

**CONCEPCION V. UNITED STATES: COMPASSIONATE DRUG
SENTENCING REFORM AGAINST A CRIMINAL LEGAL SYSTEM
BUILT ON RACIALIZED SOCIAL CONTROL**

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Abstract

The history of racial injustices in America is no secret and the persistence of systemic racism necessitates continued analysis and debate. This Comment discusses mass criminalization and incarceration, the War on Drugs, and how they have created a system of racialized social control. This Comment analyzes the racial biases and disparities that exist in sentencing for drug offenses, specifically in relation to crack-cocaine and powder-cocaine. It also examines legislative and judicial efforts to reform drug laws and suggests that these reforms are insufficient to end systemic injustices. This Comment argues that ending the use of retributive punishment for non-violent drug crimes is crucial for addressing mass criminalization and incarceration, but it also emphasizes the need for broader societal change in response to criminal behavior in general. It calls for systemic reform and dismantling systems of policing and incarceration. This Comment concludes by advocating for compassionate policies to address non-violent drug crimes, prioritizing investing in communities, and the fulfillment of foundational needs.

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INTRODUCTION

America has a history of committing racial injustices and has consistently relied on inhumane policies to create a racial hierarchy between

white people and Black people.¹ That history continues to repeat itself today by enabling slavery through the United States (U.S). criminal legal system. The criminal legal system in the U.S. relies on “implicit and explicit bias[es] that pervade[] society” to reinforce mass criminalization.² Racial biases and racialized social control in the criminal legal system are facilitated through the prohibition and criminalization of drugs and subsequent sentencing disparities.³ Notably, drugs that are more commonly used by Black people, such as crack-cocaine, are associated with harsher punishment than drugs used by white people, such as powder-cocaine.⁴

Research shows that retributive punishment does not reduce or deter drug use or the issues stemming from drug use such as addiction and drug trafficking.⁵ It is clear “that medicine and psychology work better than carceral institutions and that no one benefits from marginalizing already marginalized and often sick individuals.”⁶ Still, drug arrests currently “constitute the largest category of arrests in the United States.”⁷

In order to address the myriad of issues related to the War on Drugs,

¹ Adjoa Artis Aiyetoro, *Racial Disparities in Punishment and Alienation: Rebelling for Justice*, 71 NAT’L LAWYERS GUILD REV. 193, 195–96, 203–05, 219 (2014); Yaner Lim, *Understanding the War on Drugs in America Through the Lens of Critical Race Theory*, 5 BRISTOL L. REV. 156, 157 (2018); see also discussion *infra* Section III.A. This Comment capitalizes “Black” to acknowledge that slavery robbed Black people of their cultural identities and to respect its meaning as a racial, cultural, and ethnic identity. Mike Laws, *Why We Capitalize ‘Black’ (and Not ‘White’)*, COLUMBIA JOURNALISM REV. (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php>. The word “white” is not capitalized because it has a different meaning and “capitalizing the word in this context risks following the lead of white supremacists.” *Id.*

² André Douglas Pond Cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TUL. L. REV. 469, 479 (2022); André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J. L. & POL’Y 407, 422, 434 (2016); Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1117–18 (2013); Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41, 45 (2011).

³ Provine, *supra* note 2, at 45–46; André Douglas Pond Cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 U. ARK LITTLE ROCK L. REV. 453, 460, 470–71 (2022); Robert D. Crutchfield, *The Peculiar Journey: Race, Racism, and Imprisonment in American History*, 51 CRIME & JUST. 105, 126–28 (2022).

⁴ Provine, *supra* note 2, at 46.

⁵ Phil Lord, *Moral Panic and the War on Drugs*, 20 U.N.H. L. REV. 407, 413 (2022).

⁶ *Id.* at 407.

⁷ Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685, 1695 (2021).

Congress has slowly attempted to reform the drug laws in the U.S.⁸ However, simply reforming drug laws is not enough to correct the systemic injustices forced upon disadvantaged communities and communities of color. To effectuate meaningful change, the resources invested in the War on Drugs should be rerouted to the communities that the war destroyed.⁹ This Comment builds on prior scholarship which has extensively discussed mass incarceration, the War on Drugs, and how both have created a system of “racialized social control.”¹⁰ This Comment also examines modest efforts made by the federal legislature to improve the current system via statutes like the First Step Act and presents more effective measures to promote community investment and restitution.

Part I of the Comment begins by examining the history that led to mass criminalization and the sentencing disparities between crack and powder cocaine, then discusses what it means to be labeled a criminal. It then reviews legislative efforts to reduce drug sentences and enactment of the First Step Act. Part II reviews the Supreme Court’s opinion in *Concepcion v. United States*¹¹ and the Court’s application of the First Step Act. Part III then reviews the parallels between slavery and mass criminalization of drugs arguing that this has led to the birth of a new caste system.¹² It then explains why reducing drug sentences is not enough to end mass criminalization. Part IV then argues that to have a more effective

⁸ Fair Sentencing Act of 2010, Pub. L. 111-220, Aug. 3, 2010, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C. § 801) (amending mandatory minimum sentences); First Step Act of 2018, Pub. L. 115-391, Dec. 21, 2018, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C. § 1) (implementing sentencing reform by reducing sentences for drug crimes); Kara Gotsch & Marc Mauer, *A Step in the Right Direction on Criminal Justice Reform*, 76 N.Y.U. ANN. SURV. AM. L. 397, 397–401 (2021).

⁹ Cummings & Ramirez, *supra* note 2, at 473.

¹⁰ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th ed. 2020); MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* (2020); CAROL ANDERSON, *WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE* (2017); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); Evan Coleman, *A Rose is Still a Rose: Rethinking the Impact of Prison Alternatives*, 44 N.C. CENT. L. REV. 61 (2022); Robert D. Crutchfield, *The Peculiar Journey: Race, Racism, and Imprisonment in American History*, 51 CRIME & JUST. 105 (2022); Samantha Pereira, *Mass Incarceration: Slavery Renamed*, 6 RSCH J. JUST. STUD. & FORENSIC SCI. 42 (2018); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531 (2016); Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043 (2010).

¹¹ 597 U.S. 481 (2022).

¹² ALEXANDER, *supra* note 10, at 15.

impact on ending mass criminalization, the U.S. must stop using retributive punishment for non-violent drug crimes. Instead, the U.S. should focus on problem solving and compassion and develop policies dedicated to providing people and communities with adequate foundational needs.

I. BACKGROUND

The formal War on Drugs began in the 1970s, contributing significantly to the mass criminalization of Black, Hispanic, and poor communities.¹³ Mass criminalization worsened in the 1980s because of sentencing disparities between crack- and powder-cocaine.¹⁴ This time period yielded a new meaning for the “felon [or criminal] label”¹⁵ and gave rise to a new “caste system” in the U.S.¹⁶ Then, years later, in an attempt to atone for egregious sentencing disparities, Congress began making efforts to reduce sentences for those who were victims of the unjustified sentencing practices.¹⁷

A. *The War on Drugs, Mass Incarceration, and Mass Criminalization*

President Richard Nixon officially declared the War on Drugs on July 17, 1971.¹⁸ President Nixon asserted that the War on Drugs was necessary because the drug addiction crisis was a national emergency.¹⁹ In reality, the War on Drugs was a political strategy that used deeply rooted racial prejudices against Black people to gain momentum.²⁰ This is evident

¹³ Cummings & Ramirez, *supra* note 2, at 476–77; Provine, *supra* note 2, at 49; Lim, *supra* note 1, at 159–61; Butler, *supra* note 10, at 1047–48; Cummings & Ramirez, *supra* note 3, at 457–60.

¹⁴ Cummings & Ramirez, *supra* note 2, at 475–79; Provine, *supra* note 2, at 46–47.

¹⁵ ALEXANDER, *supra* note 10, at 2.

¹⁶ *Id.* at 15.

¹⁷ Gotsch & Mauer, *supra* note 8, at 399–401.

¹⁸ Exum, *supra* note 7, at 1691; André Douglas Pond Cummings, “*All Eyes on Me*”: *America’s War on Drugs and the Prison Industrial Complex*, 15 J. GENDER, RACE & JUST. 417, 417 (2012).

¹⁹ Exum, *supra* note 7, at 1691.

²⁰ *Id.*; Cummings, *supra* note 18, at 426–29; Juan R. Torruella, *Déjà Vu: A Federal Judge Revisit the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 193–94 (2011); see also ALEXANDER, *supra* note 10, at xiv (“[T]he political strategy of divide, demonize, and conquer has worked for centuries in the United States—since the days of slavery—to keep poor and working people angry at (and fearful of) one another rather than uniting to challenge unjust political and economic systems.”).

based off of comments purportedly made during an interview by John Ehrlichman, the domestic policy advisor for President Nixon. Ehrlichman is reported to have stated:

You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or Black, but by getting the public to associate the hippies with marijuana and Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.²¹

The U.S. implemented and upheld drug laws that demonstrated and sustained blatant racism.²² The War on Drugs is no different and is waged strategically to purposefully incarcerate people of color and those from disadvantaged communities.²³ The criminalization of drugs and harsh punishment for drug offenses led “to the mass and disproportionate incarceration of drug offenders from disadvantaged populations—nearly eighty percent of whom are Black and Latinx in federal prison.”²⁴ Ultimately, the War on Drugs created and spread rhetoric designed to heighten fear of people of color to create another legal form of race-based policing; which is exactly what President Nixon wanted when he started the war.²⁵

There is a distinction between mass incarceration and mass criminalization that is crucial to understand to fully realize the impact of the War on Drugs. Michelle Alexander, author of the New York Times best-selling book, *The New Jim Crow*, emphasizes that:

When people think about the system of mass incarceration, they typically just think about who's in prison at any given moment. But . . . this system of mass incarceration is

²¹ Exum, *supra* note 7, at 1691.

²² Exum, *supra* note 7, at 1691, 1694–96; Provine, *supra* note 2, at 45–46; *see also* Aiyetoro, *supra* note 1, at 200–04.

²³ Cummings & Ramirez, *supra* note 2, at 485; *see also* ALEXANDER, *supra* note 10, at 5 (“Mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”).

²⁴ Cummings & Ramirez, *supra* note 2, at 479.

²⁵ Exum, *supra* note 7, at 1696; Cummings & Ramirez, *supra* note 3, at 460–66.

actually a system of mass criminalization. It is a system that criminalizes people at very young ages It labels them criminals and felons, and then strips them of basic civil rights And this happens even if you’ve been sentenced only to probation.²⁶

Although it may seem like criminalization ends once an incarcerated person completes their sentence, that is not the case. Instead, formerly incarcerated individuals will carry the stigma that comes with being incarcerated for the rest of their lives.²⁷ Once labeled a criminal, these people are relegated to second-class citizenship and legalized discrimination.²⁸ The criminal label is “powerfully reinforced by social stigma” along with regulations and laws that cause formerly incarcerated persons to lose their right to vote and participate in jury duty.²⁹ Additionally, formerly incarcerated people may legally be denied “employment, housing, and public benefits” very similar to the way that Black people were segregated during the Jim Crow era.³⁰

B. The Crack Epidemic and Sentencing Disparities Between Crack and Powder Cocaine

While President Nixon started the War on Drugs in the 1970s, it was President Ronald Reagan who “instrumentalized and militarized” the war in the 1980s.³¹ As President Reagan fervently pursued the harshest means to punish drug offenders, he chose to rely on sentencing as his choice of weapon and the Anti-Drug Abuse Act of 1986 was born.³² The Act is infamous for its 100-to-1 ratio between crack-cocaine and powder-cocaine sentencing guidelines.³³ Crack-cocaine and powder-cocaine are

²⁶ David Remnick, *Ten Years After “The New Jim Crow,”* THE NEW YORKER: INTERVIEW (Jan. 17, 2020), <https://www.newyorker.com/news/the-new-yorker-interview/ten-years-after-the-new-jim-crow>.

²⁷ *Id.*

²⁸ ALEXANDER, *supra* note 10, at 5; Jamila Jefferson-Jones, “*Community Dignity Takings*”: *Dehumanization and Infantilization of Communities Resulting from the War on Drugs*, 66 U. KAN. L. REV. 993, 998–1004 (2017).

²⁹ ALEXANDER, *supra* note 10, at 5.

³⁰ *Id.*

³¹ Cummings & Ramirez, *supra* note 2, at 479.

³² Exum, *supra* note 7, at 1694.

³³ *Id.*

pharmacologically identical.³⁴ However, under the Anti-Drug Abuse Act, a defendant in possession of five grams of crack-cocaine received the same sentence as a defendant in possession of five-hundred grams of powder-cocaine.³⁵ So, a defendant in possession of crack-cocaine, mostly used in “low income communities of color” would receive a sentence 100 times worse than a defendant in possession of powder-cocaine, mostly “used by upper-class whites” despite crack-cocaine and powder-cocaine being almost identical drugs.³⁶

With the Anti-Drug Abuse Act in his arsenal, President Reagan emboldened police forces and put them at the front of the line to begin their assault on select American cities.³⁷ Despite well documented use of drugs running rampant on university campuses and throughout white-collar corporate America, “[t]he federally sponsored [War on Drugs] was never waged on Wall Street, in suburban America, or upon fraternity and sorority houses.”³⁸ Although the War on Drugs was politicized and believed to be a neutral attack on drug abuse, in reality,

The [War on Drugs] devolved into a literal decades-long military style offensive played out on the streets of urban and poor communities of color throughout the United States, replete with battering rams, tanks, helicopters, grenades, and SWAT tactical teams killing, maiming, and imprisoning primarily people of color.³⁹

Despite the notion that the War on Drugs is neutral, historical evidence substantiates the claim that the War on Drugs is instead a war on people of color and poor individuals.⁴⁰ While Black people and white people use drugs at similar rates, Black people are much likelier to be convicted for drug crimes and also receive much longer sentences than white people

³⁴ Gotsch & Mauer, *supra* note 8, at 400.

³⁵ Exum, *supra* note 7, at 1694.

³⁶ Cummings & Ramirez, *supra* note 2, at 475–76.

³⁷ See Exum, *supra* note 7, at 1692.

³⁸ Cummings & Ramirez, *supra* note 2, at 484.

³⁹ *Id.* at 471.

⁴⁰ *Id.* at 478; Aiyetoro, *supra* note 1, at 200–04; see also ALEXANDER, *supra* note 10, at 124–25 (“The notion that most illegal drug use and sales happens in the ghetto is pure fiction. Drug trafficking occurs there, but it occurs everywhere else in America as well. Nevertheless, black men have been admitted to state prison on drug charges at a rate that is more than thirteen times higher than that of white men.”).

for drug offenses.⁴¹ Data from 2022 to 2024 indicates over 44% of those incarcerated in federal prison were convicted of a drug offense, and even though Black people only make up a little over 13% of the U.S. population, they account for almost 39% of the federal prison population.⁴²

C. Sentence Reduction and the First Step Act

The War on Drugs waged relentlessly for almost forty years.⁴³ Finally, after years of advocacy for change, drug reform started to take place.⁴⁴ Particularly, the U.S. Sentencing Commission (Commission) began to take steps to reduce the prison population by publishing reduced sentencing guidelines “first for crack cocaine offenses and later for all drug offenses.”⁴⁵ The Commission made the drug sentencing guideline amendments retroactive.⁴⁶ Additionally, in 2006 then-Senator Joe Biden

⁴¹ SAMUEL R. GROSS, MAURICE POSSLEY, KEN OTTERBOURG, KLARA STEPHENS, JESSICA WEINSTOCK PAREDES, & BARBARA O'BRIEN, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTION IN THE UNITED STATES 27–28 (2022); see PATRICK A. LANGAN, U.S. DEPT. OF JUST., THE RACIAL DISPARITY IN U.S. DRUG ARRESTS 2–3 (1995); ALEXANDER, *supra* note 10, at 123 (“If there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in illegal drug dealing than people of color.”); Provine, *supra* note 2, at 45–47.

⁴² Brandon Hasbrouck, *Movement Constitutionalism*, 75 OKLA. L. REV. 89, 94–95 (2022); Cummings & Ramirez, *supra* note 3, at 455 n.10; *Inmate Statistics*, FED. BUREAU OF PRISONS (Jan. 20, 2024), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp; *Inmate Race*, FED. BUREAU OF PRISONS (Feb. 3, 2024), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp; *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045223> (last visited Feb. 12, 2024).

⁴³ Gotsch & Mauer, *supra* note 8, at 398; Torruella, *supra* note 20, at 193–98; Cummings & Ramirez, *supra* note 3, at 455–58.

⁴⁴ Fair Sentencing Act of 2010, Pub. L. 111-220, Aug. 3, 2010, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C. § 801) (amending mandatory minimum sentences); First Step Act of 2018, Pub. L. 115-391, Dec. 21, 2018, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C. § 1) (implementing sentencing reform by reducing sentences for drug crimes); Michelle S. Phelps, *Possibilities and Contestation in Twenty-First-Century US Criminal Justice Downsizing*, 12 ANN. REV. L. & SOC. SCI 153, (2016); Gotsch & Mauer, *supra* note 8, at 399.

⁴⁵ Gotsch & Mauer, *supra* note 8, at 398–99; News Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Reports on Impact of Fair Sentencing Act of 2010: Finds Decline in Federal Crack Cocaine Prosecutions (Aug. 3, 2015).

⁴⁶ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., on The U.S. Sentencing Commission's Decision on Retroactive Application of the Amendment to

sponsored a bill to dismantle the disparity between crack-cocaine and powder-cocaine.⁴⁷ Despite the bill's failure to pass, Biden persisted in prioritizing reform after he became the Vice President.⁴⁸ Senator Richard Durbin took over Biden's bill and successfully negotiated a proposal that decreased the quantity disparity to 18-to-1.⁴⁹

Then in 2010, Congress enacted the Fair Sentencing Act to address the sentencing disparity between crack-cocaine and powder-cocaine.⁵⁰ However, Congress did not explicitly specify whether the Fair Sentencing Act should be applied to "those previously sentenced, those whose sentences had yet to become final, or only those committing offenses after the [Fair Sentencing Act] went into effect."⁵¹ After the debate began over which incarcerated people were able to receive relief under the Fair Sentencing Act, the Supreme Court heard *Dorsey v. United States*⁵² which considered whether or not the Fair Sentencing Act had a retroactive effect.⁵³ In *Dorsey*, the Court held that the Fair Sentencing Act did not have a retroactive effect and should only be applied to those who did not yet have a final sentence and to those who committed an offense after the effective date of the Fair Sentencing Act.⁵⁴ The Court's decision in *Dorsey* was a major

the Sentencing Guidelines for Crack Cocaine Offenses, to All Federal Prosecutors (July 1, 2011).

⁴⁷ Gotsch & Mauer, *supra* note 8, at 401; *Federal Cocaine Sentencing Law: Reforming the 1-to-1 Crack/Powder Disparity: Hearing on S. 110-672 Before the Subcomm. on Crime & Drugs of the Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Joseph R. Biden, then-Senator).

⁴⁸ Ian S. Thompson, *Now is the Time to Crack the Disparity Once and for All*, ACLU (Nov. 13, 2008), <https://www.aclu.org/news/smart-justice/now-time-crack-disparity-once-and-all> ("the Obama/Biden transition agenda's civil rights section [discusses] the incoming-administration's support for ending the disparity"); German Lopez, *Joe Biden's Long Record Supporting the War on Drugs and Mass Incarceration, Explained*, VOX (July 31, 2019, 10:24 PM), <https://www.vox.com/policy-and-politics/2019/4/25/18282870/joe-biden-criminal-justice-war-on-drugs-mass-incarceration>.

⁴⁹ *President Obama Signs Durbin's Fair Sentencing Act Into Law*, DICK DURBIN U.S. SENATOR ILL. (Aug. 3, 2010), <https://www.durbin.senate.gov/newsroom/press-releases/president-obama-signs-durbins-fair-sentencing-act-into-law>.

⁵⁰ Fair Sentencing Act of 2010, Pub. L. 111-220, Aug. 3, 2010, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C. § 801); Jesse Lee, *President Obama Signs the Fair Sentencing Act*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Aug. 3, 2010, 4:58 PM), <https://obamawhitehouse.archives.gov/blog/2010/08/03/president-obama-signs-fair-sentencing-act>.

⁵¹ Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 UNIV. MICH. J. L. REFORM 53, 54 (2013).

⁵² 567 U.S. 260 (2012).

⁵³ *Id.* at 264.

⁵⁴ *Id.* at 280-82.

disappointment and unfairly left thousands of people to suffer the duration of incredibly long sentences resulting from racist and disparate drug laws.

Over the next several years, policymakers and advocates continued to make attempts to reduce drug sentences and the overall impact of the War on Drugs and mass criminalization, but bureaucracy and politics stunted any real progress. After years of debate, the First Step Act was signed into law in 2018 to further address the mass criminalization that resulted from the War on Drugs.⁵⁵ The First Step Act added the long sought-after retroactive component to the Fair Sentencing Act.⁵⁶ Within one year of the retroactive provision of the First Step Act taking effect, “2,612 people were granted sentence reductions.”⁵⁷ However, the question remained: can district court judges consider “intervening changes of law . . . or changes of fact . . . in adjudicating a First Step Act motion?”⁵⁸ Put differently, would judges be able to take into consideration the discriminatory motivation that led to the unjust sentencing disparities between crack and powder cocaine? *Concepcion* held that they may.⁵⁹

II. CONCEPCION V. UNITED STATES

A. Facts

In 2007, Carlos Concepcion pled guilty to distribution of “five or more grams of crack cocaine” and in 2009, was sentenced to 228 months, or nineteen years, in prison.⁶⁰ Concepcion’s Sentencing Guidelines range would have been fifty-seven to seventy-one months, but Concepcion qualified as a “career offender”, so his Sentencing Guidelines range was enhanced to 262 to 327 months.⁶¹ A few years later, Congress passed the Fair Sentencing Act of 2010 with the intent to correct sentencing disparities between crack and powder cocaine by increasing “the amount of crack cocaine needed to trigger a 5-to-40-year sentencing range from 5 grams to

⁵⁵ First Step Act of 2018, Pub. L. 115-391, Dec. 21, 2018, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C. § 1); NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019).

⁵⁶ First Step Act of 2018, Pub. L. 115-391; JAMES, *supra* note 55, at 8–9.

⁵⁷ Gotsch & Mauer, *supra* note 8, at 408.

⁵⁸ *Concepcion v. United States*, 597 U.S. 481, 486 (2022).

⁵⁹ *Id.*

⁶⁰ *Id.* at 487.

⁶¹ *Id.*

28 grams.”⁶²

The Fair Sentencing Act was not applied retroactively until 2011, when the Sentencing Guidelines were amended “to lower the Guidelines range for crack-cocaine offenses” and for some defendants that reduction would apply retroactively.⁶³ Concepcion was not eligible to receive a sentence reduction under the 2011 amendment because of his status as a career offender.⁶⁴ Then, in 2018 the First Step Act was enacted by Congress.⁶⁵ The First Step Act authorized sentence reduction for defendants who were convicted of “certain crack-cocaine offenses ‘as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed.’”⁶⁶

B. Procedural History

In 2019, after the First Step Act was passed, Concepcion sought sentence reduction by filing a pro se motion under the Act.⁶⁷ Concepcion argued that “§ 2 of the Fair Sentencing Act ‘modified’ the statutory penalties for his conviction.”⁶⁸ The Government acknowledged that Concepcion was eligible for relief but opposed the motion because Concepcion’s original 228-month sentence was already “within the new Guidelines range of 188 to 235 months.”⁶⁹

With the representation of counsel, Concepcion filed a reply brief arguing that one of his prior convictions was vacated so he was not considered a career offender and since the career offender enhancement would no longer apply to his sentence, his actual sentencing “Guidelines range should be 57 to 71 months.”⁷⁰ Concepcion also urged the District Court to consider evidence of rehabilitation since his sentencing.⁷¹ The District Court denied Concepcion’s motion because the court did not believe that they were authorized by the First Step Act to consider that Concepcion no longer qualified as a career offender.⁷² The decision was affirmed by the

⁶² *Id.* at 488.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 489.

⁷¹ *Id.*

⁷² *Id.*

Court of Appeals.⁷³ The divided opinion “added to the disagreement . . . as to whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact.”⁷⁴ The U.S. Supreme Court granted certiorari.⁷⁵

C. Opinion of the Court

Justice Sotomayor delivered the majority opinion of the Court and Justices Thomas, Breyer, Kagan, and Gorsuch joined the majority opinion.⁷⁶ The Supreme Court reversed the decision of the U.S. Court of Appeals for the First Circuit holding that the First Step Act requires a district court to consider evidence and arguments raised by a party in support of sentence reduction.⁷⁷ Justice Sotomayor began her argument by making note of the historical tradition of federal courts exercising discretion and considering a range of relevant evidence and sources when determining an appropriate sentence.⁷⁸ Further, she explained that “Congress passed the Fair Sentencing Act of 2010 to correct the harsh disparities between crack and powder cocaine sentencing.”⁷⁹ Justice Sotomayor argued that Congress enacted the First Step Act with that historical context in mind.⁸⁰ Therefore, district courts may consider changes of law or fact when making a sentence reduction determination under the First Step Act.⁸¹

Justice Sotomayor explained that in the same way that a district court must take into consideration a party’s arguments during sentencing, pursuant to the First Step Act district courts must take into consideration intervening changes raised by the parties during sentence reduction proceedings.⁸² However, she noted that while courts must consider a party’s arguments, “the First Step Act does not compel courts to exercise their discretion to reduce any sentence based on those arguments.”⁸³ Justice Sotomayor concluded that district courts must consider a party’s nonfrivolous arguments, but when courts exercise their discretion, they may

⁷³ *Id.* at 490.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 485.

⁷⁷ *Id.* at 502.

⁷⁸ *Id.* at 486.

⁷⁹ *Id.* at 487–88.

⁸⁰ *Id.* at 486.

⁸¹ *Id.*

⁸² *Id.* at 486–87.

⁸³ *Id.* at 487.

choose whether or not to agree with the arguments brought before the court and the court only needs to provide “a brief statement of [its] reason[ing].”⁸⁴

D. Justice Kavanaugh’s Dissenting Opinion

Justice Kavanaugh dissented from the majority opinion and Chief Justice Roberts and Justices Alito and Barrett joined in the dissent.⁸⁵ In his dissent, Justice Kavanaugh argued that the First Step Act permits a district court to resentencing a defendant considering only “the lower sentencing ranges for crack-cocaine offenses . . . [but not] consideration of unrelated intervening legal or factual changes.”⁸⁶ Therefore, Justice Kavanaugh reasoned that there is no express grant in the First Step Act permitting consideration of intervening changes when adjudicating a sentence reduction case.⁸⁷

III. RACIAL CASTE SYSTEMS IN THE U.S.

Part A of this Section begins by reviewing the parallels between slavery and mass criminalization of drugs, arguing that this resulted in the birth of a new caste system. Part A continues to discuss who is affected by this new caste system and what the system ultimately achieves. Part B then asserts that while the Court’s decision in *Concepcion* is a step towards reducing mass criminalization and the resulting caste system, stronger measures are needed to correct the existing systemic issues. In support of this assertion, Part B analyzes the issues that can result by leaving sentence reduction decisions up to a judge’s discretion and by making sentence reduction available to only certain incarcerated individuals.

A. The Birth of a New Caste System: The Parallels Between Slavery and Mass Criminalization of Drugs

The U.S. has the highest number of people incarcerated than any other country in the world, a majority of whom are Black.⁸⁸ But, why would

⁸⁴ *Id.* at 501.

⁸⁵ *Id.* at 502.

⁸⁶ *Id.* at 504.

⁸⁷ *Id.* at 504–05.

⁸⁸ Aaron Gottlieb & Kalen Flynn, *The Legacy of Slavery and Mass Incarceration: Evidence from Felony Case Outcomes*, SOC. SERV. REV. 3, 3 (2021); Delgado & Stefancic, *supra*

the supposed leader of the free world have so many of its citizens imprisoned (notably when a majority of those imprisoned are racial minorities)?⁸⁹ The answer is that the American criminal legal system is a form of modern-day slavery that intentionally targets racial minorities through the mass criminalization of drugs which has led to a 500% increase in the number of people incarcerated in the U.S.⁹⁰

1. The New Caste System

After the end of the Civil War in 1865, the Emancipation Proclamation was passed and the Thirteenth Amendment was adopted to “officially end slavery in the United States.”⁹¹ However, southern states adamant on keeping a hierarchy between white people and Black people, quickly enacted “Black Codes” that were meant “to maintain white supremacy and to continue their pre-war control of Black people’s labor and behavior.”⁹² Black Codes were based off of slave codes and were a legal way to force Black people into labor, control property rights of Black people, and force Black children into labor.⁹³

Many Northerners were enraged by Southerners’ attempts at restoring slavery through the enactment of Black Codes.⁹⁴ In an attempt to subvert the Black Codes, Congress stepped in and passed the Reconstruction Act of 1867, requiring every state to “uphold equal protection under the 14th amendment.”⁹⁵ However, due to continued conflict between the North

note 10, at 1552 (“excessive imprisonment is a source of misery for African-Americans . . . [and] [o]ur prisons house over two million inmates, a much larger percentage of the population than that of any other country”).

⁸⁹ “No other country in the world imprisons so many of its racial or ethnic minorities.” ALEXANDER, *supra* note 10, at 8.

⁹⁰ Gottlieb & Flynn, *supra* note 88, at 4; American Civil Liberties Union, *Mass Incarceration*, SMART JUSTICE, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Dec. 28, 2022).

⁹¹ Exum, *supra* note 7, at 1688.

⁹² *Id.*

⁹³ *Jim Crow Laws*, HISTORY.COM, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> (last updated Jan. 11, 2022).

⁹⁴ *The Southern “Black Codes” of 1865-66*, CONST. RIGHTS FOUND., <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html#:~:text=Southern%20Black%20Codes%20provided%20another,males%20and%2018%20for%20females.> (last visited Dec. 28, 2022).

⁹⁵ National Geographic Society, *The Black Codes and Jim Crow Laws*, ENCYCLOPEDIA ENTRY, <https://education.nationalgeographic.org/resource/black-codes-and-jim-crow-laws> (last updated July 8, 2022); CONST. RIGHTS FOUND., *supra* note 94; *Reconstructing Citizenship*, SMITHSONIAN: NAT’L MUSEUM OF AFRICAN AM. HIST. & CULTURE,

and South along with relentless political debate, the Reconstruction period ended in 1877 and the “Jim Crow” era began.⁹⁶ Jim Crow laws were a new form of Black Codes that “made it illegal for [B]lacks and whites to share public facilities. This meant that [B]lacks and whites had to use separate schools, hospitals, libraries, restaurants, hotels, bathrooms, and drinking fountains.”⁹⁷

After slavery “ended,” segregation and discrimination were legal for almost 100 years.⁹⁸ Jim Crow laws remained in effect until 1964 when the Civil Rights Act was passed.⁹⁹ Then, just six years later, the formal War on Drugs began.¹⁰⁰ “The reality of what is happening today is quite reminiscent of the emergence of the Black Codes in the 1860s.”¹⁰¹

Mass incarceration is a comprehensive “system of laws, policies, customs, and institutions that” work together to ensure the subordination of a racial group, just like the Jim Crow era and slavery.¹⁰² These types of systems built on racialized social control are considered caste systems.¹⁰³ The term racial caste is used “to denote a stigmatized racial group locked into an inferior position by law and custom.”¹⁰⁴ Like Jim Crow and slavery, mass incarceration is a caste system that is being used to permanently deprive people of color equal rights and force them into “second-class citizenship.”¹⁰⁵

2. Who is Affected by This System?

The U.S. has a caste system that perpetuates slavery and intentionally targets people of color, and those in disadvantaged

[https://nmaahc.si.edu/explore/exhibitions/reconstruction/citizenship#:~:text=In%201867%2C%20Congress%20passed%20the,and%20protections%20to%20African%20Americans.\(last%20visited%20Jan.%2015,%202024\).](https://nmaahc.si.edu/explore/exhibitions/reconstruction/citizenship#:~:text=In%201867%2C%20Congress%20passed%20the,and%20protections%20to%20African%20Americans.(last%20visited%20Jan.%2015,%202024).)

⁹⁶ CONST. RIGHTS FOUND., *supra* note 94; SMITHSONIAN, *supra* note 95.

⁹⁷ *Id.*

⁹⁸ National Geographic Society, *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ Lord, *supra* note 5, at 410–11.

¹⁰¹ Exum, *supra* note 7, at 1689.

¹⁰² ALEXANDER, *supra* note 10, at 16.

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (“The term mass incarceration refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison. Once released from prison, people enter a hidden underworld of legalized discrimination and permanent social exclusion. They are members of Americas new undercaste.”).

communities. In 1976, before the War on Drugs gained momentum, Black people accounted for only 22% of drug-related arrests.¹⁰⁶ However, by 1990, after the Anti-Drug Abuse Act was passed, Black people “accounted for 40% of all drug-related arrests.”¹⁰⁷ Today, while Black people make up about 13% of the population in the U.S., they account for 62% “of drug offenders in state prison systems”¹⁰⁸ and 39% of the offenders in federal prison.¹⁰⁹ In cities that were hit the hardest by the War on Drugs, up to 80% of Black men have been permanently labeled as criminals and will be “subject to legalized discrimination for the rest of their lives.”¹¹⁰ Criminalizing drug use, specifically the kinds of drugs predominantly used by Black people (crack-cocaine), is a method of social control and reinforces the fabricated perception that Black people need to be policed and punished, which is exactly the kind of control inflicted under Black Codes.¹¹¹

3. What Does This New System Ultimately Achieve?

The Constitution prevents discrimination.¹¹² So, instead of relying on race as a basis for subjecting people to second-class citizenship, the criminal legal system “label[s] people of color ‘criminals’ and then engage[s]” in discriminatory practices.¹¹³ Once someone becomes a part of the criminal legal system, “the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal.”¹¹⁴

This new caste system was designed to achieve racialized social control quite like that which was held during slavery, the era of Black Codes, and the Jim Crow era. Consider the following timeline for a perspective on the development of caste systems in the U.S. that have continued to force people of color into second-class citizenship:

¹⁰⁶ Exum, *supra* note 7, at 1695.

¹⁰⁷ *Id.*

¹⁰⁸ Lord, *supra* note 5, at 415.

¹⁰⁹ See sources cited *supra* note 42; see also Lord, *supra* note 5, at 415; Exum, *supra* note 7, at 1697.

¹¹⁰ ALEXANDER, *supra* note 10, at 8.

¹¹¹ Exum, *supra* note 7, at 1695.

¹¹² U.S. CONST. AMEND. XIV.

¹¹³ ALEXANDER, *supra* note 10, at 2.

¹¹⁴ *Id.*; Jefferson-Jones, *supra* note 28, at 996–1002.

- 1526–1865: The initiation and perpetuation of slavery, a legal institution where Black people were enslaved as human chattel.¹¹⁵
- 1865: The 13th Amendment was passed abolishing slavery in the U.S.¹¹⁶ Notably, by 1860 there were an estimated 4.5 million Black people in the U.S., 4 million of whom were slaves, meaning that 89% of the Black population was enslaved.¹¹⁷
- 1866: Black Codes were enacted which were laws based off of slave codes and were a legal way to force Black people and their children into labor and control property rights of Black people.¹¹⁸
- 1867–1877: The Reconstruction Era began with the passage of the Reconstruction Act which required every state to “uphold equal protection under the 14th amendment.”
- 1877–1964: The Jim Crow Era implemented a new form of Black Codes legalizing segregation and discrimination making it illegal for Black people to share public facilities with white people.¹¹⁹ Notably, during this time more than 4,000 Black people were murdered by lynching and many, many more were victimized

¹¹⁵ Steven Mintz, *Historical Context: Facts about the Slave Trade and Slavery*, THE GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/teacher-resources/historical-context-facts-about-slave-trade-and-slavery> (last visited May 27, 2023) (noting that there were also indigenous slaves). As an aside, 1619 has been most-cited as the year that the first Black people became enslaved in North America, however, there are accounts that “[t]he first voyage carrying enslaved people direct from Africa to the Americas probably sailed in 1526.” *Id.* Additionally, being that the U.S. became an independent country in 1776, the U.S. as a nation has *technically* been involved in the slave trade since 1776. *On This Day, the Name “United States of America” Becomes Official*, NAT’L CONST. CTR. (Sept. 9, 2022), <https://constitutioncenter.org/blog/today-the-name-united-states-of-america-becomes-offici>.

¹¹⁶ U.S. CONST. AMEND. XIII.

¹¹⁷ Aaron O’Neill, *Black and Slave Population of the United States from 1790 to 1880*, STATISTA (June 21, 2022), <https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880/>.

¹¹⁸ See discussion *supra* Section III.B.1.

¹¹⁹ See discussion *supra* Section III.B.1.

on a daily basis.¹²⁰

- **1964:** The Civil Rights Act was passed criminalizing segregation and discrimination.¹²¹
- **1971:** The War on Drugs was officially declared by then-President Richard Nixon.¹²²

B. More Than Sentence Reduction is Needed to End Mass Criminalization

From 1980 to 2019 drug-related arrests almost tripled and in 2020, there were an estimated 1,155,610 drug-related arrests, 86.7% of which were for possession “and only 13.3% were for the sale or manufacture of a controlled substance.”¹²³ The War on Drugs never targeted drug trafficking or attempted to lower the use of hard drugs, but instead directed all of its fire power at criminalizing poor people and people of color who simply engaged in non-violent drug use.¹²⁴ In fact, between 1999 and 2017, drug overdoses more than tripled and in 2021, reached record highs.¹²⁵ Further, drug prices have declined over the years and drug quality has actually improved since 1986.¹²⁶ Without a doubt, the War on Drugs has been lost.¹²⁷ Prisons were filled, lives were lost, and hopes and dreams were shattered.¹²⁸

While some measures attempted to right the wrongs of the past, sentence reduction and legislation like the First Step Act barely scratch the surface of reducing mass criminalization let alone bringing it to its demise. First, even with the First Step Act, the Commission’s sentencing guidelines, and the Supreme Court’s decision in *Concepcion*, it is still within a judge’s discretion to decide whether to send a case back for resentencing, and a judge is under no obligation to actually resentence a defendant if they are not convinced to do so.¹²⁹ Second, sentence reduction like that in

¹²⁰ Victor Luckerson, *New Report Documents 4,000 Lynchings in Jim Crow South*, TIME (Feb. 10, 2015, 12:33PM), <https://time.com/3703386/jim-crow-lynchings/>; EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 40 (3d ed. 2017) (available at <https://eji.org/reports/lynching-in-america/>).

¹²¹ See discussion *supra* Section III.B.1.

¹²² See discussion *supra* Section III.B.1.

¹²³ Lord, *supra* note 5, at 412.

¹²⁴ *Id.* at 413; Cummings & Ramirez, *supra* note 2, at 478.

¹²⁵ Cummings & Ramirez, *supra* note 2, at 489.

¹²⁶ *Id.* at 490.

¹²⁷ Lord, *supra* note 5, at 407

¹²⁸ *Id.*

¹²⁹ *Concepcion v. United States*, 597 U.S. 481, 500–02 (2022).

Concepcion, is only applicable for a small subset of the population incarcerated for drug offenses thus making it nearly impossible to actually be useful.

1. Discretion Hinders Sentence Reduction

A major issue with measures like sentence reform and the First Step Act is that the decisions are dependent upon a judge's discretion.¹³⁰ The party seeking resentencing is only permitted to introduce nonfrivolous evidence for the judge to consider, but the judge is under no legal obligation to reduce the sentence if they are not convinced to do so.¹³¹ Because of this discretionary aspect, resentencing under the First Step Act in jurisdictions where judges are harsher on sentencing will likely lead to inequitable results. Black people are already incarcerated at a rate ten times higher than white people for drug offenses even though Black people and white people use drugs at the same rate.¹³² Additionally, on average Black men receive sentences 19.1% longer than white men who have committed similar offenses.¹³³

Empirical data has shown that the legacy of slavery in the U.S. shapes the way that people think about and treat Black people.¹³⁴ The data demonstrates that states entrenched in slavery are much likelier to incarcerate people of color and give them longer sentences.¹³⁵ Further, white Southerners living in counties that had higher levels of slavery will be "more likely to express racial resentment and exhibit colder feelings toward Black people."¹³⁶ Additionally, counties that had high slave rates have much higher rates of Black hate crimes, and states that had high rates of lynching Black people "have higher rates of contemporary prison admissions" and are "associated with more death sentences."¹³⁷ Ultimately, because racism and modern day slavery corrupted the American criminal legal system, it is difficult to believe that every incarcerated person with a substance use disorder who is deserving of sentence reduction will actually receive it.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² American Civil Liberties Union, *supra* note 90.

¹³³ U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017).

¹³⁴ Gottlieb & Flynn, *supra* note 88, at 5.

¹³⁵ *Id.* at 27.

¹³⁶ *Id.* at 5.

¹³⁷ *Id.* at 6.

2. Many Fall Between the Cracks

Not only is the application of the First Step Act subjective, but it is also selective in that it does not apply to all non-violent drug offenders. This led to a great deal of debate about how to apply the First Step Act and amidst the discourse, people who committed non-violent drug crimes remain imprisoned for egregiously long sentences, many of whom were targeted because of racial bias.¹³⁸ About one year before the Supreme Court's decision in *Concepcion*, the Court heard *Terry v. United States*.¹³⁹ In *Terry*, the Court resolved a debate over whether or not incarcerated people sentenced under 21 U.S.C. § 841(b)(1)(C) without a mandatory minimum sentence were eligible to seek sentence reduction.¹⁴⁰ The Court determined that those incarcerated people were not eligible for sentence reduction under the First Step Act.¹⁴¹

Unlike *Concepcion*, whose crack-cocaine offense was covered under the First Step Act, *Terry* was convicted of a crack-cocaine offense, but the offense did not trigger a mandatory minimum sentence. In *Terry*, the Court reasoned that “a crack offender is eligible for a sentence reduction under the First Step Act only if convicted of a crack offense that triggered a mandatory minimum sentence.”¹⁴² Further, “the Fair Sentencing Act did not modify the statutory penalties for petitioner’s offense.”¹⁴³ While the First Step Act is an effort to correct sentencing disparities, it is not enough to effectuate meaningful change.

Mass criminalization will not be stopped by merely reducing a particular set of drug offenses. Further, enacting legislation that attempts to address racial sentencing disparities is meaningless if the systems that allow such disparities persists.¹⁴⁴ The damage done by the War on Drugs must be repaired and “the very system that relies on a wartime ideology of seeing the drug offender, who is often viewed as a Black man, as the enemy” must be abolished.¹⁴⁵

¹³⁸ See Colan Jonathan D. Colan, *A Brief History of Section 404’s Crack Sentencing Reform*, 69 DEP’T JUST. J. FED. L. PRAC. 57 (2021).

¹³⁹ 593 U.S. 486 (2021).

¹⁴⁰ *Id.* at 488.

¹⁴¹ *Id.*

¹⁴² *Id.* at 486.

¹⁴³ *Id.* at 487.

¹⁴⁴ Exum, *supra* note 7, at 1709.

¹⁴⁵ *Id.* at 1690.

IV. ENDING RETRIBUTIVE PUNISHMENT IS OVERDUE

The War on Drugs criminalized drugs and deceitfully perpetuated racial injustices by capitalizing on misunderstandings about substance use disorders and drug use.¹⁴⁶ Over the years, public opinion has shifted regarding the idea that people deserve to be punished and suffer when they commit drug related offenses.¹⁴⁷ Still, the criminalization of drugs led to severe consequences for Black communities that must be recognized and repaired.¹⁴⁸ Part A of this Section argues that retributive punishment is an ineffective method to combat drug crimes and highlights the economic impact of the War on Drugs and who ends up paying the price. Then, Part B offers a more effective solution to working towards ending mass criminalization and preventing the development of other forms of institutionalized slavery.

A. The Economic Impact of the War on Drugs and Who Ultimately Pays the Price

Every year the U.S. spends an estimated \$80 billion on its prison system.¹⁴⁹ Moreover, over the forty year span of the War on Drugs, total expenditures amount to more than \$2.5 trillion.¹⁵⁰ If law enforcement agencies made drug enforcement their top priority, then they would receive huge cash grants that were then used to buy paramilitary weaponry, such as tanks and battering rams, to attack communities of color.¹⁵¹ These government sanctioned expenditures took public resources and used them to support “a fundamentally racist project.”¹⁵²

Not only has mass criminalization caused an exorbitant amount of tax-payer dollars to be invested in institutionalized slavery, mass criminalization also decimated Black communities.¹⁵³ Being convicted of a drug offense and subsequently being imprisoned leads to losing federal

¹⁴⁶ See Marissa A. Booth, *The Road to Recovery: The Third Circuit Recognizes the Importance of Rehabilitative Needs During Sentencing in United States v. Schoenwolf*, 64 VILL. L. REV. 569, 569–75 (2019); Cummings & Ramirez, *supra* note 3, at 458–459 n.27, 482–83.

¹⁴⁷ Lord, *supra* note 5, at 414.

¹⁴⁸ Exum, *supra* note 7, at 1697.

¹⁴⁹ American Civil Liberties Union, *supra* note 90.

¹⁵⁰ Cummings & Ramirez, *supra* note 2, at 488.

¹⁵¹ *Id.* at 481.

¹⁵² *Id.* at 489.

¹⁵³ *Id.*; Exum, *supra* note 7, at 1697.

benefits and increased difficulty in finding employment.¹⁵⁴ Evidence also shows “that children of incarcerated parents face emotional, mental, and physical health difficulties at a greater rate than other children.”¹⁵⁵ Additionally, by focusing on poor Black communities, the War on Drugs diminished the opportunity for many Black families to accumulate generational wealth and as a result, the average white family is worth \$171,000 whereas the average Black family is worth only \$17,150.¹⁵⁶

1. The Call to End Retributive Punishment for Non-Violent Drug Crimes

Malcom X was a prominent civil rights activist who was a key player in the passage of the Civil Rights Act of 1964.¹⁵⁷ While some people found his methods controversial and radical compared to his activist counterparts, Malcom X remained outspoken against the racist and brutal treatment of Black people and advocated for Black empowerment.¹⁵⁸ During an interview in March 1964, just a few months before the Civil Rights Act passed, Malcom X was asked if he thought progress was being made in the U.S., to which he replied,

No, no, I will never say that progress is being made. If you stick a knife in my back nine inches and pull it out six inches, there’s no progress. If you pull it all the way out, that’s not progress. The progress is healing the wound that the blow made. And they haven’t even begun to pull the knife out, much less heal the wound. They won’t even admit the knife is there.¹⁵⁹

Almost sixty years later, the U.S. is still grappling with how to make progress and heal the wounds caused by racial injustices. Sentence reduction

¹⁵⁴ Exum, *supra* note 7, at 1697.

¹⁵⁵ *Id.*

¹⁵⁶ Cummings & Ramirez, *supra* note 2, at 490–91.

¹⁵⁷ *Malcolm X Day: Who Was He and Why Was He Important?*, BBC: NEWS ROUND, <https://www.bbc.co.uk/newsround/52678571> (last updated May 18, 2020).

¹⁵⁸ Sydney Trent, *Malcom X: Who Was He, Why Was He Assassinated, and Who Did It?*, WASHINGTON POST, <https://www.washingtonpost.com/history/2021/11/17/malcolm-x-assassination-who-why/> (last updated Nov. 18, 2021).

¹⁵⁹ Mateo Askaripour, *Mateo Askaripour, Falling in Love with Malcolm X—and His Mastery of Metaphor*, LITERARY HUB (Apr. 10, 2019), <https://lithub.com/falling-in-love-with-malcolm-x-and-his-mastery-of-metaphor/>.

and the First Step Act are the equivalent to pulling the knife out just six-inches, but the knife still remains. Retributive punishment does not work and instead inflicts further injury on those who are imprisoned.

The U.S. criminal legal system has been confronted by its history of enacting laws that show strong racial bias and when provided with statistical evidence verifying the allegations of racial bias, the courts ignored it.¹⁶⁰ Instead of facing the issue head on and dismantling the system that created the problem in the first place, the injustices persist. It is evident that trying to fix the broken criminal justice system piece by piece will not work. We need “ambitious commitment to dismantling systems of policing and incarceration, and their articulation by movement organizations committed to direct action, power building, and community organizing.”¹⁶¹

B. A More Effective Approach to Ending Mass Criminalization

The evidence presented in this Comment is indicative of the need to find a more effective approach to ending mass criminalization. To actually be effective, the American criminal legal system needs to move towards “an approach that truly repairs the damage of the [War on Drugs] and protects us from simply repackaging racism into another form.”¹⁶² This can be

¹⁶⁰ *McCleskey v. Kemp*, 481 U.S. 279 (1987), is a landmark case in which the Supreme Court refused to concede that the criminal justice system was racially biased. The Court admitted that statistics presented by McCleskey’s counsel demonstrated that the criminal justice system was racially biased. *Id.* at 287. Nonetheless, the Court ruled that the evidence was insufficient because it did not prove that McCleskey was explicitly discriminated against. *Id.* at 292–93, 297. The Court affirmed that they were unwilling to consider the statistical evidence as sufficient to prove racial bias because doing so would “open the door to widespread challenges to all aspects of criminal sentencing.” *Id.* at 339 (Brennan, J., dissenting). The Court’s decision in *McCleskey* has been regarded as having “a fear of too much justice.” *Id.* The Court’s reasoning in *McCleskey* clearly indicates that the Court decided to ignore the statistical evidence because they did not want to be confronted with the consequences of having a racist criminal justice system because then the Court would have to address racial disparities throughout the entire justice system. (“The real issue at hand was whether—and to what extent—the Supreme Court would tolerate racial bias in the criminal justice system as a whole. The Court’s answer was that racial bias would be tolerated-virtually to any degree-so long as no one admitted it.” ALEXANDER, *supra* note 10, at 137–38.).

¹⁶¹ Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1583 (2022).

¹⁶² Exum, *supra* note 7, at 1697; see also ALEXANDER, *supra* note 10, at 22 (“[N]othing short of a major social movement can successfully dismantle the new caste system. Meaningful reforms can be achieved without such a movement, but unless the public

accomplished by focusing on problem solving and compassion¹⁶³ and also investing in providing people with adequate foundational needs.¹⁶⁴

1. Focus on Problem Solving and Compassion

Current prison reform efforts such as sentence reduction and the First Step Act do little to actually improve the system or to rehabilitate people, and instead focus on “modifying retribution and deterrence initiatives” and “on decreasing the burden on the system.”¹⁶⁵ The goal of retributive punishment is “to inflict a cost” on criminal behavior, whereas rehabilitation seeks to reform the person who committed the crime.¹⁶⁶ The shamefully high incarceration rates in the U.S. are just one piece of evidence that demonstrates that retribution and deterrence are not effective theories of punishment. In order to effectively decrease criminal behavior, the criminal legal system must focus on rehabilitative reforms.

Substance use disorders can impact whether or not someone is motivated to engage in criminal behavior. For example, many people in prison have issues with substance use disorders and their addiction led them to commit other crimes such as stealing money or property in order to buy the drugs they are addicted to.¹⁶⁷ Instead of criminalizing certain behaviors and imprisoning people as a form of punishment, the focus of criminal justice should be on treating the root cause of the problem which is imperative to reducing criminal behavior.¹⁶⁸ Overall, treating substance use disorders before they result in criminal behavior is crucial for the well-being of both individuals and communities.

consensus supporting the current system is completely overturned, the basic structure of the new caste system will remain intact.”).

¹⁶³ ALEXANDER, *supra* note 10, at xxiv (“If we want to reduce violence in our communities, we need to hold people accountable in ways that aim to repair and prevent harm rather than simply inflicting more harm and trauma and calling it justice.”).

¹⁶⁴ *Id.* at xxxi (“The safest communities are not the ones with the most police, prisons, or electronic monitors, but the ones with quality schools, health care, housing, plentiful jobs, and strong social networks that allow families not merely to survive but to thrive.”).

¹⁶⁵ Kevin Mark Smith, *A Targeted Approach to Criminal Justice Reform*, 90 UMKC L. REV. 397, 416 (2021).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 419–20.

¹⁶⁸ There are many factors that lead people toward crime including substance use disorders, biological risk factors, bad social environments, and adverse childhood experiences. *What Influences Criminal Behavior?*, WALDEN UNIV., <https://www.waldenu.edu/online-bachelors-programs/bs-in-criminal-justice/resource/what-influences-criminal-behavior> (last visited Mar. 12, 2024).

Additionally, many people who suffer from substance use disorders and are incarcerated never receive treatment for their addiction.¹⁶⁹ When they are released it is likely that they will continue to engage in criminal behavior that will cause them to become incarcerated again.¹⁷⁰ Research shows that when well-designed drug treatment programs are carefully implemented, they reduce criminality and recidivism as well as “increase levels of education and employment upon return to the community.”¹⁷¹ A well-designed drug treatment program involves several steps including detox, counseling, and possibly medication, and should provide people who have substance use disorders with the ability to change the way they think about drug use, stay drug free, and live a healthy and productive life.¹⁷² Without a comprehensive treatment program, incarcerated people who have substance use disorders are 129 times likelier to overdose and die than the average person.¹⁷³

The American criminal legal system is demonstrably defective and unreliable, and operates to uphold racist philosophies and politics.¹⁷⁴ There is no way to improve such a deadly machine, so steps must be taken so that the system “ceases to exist.”¹⁷⁵ Instead of continuing to tip toe around reform and work within a system based on racist principles, the current system must be completely abolished and rebuilt with a focus on addressing “the needs and health of people.”¹⁷⁶

2. Invest in Providing People with Adequate Foundational Needs

Unlike the U.S., where the goal of criminal justice is punishment, some countries like Germany and Norway use rehabilitative systems to address criminal behavior, which resulted in “lower violent crime and reoffender rates than the United States.”¹⁷⁷ Criminal justice systems like

¹⁶⁹ *Id.* at 419.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² NAT’L INST. ON DRUG ABUSE, TREATMENT APPROACHES FOR DRUG ADDICTION DRUGFACTS 7–9 (2019).

¹⁷³ Smith, *supra* note 165, at 419.

¹⁷⁴ Stahly-Butts & Akbar, *supra* note 161, at 1554.

¹⁷⁵ *Id.* at 1553–54.

¹⁷⁶ *Id.* at 1557.

¹⁷⁷ Cody McGraw, *Prosecuting with Compassion, Defending with Power: Progressive Prosecutors and the Case for Rehabilitative Justice*, 9 PENN ST. J. L. & INTERNATIONAL AFFAIRS 261, 291 (2021).

those in Germany and Norway consider all human life to be of value and focus on rehabilitating and reintegrating incarcerated people back into society.¹⁷⁸ One Norwegian prison accomplishes this by utilizing private dorm-like rooms to house incarcerated people and provides them with private amenities such as a bathroom, refrigerator, and even a TV.¹⁷⁹ Additionally, Norwegian prisons offer many recreational activities and educational opportunities to encourage incarcerated people “to live a full life once their sentence time reaches completion.”¹⁸⁰ Instead of using incarceration as a form of vengeance, countries that embrace rehabilitative criminal justice systems “view[] the loss of freedom and personal liberties as the ultimate and only available form of meaningful punishment in the realm of criminal corrections.”¹⁸¹

To really recover from the War on Drugs and mass criminalization, not only will the U.S. have to change the way it addresses criminal behavior, it will also have to focus heavily on diverting resources away from carceral punishment and instead focus on investing in communities.¹⁸² A group of experts, scholars, researchers, and other professionals published a report (Report on Drug Policy Reform) in support of an evidence-based policy proposal that provides a constructive approach to investing in communities.¹⁸³ The proposal highlights the importance of:

- (1) community-building programs focused on poverty alleviation, job creation, improved schooling and housing, and social mobility . . . ;
- (2) adequately expanded healthcare, social support programs, and rehabilitation efforts . . . ; and

¹⁷⁸ *Id.* at 298.

¹⁷⁹ Bolorzul Dorjsuren, *Norway’s Prison System Benefits Its Economy*, The Borgen Project: The Blog (Nov. 6, 2020), <https://borgenproject.org/norways-prison-system/>.

¹⁸⁰ *Id.*; see also Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> (“The treatment of inmates at Halden is wholly focused on helping to prepare them for a life after they get out. Not only is there no death penalty in Norway; there are no life sentences. . . . ‘Better out than in’ is an unofficial motto of the Norwegian Correctional Service, which makes a reintegration guarantee to all released inmates. It works with other government agencies to secure a home, a job and access to a supportive social network for each inmate before release; Norway’s social safety net also provides health care, education and a pension to all citizens.”).

¹⁸¹ McGraw, *supra* note 177, at 298.

¹⁸² Stahly-Butts & Akbar, *supra* note 161, at 1557.

¹⁸³ Brian D. Earp, Jonathan Lewis, Carl L. Hart, & with Bioethicists & Allied Professionals for Drug Policy Reform, *Racial Justice Requires Ending the War on Drugs*, 21:4 AM. J. BIOETHICS 4, 4 (2021).

(3) realistic, evidence based educational programs oriented around dissuading minors from drug use, promoting safety among adults who choose to use drugs, and honestly informing the public, policymakers, and other stakeholders about the benefits and risks of using different drugs in different settings.¹⁸⁴

To repair the harms caused by mass criminalization and to avoid those harms from recurring, it is necessary to shift the power dynamic in those communities that have suffered the most from the legally enforced racial hierarchy between white people and Black people.¹⁸⁵ The criminal legal system must be transformed from a system rooted in racism to a system focused on compassionate support of impoverished communities and communities of color.¹⁸⁶

Building from the policy proposal suggested in the Report on Drug Policy Reform, this Comment offers one suggestion that can be used to promote community investment and restitution and provide communities with adequate foundational needs: create a set of policies that guarantee people fundamental resources—income, health care, food, housing, and education. Instituting these policies as easily accessible, basic rights will transition the U.S. into an equitable system that works justly for all Americans; it will assist those victimized by the War on Drugs to break out of racialized class warfare; and it will help to prevent future racial caste systems from forming.

Although these kinds of policies would certainly be expensive to fund, the U.S. undoubtedly has the wealth to support these kinds of basic rights. There is about \$142 trillion of wealth in the U.S.,¹⁸⁷ but the problem is that that money is controlled by a small group of the population and has been passed down generationally.¹⁸⁸ As noted above, the War on Drugs

¹⁸⁴ *Id.* at 12.

¹⁸⁵ Stahly-Butts & Akbar, *supra* note 161, at 1559.

¹⁸⁶ Gotsch & Mauer, *supra* note 8, at 420.

¹⁸⁷ Robert Burgess, *The Most Important Number of the Week is \$142 Trillion*, Bloomberg (Sept. 25, 2021, 6:00AM), <https://www.bloomberg.com/opinion/articles/2021-09-25/record-u-s-household-net-worth-of-142-trillion-is-double-edged-sword#xj4y7vzkg>.

¹⁸⁸ *See Wealth Distribution Chart*, RILEY ADAMSON, <https://www.rileyadamson.com/wealth-distribution-chart> (last visited May 27, 2023) (a copy of the chart is also on file with the author); Greg Leiserson, Will McGrew, & Raksha Koppam, *The Distribution of Wealth in the United States and Implications for a Net Worth Tax*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 21, 2019), <https://equitablegrowth.org/the-distribution-of-wealth-in-the-united-states-and-implications-for-a-net-worth-tax/>.

denied those victimized by the war from being able to accumulate generational wealth.¹⁸⁹ Furthermore, wealth in the U.S. is not distributed equitably, resulting in essential resources being controlled by a small group of wealthy people while the average person struggles for resources and those with the criminal label are even further marginalized from mainstream society.¹⁹⁰

The U.S. needs to enact highly progressive change to correct the systemic injustices and resulting mass incarceration and criminalization of people of color and disadvantaged communities. While there are many ways to distribute wealth, one method that would be tremendously impactful is a net worth tax.¹⁹¹ This tax would apply only to extremely wealthy people who make up just 10% of the U.S. population and have accumulated anywhere from \$2 million up to \$12 billion of wealth.¹⁹² Collectively the top 10% wealthiest people in the U.S. have accumulated \$99.2 trillion of wealth.¹⁹³ Applying a net worth tax of just 10% would generate \$9.92 trillion dollars to invest back into communities, especially those victimized by the War on Drugs. To put it into perspective, that would generate about \$60,000 for each of the 165 million people in the working class each year.¹⁹⁴ That \$9.92 trillion is also enough money to do all the following in the U.S.:

¹⁸⁹ See discussion *supra* Section III.C.1.

¹⁹⁰ *Facts: Income Inequality in the United States*, INST. FOR POL'Y STUD.: INEQ., <https://inequality.org/facts/income-inequality/> (last visited May 27, 2023).

¹⁹¹ Greg Leiserson, Will McGrew, & Raksha Koppam, *Net Worth Taxes: What They Are and How They Work*, Equitable Growth (Mar. 21, 2019), <https://equitablegrowth.org/research-paper/net-worth-taxes-what-they-are-and-how-they-work/?longform=true> (“A net worth tax is an annual tax imposed on an individual or family’s wealth, or net worth.”).

¹⁹² See sources cited *supra* note 188.

¹⁹³ See *Wealth Distribution Chart*, *supra* note 188.

¹⁹⁴ \$9.92 trillion / 165 million = \$61,121,21; Press Release, Bernie Sanders: U.S. Senator for Vermont, Sanders Delivers “State of the Working Class” Speech (Jan. 17, 2023) (available at <https://www.sanders.senate.gov/press-releases/prepared-remarks-sanders-delivers-state-of-the-working-class-speech/>).

end homelessness;¹⁹⁵ pay off all student loan debt;¹⁹⁶ end hunger;¹⁹⁷ cover healthcare costs and insurance;¹⁹⁸ and also give \$1,000 per month to every one of the 336 million people in the U.S.¹⁹⁹

CONCLUSION

Of all the reasons to imprison someone, the one category of criminal activity that is responsible for the majority of people being incarcerated is drug crimes.²⁰⁰ While drug prohibition has been a major contributing factor to mass criminalization, a large portion of those in prison or jail are incarcerated for things that are the same or less serious than drug offenses.²⁰¹ It is evident that discontinuing the use of retributive punishment for non-violent drug crimes will have a significant impact on ending mass criminalization, but at the end of the day, American society must change the way that it responds to criminal behavior in general.²⁰² The criminal

¹⁹⁵ The Department of Housing and Urban Development estimates that the cost of ending homelessness in the U.S. is \$20-billion. *What Will It Take to End Homelessness in the U.S.?*, GIVING COMPASS NETWORK (June 13, 2023), <https://givingcompass.org/partners/homelessness/what-will-it-take-to-end-homelessness-in-the-u-s>.

¹⁹⁶ Student loan debt currently totals \$1.77-trillion. Rebecca Safier & Ashley Harrison, *Student Loan Debt: Averages and Other Statistics in 2024*, USA TODAY (Nov. 1, 2023, 5:25 PM), <https://www.usatoday.com/money/blueprint/student-loans/average-student-loan-debt-statistics/>.

¹⁹⁷ *How Much Would It Cost to End World Hunger?*, GLOBAL GIVING (Mar. 1, 2021), <https://www.globalgiving.org/learn/how-much-would-it-cost-to-end-world-hunger/#:~:text=How%20much%20would%20it%20cost%20to%20end%20hunger%20in%20the,enough%20money%20to%20buy%20food>. (estimating that it would cost \$25-billion to end hunger in the U.S.).

¹⁹⁸ It is estimated that a universal healthcare system in the U.S. would cost \$3.03-trillion per year. Alison P. Galvani, Alyssa S. Parpia, Eric M. Foster, Burton H. Singer, & Megan C. Fitzpatrick, *Improving the Prognosis of Healthcare in the United States*, NAT'L LIBR. OF MED.: NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Nov. 15, 2020) (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8572548/#:~:text=Through%20the%20mechanisms%20detailed%20above,than%20current%20national%20healthcare%20expenditure>).

¹⁹⁹ \$1,000 x 12 x 336 million = \$4.03 trillion. *U.S. and World Population Clock*, U.S. Census Bureau (Feb. 12, 2024), <https://www.census.gov/popclock/>.

²⁰⁰ McGraw, *supra* note 177, at 273.

²⁰¹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE: PUBLICATIONS (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

²⁰² *Id.*

legal system must move away from “eye for an eye” forms of punishment and instead focus on supporting communities and providing them with foundational needs.

The concepts discussed in this Comment have been heavily analyzed and debated for decades. Still, over 150 years after the end of slavery, racism persists throughout the American criminal legal system. Consequently, the views and policy proposals discussed here are necessary to keep promoting until appropriate action is taken to rectify the injustices caused by mass criminalization. As the legislature and judiciary continue to get lost in bureaucracy “the American public [continues] to lose a great amount of respect for the law of the United States as a whole.”²⁰³ For advocates of rehabilitative justice, transformative change cannot happen within such a broken system. Therefore reform efforts must focus on “dismantling systems of policing and incarceration” and on investing in communities to achieve fundamental transformation.²⁰⁴

²⁰³ McGraw, *supra* note 177, at 300.

²⁰⁴ Stahly-Butts & Akbar, *supra* note 161, at 1583.