

In his 1980 bid for president, Ronald Reagan relentlessly condemned two targets: drug offenders and so-called welfare queens.<sup>190</sup> Reagan’s “welfare queen” provided the perfect propaganda to demonize and criminalize the welfare system. The welfare queen, characterized as a poor Black woman “working” the welfare system, walked hand-in-hand with the drug addict and street dealer. The welfare queen was the mother, sister, grandmother, wife, or girlfriend of the drug offender. The political narrative painted a picture that linked the two groups as threats to the social order. While the drug offender threatened to morally bankrupt the American people with trafficking and addiction, the welfare queen threatened to financially bankrupt the American budget by cheating taxpayers through welfare fraud.<sup>191</sup> Poor women, especially Black women, were classified as criminals. This criminalization was generated through the stereotype of the welfare queen as a lazy fraudster who refused to work.<sup>192</sup> Just as important, the welfare queen was seen as an “incubator[] of criminal activity”—through her children.<sup>193</sup> She decided to have more and more children out of wedlock to

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187. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 8 (2d ed. 2012).

188. *Id.*

189. *Id.*

190. GUSTAFSON, *supra* note 30.

191. *Id.*

192. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY, 643, 650–51 (2009); Ocen, *supra* note 30, at 1562.

193. Ocen, *supra* note 30, at 1562.

increase her public benefits, as opposed to working and getting married.<sup>194</sup> Americans viewed welfare as a Black program that rewarded laziness.<sup>195</sup> Both groups were thus presented as public enemies deserving of tough punishments.

### *1.1. The Anti-Drug Abuse Act of 1988*

The manifestation of this political sentiment was first statutorily expressed in the Anti-Drug Abuse Act of 1988, which was an important amendment to the existing United States Housing Act of 1937.<sup>196</sup> The last major piece of federal anti-drug *criminal* legislation, the 1988 Act started the spillover of the War's policies into the housing realm. The first shots in the anti-drug offensive on national housing policy were fired.

In the 1988 Act, Congress made a number of findings, including that drug dealers were “imposing a reign of terror” on federal housing program tenants and that drug-related crime was “rampant” in federal housing projects, leading to violence.<sup>197</sup> In furthering laying the groundwork, Congress created a clearinghouse on drug abuse in public housing and training programs for public housing officials confronting drugs on their property.<sup>198</sup> The congressional findings declared war on drug dealers utilizing federal housing programs. The clearinghouse served as the center for drug related intelligence. And the training programs provided a planning stage to craft strategies from which to launch an assault.

In terms of tenancies, drug-related criminal activity was made a federal statutory basis for termination from public housing. With Congressional findings that drug crimes were “rampant” in public housing projects, the focus of this amendment was the eradication of drugs from federal housing programs.<sup>199</sup> Public housing tenants, or other persons under the tenants' control suspected of “drug-related criminal activity, on or near” a public

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194. GUSTAFSON, *supra* note 30.

195. MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 3, 60–61 (1993).

196. Anti-Drug Abuse Act of 1988, *supra* note 37, § 5101 (amending the United States Housing Act of 1937).

197. Public Housing Drug Elimination Act of 1988, Pub. L. No. 100-690, § 5122, 102 Stat. 4181, 4301 (codified as amended at 42 U.S.C. § 11901); Cranston-Gonzalez National Affordable Housing Act of 1990, *supra* note 179, § 581(a); Quality Housing and Work Responsibility Act of 1998, *supra* note 185, § 586(b).

198. Public Housing Drug Elimination Act of 1988, *supra* note 197, §5143(a) (codified as amended at 42 U.S.C. § 11922); 42 U.S.C. Ch. §§ 11901–11925; H.R. Res. 4483, 100th Cong. (1988).

199. Anti-Drug Abuse Act of 1988, *supra* note 37, § 5101.

housing project, could be terminated from the program.<sup>200</sup> Any suspicion of drugs and the household was out. Moreover, leasehold interests were now considered subject to civil forfeiture, allowing the government to take possession of federally-subsidized housing units premises.<sup>201</sup>

The 1988 Act also authorized the Public Housing Drug Elimination Program (“PHDEP”) as a pilot program meant to eradicate drug-related activity in federally-subsidized housing.<sup>202</sup> The goals of the program included the eradication of drug-related crimes on or near public housing projects, the development of strategies to address drug activities by Public Housing Agencies (“PHAs”), and funding to effectuate these tactics.<sup>203</sup> With this, five key strategy topics evolved: (1) law enforcement/security, (2) physical improvements, (3) drug treatment, (4) drug prevention, and (5) Resident Council programs.<sup>204</sup> Federal funding for enforcement was also provided through an amendment to the Omnibus Crime Control and Safe Streets Act of 1968, authorizing the Bureau of Justice Assistance to issue block grants to housing programs confronting drug trafficking.<sup>205</sup>

President Reagan also successfully struck at legal services for the poor.<sup>206</sup> Legal services provide free civil legal representation to the poor, including to federal housing assistance recipients.<sup>207</sup> In his first term, Reagan attempted to completely eliminate the congressional budget for the Legal Services Corporation.<sup>208</sup> After encountering opposition, he settled for cutbacks.<sup>209</sup> The cutback in federal funding left legal aid offices resource-starved and unable to serve clients adequately.<sup>210</sup> During his tenure, Reagan also plugged the engine of the 1960s/1970s welfare rights movement: legal

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200. *Id.*; see also 24 C.F.R. § 982.553(b)(1)(i); 24 C.F.R. § 982.310(c)(1) (“The lease must provide that drug-related criminal activity engaged in, *on or near* the premises by any tenant, household member, or guest, or such activity engaged in on the premises by any other person under the tenant’s control, is grounds for the owner to terminate tenancy.”) (emphasis added).

201. Anti-Drug Abuse Act of 1988, *supra* note 37, § 5105 (codified as amended at 42 U.S.C. § 3751).

202. U.S. DEP’T HOUSING & URB. DEV., PUBLIC HOUSING DRUG ELIMINATION PROGRAM RESOURCE DOCUMENT: FINAL REPORT (1994), [https://www.huduser.gov/portal/Publications/pdf/ HUD-006464.pdf](https://www.huduser.gov/portal/Publications/pdf/HUD-006464.pdf) [hereinafter PUBLIC HOUSING FINAL REPORT].

203. *Id.* at i–iv.

204. *Id.* at ii.

205. Anti-Drug Abuse Act of 1988, *supra* note 37, § 5104 (codified as amended at 42 U.S.C. § 3751).

206. GUSTAFSON, *supra* note 30, at 37.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

aid lawyers were now forbidden to file class action lawsuits against the government, state and federal.<sup>211</sup>

### *1.2. The National Affordable Housing Act of 1990*

During the presidential administration of George H.W. Bush, HUD received substantial federal financial support for waging the War in subsidized housing. This began with the enactment of the Cranston-Gonzalez National Affordable Housing Act of 1990.<sup>212</sup> The legislation issued directives requiring PHAs to target drug activity with regard to program “preference” classifications,<sup>213</sup> public housing lease provisions,<sup>214</sup> and eviction procedures.<sup>215</sup> The preference classification includes the poorest families.<sup>216</sup> The Act banned households from the “preference” classification for three years if they were evicted from public housing in connection with drug-related criminal activity, unless the tenant successfully completed rehabilitation programming.<sup>217</sup>

Public housing leases were also required to explicitly implement the War’s principles.<sup>218</sup> PHAs were directed to impose lease provisions incorporating the drug-related termination language,<sup>219</sup> thereby transforming “drug related activity” into an official and contractual program rule violation. The legislation further established an “expedited” eviction procedure for households allegedly involved in “drug-related criminal activity on or near” a public housing project.<sup>220</sup> PHAs were statutorily authorized to exclude this class of terminations and evictions from the traditional administrative grievance process, providing a faster track for a household’s removal.<sup>221</sup> Serving as the HUD Secretary from 1989 to 1993, Jack Kemp executed an aggressive multi-faceted attack on subsidized housing.<sup>222</sup> Kemp’s strategy included utilization of the fast track eviction procedure outlined in the Act,

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211. *Id.*

212. Cranston-Gonzalez National Affordable Housing Act of 1990, *supra* note 179.

213. *Id.* § 501 (amending 42 U.S.C. § 1437d(c)(4)(A)).

214. *Id.* § 503 (amending 42 U.S.C. § 1437d(1)(5)).

215. *Id.* § 503 (amending 42 U.S.C. § 1437d(k)).

216. *Id.* § 501 (amending 42 U.S.C. § 1437d(c)(4)(A)).

217. *Id.* § 501 (amending 42 U.S.C. § 1437d(c)(4)(A)).

218. *Id.* § 503 (amending 42 U.S.C. § 1437d(1)(5)).

219. *Id.* § 504. Section 6(1)(5) of the Housing Act of 1937 was amended to read as follows: “provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.” *Id.*

220. *Id.* § 503 (amending 42 U.S.C. § 1437d(k)).

221. *Id.*; *see also* 24 C.F.R. § 982.51(a)(1)(i)(B).

222. Reagan, *supra* note 21, at 207.

terminating households suspected of drug-related activity without an administrative hearing.<sup>223</sup>

Moreover, it was during George H.W. Bush's presidency that HUD was permitted to award grants to PHAs to train tenant patrols and security personnel, employ security, and hire investigators to investigate drug-related crime specifically.<sup>224</sup> From 1989 to 1993, Congress appropriated over \$530 million to fund the PHDEP program started by Reagan as a pilot program: "\$8.2 million in FY 1989; \$97.4 million in FY 1990; \$140.8 million in FY 1991; \$140.6 million in FY 1992; and \$145.5 million in FY 1993."<sup>225</sup> Law enforcement and security, as a category, was allocated the largest share of PHDEP funding,<sup>226</sup> which included the hiring of security personnel, investigators, and "[a]dditional [s]ecurity and [p]rotective [s]ervices from [l]ocal [l]aw [e]nforcement [a]gencies."<sup>227</sup> In reality, PHAs turned to local enforcement to provide additional security rather than using private security companies.<sup>228</sup> PHAs were encouraged to collaborate with local law enforcement to seek and destroy drug-related crime in public housing. The tactics employed included information sharing between PHAS and law enforcement, no-notice entries into the units of PHA tenants, and public housing sweeps.

In his 1996 State of the Union Address, President Clinton declared the "One Strike and You're Out" policy, which helped to strengthen termination rules in public housing.<sup>229</sup> The negative political rhetoric that started during Reagan's administration was legislatively realized during the tenure of President Bill Clinton with the decentralization of welfare and implementation of conditions and restrictions on public assistance recipients.<sup>230</sup> As part of his tough on crime stance, he called for PHAs to automatically terminate households suspected of engaging in drug-related activity and to deny drug offenders admission to PHAs strictly based on

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223. *Id.* (citing David B. Bryson & Roberta L. Youmans, *Crimes, Drugs and Subsidized Housing*, 24 CLEARINGHOUSE REV. 435 (1990)).

224. *See* Public Housing Drug Elimination Act of 1988, *supra* note 197, § 5123 (codified as amended at 42 U.S.C. § 11902); Cranston-Gonzalez National Affordable Housing Act of 1990, *supra* note 179, § 581(a); Quality Housing and Work Responsibility Act of 1998, *supra* note 185, § 586(b).

225. *See* PUBLIC HOUSING FINAL REPORT., *supra* note 202, at i.

226. *Id.* at i-ii ("Law enforcement/security activities received the largest share of funds (47 percent). The prevention area received 38 percent; physical improvements, 6 percent; drug treatment, 6 percent; and resident initiatives, 4 percent.").

227. *Id.* at 32.

228. *Id.* at 38.

229. ALEXANDER, *supra* note 174, at 145, 181.

230. *Id.* at 182.

having a past drug conviction.<sup>231</sup> President Clinton’s “One Strike” proclamation not only culminated in legislation, but it also impelled HUD to draft and adopt regulations implementing more stringent exclusionary standards.<sup>232</sup>

### 1.3. *The Housing Opportunity Program Extension Act of 1996*

The legislation enacted in 1996, the Housing Opportunity Program Extension Act of 1996,<sup>233</sup> is perhaps the most pernicious of the anti-drug housing legislation, as it further expanded the War’s reach to include the Section 8 housing certificate and voucher (“HCV”) programs<sup>234</sup>—the most utilized federally-subsidized housing program in the country.<sup>235</sup> Legislation previously enacted to combat drug crimes in public housing was now applied to Section 8 programming.<sup>236</sup> In addition, use or addiction to either drugs or alcohol, were targeted for termination from both public housing and Section 8 programming.<sup>237</sup> A PHA’s determination of reasonable cause that a tenant is engaging in illegal drug or alcohol use was deemed a sufficient basis to terminate and evict under the Act.<sup>238</sup> Lease provisions were also revisited, with termination language amended from “drug-related criminal activity on or near the premises”<sup>239</sup> to “drug-related criminal activity on or off the premises.”<sup>240</sup> Suspicion alone, not only criminal convictions, involving drug-related criminal activity occurring *anywhere* served as permissible grounds for termination from public housing and Section 8. In addition, Congress authorized PHAs to pull criminal records to make admission and eviction decisions.<sup>241</sup> Thus, the United States Housing Act of 1937 was amended, yet again, with wartime policy weaponizing national housing policy to capture more prisoners. The War’s violence was mobilizing bodies not only from society to prison but also from federal housing into the abyss of homelessness.

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231. *Id.*

232. *Id.*

233. Housing Opportunity Program Extension Act of 1996, *supra* note 184, § 1.

234. *Id.* § 9(e).

235. *Housing Choice Vouchers Fact Sheet*, HUD, [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited May 30, 2021).

236. *See* Housing Opportunity Program Extension Act of 1996, *supra* note 184, § 9.

237. *Id.*

238. *Id.*

239. Anti-Drug Abuse Act of 1988, *supra* note 37, § 5101.

240. Housing Opportunity Program Extension Act of 1996, *supra* note 184, § 9.

241. *Id.*



*1.4. The Quality Housing and Work Responsibility Act of 1998*

The final piece of major anti-drug housing legislation was the Quality Housing and Work Responsibility (“QHWR”) Act of 1998.<sup>242</sup> The QHWR Act authorized PHAs to deny admission to applicant households with a member who had “engaged in any drug-related . . . criminal activity” within a “reasonable period.”<sup>243</sup> Substance abuse was also once again a focal point of anti-drug efforts with the QHWR Act authorizing PHAs to require program applicants to sign a release of information for drug abuse treatment centers.<sup>244</sup> PHAs were then permitted to consider this information in deciding whether the applicant or tenant was “currently” engaging in substance abuse (alcohol or drugs).<sup>245</sup>

The QHWR Act also continued the War’s concentration on enforcement by encouraging and emphasizing capacity-building and cooperation between PHAs and law enforcement to address drug-related (and violent) crime in federally-subsidized housing.<sup>246</sup> Owners that refused to evict households for suspicion of engaging in drug-related criminal activity were also at risk of PHAs refusing to enter into new subsidy contracts.<sup>247</sup>

The administrative federal housing rules that developed during the War provided an officially sanctioned basis for denial of and termination from federally subsidized housing. Neither a criminal conviction nor an official finding of a violation is required for exclusion.<sup>248</sup> These administrative rules granted PHAs enormous discretion in making eligibility determinations and were encouraged by President Clinton himself.<sup>249</sup>

In terms of admissions to public housing and Section 8 certificate and voucher programs, the HUD Public Housing Occupancy Guidebook recommended (and still recommends) that PHAs perform criminal background checks for a minimum of three years prior to potential admission.<sup>250</sup> With Congress authorizing PHAs to pull criminal records and use a criminal history as a basis in admission and termination decisions, public housing and Section 8 administrative rules developed to exclude households strictly on the basis of a drug conviction of a household member.

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242. Quality Housing and Work Responsibility Act of 1998, *supra* note 197, § 501.

243. *Id.* § 576(c).

244. *Id.* § 575(e).

245. *Id.*

246. *Id.* § 586(b).

247. *Id.* § 545(a); *see also Housing Choice Vouchers Fact Sheet*, *supra* note 235.

248. ALEXANDER, *supra* note 174, at 146.

249. *Id.* at 145.

250. U.S. DEP’T. OF HOUS. & URB. DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 96–97 (2003), [https://www.hud.gov/sites/documents/DOC\\_10760.PDF](https://www.hud.gov/sites/documents/DOC_10760.PDF).

PHAs are permitted to determine the “look-back” or set an “exclusion period,” which is the length of time applicants must be crime-free before being considered “eligible” for public housing.<sup>251</sup> According to the federal statute, the look-back period should be for a “reasonable time,” though the phrase is left undefined.<sup>252</sup> Congress delegated that task to HUD and the PHAs, which has resulted in varied and, often, unnecessarily severe look-back periods. For example, some PHAs implemented permanent bans on specific crimes<sup>253</sup> while others instituted unreasonably long look-back periods.<sup>254</sup> A 2011 study that investigated the waiting periods outlined in over 100 tenant selections, found that over half of the plans had waiting period in the double digits.<sup>255</sup>

Anti-drug housing legislation penetrated through many layers of national housing policy. It influenced admissions, terminations, and lease provisions. Moreover, it authorized a full-scale attack on public housing and Section 8 programming by law enforcement that was backed by massive federal expenditures. The police could raid households and families could be torn apart and forbidden to live together pursuant to housing regulation. Fathers, sons, mothers, daughters, uncles, and brothers were arrested, banned from their public housing residence, and sent to jail or prison by the boatloads. When they returned, they were prohibited from residing or even visiting with their family based on a number of program rules. Thus, family members would be forced to choose between risking their subsidy and housing their family. With this, the drug enforcement machine was able to flank poor, minority households, and their social networks under the banner of the Drug War. The political rhetoric pronouncing, “law and order” and “tough on crime” policies oozed into the conservative cries for welfare

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251. 24 C.F.R. § 5.855(a); *see also* 42 U.S.C. § 13662(a).

252. 42 U.S.C. § 13661(c).

253. Marie Claire Tran-Leung, *When Discretion Means Denial: The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois*, SHRIVER CTR. 10–11 (2011). The Shriver Center reports that “Brown County Housing Authority in Illinois permanently bans applicants with prior convictions for any drug-related criminal activity other than possession for personal use, such as manufacturing and sale.” *Id.* at 11 (citing BROWN COUNTY HOUSING AUTHORITY, ADMISSIONS AND OCCUPANCY PLANS AND PROCEDURES 5 (2008)).

254. *Id.* The Shriver Center reviewed over 100 tenant selection plans in its study. Of the 100 that were reviewed, 77 adopted the following boilerplate language:

Applicants who fall into the following categories may be rejected.

a) Criminal convictions that involved physical violence to persons or property, or endangered the health and safety of other persons within the last \_\_\_ years;

or

b) Criminal convictions in connection with the manufacture or distribution of a controlled substance within the last \_\_\_\_\_ years.

*Id.* at 11–12.

255. *Id.* at 12.

reform.<sup>256</sup> By the end of President Clinton's first term, criminal justice policy had married welfare, producing harsh stipulations and exclusionary policies based on illicit behavior that further narrowed the class of eligible housing assistance recipients.<sup>257</sup> "One Strike" tore through the hearts of many families, leaving displaced bodies littered across the battlefields of federally subsidized communities.

## 2. *Repercussions*

The attack on federal housing during the War created a climate of fear and hostility in public housing and Section 8 HCV and certificate households. The all-powerful government was permitted to aggressively hunt and trap residents and guests, as well as intrude into homes and search without notice or even a warrant. When challenged, the government set up the system to suspend the procedural rights of those recipients suspected of drug related criminal activity. And when the prisoners of the War returned home after paying their debt, they further discovered that they remained excommunicated from these housing communities.

### 2.1. *Collaboration Between Law Enforcement and Housing Authorities*

The political rhetoric of the 1980s and 1990s unifying public housing, crime, and minorities—and legislation authorizing additional enforcement and exclusions in the housing context—sanctioned a full government siege on public housing and Section 8 HCV and certificate communities.<sup>258</sup> The overlap between welfare and law enforcement agencies resulted in shared "goals and attitudes toward the poor" as well as "collaborative practices and shared information systems between welfare offices and various branches of the criminal justice system."<sup>259</sup> The Clinton welfare reforms authorized the policing of federal housing subsidies and, often, entire public housing communities.<sup>260</sup> The expansion of the power of both law enforcement and PHAs promoted a negative and dangerous dichotomy between the government and the tenants. Working together, PHAs and the police employed practices that mirrored a wartime criminal investigation, utilizing surveillance tactics and stigmatizing household members with overzealous

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256. GUSTAFSON, *supra* note 30, at 1.

257. *Id.* at 1–2, 35; Ocen, *supra* note 30, at 1563–64.

258. *See generally* GUSTAFSON, *supra* note 30.

259. *Id.* at 2.

260. Ocean, *supra* note 30, at 1563.

investigative strategies.<sup>261</sup> Housing recipients were socio-economically criminalized through the enforcement of wartime legislative directives and administrative rules.

War on Drug legislation granted wide latitude in the decision-making authority to law enforcement and PHAs as well as infused federal dollars to fund collaborative strikes on federal housing communities. With wartime rules stripping public housing and Section HCV recipients of privacy protections, these two bodies mutated into a monolithic enforcement structure that devoured its target. Under the flag of President Clinton's "One Strike" policy, PHAs and the police banded together and engaged in a type of lawful lawlessness justified on the basis of suspicion of drug activity.

The drug enforcement piece was multifaceted. It ran the gamut from the run of the mill "stop and frisk" campaigns to informant set-ups to community raids to civil forfeiture. First, the intentional and widespread deployment of "stop and frisk" on public housing grounds was not a secret.<sup>262</sup> For example, the NAACP Legal Defense Fund filed a federal class action lawsuit against the New York Police Department citing its "unlawful policy and practice of routinely stopping and arresting [New York City Housing Authority] residents and guests" in a racially discriminatory manner.<sup>263</sup> The federal court upheld the challenge against a motion for summary judgement.<sup>264</sup>

PHAs and local law enforcement worked together to not only investigate and, when necessary, arrest and remove violators from federal subsidized housing, they also collaborated to "set-up" targeted housing recipients to specifically terminate a household's subsidy.<sup>265</sup> One instance occurred in Berkeley, California beginning in 1989 with the City's "Drug Mitigation Policy."<sup>266</sup> The policy goal was the elimination of drugs from the city through inter-departmental cooperation.<sup>267</sup> One aspect of the policy focused on "high crime areas" and specifically targeted Section 8 certificate holders.<sup>268</sup> The strategy was to trap suspected drug dealers through controlled buys.<sup>269</sup> Using a confidential informant, the drug task force would engage in

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261. Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty?: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F. L. & SOC. CHANGE 1, 6 (2016).

262. *Id.*

263. *Davis v. City of New York*, 959 F. Supp. 2d 427, 430 n.6 (S.D.N.Y. 2013).

264. *Id.* at 431.

265. Reagan, *supra* note 21, at 208.

266. *Id.* at 208–11.

267. *Id.* at 208.

268. *Id.*

269. *Id.*

controlled buys, use the information to secure a search warrant, execute a search of the unit, and then use that information to threaten the household with termination.<sup>270</sup> Most of the tenants threatened with termination were grandmothers and mothers who had no knowledge of the acts of their grandchildren and children—the basis of the termination.<sup>271</sup>

Searches of public housing units without advance notification or consent also transpired.<sup>272</sup> In total disregard of tenants' Fourth Amendment right to be free from "unreasonable searches and seizures,"<sup>273</sup> PHA employees and law enforcement would enter federal subsidized housing units without notifying the tenant in advance and without a warrant authorizing entry.<sup>274</sup> In one Florida federal district court case, a PHA interpreted a lease provision to authorize a no-notice entry and inspection of a unit by a PHA and local law enforcement.<sup>275</sup> The lease provision provided that an inspection may occur "at any time without advance notification when there is a reasonable cause to believe that an emergency exists."<sup>276</sup> The PHA interpreted the provision as a grant to enter without notice based on reasonable suspicion, as well as permission for the PHA to search for evidence of criminal activity.<sup>277</sup> The district court granted the tenants' request for a preliminary injunction against the PHA's practice.<sup>278</sup> The court concluded the PHA was required to afford advance notice and that, absent exigent circumstances, police could not enter without a warrant.<sup>279</sup>

Perhaps the most damaging law enforcement/security tactics employed were the sweeps of public housing complexes authorized under the PHDEP. In pursuit of "drugs, weapons, and unauthorized persons," law enforcement (in collaboration with PHA employees and security personnel) would perform sweeps of targeted buildings in public housing projects.<sup>280</sup> The Chicago Housing Authority's ("CHA") "Operation Clean Sweep" is one such example.<sup>281</sup> "Operation Clean Sweep, the CHAs ballyhooed security program, did chase the gangbangers and drug dealers from the Prairie Court

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270. *Id.* at 208–09.

271. *Id.* at 209.

272. *Noble v. Tooley*, 125 F. Supp. 2d 481 (M.D. Fla. 2000).

273. U.S. CONST. amend. IV.

274. *Noble*, 125 F. Supp. at 483.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 486.

279. *Id.*

280. Chi. Hous. Auth., "Operation Clean Sweep" Implementation Guide, prepared for and filed in *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill, Nov. 30, 1989); *Case Developments*, 24 CLEARINGHOUSE REV. 1281, 1291 (1991).

281. Chi. Hous. Auth., *supra* note 280/

high rise. But it also robbed innocent tenants of their freedom and dignity . . . .”<sup>282</sup>

Beginning in the late 1980s, Operation Clean Sweep included a series of raids on targeted buildings in Chicago public housing in pursuit of drugs, guns, and unauthorized persons.<sup>283</sup> Under the guise of inspecting units for repairs, law enforcement, security personnel, and PHA maintenance would search units for drugs, weapons, and unauthorized people.<sup>284</sup> In the December 1988 raid of the CHA’s Prairie Courts property, twenty-three people were brought to a nearby police station, where twelve were charged with criminal trespass of a state-supported building.<sup>285</sup> Represented by the ACLU, tenants later filed suit against the CHA and the City of Chicago, which resulted in a consent decree designed to prevent the unconstitutional conduct identified during these sweeps while simultaneously providing necessary support to PHA efforts to improve public housing tenants’ quality of life.<sup>286</sup>

## 2.2. Civil Forfeiture

The government also used civil forfeiture to seize public housing leaseholds and evict tenants. In two important federal district court opinions decided in 1990—*United States v. 850 S. Maple*<sup>287</sup> and *Richmond Tenants Organization, Inc. v. Kemp*<sup>288</sup>—the Government’s civil forfeiture tactics were unveiled and successfully challenged. The strategy was entitled, the “National Public Housing Asset Forfeiture Project”—a collaborative effort by HUD and DOJ, authorizing the government to seize the homes of public housing tenants suspected of drug-related activity without prior notice or a hearing.<sup>289</sup> In both of these cases, the government did just that—it seized the

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282. Jane Juffer, *Clean Sweep’s Dirty Secret*, CHI. READER (Oct. 4, 1990), <https://www.chicagoreader.com/chicago/clean-sweeps-dirty-secret/Content?oid=876436>.

283. Chi. Hous. Auth., *supra* note 280; Case Developments, *supra* note 280; Juffer, *supra* note 282.

284. Chi. Hous. Auth., *supra* note 280.

285. Juffer, *supra* note 282 (“Twelve of those people were charged with criminal trespass of a state-supported building, a misdemeanor. Three others were charged with unlawful use of a weapon and three with possession of cocaine.”).

286. *Summeries v. Chicago Hous. Auth.*, No. 88-C-10566 (N.D. Ill, Nov. 30, 1989). The decree established a new visitor policy whereby all tenants are permitted to have guests at all hours and for up to two weeks. *Id.* If a guest plans to stay for longer than one day, the tenant is required to get a guest card. As for the sweeps, PHAs are not absolutely barred from engaging in the sweep strategy but are only permitted to do so if the PHA director finds a specific threat to a PHA tenant, employee, business invitee, or the property. *Id.*

287. 743 F. Supp. 505 (E.D. Mich. 1990).

288. 753 F. Supp. 607 (E.D. Va. 1990).

289. *Richmond Tenants Org.*, 753 F. Supp. at 608.

homes of tenants without notice or a hearing.<sup>290</sup> In turn, the courts found the practice unconstitutional.<sup>291</sup>

In *United State v. 850 S. Maple*, the Government seized the public housing unit pursuant to a warrant authorizing the seizure of a public housing unit, as well as the immediate removal of the tenant.<sup>292</sup> The warrant application alleged the premises, occupied by Juide and her family, was being used to facilitate the distribution of cocaine.<sup>293</sup> The details are startling:

[T]he United States Marshal seized the apartment and evicted Juide [the tenant] and her two children. Juide and her family, who were asleep when they were awakened by the shouting of Government agents inside her apartment, were not given any prior notice of this action. According to Juide, one agent came into her bedroom with a gun drawn and pointed directly at her head. She was told to leave her apartment immediately. . . . Juide and her children were given less than fifteen minutes in which to gather their belongings before they were removed from their apartment. . . . In addition [to an unidentified person filming inside the apartment], several members of the news media were waiting outside the apartment unit with additional cameras when Juide exited.<sup>294</sup>

Juide brought suit in federal district court, claiming that her due process was violated when her leasehold interest was seized without prior notice or a hearing.<sup>295</sup> The district court agreed, finding that the government improperly evicted Juide without notice or a hearing where the Government's stance on probable cause could be challenged.<sup>296</sup>

In *Richmond Tenants Organization v. Kemp*, a federal district court in West Virginia held that the Government's seizure of public housing units in accordance with the National Public Housing Asset Forfeiture Project was unlawful.<sup>297</sup> In analyzing the issue, the district court, like the court in *850 S. Maple*, pointed to the special privacy protection afforded to homes against unwarranted government intrusion.<sup>298</sup> The court also noted the lack of

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290. *Id.*; *850 S. Maple*, 743 F. Supp. at 514–15.

291. *Richmond Tenants Org.*, 753 F. Supp. at 608; *850 S. Maple*, 743 F. Supp. at 514–15.

292. *850 S. Maple*, 743 F. Supp. at 506.

293. *Id.*

294. *Id.* at 506–07 (citations omitted).

295. *Id.* at 511.

296. *Id.* at 509–11. The court recognized the special constitutional protection given to the home and the lack of exigent circumstances that would permit the seizure of a home without prior notice and a hearing. *Id.* at 510. The fact that a judicial officer authorized the seizure was deemed insufficient to satisfy the constitutional understanding of due process. *Id.*

297. *Richmond Tenants Org., Inc. v. Kemp*, 753 F. Supp. 607, 608 (E.D. Va. 1990).

298. *Id.* at 609.

exigent circumstances.<sup>299</sup> In balancing the interests, the district court determined that the “the government’s interest is a narrow one of obtaining pre-notice seizure of a fixed item like a home” and not the broader interest in drug enforcement.<sup>300</sup> For the court,

[t]he eviction of an entire household prior to a formal judicial finding that forfeiture is justified constitutes a harm of major proportions. To be rendered homeless for several months or more while a civil forfeiture action is pending may be traumatic and permanently damaging.<sup>301</sup>

Challenging PHA termination determinations was and continues to be complicated by the lack of legal services and the existing rules that forego traditional legal process.

The racial implications of the War’s influence on federally-subsidized housing programs cannot be overstated. To begin with, Black households are overrepresented among extremely low income or “ELI” renters and constitute 45% of public housing residents, while 20% are Hispanic and 32% are white.<sup>302</sup> Similar percentages are reflected in the Section 8 HCV program, with Black households representing 45% of voucher holders compared to 16% Hispanic households and 35% white households.<sup>303</sup> Based strictly on numbers, Black households were preordained to be disproportionately affected by the housing aspect of the War. Compound this with the disparate arrest and conviction rates of people of color, along with federal housing program rules that allow exclusions based on suspicion of drug-related activity, and it is clear that Black and brown communities were destined to experience the greatest losses in the War.<sup>304</sup>

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299. *Id.*

300. *Id.* at 610 (quoting *United States v. 4492 S. Livonia Road*, 889 F.2d 1258, 1265 (2d Cir. 1989)).

301. *Id.*

302. Nat’l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, 2 HOUSING SPOTLIGHT 1, 3 (2012).

303. *Id.*

304. See HELEN R. KANOVSKY, U.S. DEP’T HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 2 (2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF); E. ANN CARSON, BUREAU JUST. STATS., PRISONERS IN 2014 15, tbl. 10 (2015), <https://bjs.ojp.gov/content/pub/pdf/p14.pdf>; FBI CRIM. JUST. INFO. SERV. DIV., CRIME IN THE UNITED STATES 2013 tbl.43A (2014) (reporting that African Americans comprised 28.3% of all arrestees in 2013); U.S. CENSUS BUREAU, NATIONAL POPULATION BY CHARACTERISTICS (2021), <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html> (reporting data showing that individuals identifying as African-American or Black alone made up only 12.4% of the total U.S. population at 2013 year-end).



As the power of PHAs and the police grew, the rights and liberties of federal housing recipients decreased. During the War, families were separated, homes were taken, and the legal process was suspended for those suspected of drug-type criminality. Public housing tenants, and HCV and certificate holders, were unsympathetic collateral victims in the War on Drugs—victims themselves were branded as lazy, conniving, criminals, or criminal affiliates. This narrative encouraged a more concentrated and aggressive assault on the federal housing front. The unification of criminal enforcement with conservative welfare reform produced the ideal battleground, with the government fortifying the downhill advantage. The rules that authorized such expansive attack remain and such scenarios continue to play out every day.

The War on Drugs' influence and impact on national housing policy was devastating to prisoners returning home and their families. Prisoners are often the poorest in society and lack the financial capacity to pay for private housing.<sup>305</sup> Anti-drug legislation and housing rules result in denials of federal subsidy programs and/or the possibility of risking a household's subsidy if program rules are violated. Approximately two-thirds of returning prisoners rely on family for housing upon release, but the risk to the household is often grave.<sup>306</sup> Homelessness is sometimes the only option. Branded with a drug conviction, the War's rules operate to maintain a physical separation between those returning home and their families. This in turn impacts family reunification; it affects opportunities for critical emotional and intimate bonding, which is essential to heal families from the trauma of the War.

In addition to the familial disruption and racial impact, wartime housing rules work to deprive returning prisoners of socio-economic citizenship.<sup>307</sup> Housing is the starting point of any successful reintegration and is linked to a variety of positive outcomes.<sup>308</sup> Stable housing is correlated with reduced recidivism and improves the prospect of creating positive relationships.<sup>309</sup> Without housing, one does not gain stable footing. Once released from the criminal policy grip of the War, prisoners continue to be targeted and assaulted in the civil context.

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305. ALEXANDER, *supra* note 174, at 148.

306. U.S. COMM'N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 72 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [hereinafter COLLATERAL CONSEQUENCES].

307. GUSTAFSON, *supra* note 30, at 53.

308. Breanne Pleggenkuhle, Beth M. Huebner & Kimberly R. Kras, *Solid Start: Supportive Housing, Social Support, and Reentry Transitions*, 39 J. CRIME & JUST. 380, 381 (2016).

309. *Id.*

Today, the competition for affordable housing is stiff. An estimated 43 million people live at or below the federal poverty level and compete for a mere 7.5 million federally assisted housing units.<sup>310</sup> Households that don't "play by the rules" and are suspected of drug use or any drug-related criminal activity are subject to denial or termination from federal housing programming. For HUD,

[a]t a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules. . . . By refusing to evict or screen out problem tenants, we are unjustly denying responsible and deserving low-income families access to housing and are jeopardizing the community and safety of existing residents who abide by the terms of their lease.<sup>311</sup>

Federal housing program eligibility thus becomes a cut-off point to help "triage" the housing pressure and is "a politically cost-free way to entirely cut out a large group of people from the pool of those seeking housing assistance."<sup>312</sup>

### III. AFTERSHOCK

"My own view is that divisions never benefit anyone"  
– Niccolo Machiavelli<sup>313</sup>

After 2009, the United States experienced a decline in its state jail and prison populations—the first decline in forty years.<sup>314</sup> The number of adults under correctional supervision (probation, jail, or prison) also fell for the first time in thirty years.<sup>315</sup> Beginning in the early 2000s (and after the United

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310. BERNADETTE D. PROCTOR, JESSICA L. SEMEGA & MELISSA A. KOLLAR, U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2015* (2016), <https://www.census.gov/library/publications/2016/demo/p60-256.html>; CATHERINE BISHOP, NAT'L HOUS. L. PROJ., *AN AFFORDABLE HOME ON RE-ENTRY: FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS* 5 (2008), [https://nhlp.org/files/Page%204%20Doc%201%20Prisoner\\_Reentry\\_FINAL.pdf](https://nhlp.org/files/Page%204%20Doc%201%20Prisoner_Reentry_FINAL.pdf).

311. HUMAN RIGHTS WATCH, *NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING* (2004), [https://www.hrw.org/report/2004/11/18/no-second-chance/people-criminal-records-denied-access-public-housing#\\_ftnref50](https://www.hrw.org/report/2004/11/18/no-second-chance/people-criminal-records-denied-access-public-housing#_ftnref50) (citing "'One Strike and You're Out' Policy in Public Housing", HUD Directive No. 96-16 (April 12, 1996)).

312. *Id.*

313. NICCOLO MACHIAVELLI, *THE PRINCE* 73 (Quentin Skinner & Russell Price trans., 1988).

314. *Prison Count 2010: State Prison Population Declines for the First Time in 38 Years*, PEW CTR. ON THE STATES 1 (last updated Apr. 2010), [https://www.pewtrusts.org//media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prisoncount2010pdf.pdf](https://www.pewtrusts.org//media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisoncount2010pdf.pdf).

315. *Id.*

States had been ranked the world's number one jailer), criminal justice policy in America finally began to pivot.

*A. Criminal Policy*

“America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.”  
– President George W. Bush<sup>316</sup>

By 2000, it was clear to researchers and scholars that the War on Drugs was a disaster. Researchers reported that drug use remained constant and that government enforcement and interdiction efforts were unsuccessful in combatting drug traffickers.<sup>317</sup> Millions were incarcerated, with the majority of prisoners being minority and nonviolent offenders.<sup>318</sup> The incarceration rate had little correlation to the crime rate, and violent crime decreased 50% between 1989 and 2017.<sup>319</sup> In terms of expenditures, mass incarceration was an “unsustainable long-term strategy.”<sup>320</sup> And the label as the world's number one jailer was considered a political embarrassment.<sup>321</sup> It was time to review and overhaul drug policy. The focus was criminal law and procedure, and it was the judicial branch that signaled the need for policy reform and legislative change.

*1. The Judicial Branch*

It was the very body charged with crafting the details of federal drug policy from the start of the War that made the first calls for change: the United States Sentencing Commission.<sup>322</sup> The United States Supreme Court also confronted questions concerning the constitutional validity of various aspects of War on Drugs legislation. The conclusions and decisions offered by these two judicial bodies together signaled an urgent need for legislative

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316. George W. Bush, *2004 State of the Union Address*, C-SPAN (Jan. 20, 2004), <https://www.c-span.org/video/?c4574544/president-bush-prisoner-entry-initiative>.

317. Cole, *supra* note 171, at 36; Tony, *supra* note 3, at 36; REUTER, CRAWFORD & CAVE, *supra* note 52.

318. Cole, *supra* note 171, at 37; FACT SHEET, *supra* note 7, at 5.

319. *2017: Crime in the United States*, FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVS. DIV. tbl. 1 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-1> (reporting 666.0 violent crimes per 100,000 people in 1989 versus 382.9 violent crimes per 100,000 people in 2017).

320. Cole, *supra* note 171, at 35.

321. *Id.* at 37.

322. Beaver, *supra* note 37, at 2550.

modifications to existing criminal drug policy, specifically concerning the 100:1 ratio and the imposition of long, harsh federal sentencing practices.

The crack cocaine to powder cocaine ratio (100:1) was the first occasion for the counteroffensive against the War's drug policy.<sup>323</sup> The Sentencing Commission led the battle by denouncing the ratio in its annual reports to Congress beginning in the early 1990s.<sup>324</sup> Calling for the elimination of the ratio, the Commission described the problem as "urgent and compelling," concluding that the ratio was based upon a misunderstanding about the dangers of crack.<sup>325</sup> The Commission continued its denunciation of the penalty scheme until 2007 when, in the absence of congressional action, it adjusted its own Guidelines, lowering the recommended sentence for crack offenses from 100:1 to 20:1.<sup>326</sup>

The Court inadvertently entered the fray in 2000 when it decided the case of *Apprendi v. New Jersey*.<sup>327</sup> New Jersey had a sentencing scheme similar to that of the federal sentencing guidelines: allowing the sentencing judge to find facts by a lesser standard of proof at sentencing than is required in a criminal trial.<sup>328</sup> If the judge found specific facts, the judge was permitted to enhance the sentence beyond the statutory maximum.<sup>329</sup> This practice could, and often did, result in longer sentences. Although a state case, this essentially called the sentencing provisions outlined in the federal scheme into question. The Court found the penalty structure to be a violation of a defendant's Sixth Amendment right to a jury's determination of facts.<sup>330</sup> With this, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."<sup>331</sup> With "the stroke of a pen," the

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323. *Id.*

324. *Id.*

325. U.S. SENT'G COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 8–9 (2007), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705\\_RtC\\_Cocaine\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf).

326. U.S. SENT'G COMM'N, GUIDELINES MANUAL 140, § 2D1.1 (2007).

327. 530 U.S. 466 (2000).

328. *Id.* at 467–68. Petitioner Apprendi was charged with possession of a firearm for an unlawful person in the second-degree, which carried a five- to ten-year term of imprisonment. *Id.* at 468. The count did not include a reference to the hate crime statute. After he plead guilty, the prosecutor moved to enhance his sentence based on the hate crime statute. *Id.* at 468–69. At sentencing, the prosecutor only had to prove the elements of the statute by a preponderance of the evidence. *Id.* at 469. Apprendi was sentenced to twelve years in prison on the firearm count, two years more than permitted by statute. *Id.* at 471.

329. *Id.* at 490–92.

330. *Id.* at 490.

331. *Id.*

foundation of two decades of state sentencing began to crumble.<sup>332</sup> As Justice O'Connor predicted in her dissent, the federal system followed.<sup>333</sup>

The War was now being attacked from a constitutional angle. The first in the trilogy of War on Drugs criminal policy, the Crime Control Act of 1984, was dealt a severe blow from which it would not recover. In 2005, the Court decided *United States v. Booker*,<sup>334</sup> holding that the Federal Sentencing Guidelines, standing as mandatory, violated the Sixth Amendment.<sup>335</sup> The Court found two provisions unconstitutional and directed the federal courts to consider the Guidelines as “effectively advisory.”<sup>336</sup> One of the hallmark provisions of anti-drug legislation, the Sentencing Reform Act, was essentially gutted. Per *Booker*, federal courts were required to impose a criminal sentence based on the statutory factors laid out in 18 U.S.C. § 3553(a);<sup>337</sup> the Guidelines were only advisory. Once *Booker* was decided, the War’s sentencing structure crumbled.

Soon after *Booker*, the Court considered constitutional issues concerning the Anti-Drug Abuse Act of 1986’s 100:1 powder to crack cocaine ratio. The Court dealt the notorious 100:1 ratio a deathblow by the Court between 2007 and 2009 in two cases: *Kimbrough v. United States*<sup>338</sup> and *Spears v. United States*.<sup>339</sup> In *Kimbrough*, the Court held that federal courts may ignore the Guidelines based on ideological differences with the ratio.<sup>340</sup> In upholding the lower court’s decision to depart from the ratio, the Court cited the Sentencing Commission’s 2002 report finding that approximately 85% of federal criminal defendants convicted of crack offenses were Black, which in turn promoted a lack of confidence in the system.<sup>341</sup> For the Court, Congress was credulous with regard to the dangers of crack at the time that the Anti-Drug Abuse Act of 1986 was enacted.<sup>342</sup> In *Spears*, the Court took *Kimbrough* a step further and held that federal courts were permitted to establish their own ratios.<sup>343</sup>

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332. *Id.* at 550 (O’Connor, J., dissenting).

333. *Id.* (“[T]he apparent effect of the Court’s opinion today is to halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades’ worth of nationwide reform.”).

334. 543 U.S. 220 (2005).

335. *Id.* at 244.

336. *Id.* at 245.

337. *Id.*; see *Pepper v. United States*, 562 U.S. 476, 489–92 (2011).

338. 552 U.S. 85 (2007).

339. 555 U.S. 261 (2009) (per curiam).

340. *Kimbrough*, 552 U.S. at 91.

341. *Id.* at 98.

342. *Id.* at 95.

343. *Spears*, 555 U.S. at 265–68.

## 2. Legislative Branch

The Congressional rollback of the War's anti-drug laws formally started in 2007 and continues into the present. The consequences of the War on Drugs—mass incarceration, the costs of corrections, and international shame—were now on full display with no reasonable justification to continue the War. Judicial signaling added pressure. Congress had to act. In the past twelve years, three major pieces of legislation were enacted that work to comprehensively review and modify the War's anti-drug policy: (1) the Second Chance Act of 2007,<sup>344</sup> (2) the Fair Sentencing Act of 2010,<sup>345</sup> and (3) the First Step Act of 2018.<sup>346</sup> Redemption, fairness, and second chances formulate the ideological underpinnings of all three Acts.

### 2.1. The Second Chance Act of 2007

With the Second Chance Act of 2007,<sup>347</sup> Congress started its retreat from the War and introduced an ideology of redemption and compassion into the criminal drug laws. Amending the Omnibus Crime Control and Safe Streets Act of 1968, the Act focused on alternatives to incarceration<sup>348</sup> and drug treatment, both in and out of prison.<sup>349</sup> The legislation represented a clear withdrawal from the stringent mandatory imprisonment directives and supply-side attacks authorized by the War's anti-drug legislation.

A bipartisan effort, the Act encouraged a holistic approach to offender release and promoted federal reentry efforts.<sup>350</sup> The legislation allocated grant dollars to agencies and organizations that implemented evidence-based programming proven to reduce recidivism.<sup>351</sup> Concentrating on both public safety and criminal recidivism, Congress pledged support to the efforts of both state and federal criminal justice systems that were working towards successfully transitioning the prisoners of the War back into society.<sup>352</sup> Although the Second Chance Act did not repeal the harsh sentencing laws outright or modify the War's supply-side strategy, it started to shift the direction of America's criminal justice approach.

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344. Second Chance Act of 2007, Pub. L. No. 110-199 § 1, 122 Stat. 657 (codified as amended in scattered sections of 42 U.S.C.).

345. Fair Sentencing Act of 2010, *supra* note 9, § 1; Obama, *supra* note 12, at 826–27.

346. First Step Act of 2018, *supra* note 9, § 1; Erin McCarthy Holliday, *President Trump signs criminal justice reform First Step Act into law* (Dec. 21, 2018, 3:30 PM), <https://www.jurist.org/news/2018/12/president-trump-signs-criminal-justice-reform-first-step-act-into-law/>.

347. Second Chance Act of 2007, *supra* note 344, § 101(a)(3).

348. *Id.* § 2901 (codified at 42 U.S.C. § 3797q).

349. *Id.* § 201 (codified at 42 U.S.C. § 17521).

350. *Id.* § 101(a)(3).

351. *Id.* § 101(g).

352. *Id.* § 3(a)(5) (codified at 42 U.S.C. § 17501).

### 2.2. *The Fair Sentencing Act of 2010*

Three years later, Congress enacted the Fair Sentencing Act of 2010,<sup>353</sup> which continued the statutory counterattack against the War's anti-drug legislation. The Fair Sentencing Act ("FSA") amended the Controlled Substances Act once again and imposed a powder-to-crack cocaine ratio of 18:1 as opposed to 100:1.<sup>354</sup> Before the FSA was passed, the statutory mandatory minimum sentence required for distribution of fifty grams or more of crack cocaine was ten years.<sup>355</sup> After the Act, 280 grams or more were required to trigger the ten-year sentence.<sup>356</sup> The FSA also eliminated the mandatory minimum sentence imposed for simple possession of crack cocaine.<sup>357</sup> In enacting the FSA, Congress was acting to "restore fairness to federal cocaine sentencing" laws that had unfairly impacted blacks for almost 25 years."<sup>358</sup> The legislation shifted the political focus from drug offenders as a broad class to violent drug traffickers specifically, by increasing the penalties for violent drug offenders<sup>359</sup> and those who play a substantial role in drug conspiracies.<sup>360</sup> Although the Act offered promise of relief from the harshness of the War's drug policy, it applied only prospectively.<sup>361</sup>

### 2.3. *The First Step Act of 2018*

Most recently, Congress enacted the First Step Act in 2018.<sup>362</sup> The First Step Act continued the momentum of redemption with a number of provisions to dismantle the War's legislation and further encourage reentry programming. Perhaps most significantly, the Act called for the retroactive application of the Fair Sentencing Act of 2010's powder-to-crack cocaine

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353. *Id.*

353. Fair Sentencing Act of 2010, *supra* note 9, § 1; Obama, *supra* note 12, at 826–27.

354. Fair Sentencing Act of 2010, *supra* note 9, § 2(a) (amending 21 U.S.C. § 841(b)(1)); Obama, *supra* note 12, at 826–27.

355. Fair Sentencing Act of 2010, *supra* note 9, § 2(a) (amending 21 U.S.C. § 841(b)(1)); Obama, *supra* note 12, at 826–27.

356. Fair Sentencing Act of 2010, *supra* note 9, § 2(a) (amending 21 U.S.C. § 841(b)(1)); Obama, *supra* note 12, at 826–27; Memorandum from Gary G. Grindle, Acting Deputy Atty. Gen., to All Federal Prosecutors 2 (Aug. 5, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fair-sentencing-act-memo.pdf> (regarding the Fair Sentencing Act of 2010).

357. Fair Sentencing Act of 2010, *supra* note 9, § 3; Grindle, *supra* note 356, at 1.

358. *United States v. Blewett*, 719 F.3d 482, 484 (6th Cir. 2013), *vacated*, 746 F.3d 647 (6th Cir. 2013) (en banc).

359. Fair Sentencing Act of 2010, *supra* note 9, § 6; Grindle, *supra* note 356, at 2.

360. Fair Sentencing Act of 2010, *supra* note 9, § 6.

361. *Id.*

362. First Step Act of 2018, *supra* note 9.

ratio of 18:1.<sup>363</sup> Thus, all federal prisoners convicted and sentenced under the old 100:1 ratio were to be resentenced under the 18:1 ratio.<sup>364</sup>

The First Step Act also allocated funding pursuant to the Second Chance Act of 2007<sup>365</sup> and included a number of reentry-related provisions that offer incentives to federal prisoners who participate in recidivism reduction programming in prison.<sup>366</sup> In addition, the Act encourages the federal Bureau of Prisons to partner with community, faith-based, and nonprofit organizations to provide federal recidivism reduction programming in prison.<sup>367</sup> The First Step Act not only continued to release the prison pressure valve, it also maintained the stream of federal dollars to support the prisoners of the War in their transition back home.

### 3. Executive Branch

The policies of the Executive Branch shifted along with those of the other two branches of government. In his 2004 State of the Union address, President George W. Bush asked Americans “to consider another group of Americans in need of help”—the 600,000 people released from prison back into society annually.<sup>368</sup> He proposed a \$300 million federal allocation to reentry efforts that would assist with providing newly released prisoners transitional housing and employment readiness programming—the Prisoner Reentry Initiative (“PRI”).<sup>369</sup> Both liberal Democrats, such as Representative John Conyers, and conservative Republicans, such as Sam Brownback, supported the proposal.

With the election of President Obama, DOJ made sweeping changes to the administration of criminal justice through its “Smart on Crime” initiative, which included major changes to federal charging policies.<sup>370</sup> In 2010, Attorney General Eric Holder began reversing and modifying a number of Department charging guidelines, including a policy that required federal prosecutors to charge federal defendants with offenses that could result in the

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363. *Id.* § 404 (codified at 21 U.S.C. § 841).

364. *Id.*

365. *Id.* Title V (codified at 34 U.S.C. § 10101).

366. *Id.* § 101. These incentives may include increased phone privileges, additional time for visitation, placement in a facility closer to the prisoner’s release residence, increased commissary, and extended email opportunities. *Id.*

367. *Id.* § 504(g).

368. *2004 State of the Union Address*, *supra* note 316.

369. *Id.*

370. Obama, *supra* note 12, at 824.



harshest possible sentence.<sup>371</sup> Instead, federal prosecutors were instructed to bring charges based on an individualized analysis of the defendant's circumstances, as "equal justice depends on individualized justice, and smart law enforcement demands it."<sup>372</sup> Attorney General Holder also directed federal prosecutors to stop utilizing "Section 851" enhancements—a recidivist enhancement that triggers severe mandatory minimums and longer sentences based on prior drug convictions—to acquire leverage in plea negotiations.<sup>373</sup> In 2013, and for the first time in thirty-three years, the proportion of drug offenders convicted of an offense carrying a minimum penalty declined and the overall federal prison population experienced a reduction.<sup>374</sup>

During President Obama's second term, DOJ announced a number of data driven reentry related initiatives emphasizing evidence-based practices to reduce recidivism and address core behavioral issues.<sup>375</sup> In 2016, it announced that the Bureau of Prisons ("BOP") was constructing "a semiautonomous school district within the federal prison system—one that blends face-to-face classroom instruction with education software on mobile tablets."<sup>376</sup> That same year, DOJ launched "National Reentry Week," where Attorney General Loretta Lynch announced the Administration's strategic reentry plan—the "Roadmap to Reentry."<sup>377</sup> The Roadmap outlined an overhaul to the federal prison system with the twin goals of reducing

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371. *Id.* at 825 (citing Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't Justice, to All Federal Prosecutors (May 19, 2010), <https://subjecttoinquiry.lexblogplatformtwo.com/files/2013/09/Holder-Charging-Memo-5-19-10.pdf>).

372. *Id.* (quoting Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't Justice, to All Federal Prosecutors (May 19, 2010), <https://subjecttoinquiry.lexblogplatformtwo.com/files/2013/09/Holder-Charging-Memo-5-19-10.pdf>).

373. *Id.* (citing Memorandum from Eric Holder, Jr., Att'y. Gen., U.S. Dep't Justice, to Department of Justice Attorneys (Sept. 24, 2014), [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/clemency/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/memorandum-to-all-federal-prosecutors-from-eric-h-holder-jr-attorney-general-on-851-enhancements-in-plea-negotiations.pdf)).

374. *Id.* at 826 (citing U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015 7–8 (2016), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf); BUREAU OF JUST. STATS., U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), <https://www.bjs.gov/content/pub/pdf/cpus13.pdf>).

375. *Id.* at 832 (citing *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, U.S. DEP'T OF JUSTICE (last updated Mar. 6, 2017), <https://www.justice.gov/archives/prison-reform>).

376. *Id.* (citing Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Announces Reforms at Bureau of Prisons to Reduce Recidivism and Promote Inmate Rehabilitation (Nov. 30, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-reforms-bureau-prisons-reduce-recidivism-andpromote-inmate>).

377. *Id.* (citing U.S. DEP'T OF JUSTICE, ROADMAP TO REENTRY (2016), <https://www.justice.gov/reentry/file/844356/download>).

recidivism and improving outcomes for prison releasees.<sup>378</sup> Halfway houses and residential reentry centers also experienced some reform, with DOJ crafting new standards and funding various reentry-related costs (for example, state-issued identification).<sup>379</sup>

Recent presidents have also used the executive clemency power to eliminate the relics of the War's drug policy. Though the clemency power was used frequently at one point in American history, the practice declined with the advent of the parole system.<sup>380</sup> With "truth in sentencing" rhetoric pronounced in the 1980s, the use of clemency was largely abandoned.<sup>381</sup> The Obama Administration looked closely at the clemency power as a possible tool to address the excessive sentencing practices of the War.<sup>382</sup> More specifically the efforts were meant

to identify types of inmates who deserve particular consideration for clemency—and to encourage individuals who have demonstrated good behavior in the federal system to seek clemency if they were sentenced under outdated laws that have since been changed and are no longer appropriate to accomplish the legitimate goals of sentencing.<sup>383</sup>

With this, the Obama Administration launched an executive clemency initiative. By the end of his Presidency, President Obama had commuted the criminal sentences of 1,927 individuals, totaling more commutations than the past eleven American presidents combined.<sup>384</sup> In using clemency during his term to remedy unjust wartime sentences, President Obama brought visibility to the power and its potential use. During his administration, President Trump also used the power to provide relief to federal prisoners of the War on Drugs.<sup>385</sup>

The reform in criminal justice policy at the federal level has trickled down to the states. States are currently reforming supervision and implementing sentencing practices that authorize alternatives to imprisonment.<sup>386</sup> They are increasing resources to support reentry-related

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378. *Id.*

379. *Id.*

380. *Id.* at 835 (observing that between 1885 and 1930, an average 222 pardons were issued per year) (citing Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 814 (2015)).

381. *Id.* at 835–36 (citing *Clemency Statistics*, U.S. DEP'T JUST. (last updated Oct. 28, 2016), <http://www.justice.gov/pardon/statistics.htm>).

382. *Id.* at 836.

383. *Id.*

384. *Id.* at 837.

385. *Id.*; *Pardons Granted by President Donald J. Trump (2017–2021)*, *supra* note 12.

386. Cole, *supra* note 171, at 30.

programming,<sup>387</sup> with a number of states reinvesting cost savings associated with early release programs into community programming in the inner cities.<sup>388</sup> States are closing prisons,<sup>389</sup> and many are offering more substance abuse programs, as well as diversions to treatment as an alternative to imprisonment.<sup>390</sup> However, the redemption and second chances offered in the criminal justice context at both the federal and state levels have failed to penetrate other critical areas of substantive law and regulation influenced by the War on Drugs, such as national housing policy.

### *B. Housing Policy*

“If you are neutral in situations of injustice, you have chosen the side of the oppressor.”  
– Desmond Tutu<sup>391</sup>

The War’s influence in the criminal context permeated federal housing policy. However, the reform movement has not resulted in the same legislative overhaul in the federal housing context. Instead, the statutes and regulations enacted during the War remain on the books without modification or amendment. With this, the proclamation of redemption and second chances for the prisoners of the War remains a promise unfulfilled: the offer extends only so far.

It is no secret that a disproportionate number of the poor have a criminal history or have immediate family members with criminal records. Over 11 million men and women are moving in and out of U.S. jails every year.<sup>392</sup> An estimated 100 million Americans—roughly a third of the adult population—have some type of criminal record.<sup>393</sup> Approximately 600,000 prisoners are

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387. *Id.* at 32.

388. CSG Justice Center Staff, *JRI Maximizing State Reforms Awards Announced for FY2017*, COUNCIL OF STATE GOV’TS JUSTICE CTR. (Oct. 18, 2017), <https://csgjusticecenter.org/jr>.

389. VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 6 (2009)

390. Cole, *supra* note 171, at 30.

391. OXFORD ESSENTIAL QUOTATIONS (5th ed. 2017), <https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00016497>.

392. Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POL’Y INITIATIVE (Aug. 14, 2015), <https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/>.

393. SENT’G PROJ., *AMERICANS WITH CRIMINAL RECORDS* 2 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>; WHITE HOUSE COUNCIL OF ECON. ADVISORS, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* 46 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf) [hereinafter *ECONOMIC PERSPECTIVES*].

released each year without a program to assist in the transition back into society.<sup>394</sup> Most of these individuals are slated to return home to their families, many of whom may be living in federally subsidized housing.<sup>395</sup>

As mentioned above, approximately two-thirds of those returning home rely on family for housing.<sup>396</sup> Studies indicate this dependence is long-term in nature, finding only 19% of the respondents are able to establish independent housing nearly a year and half after release.<sup>397</sup> It is critical that newly released persons have instant housing, as the highest risk of recidivism occurs immediately upon release.<sup>398</sup> Housing serves as the foundation of a productive and successful reintegration.<sup>399</sup> Positive outcomes associated with stable housing include better employment opportunities and a reduction in criminal recidivism.<sup>400</sup>

For those returning home, securing housing is extremely difficult. Prisoners returning to families that receive federal housing assistance may endanger the household subsidy and/or be outright denied a tenancy.<sup>401</sup> The private housing market also may not be an option, as returning persons typically have a minimal work history and little or no money.<sup>402</sup>

In the past thirty years, reentry scholars and advocates have encouraged the review and reform of a number of collateral consequences, gaining significant traction with voting and employment.<sup>403</sup> For example, Christopher Uggen and Jeff Manza's 2000 study demonstrated the way in which felon disenfranchisement could affect election outcomes.<sup>404</sup> Today,

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394. ECONOMIC PERSPECTIVES, *supra* note 393, at 24.

395. Letter from Shaun Donovan, Sec'y of Hous. & Urb. Dev., to PHA Executive Directors 1 (June 17, 2011), [https://www.usich.gov/resources/uploads/asset\\_library/Reentry\\_letter\\_from\\_Donovan\\_to\\_PHAs\\_6-17-11.pdf](https://www.usich.gov/resources/uploads/asset_library/Reentry_letter_from_Donovan_to_PHAs_6-17-11.pdf).

396. COLLATERAL CONSEQUENCES, *supra* note 306.

397. Jennifer Yahner & Christy Visher, *Illinois Prisoners' Reentry Success Three Years After Release*, URB. INST. (2008).

398. Pleggenkuhle, Huebner & Kras, *supra* note 308, at 381; Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 23 (Jeremy Travis & Michelle Wall eds., 2003).

399. Pleggenkuhle, Huebner & Kras, *supra* note 308, at 381.

400. *Id.*

401. *See generally* Travis & Waul, *supra* note 398.

402. COLLATERAL CONSEQUENCES, *supra* note 306; Travis & Waul, *supra* note 398, at 23.

403. *See e.g.*, Pinard & Thompson, *supra* note 16; Love, *supra* note 29; COLLATERAL CONSEQUENCES, *supra* note 306; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

404. *See generally* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement Laws in the United States*, 67 AM. SOC. REV. 777, 786–90 (2002) (presented at the annual meeting of the American Sociological Association, on August 16, 2000, in Washington D.C.).

most states re-enfranchise upon completion of a criminal sentence.<sup>405</sup> Moreover, for the past decade, not-for-profit agencies, as well as governmental bodies such as the Equal Employment Opportunity Commission (“EEOC”), have worked on implementing fairness standards in both the public and private employment markets concerning applicants with criminal histories. However, national housing policy has remained largely untouched. Individuals with a drug history or suspicion of drug activity remain excluded from federally subsidized housing at a time when they need it the most—upon release from prison. This translates to a “we’ll let ‘em vote when their sentence is complete, we may even let ‘em work but we don’t want to live with ‘em or let ‘em live off our taxpayer dollars” sentiment. The War’s anti-drug housing legislation should be reviewed with the purpose of recalibrating the rules to reflect the redemptive ideological shift in policy underlying the reform experienced in criminal context. Though minimal, there has been some movement in the housing arena that could be used as a springboard for a thorough and intentional review of anti-drug policy.

### 1. Judicial Branch

Unlike the experience in the criminal law context, the judicial branch has been somewhat timid and, at times, torn between administrative deference and the principles of fairness and equity. Courts reviewing housing rules and practices typically defer to PHA administrative decisions.<sup>406</sup> But courts have also invalidated and reversed PHA administrative determinations steeped in the harshness encouraged by the War on Drugs.<sup>407</sup> Lower court decisions addressing anti-drug legislation specifically fall into two principal categories: (1) PHA use of criminal records and (2) terminations based on drug-related criminal activity.

Perhaps the issue that has gained most traction in the courts is the use of criminal histories to disqualify or terminate households from federally subsidized housing. As mentioned, courts generally defer to PHA administrative termination decisions.<sup>408</sup> In recent years, however, some courts have invalidated PHA determinations. For example, in *Cabrini-Green Local Advisory Council v. Chicago Hous. Auth.*,<sup>409</sup> a federal district court struck down a lease provision that required the eviction of tenants convicted

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405. SENT’G PROJ., FELONY DISENFRANCHISEMENT: A PRIMER 2 (2014), [http://www.sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

406. See *supra* Part II.

407. *Id.*

408. *Hous. Auth. of New Orleans v. Green*, 657 So. 2d 552 (La. Ct. App. 1995); *South S.F. Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367, 370 (App. Dep’t. Super. Ct. 1995).

409. No. 96 C 6949, 2007 U.S. Dist. LEXIS 6520 (N.D. Ill. Jan. 29, 2007).

of a felony.<sup>410</sup> The court concluded that the provision was a blanket prohibition that improperly expanded the PHA's authority without any rational relation "to any legitimate housing purposes."<sup>411</sup> In another case, *Landers v. Chicago Housing Authority*,<sup>412</sup> the Chicago Housing Authority ("CHA") denied the petitioner's application based on "a pattern of arrest and/or conviction."<sup>413</sup> The petitioner produced evidence that all of the criminal charges were dismissed.<sup>414</sup> Despite this evidence, his application was still denied.<sup>415</sup> On appeal to the circuit court, the court determined that the petitioner did not pose a threat, and that almost all his arrests were dismissed and were also the result of homelessness.<sup>416</sup> The Illinois Appellate Court affirmed the circuit court.<sup>417</sup>

The War's housing program rules also make it difficult to maintain the family structure when a household member has a criminal history, particularly a drug history. For many households, accepting a federal housing program subsidy is a trap—you have housing assistance, but you must sacrifice a family member in exchange for housing. Many have trouble excising fathers, sons, daughter, and mothers from their households and thus risk a finding of program rule violations. The courts are hearing such cases. In *In re Juanita Matos v. Hernandez*,<sup>418</sup> a New York appellate court

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410. *Id.* at \*15–16. The lease provision read: "For termination of the LEASE, the following procedures shall be followed by LESSOR and the TENANT: . . . The LEASE may be terminated . . . [when] [t]he TENANT or any authorized family member is convicted of a felony." *Id.* at \*3–4 (alterations in original).

411. *Id.* at \*8–9, \*13.

412. 936 N.E.2d 735 (Ill. App. Ct. 2010).

413. *Id.* at 736.

414. *Id.* at 737, 740.

415. *Id.*

416. *Id.* at 737.

417. *Id.* at 742. The court reviewed the CHA's administrative plan rules and regulations. *Id.* at 738–39. Examining the provision governing rejections based on arrests reports, the court pointed out that the CHA's own policy requires the CHA to place "the applicant's name . . . on the wait list until documentation is presented showing the outcome of the case." *Id.* at 739. For the court, the evidence in the case was "bare bones." *Id.* at 740. Recognizing that the CHA is not required to meet any evidentiary standard, the court was displeased that the CHA failed to even meet a preponderance of the evidence standard. *Id.* at 741.

418. 79 A.D. 3d 466 (N.Y. App. Div. 2010); *see also* Wellington Hous. Auth. v. Murphy, 131 S.W.3d 378, 379 (Mo. App. 2004). In *Murphy*, the PHA terminated the respondent's lease for "having an unauthorized male . . . with a criminal record residing in your apartment and/or inviting a male . . . with a criminal record to your unit after being told of his criminal conviction and that he was not allowed to come on any Wellston Housing Authority's property, and/or placing other residents in danger because of [his] prior criminal activity." *Murphy*, 131 S.W.3d at 379 (alterations in original). On appeal, the housing authority argued that the trial court erred in determining that it could not evict the tenant for her guest's prior criminal record. *Id.* It argued that 42 U.S.C. 1437d(l)(6) granted PHAs the discretion to terminate a tenant's lease on the basis of a guest's "criminal activity" that may threaten the safety of other residents. *Id.* at 380. The Missouri Court

determined that a PHA's decision to condition the continuation of housing benefits on the permanent exclusion of the tenant's son "was so disproportionate to the offense as to shock the judicial conscience" and warrant a "lesser sanction."<sup>419</sup> In this case, the tenant's son was convicted of two misdemeanor offenses but was always in compliance with program rules.<sup>420</sup> The tenant was also disabled and relied on her son and his younger brother for her care.<sup>421</sup> The court held that the PHA's determination was disproportionate to the tenant's offense.<sup>422</sup> Nevertheless, courts generally continue to enforce terminations based on drug-related criminal activity.

The drug-related criminal activity lease provision has also been challenged in the courts. The provision extends not only to the tenant and household members, but also to "guest[s]" and other persons "under the tenant's control."<sup>423</sup> A "guest" subjects the household to greater liability than an "other person under the tenant's control."<sup>424</sup> A "guest," as defined by HUD, is a person "staying in the unit with the permission of the tenant or another household member with the authority to give such permission."<sup>425</sup> An "other person under the tenant's control" is defined as a "short-term invitee who is not 'staying' in the unit."<sup>426</sup> Taken together, the statute and regulations create strict liability for the actions of a third party.

In 2002, the United States Supreme Court in *HUD v. Rucker*<sup>427</sup> upheld the provision, determining that the no-fault eviction lease provision did not violate due process.<sup>428</sup> Instead, the PHA was acting as a landlord enforcing the lease.<sup>429</sup> In that case, public housing tenants of the Oakland Housing Authority ("OHA") in Oakland, California sued HUD, OHA, and the

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of Appeals interpreted the governing statute to only include criminal activity that occurred during the term of the lease. *Id.* Because the criminal record of the guest occurred prior to the term of the lease, that conduct was excluded from the conduct considered by the statute as relevant to a termination. *Id.* The PHA also argued that because it authorized to reject an applicant based on a criminal record or prevent individuals with criminal records from entering the premises, it is also authorized to evict a tenant based on a guest's criminal record. *Id.* at 380–81. The court disagreed recognizing that a PHA's right to exclude an individual with a criminal record is "separate and distinct" from the PHA's rights in relation to a termination of a tenant. *Id.* at 381.

419. *Hernandez*, 79 A.D.3d at 466–67.

420. *Id.* at 467.

421. *Id.*

422. *Id.* 466–67

423. 42 U.S.C. § 1437f(d)(1)(B)(iii).

424. *Id.*

425. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28,776, 28,777 (May 24, 2001) (codified at 24 C.F.R. § 5.100).

426. *Id.* at 28,777–78 (codified at 24 C.F.R. § 5.100).

427. 535 U.S. 125, 128 (2002).

428. *Id.* at 135.

429. *Id.* at 135.

Director of OHA in federal court after the Authority initiated eviction proceedings in state court based on the no-fault lease provision.<sup>430</sup> The state court eviction proceedings included three cases based on the following facts:

(1) that respective grandsons of respondents William Lee and Barbara Hill, both of whom were listed as residents on the leases, were caught in the apartment complex parking lot smoking marijuana; (2) that the daughter of respondent Pearlie Rucker, who resides with her and is listed on the lease as a resident, was found with cocaine and a crack cocaine pipe three blocks from Rucker's apartment; and (3) that . . . Herman Walker's caregiver and two others were found with cocaine in Walker's apartment. OHA had issued Walker notices of a lease violation on the first two occasions, before initiating the eviction action after the third violation.<sup>431</sup>

The tenants argued the statute did not require the lease terms to evict "innocent" tenants and alternatively argued that if the statute did require such evictions, then the statute is unconstitutional.<sup>432</sup>

The district court issued a preliminary injunction enjoining the OHA from evicting tenants "for drugrelated [sic] criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of and had no reason to know of, the drug-related criminal activity."<sup>433</sup> The U.S. Court of Appeals for the Ninth Circuit reversed and held that the statute did permit no-fault evictions regardless of the knowledge of the tenant.<sup>434</sup> An en banc panel of the Ninth Circuit reversed, and affirmed the district court's determination that HUD's interpretation authorizing the eviction of "'innocent' tenants 'is inconsistent with Congressional intent.'"<sup>435</sup> For the en banc court, such an interpretation raised "'serious questions under the Due Process Clause of the Fourteenth Amendment,' because it permits 'tenants to be deprived of their property interest without any relationship to individual wrongdoing.'"<sup>436</sup> The United States Supreme Court reversed, holding that 42 U.S.C. § 1437d(1)(6) unambiguously requires lease terms that vest local public authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew or should have known about the activity.<sup>437</sup>

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430. *Id.* at 129.

431. *Id.* at 128 (footnote omitted).

432. *Id.* at 129.

433. *Id.* at 129–30.

434. *Id.* at 130.

435. *Id.*

436. *Id.* at 135 (quoting *Rucker v. Davis*, 237 F.3d 1113, 1124–25 (9th Cir. 2001)).

437. *Id.* at 136.



The Court's decision was based primarily on a textual analysis finding that the statutory language was clear.<sup>438</sup> However, it addressed the due process concern, concluding that the government was not trying to punish or regulate "respondents as members of the general populace."<sup>439</sup> For the Court, the government was instead "acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required."<sup>440</sup> With this, third-party strict liability based on drug-related criminal activity was proclaimed constitutionally permissible.

Lower courts struggling with the third-party strict liability lease provision produce mixed results. Generally, a household member that possesses drugs or engages in drug-related criminal activity subjects the entire household to termination and/or eviction. For example, in *South San Francisco Housing Authority v. Guillory*<sup>441</sup> an entire family was evicted based on the actions of the son, a household member who possessed drugs within the home.<sup>442</sup> The court concluded that the entire household was liable for the acts of one member.<sup>443</sup>

Some courts have identified factual nuances that permit a tenant to escape liability. In *Housing Authority of the City of Hoboken v. Alicea*,<sup>444</sup> the PHA terminated a tenant from federally subsidized programming based on her son's arrest and conviction of drug possession in the tenant's apartment building—not in the tenant's unit. The court disagreed with the PHA's determination because the tenant did not allow her son to live in her unit nor did she have knowledge that her son was involved in drug-related criminal activity.<sup>445</sup> Also, in *Syracuse Housing Authority v. Boule*,<sup>446</sup> a tenant was evicted for the drug-related criminal activities of a babysitter's guest.<sup>447</sup> The court concluded that the tenant had not given the babysitter authority to invite guests to her unit and thus had no knowledge that the babysitter's guests sold drugs from her unit.<sup>448</sup> However, in *Housing Authority of New Orleans v. Green*,<sup>449</sup> a tenant was terminated because a friend of her daughter hid drugs

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438. *Id.* at 130–32.

439. *Id.* at 135.

440. *Id.*

441. 49 Cal. Rptr. 2d 367 (Cal. Ct. App. 1995).

442. *Id.* at 369.

443. *Id.* at 371–72.

444. 688 A.2d 108 (N.J. Super. Ct. App. Div. 1997).

445. *Id.* at 110.

446. 265 A.D.2d 832 (N.Y. App. Div. 1999).

447. *Id.* at 832.

448. *Id.*

449. 657 So. 2d 552 (La. Ct. App. 1995).

in her home without the tenant's knowledge. The Louisiana court upheld the PHA's termination, finding the tenant strictly liable for the actions of her daughter's guest.<sup>450</sup>

Bound by *HUD v. Rucker*, restricted by the principles of administrative law, and constrained by otherwise valid anti-drug legislation, the judiciary is left without an appropriate legal vehicle to join the movement experienced in the criminal law. Unless an opportunity presents itself, reform must originate from the other branches of government.

## 2. Legislative Branch

Congress and state legislatures have left the War's anti-drug housing policy largely intact. The rules enacted during the War have yet to be reviewed or modified, continuing to wreak havoc on the communities and families of the prisoners of the War. Although national housing policy, as a substantive area of law, has been largely ignored, the redemptive criminal legislation enacted recently mentions housing as a focus area in the development of wraparound reentry services. For example, the Second Chance Act promised to

provid[e] coordinated supervision and comprehensive services for offenders upon release from prison, jail, or a juvenile facility, including housing and mental and physical health care to facilitate re-entry into the community, and which, to the extent applicable, are provided by community-based entities.<sup>451</sup>

The goals underlying these proposed programs include helping "offenders to develop safe, healthy, and responsible family relationships and parent-child relationships,"<sup>452</sup> as well as the inclusion of the entire family unit in the reentry process.<sup>453</sup> Moreover, the legislation explicitly authorized grant funds to provide housing assistance to adult offenders.<sup>454</sup> Aside from this scant reference to housing brushed in broad strokes, the Act is silent.

The more recent First Step Act also considers housing in its reentry legislation. The Act codified the efforts of the Reentry Council, the cabinet-level agency formed during the Obama Administration that worked to

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450. *Id.* at 553–54.

451. Second Chance Act of 2007, *supra* note 344, § 101(a)(3); *see also* CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 17–18 (2004), <https://www.hrw.org/sites/default/files/reports/usa1104.pdf>.

452. Second Chance Act of 2007, *supra* note 344, § 101(a)(4)(A).

453. *Id.* § 101(a)(4)(B).

454. *Id.* § 111.

coordinate supportive services to prisoners returning home.<sup>455</sup> The legislation calls for federal interagency reentry collaboration among various cabinet-level agencies, including HUD, as well as nonprofits and other interested stakeholders to coordinate services to support new releasees.<sup>456</sup> The Act also reauthorizes Second Chance Act grant dollars to be allocated to agencies and nonprofit organizations involved in transitioning former prisoners back into society through coordinated services that include securing housing.<sup>457</sup> In assessing outcomes, housing was listed as a required performance measurement.<sup>458</sup> Moreover, the Act directs that the planning for transitional housing begin upon admission to jail or prison.<sup>459</sup>

While the First Step Act demonstrates a congressional acknowledgement of housing as a factor in achieving success in the transition from prison back to society, in reality it does little more than identify housing as a problem. The rules enacted during the War contribute to maintaining the housing problem and remain completely ignored. There are no amendments to any of the War on Drugs housing legislation. Indeed, they remain on the books and continue to be enforced with vigor by PHAs. Thus, the redemption promised in recent legislation only works to open the prison gates. It does not restore the formerly incarcerated to full citizenship with a clean slate. The drug history obtained during the War follows the formerly incarcerated individual through the prison gates and operates to close doors of opportunity shut by the War's anti-drug legislation.

### 3. Executive

Beginning with President George W. Bush in 2004, criminal recidivism and offender reentry has moved to the forefront of the political agenda. The stance is no longer “tough on crime.” Instead, it is “second chances.”

As mentioned above, President Bush proposed a four year \$300 million reentry grant called the Prisoner Re-entry Initiative (“PRI”) in his 2004 State of the Union Address.<sup>460</sup> The project operated through a federal partnership that included DOJ, the Department of Labor (“DOL”), and HUD.<sup>461</sup> The purpose of the PRI was to assist ex-offenders in successfully integrating back

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455. DEP'T OF JUSTICE, THE FEDERAL INTERAGENCY REENTRY COUNCIL: A RECORD OF PROGRESS AND ROADMAP FOR THE FUTURE 13 (2016), <https://s3.amazonaws.com/static.nicic.gov/Library/032749.pdf> [hereinafter FEDERAL INTERAGENCY REENTRY COUNCIL].

456. First Step Act of 2018, *supra* note 9, § 505.

457. *Id.* § 3041 (“Grant Program to Evaluate and Improve Educational Methods at Prisons, Jails, and Juvenile Facilities”).

458. *Id.* § 507(a)(1) (“Evaluation of the Second Chance Act Program”).

459. *Id.* § 502(f)(3)(C)(i).

460. 2004 *State of the Union Address*, *supra* note 316.

461. *Id.*

into their communities.<sup>462</sup> It was designed to provide job training and placement, transitional housing, and mentoring to non-violent offenders.<sup>463</sup>

The following year, DOL awarded thirty grants to faith-based and community organizations to develop employment programs and support services in other areas, including housing.<sup>464</sup> However, the PRI grant appropriation could not be used to provide direct financial housing assistance.<sup>465</sup> Instead, the expectation was that organizations would develop networks with housing providers that would in turn provide the assistance.<sup>466</sup> The interim report indicated that “[p]artnerships with housing providers that would allow participants in need of housing to access such services were generally not well developed.”<sup>467</sup> DOL’s “Final Report” on the PRI included housing outcomes, with staff citing “housing as the most significant obstacle to reintegration.”<sup>468</sup> As the Final Report explains,

[p]roject managers, case managers, and community justice representatives were asked to identify the major challenges that ex-offenders faced based on their experience in PRI and elsewhere. Housing was cited most often by these three types of interviewees, and substance abuse was the second most frequently mentioned challenge.<sup>469</sup>

While criminal backgrounds and lack of funds contribute to the difficulty of obtaining housing, Section 8 and public housing rules made the top half of the list of reported housing barriers.<sup>470</sup> In the end, the largest gap in services was reported to be housing.<sup>471</sup> The report was published in 2009, twelve years ago as of the date of this writing.<sup>472</sup> Little has changed.

The Obama Administration tackled criminal justice reform from the outset, but it also touched national housing policy. As mentioned above, the cabinets busily worked to deconstruct the lingering effects of the War on Drug in the criminal context. The administration also quietly implemented

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462. *Id.*

463. *Oversight of Federal Assistance for Prisoner Rehabilitation and Reentry in our States: Hearing Before the Subcomm. on Corr. and Rehab. of the S. Comm. on the Judiciary*, 109th Cong. 75–78 (2006) (statement of Robert J. Bogart, Director, Center for Faith Based Community Initiatives), <http://archives.hud.gov/testimony/2006/test092106.cfm> [hereinafter Statement of Bogart].

464. HALL & KOLOVICH, *supra* note 17, at 1.

465. *Id.* at 10.

466. *Id.*; *see also* Statement of Bogart, *supra* note 463.

467. HALL & KOLOVICH, *supra* note 17, at 15.

468. *Id.* at xxvii–xxviii.

469. *Id.* at 52, 53 tbl IV.1.

470. *Id.* at 105, tbl IV.17.

471. *Id.* at 111, tbl IV.19.

472. *See generally id.*

policies to reverse administrative practices in other areas influenced by the War. For example, the cabinet-level Reentry Council was established during Obama's administration, with the purpose of assisting prisoners returning home.<sup>473</sup> The Council consisted of twenty federal agencies charged with the administrative oversight and enforcement of legislation.<sup>474</sup> Along with DOJ and DOL, HUD was part of the Council.

A review of housing rules also started to take shape under the Obama Administration culminating in calls for PHAs to use their discretion to roll back the harshness of the War's exclusion policies. HUD Secretary Shaun Donovan reminded PHAs in a 2011 letter that the Obama Administration believed in second chances and explicitly encouraged PHAs "to allow ex-offenders to rejoin their families in the Public Housing and Housing Choice Voucher programs," when appropriate.<sup>475</sup> Recognizing that a substantial number of new releasees intend to return to their families who may live in federally-subsidized housing, the letter called for PHAs to balance family reunification goals with the safety of housing residents.<sup>476</sup> While the letter from Secretary Donovan did not have the force of amending the anti-drug federal housing statutes on the books, it did provide official executive support to PHAs deviating from War calls to exclude whenever an option.

In 2016, HUD also issued PIH Notice 2015-19, which offered guidance on the use of arrests to exclude households from federal housing programs.<sup>477</sup> The notice concluded that an arrest alone is insufficient evidence of criminal activity to evict or terminate a tenant, noting the Uniform Landlord Tenant Act, which provides that evictions should be dismissed when the notice only cites arrest as the basis for the eviction.<sup>478</sup> The HUD notice warned that a PHA's notice of noncompliance based on an arrest alone would be legally insufficient and result in dismissal.<sup>479</sup>

HUD also noted that such practices might lead to concerns under the Fair Housing Act ("FHA") in the form of discriminatory effects liability.<sup>480</sup> Although having a criminal history is not a protected trait, criminal records-

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473. FEDERAL INTERAGENCY REENTRY COUNCIL, *supra* note 455, at v.

474. *Id.*

475. HUD Letter Encourages Reuniting Ex-Offenders with Families without Compromising Safety, THE RESIDENT NEWSLETTER (Pub. & Indian Hous. Info. Res. Ctr., Gambrills, MD), Aug. 2011, at 1. See also Donovan, *supra* note 395, at 1.

476. Donovan, *supra* note 395, at 1.

477. U.S. DEP'T OF HOUS. & URB. DEV. OFFICE OF PUB. & INDIAN HOUS., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3-4 (Nov. 2, 2015).

478. *Id.* at 3.

479. *Id.*

480. KANOVSKY, *supra* note 304, at 2.

based exclusions violate the Act if a housing provider's practice or policy has an unjustified effect, even if the housing provider can show a valid interest and there is no evidence of discriminatory intent.<sup>481</sup> The fact that people of color are arrested at disproportionate rates might create discriminatory effect liability in certain areas. However, a statutory exemption, a relic from the War, protects housing providers that exclude individuals convicted of one or more enumerated drug crimes, regardless of the discriminatory effect.<sup>482</sup> Nevertheless, the Act requires that the practice or policy serve a substantial, legitimate, nondiscriminatory interest to pass muster.<sup>483</sup> With this, HUD concluded that policies and practices that fail to consider the amount of time that passed since the last incident of criminality would likely fall short of the required threshold.<sup>484</sup> Yet again, the HUD notice only carries the force of the Administration's political will without any real teeth or lasting impact.

Unlike the reform movement in the context of criminal law, national housing policy continues to operate according to the rules and practices established during the War. Congress has yet to revisit the legislation imposing harsh consequences for suspicions of drug-related activity, exclusions triggered by drug convictions, and terminations based on drug abuse. Although HUD started to refocus housing policy towards a more redemptive approach regarding drug offenders, the momentum died with the presidential election of Donald Trump and the confirmation of Ben Carson as HUD Secretary. The Trump administration's focus was on the removal of undocumented immigrants from federally subsidized housing programs.<sup>485</sup> The courts, bound by the principle of administrative deference and *HUD v. Rucker*, offer little relief from the War's draconian regulations, leaving returning prisoners and their families at the mercy of PHA discretion.

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481. 24 C.F.R. § 100.500 (2020); *see also* Texas Dep't of Hous. and Cmty. v. Inclusive Cmty's Project, Inc., 576 U.S. 519, 541 (2015) (explaining that housing providers may maintain a policy that causes disparate impact "if they can prove it necessary to achieve a valid interest"). This "unjustified" effect "occurs when the burden of the provider's practice or policy falls more often on housing market participants of one race or over another. *Id.* at 524.

482. 42 U.S.C. § 3607(b)(4). Section 807(b)(4) of the Fair Housing Act prohibits protection against people for convictions concerning manufacture or distribution. Thus, a housing provider will not be found liable for excluding individuals because they have been convicted of one or more specific drug crimes, regardless of any discriminatory effect that may result. *Id.*

483. 24 C.F.R. §§ 100.500(b)(i)–(iii); *see also* *Inclusive Cmty's Project*, 576 U.S. at 541 (explaining that housing providers may maintain a policy that causes disparate impact "if they can prove it necessary to achieve a valid interest").

483. KANOVSKY, *supra* note 304, at 7.

484. *Id.*

485. Tracy Jan, *HUD Secretary Ben Carson Defends Plan to Evict Undocumented Immigrants: 'It's not that we're cruel, mean-hearted. It's that we are logical.'*, WASH. POST (May 21, 2019, 1:45 P.M. EDT), <https://www.washingtonpost.com/business/2019/05/21/house-democrats-grill-hud-secretary-ben-carson-plan-evict-undocumented-immigrants/>.

## IV. CONCLUSION

This Article is meant as a call for a review of Wartime legislation and a reform of national housing policy. For the past twenty years, all three branches of government contributed to the reform movement in the criminal law. Starting with the judicial branch, major pieces of anti-drug legislation were dismantled, culminating in an era of redemption and second chances for prisoners of the War. The contributions of Congress and the Executive resulted in the development of release mechanisms to free drug prisoners from the overly punitive sentences meted out during the War. Congress amended the law while the Executive modified prosecutorial charging practices and resurrected the presidential clemency power. However, national housing policy remains a War stronghold.

If the political rhetoric of second chances and redemption is to be offered as a truth, all areas of substantive law affected by the policies of the War on Drugs should be reviewed and modified. Housing policy must consider the 600,000 people returning annually from America's prisons and jails and the recent legislation further opening the prison gates. Where will they go? Because housing is understood to be the most difficult challenge in the reentry process and is critical to post-incarceration stability, it is imperative that federal housing legislation be immediately examined and reformed as part of the current broader criminal reform.

While criminal law reform may have opened the door, the War's policies in other areas of law continue to keep prisoners excluded from mainstream society. This in effect continues the War's violence on targeted groups. It is just that now it is socio-economic as opposed to criminal. Such a schizophrenic policy sustains the revolving prison door. With the criminal law reform movement serving as a model, it is clear that it will take all three branches of government to participate in deconstructing the War's influence on national housing policy.

In his first 100 days, President Biden demonstrated an interest in addressing the housing crisis. He is showing a promising commitment to racial equality in housing and his administration is working to ensure the rules reflect this.<sup>486</sup> First, he appointed Marcia Fudge, an African American lawyer, to the position of HUD Secretary.<sup>487</sup> She immediately started the rollback of Trump era policies and resurrecting the fair housing work of the

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486. Tracy Jan, *Trump Gutted Obama-era Housing Discrimination Rules. Biden's Bringing Them Back.*, WASH. POST (April 13, 2021, 6:39 AM), <https://www.washingtonpost.com/us-policy/2021/04/13/hud-biden-fair-housing-rules/>.

487. Ebony Bowden, *Joe Biden Chooses Ohio Rep. Marcia Fudge to be HUD secretary*, NEW YORK POST (December 8, 2020, 7:13 PM), <https://nypost.com/2020/12/08/joe-biden-chooses-ohio-rep-marcia-fudge-to-be-hud-secretary/>.

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Obama Administration.<sup>488</sup> In addition, in his proposed Infrastructure plan, President Biden earmarked \$213 billion to housing with \$40 billion allocated to updating and upgrading public housing and a promise to build 500,000 units for low-income families.<sup>489</sup> With national attention now being paid to the housing issue, now is the time to review and modify HUD rules that work to exclude individuals with criminal histories. With funding available and refreshed political will, we can begin thinking of new and innovative ways to provide housing to this demographic.

Reentry, as a substantive area of law, is unique in its bipartisan legislative support. While other areas of law experience severe partisan divides, both sides of the aisle support reentry-centered initiatives and have done so for the past twenty-five years. In addition to critically reviewing and modifying legislation, a new legislative ideals should be developed that reflect the second chance principle in the area of housing.

Courts should continue to examine subsidized housing rules with an eye towards strictly enforcing constitutional due process requirements as well as protecting Fourth Amendment rights against unreasonable search and seizure. The War is no longer an appropriate justification for a constitutional exemption. While administrative deference is essential to the efficient workings of government, constitutional protections and the principle of fairness should be given full accord.

One a more local level, partnerships between local government, community-based organizations, and private landlords should be explored with a strong focus on geographic zones where most prisoners return. Financial backing by local government may incentivize private landlords typically renting in already depressed areas to loosen exclusionary policies. Another suggestion is to create affordable residential units for short-term stays for this group with strong ties to supportive services such as job training and placement, vocational training, and counseling. Boots-on-the-ground service providers should collaborate with government actors and the private market to investigate ways to offer safe and affordable housing to those returning home.

Policymakers and bureaucrats must understand that reentry is not strictly a criminal law topic. It transcends the criminal law and penetrates other areas such as housing, employment, public benefits. True reentry requires a commitment to offer a second chance to prisoners in all aspects of

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488. Jan, *supra* note 486.

489. Natalie Campisi, *Biden's Infrastructure Plan Earmarks \$213 Billion for Housing. Here's He How He'd Spend It*, FORBES ADVISOR (April 2, 2021, 4:59 PM), <https://www.forbes.com/advisor/mortgages/bidens-infrastructure-plan-earmarks-213-billion-for-housing-heres-how-hed-spend-it/>.



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life. Opening the prison gates is the first step in the transition back home. But to fully integrate the formerly incarcerated, we must open the door to American life by offering real and equal socio-economic opportunity as well embodying second chance ideologies in our day-to-day.

While benevolence and redemption are emerging as the signature creed of recent criminal justice reform, zero-tolerance and harsh regulation continue to dominate the underlying philosophy of other substantive areas of law shaped by the War on Drugs. This in turn offers a duplicitous political promise of a second chance. Thus, a second chance extends only as far as the purpose of release from prison or relief from a criminal sentence. It no longer applies once an individual walks across the threshold of the prison gate back into free society. It is there that the opportunity for a real second chance exists and, unfortunately, it is there that violence from the War continues in the socio-economic realm of American life.