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# The War on Drugs and the Case for Rehabilitation

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## Introduction

Racism has pervaded American history from slavery to Jim Crow and even after the passing of the Civil Rights Act in 1964. For true reform to take place the necessary changes must occur in both legal and social spheres. Consequently, we should not only oppose the social constructs that perpetuate oppression, but the legal foundations that uphold them. It is crucial that collectively as a nation, we analyze, approach and combat injustice by understanding the narrative and push for the necessary legal action to rectify it.

While the U.S looks towards the Constitution as the means to “form a more perfect union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty”<sup>1</sup>, the same self-asserted indivisible nation has neglected the all inclusionary nature of its values. By analyzing the 13<sup>th</sup> and 14<sup>th</sup> amendments, I will draw concrete connections between America’s view of criminality and incarceration by looking at the contributions and impact of Jim Crow laws on historical injustices within America’s racial demography, and how current drug problems find root in both of those issues.

In the next section I’ll be focusing on the Constitution and how racial oppression is embedded in our laws with evidence in historical precedent such as Jim Crow laws and *Plessy v. Ferguson*. In order to substantiate and clarify that claim I’ll discuss racial frameworks and the fallacies in how we perceive racism. I’ll be focusing on structural and institutional instances of racism such as the Prison Industrial Complex, habitual offender laws, and quotas. By better understanding the racial narrative we can then more accurately analyze the manifestations of that, namely by turning our attention to the War and Drugs in section IV and its levels of impact on society. Finally, by using these evidences I propose that we make rehabilitation a more central focus in our legal proceedings in contrast to using that which seems to be exclusively punitive and explore that concept by scrutinizing the process of decriminalization in legislation such as the Marchman Act. As a final call to action, it is ever more important that we do as Brian Stevenson once emphasized during a forum at Brigham Young University and “Change the narratives underneath the policy issues we grapple with”<sup>2</sup> to not only ensure that racial bias doesn’t seep further into the social fabric but to purge it completely.

## I. Background

The values of individual liberty and freedom are written into our Constitution and stand as the foundation upon which centuries of social progress have been established. Although it took some time, in 1865 the 13th Amendment was passed outlawing slavery and letting the metaphorical umbrella of freedom cover more ground. Unfortunately, centuries of indoctrination made the persistence of prejudice almost inevitable, leading to segregation, lynch mobs, and violent protests. While it took around a century for the gears of slavery to slow through legislation, the social effects are still felt today.

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<sup>1</sup> U.S. Const. pmb1.

<sup>2</sup> Bryan Stevenson, BYU Forum: Creating Justice, <https://news.byu.edu/news/byu-forum-creating-justice> (last visited Feb. 26, 2019).

Within the 13th Amendment lies an interesting and commonly overlooked clause: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>3</sup> According to the National Council on Crime and Delinquency, the United States incarceration rate is 4 times the global average<sup>4</sup>. The World Prison Brief states that with 4.4% of the global population, the United States maintains nearly 22% of people incarcerated in the world. The United States incarceration population, in raw numbers, equates to nearly 2.2 million people out of 323 million<sup>5</sup>. Even though they only constitute about 13% of the general population, African Americans make up nearly 40% of this 2.2 million<sup>6</sup>.

There are several stipulations to consider. For one, many countries use the death penalty as a more frequent alternative to incarceration, so that is to be noted in understanding on what moral grounds the United States might value and emphasize incarceration over other penalties.<sup>7</sup> There is certainly a variety of disproportionate statistics when we look at the evidence, which is enough to call for deep analysis, explanation, and solutions if possible.

The purpose of the 14th amendment was to task the government with protecting minority groups whose unjust treatment was brought about on immoral grounds even though the majority supported it. This is relatively effective except when the majority writes into law that which is meant to discriminate against the minority. Even with the redaction of laws supporting discrimination, the prejudicial mentalities left in their wake propagate the legislation to pass laws that may still target minority groups in more covert ways. The law itself may be written to be neutral, but its execution may prove different.

## II. Fallacies of Racism

### A. *The Individualistic and Legalistic Fallacy*

Many interpret the definition of racism and strictly associate the word to lynching, segregationist policies, or racial slurs. While these certainly are heinous forms of racism, to put racism in such a small box is to focus the lens on the symptoms rather than the cause.

The individualistic fallacy confines racism to ideas and attitudes. By labeling racism in terms of acts that happen in isolated interactions, people absolve themselves of responsibility by

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<sup>3</sup> U.S. Const. amend. XIII, § 2

<sup>4</sup> Christopher Harvey, US Rates of Incarceration: A Global Perspective, RESEARCH FROM THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, [https://www.nccdglobal.org/sites/default/files/publication\\_pdf/factsheet-us-incarceratio2n.pdf](https://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceratio2n.pdf)

<sup>5</sup> World Prison Brief, World Prison Population List, INSTITUTE FOR CRIMINAL POLICY RESEARCH, Table 6, 14 (2016).

[http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition\\_0.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf)

<sup>6</sup> Inmate Statistics - Race, Federal Bureau of Prisons. (Nov. 24, 2018), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp)

<sup>7</sup> Amnesty International Global Report, DEATH SENTENCES AND EXECUTIONS, <https://www.amnesty.org/download/Documents/ACT5034872016ENGLISH.PDF>. (last visited Feb. 26, 2019)

checking off a list of things they're not guilty of. Along with that, this fallacy fails to acknowledge the possibility of racism at the institutional level and the prospect of being woven into the fabric of society.

Part of what aids in that limited understanding of racism is what is known as the legalistic fallacy. This fallacy assumes that because something is written into law it becomes fact within the social sphere. Outlawing racism and racist practices would be no different especially considering that America has a blatant racist history with racist policies sanctioned by the government such as segregation of schools and other public facilities, laws against interracial marriage, authorized discrimination with banks and housing agencies, and slavery as the precursor to it all. To better understand how there is a lack of legitimacy in claiming racism a thing of the past given current legislation we can look at the history of the 14<sup>th</sup> amendment and the circumstances surrounding its implementation.

i. *Plessy v. Ferguson*

*Plessy v. Ferguson* is the origin of the “separate but equal” doctrine.<sup>8</sup> The court concluded that, “The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”<sup>9</sup>

While the 14<sup>th</sup> Amendment was created to establish protection for the citizenship rights of slaves after the Civil War, with *Plessy v. Ferguson* it was interpreted in such a way as to detriment the very people that it initially sought to protect. It was this ruling and the ideology embodied in it that led to Jim Crow, the deep injury of which would only be recognized retrospectively decades after the atrocities had already occurred.

ii. Jim Crow

Jim Crow, using the name from a song and dance routine characterized by black face, saw that segregation was fully implemented across America and maintaining that blacks were fully aware that they should be separate but not necessarily equal. The lack of access to political power within the black community formed a regime that led to mass-produced negligence and indifference. Not only were black schools subject to less funding, but in many cases the funding received by the state was allocated to other local government areas. It was reported that in 1964 the average educational expenditure in Mississippi for white students was \$81.66 which was nearly 4 times more than black students whose educational expenditures were estimated at \$21.77<sup>10</sup> and these estimates are from a decade after the Supreme Court's ruling on *Brown v. Board of Education*.

*B. The Ahistorical Fallacy*

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<sup>8</sup> *Plessy v. Ferguson*, 163 U.S. 552 (1896)

<sup>9</sup> *Plessy v. Ferguson*, 163 U.S. 552 (1896)

<sup>10</sup> Clayborne Carson et al., *Civil Rights Chronicle: The African American Struggle for Freedom* 266 (Public International Ltd. Ed., 2003)

One of the main arguments against claims of institutional racism as it stands to today is isolating events from the past and invalidating their connection to current social and political structures. This is known as the ahistorical fallacy. An unknown history is destined to repeat itself because patterns repeat themselves through unaddressed and unadjusted paradigms and attitudes. The present is strongly tied to the past and this is made even more evident as I make connections between former legislation and current laws.

#### i. Criminality, Policing, and Quotas

Shortly after the abolition of slavery with the ratification of the 13th Amendment and the passage of the Civil Rights Act of 1865, the agricultural south was intent on holding on to its economic providence and the free labor that backed it through slaves. To circumvent the newly passed laws a new system known as the Convict Leasing system was used to exploit the labor of blacks. By arresting blacks for misdemeanors such as loitering or public intoxication, the government could then lease out those who were convicted to private companies forcing them to work in coal mines or lumber mills. These collections of laws were known as the Black Codes and were created for the sole purpose of preserving slavery. The defining laws that fueled the “slave codes” were vagrancy laws which authorized the arrest of individuals with no proof of employment. Similar patterns can be found today in cases like the Three Strikes Law, prison minimum occupancy limits, policing quotas, and mandatory minimums.

#### ii. Lockup Quotas

Today, there is economic and political pressure for privately owned prisons to keep their prisons through the implementation of occupancy clauses or “lockup quotas.” The government pays private prisons to house inmates with the condition that they keep the prisons at a certain capacity to better regulate payment (new citation 3). To make sure those quotas are met legislation like habitual offender laws, also known as Three Strikes Laws, requires those who have committed a serious felony with two previous convictions to serve a mandatory life sentence.<sup>11</sup> There is already data showing that these laws disproportionately affect minorities. In 2015 data showed that 35% of three strikers were black, 37% were Hispanic, and 22% were white.<sup>12</sup>

#### iii. Productivity Goals

These quota-based systems then pressure those that enforce the law to adopt similar approaches. For legal purposes, most police departments won’t admit to using quotas, but will rather define their efforts through productivity goals. This leads to over policing in lower income areas where crime is higher, specifically drug related crime.

In the absence of effective rehabilitation programs and efforts, those who are involved in crime are labeled as criminals. The danger and adverse impact of labels are emphasized in both

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<sup>11</sup> (18 U.S.C. § 3559 (1984))

<sup>12</sup> Jennifer Walsh, Three Strikes Analysis: Demographic Characteristics of Strike Offenders (2016), <http://roseinstitute.org/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf>.

psychology and sociology and are manifest in high rates of recidivism within the United States. Recidivism is the likelihood of released offenders to commit another crime. While the assumed purpose in labeling criminals was to severely stigmatize crime to deter others from following that path, taken to the extreme, the social consequences outweighed the benefits of implementation.

It is interesting to note that the 13th Amendment, which outlawed slavery *except* in cases of imprisonment, was ratified shortly before the passing of the Civil Rights Act of 1866, which granted slaves citizenship. That there are a disproportionate number of black prisoners in comparison to white prisoners is another insight into the narrative that reveals policy which is seemingly racially neutral perfectly capable of constructing a racially stratified regime by oppressing blacks. Such connections can only be understood by simultaneously understanding America's historical approach to race issues and the matter of criminality as it relates to it.

### **III. The War on Drugs**

The discussion of prisoners as the new slaves and imprisonment as the new institution of slavery has foundation in the dehumanization of criminals and with that the "constitutional" precedent for that social mindset. The evidence of that is found in the origins of the War on Drugs and the administration that implemented it. President Nixon's Domestic Policy Advisor John Ehrlichman admitted the following<sup>13</sup>:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. 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.

The evidence of malice behind the War on Drugs, as well as the veracity of Ehrlichman's statement, is made more apparent by the results long-term effects of the policy war. Drug related arrests account for two thirds of the rise in the federal inmate population from 1985 to the year 2000. There are nearly 500,000 incarcerated today on drug related charges<sup>14</sup>. According to the NAACP, while African Americans account for 12.5% of illicit drug users, they account for 29% of those arrested for drug offense and 33% incarcerated for the same<sup>15</sup>.

Many argue the efficacy of imprisonment as one of few viable options in maintaining a crime-free and "orderly" society, but statistics say otherwise. According to a study done by the

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<sup>13</sup> Dan Baum, *Legalize It All*, HARPERS, Apr. 2016, at 1. <https://www-m.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/index.html?r=https%3A%2F%2Fwww.google.com%2F>

<sup>14</sup> Inmate Statistics - Offenses, Federal Bureau of Prisons. (Nov. 24, 2018), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp)

<sup>15</sup> Criminal Justice Fact Sheet, NAACP, (2015), <https://www.naacp.org/criminal-justice-fact-sheet>

National Institute of Justice tracking 404,638 prisoners in 30 states after their release from prison, they found that within three years of release, approximately 68% of those that were released were rearrested. Within five years of release, that number jumps to 76.6%. Drug offenders comprise 76.9% of those that were rearrested.<sup>16</sup> This not only speaks to the relative ineffectiveness of current legislation, but also from a broader perspective America's unwillingness to address the heart of the issue.

#### *A. Mandatory Minimums*

Mandatory minimums require, by law, that certain crimes require a specific amount of time spent incarcerated that judges cannot overrule regardless of circumstance. This is inextricably tied to the war on drugs, which has given rise to the stigmatization of crack cocaine with the black community as a scapegoat. Crack cocaine is nearly identical chemically to powdered cocaine except for the addition of water and baking soda.<sup>17</sup> It is important to note that there are many nuances and caveats that lend to the notion of crack being more dangerous as far as the culture surrounding it. The mixture of water and the method of smoking crack as opposed to snorting cocaine allows for quicker absorption in the brain leading to a more intense high that doesn't last as long (about 5-10 minutes as opposed to the 15-30 minutes of powdered cocaine). The assertion is this makes crack more psychologically addicting which is yet to be empirically determined.

Before the Fair Sentencing Act of 2010 created by the Obama administration, the sentencing ratio of crack to powdered cocaine was 100:1. Under the establishment of the Anti-Drug Abuse Acts of 1986 and 1988 the possession of five grams of crack would mandate the same sentence as 500 grams of powdered cocaine. With the FSA, the ratio moves to 18:1, which is more palatable but remains a compromise given the history.<sup>18</sup> The verdict is contradictory to the narrative used to propel its founding. If the rhetoric is that drugs are in and of themselves dangerous, then it logically maintains that a 1:1 ratio is sounder given the social and health-based consequences of both.

#### *B. Unintended Consequences: The Opioid Epidemic*

Within the last few decades incarceration has dropped within the black community. From 2009 to 2016 incarceration in the black community has dropped by 25%<sup>19</sup>. From 2000 to 2009

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<sup>16</sup> U.S. Department of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUSTICE STATISTICS, Figure 3, 8 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>

<sup>17</sup> Amanda Lautieri, *CRACK COCAINE & COCAINE: WHAT'S THE DIFFERENCE?* <https://americanaddictioncenters.org/cocaine-treatment/differences-with-crack>. (last visited Feb. 26 2019)

<sup>18</sup> 21 U.S.C. § 841 (1970), amended by 21 U.S.C. § 801 (FSA 2010)

<sup>19</sup> The Gap between the number of blacks and whites in prison is shrinking, Pew Research Center, (Jan. 12, 2018), <http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>

the black imprisonment rate for drug offenses dropped by 16% whereas for whites it increased by 27%.

One unforeseen outcome, even considering the decline with the crack epidemic, is the rise of meth and opioids in white communities, particularly those of lower income. One of the main causes of this new drug epidemic is the lack of infrastructure that should have taken place during the rise of crack and cocaine.

Methamphetamine users constitute about one third (569,000) of the 1.6 million non-medical stimulant users. Out of the 1.5 million non-medical cocaine consumers, about 354,000 use crack<sup>20</sup>. While there is bound to be overlap between cocaine and crack users, the most rigid line that separates the two is socioeconomic status which in often cases blends into race. While a lot of due emphasis is given to the disproportionality of incarceration rates and the factors that drive that inequality, it is all merely a symptom of a larger problem.

#### **IV. Rehabilitative Solutions**

I've taken the first step in finding resolution by endeavoring to understand the demographics and history of drug use and America's relationship to drugs. It is evident that our current system is ill equipped to deal with the sheer numbers of such a rampant health problem.

The most viable solution is to not only reevaluate how I view drugs in America, but to reassess our understanding of criminality. With emphasis on drug related crimes, America has mis stepped in solely viewing drugs as an issue of public safety rather than public health. Fear and obscurity have pervaded the narrative distancing the average citizen from the issue and thus ostracizing those who suffer the most from addiction and drug related issues. With such negative stigmatization of drugs and harsh penalties for those affiliated with them, there has been large social and economic backlash that has occurred as a result.

With little access to means of rehabilitation because of lack of infrastructure and the fear of imprisonment because the criminalization of drugs, the problem is either overlooked or patched over with incarceration. The average yearly cost to house a single prison inmate is about \$32,000. With an incarcerated population of nearly 2.2 million, America spends about 70 billion dollars annually for the upkeep. That is 16 billion dollars for the half a million inmates incarcerated on drug charges!

After factoring in the probability of an inmate being incarcerated again after being released, the lack of economic contribution given our lack of rehabilitative infrastructure and the inability to properly assimilate into society because of the rigid stigmas we've created surrounding drugs, the socioeconomic effects are compounded. These outcomes stand in stark contrast to places like Portugal who have decriminalized drugs and thus cut their incarceration

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<sup>20</sup> Substance Abuse and Mental Health Services Association, Behavioral Health Trends in the United States: Results from the 2014 National Survey on Drug Use and Health, SAMHSA, Figure 1, 10 (Sept. 2015), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf>

rates by 50% since the policy was instituted in 2001<sup>21</sup>. To clarify, decriminalization is not the same as legalization. Decriminalization simply means the sanctions imposed on those who either use or distribute drugs are changed by the federal government from criminal to administrative. The government does not condone the use or distribution of drugs and thus does not tax the vending of drugs, but it orients the penalties around drugs to be more reformatory rather than punitive. The only part in this conversation with drugs in which America has participated is the decriminalization of marijuana, which has far less lethal implications and thus makes for a very rough comparison.

While decriminalizing drugs doesn't have the same impact as legalizing them, it does lean towards the notion of more leniency of general drug use which would be opposite to the initial purposes of decriminalization. The principle concerns would remain the same: How does society maintain the same standards of abstinence from drugs? And in the case of those who abuse drugs, what can be done to ensure their rehabilitation?

A prospective solution can be found Florida's implementation of the Marchman Act. The legislation posits that if certain conditions and criteria are met, individuals can be involuntarily assessed and treated for alcohol or drug abuse. The criteria are that 1) The person be impaired by substance abuse and that the medical and behavioral conditions of the person are not beyond the safe management capabilities of the service provider. 2) The service provider must emphasize admission to the service component that represents the least restrictive setting that is appropriate to the person's treatment needs.<sup>22</sup> The act was passed in response to staggering numbers in incarceration rates due to intoxication that nearly prompted the construction of another jail in Broward County. The community has since saved \$350,000 each year as a result of the law.<sup>23</sup>

## V. Conclusion

While the 13th Amendment aided in the abolishment of slavery, it also contributed to a new form of oppression found in the Prison Industrial Complex. And although the motive behind the Equal Protection Clause in the 14th Amendment was to put everyone on equal footing, it was still used as justification for Jim Crow laws. These are evidences that no law is above scrutiny when the effects of such are experienced disproportionately.

Drugs are a problem, but so is the history surrounding their criminalization and their weaponization to oppress minorities. We need to change policy in order to reflect the ideal that America is more focused on encouraging good behavior rather than strictly punishing bad behavior. We need to dissolve quota systems that fuel prison occupation and cause over-policing in minority communities, question the normalcy of privatization in the prison industry and thereby stigmatize the exploitation of prisoners as a form of slave labor, and restructure the

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<sup>21</sup> George Murkin, Drug decriminalisation in Portugal: setting the record straight, UNODC, 3 (June 2014), <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Transform-Drug-Policy-Foundation/Drug-decriminalisation-in-Portugal.pdf>

<sup>22</sup> FLA. STAT. § 397.601 (2009).

<sup>23</sup> Jessica Zimmer, Florida's Marchman Act: Why Involuntary Commitment Works (2014), <https://www.thefix.com/content/florida%E2%80%99s-marchman-act-why-involuntary-commitment-works?page=6>

current prison system to be geared towards rehabilitation allowing for the assimilation of released prisoners back into society. As the Great Reverend Martin Luther King once said, “An individual has not started living until he can rise above the narrow confines of his individualistic concerns to the broader concerns of all humanity.” It is in that same spirit that we urge all to consider where they stand and what their role will be in making America a more perfect union.