

2015

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Recommended Citation

15 U. Md. L. J. of Race, Religion, Gender & Class 310 (2015)

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ON LAW-BREAKING AND LAW'S LEGITIMACY

Aliza Plener Cover*

Our criminal justice system is built and justified on the idea that criminal laws reflect our communal sense of right and wrong; criminal punishment is theorized as distinct from civil confinement primarily because of the collective moral opprobrium attached to a criminal conviction.¹ What happens, then, to the legitimacy of criminal law when large segments of the community persistently engage in the conduct it prohibits?

The war on drugs catalyzed an era of mass incarceration, a phenomenon much studied and critiqued by scholars, policymakers, and advocates.² Less discussed in legal circles is the coexistence of mass law-breaking—law-breaking by individuals across racial and economic lines, within all sectors of society, and in numbers vastly disproportionate to those serving time. Our last three presidents either allegedly or admittedly used illicit drugs in their younger days.³ So,

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¹ E.g., Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBLEMS 401, 404–05 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. . . . [A crime] is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”).

² See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); André Douglas Pond Cummings, “*All Eyes on Me*”: *America’s War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417 (2012); HUMAN RIGHTS WATCH, *NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION* (2014), http://www.hrw.org/sites/default/files/related_material/2014_US_Nation_Behind_Bars_0.pdf; PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009), http://www.pewtrusts.org/~media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf.

³ See *Clinton Tried Marijuana as a Student, He Says*, N.Y. TIMES (Mar. 30, 1992), http://www.nytimes.com/1992/03/30/news/30iht-bill_1.html; *Bush Faces New Round of Drug Questions*, CNN.COM (Aug. 20, 1999), <http://www.cnn.com/ALLPOLITICS/stories/1999/08/20/president.2000/bush.drug/>.

too, have multiple legislators,⁴ judges,⁵ executive officials,⁶ and prosecutors.⁷ They fall squarely within the norm. According to government data, in 2013, just under 127.5 million (or 48.6%—*nearly half*—of) Americans over the age of 12 had, at some point in their lives, used illicit drugs, and more than 24.5 million (or 9.4%) had done so in the past month.⁸ Meanwhile, in 2012, just over 310,000 inmates were incarcerated in state and federal facilities for drug offenses⁹—a striking number, but one dwarfed by the millions violating the law each year.

08/20/president.2000/bush.drug/; BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 93–94 (2004 ed.) (candidly admitting cocaine and marijuana use).

⁴ Former Representative Trey Radel of Florida, for example, who voted to pass a bill allowing drug-testing of food stamp recipients, was subsequently convicted of cocaine possession. See David A. Fahrenthold, Keith L. Alexander and Sari Horwitz, *Rep. Trey Radel of Florida Pleads Guilty to Cocaine Charge*, WASH. POST (Nov. 20, 2013), http://www.washingtonpost.com/local/crime/rep-trey-radel-expected-to-face-judge-on-charges-of-cocaine-possession/2013/11/20/b029caba-51ce-11e3-a7f0-b790929232e1_story.html.

⁵ Justice Clarence Thomas is among them. See Stephen Labaton, *Thomas Smoked Marijuana But Retains Bush Support*, N.Y. TIMES (Jul. 11, 1991), <http://www.nytimes.com/1991/07/11/us/thomas-smoked-marijuana-but-retains-bush-support.html>.

⁶ David Paterson was the governor of New York from 2008 to 2010. See David Paterson Admits Using Cocaine, *Marijuana In His 20s*, HUFFINGTON POST (Apr. 1, 2008), http://www.huffingtonpost.com/2008/03/24/david-paterson-admits-usi_n_93218.html; Michael Bloomberg was mayor of New York City from 2002 to 2013. See Jennifer Steinhauer, *Bloomberg Says He Regrets Marijuana Remarks*, N.Y. TIMES (Apr. 10, 2002), <http://www.nytimes.com/2002/04/10/nyregion/bloomberg-says-he-regrets-marijuana-remarks.html>.

⁷ E.g., Stephen Visser, *Former Fulton Narcotics Prosecutor Disbarred for Felony Drug Charges*, ATLANTA JOURNAL-CONSTITUTION (Feb. 2, 2015), <http://www.ajc.com/news/news/former-fulton-narcotics-prosecutor-disbarred-for-f/nj3N3/>.

⁸ SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMINISTRATION, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES, Table 1.1B, <http://www.samhsa.gov/data/sites/default/files/NSDUH-DefTabs2013/NSDUH-DefTabs2013.htm#tab1.1a>.

⁹ See E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 16–17, <http://www.bjs.gov/content/pub/pdf/p13.pdf> (98,900 drug offenders were incarcerated in federal facilities and 210,200 in state penal institutions). This tally includes offenses such as the distribution of drugs that encompass conduct beyond simple possession. See *id.*

In this essay, I argue that persistent, mass law-breaking is a phenomenon worthy of significant scholarly and policymaking attention. In the context of the war on drugs, mass law-breaking undermines the legitimacy of harsh sentencing practices and weighs in favor of a new approach. I argue here that widespread law-breaking is not always a scourge to be eliminated; sometimes, it is a grassroots expression of community morality to be heeded. I urge here that law-makers and law-enforcers should not only seek to *suppress*, but also to *learn from* and *adapt because of*, widespread law-breaking. In making this argument, I begin by identifying three primary ways in which mass law-breaking undermines and reveals deficiencies in the legitimacy of the law. I then note limitations on my argument, and conclude.

First, mass law-breaking weakens the law's legitimacy by destabilizing its connection to community standards of justice and morality.¹⁰ As Paul Robinson has notably argued, a wide gap between "the community's shared intuitions of justice" and formal law endangers both the legitimacy and the efficacy of the criminal justice system.¹¹ In the context of the war on drugs, the unrelenting prevalence of illicit drug use constitutes powerful empirical evidence that the retributive calculations of criminal drug policy are out of sync with the moral orientation of large swaths of the community. Rates of law-breaking are not the *only* indicators of community standards of justice: social science literature assessing the moral intuitions of ordinary citizens through research studies and surveys present significant evidence, as well.¹² Yet the organic data points of *actual*

¹⁰ Problematically, the Supreme Court tends to ignore the possibility of such a schism. In its Eighth Amendment jurisprudence, for example, the Supreme Court considers harsh sentencing laws to be in and of themselves determinative of community norms about appropriate punishment. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (laying out principles of proportionality review that emphasized deference to legislative judgments and authorized overturning such judgments only under extreme circumstances of gross disproportionality of sentence to crime).

¹¹ Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1107 (2011) ("One may conclude, then, that the crime-control power of the criminal law depends in some significant part upon how well it tracks the community's shared intuitions of justice.").

¹² *See* Paul H. Robinson et. al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010). Like mass law-breaking, such surveys suggest that punishment practices are out of step with community norms. *See id. at* 1976–77 ("The available empirical

conduct—of real-world illicit drug use—provide particularly compelling information. Sometimes people express their moral standards not only through their words, but also—and sometimes more truthfully¹³—through their actions. When a significant percentage of society breaks—or has, in the past, broken—a particular law, this fact impacts the actual and perceived legitimacy of harshly punishing that conduct.

Second, mass law-breaking undercuts the law's legitimacy by revealing its ineffectuality. The persistence of pervasive illicit drug use shows a pragmatic failure of the war on drugs to achieve its desired end; it undermines the deterrence rationale on which the drug war is justified and hence the legitimacy of the war itself. Cast in its noblest light, the drug war was an effort to eradicate and deter harmful, widespread behavior. Yet, several decades and several billions of dollars later, the continued ubiquity of illicit drug use provides significant evidence that harsh criminal sanctions are not working, and therefore cannot be justified even on utilitarian grounds.¹⁴

Third, mass law-breaking undermines law's legitimacy by starkly illuminating its discriminatory impact. Pervasive illicit drug use across racial groups, alongside racially-disparate patterns of punishment, raises a compelling inference of discriminatory

evidence suggests that, while many people see drug offenses as serious, they typically are not viewed as being nearly as blameworthy as current sentences would suggest" (explaining and citing studies)); Robinson, *supra* note 11, at 1107 ("One may well ask how well current American criminal law matches the community's intuitions of justice. The short answer is: not well. Modern crime-control programs, such as three strikes, high drug-offense penalties, adult prosecution of juveniles, narrowing the insanity defense, strict liability offenses, and the felony-murder rule, all distribute criminal liability and punishment in ways that seriously conflict with lay persons' intuitions of justice.").

¹³ See, e.g. Fahrenthold, Alexander & Horwitz *supra* note 4. Imagine a legislator—such as Representative Trey Radel—who votes for the passage of a tough-on-drugs bill but who is caught using drugs recreationally. Which conduct is more truthfully indicative of his view of decency? His public denial of illicit drug use, in a system that disproportionately targets poor and minority drug users, or his private participation in the criminal conduct he publicly seeks to punish?

¹⁴ See, e.g., Andrew D. Leipold, *The War on Drugs and the Puzzle of Deterrence*, 6 J. GENDER, RACE & JUST. 111, 112–17 (2002) (describing the "apparent failure of deterrence").

enforcement—an inference that, once again, undermines the legitimacy of criminal law.¹⁵ While “[s]tudies show that people of all colors *use and sell* illegal drugs at remarkably similar rates,” “[i]n some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.”¹⁶ In 2007, only 14% of regular drug users—but “37% of those arrested for drug offenses and 56% of persons in state prison for drug offenses”—were African American.¹⁷ When punishment, but not law-breaking, is concentrated disproportionately against minorities, the legitimacy of the law necessarily unravels.

Persistent and pervasive illicit drug use, in short, weakens the legitimacy of harsh criminal drug laws by distancing them from community norms of justice, by revealing their inefficacy, and by exposing their discriminatory impact. This crisis of legitimacy is not easily remedied by increased punitiveness. Rather, mass law-breaking should signal to lawmakers that the criminal law is out of touch with the community it serves and is in need of change.

Having made the central claim—that mass law-breaking undermines the legitimacy of harsh criminal sentencing in the drug context—I will briefly address a few important clarifications and limitations. First, I do not argue that it is inherently illegitimate to *criminalize* any and all misconduct simply because a large number of people engage in it.¹⁸ Taking this argument to its extreme, there would be no role for a legitimate criminal justice system to protect the vulnerable from the tyrannical whims of the majority. Instead, I argue that the frequency of commission of a given offense is an important factor in assessing the legitimate parameters of its *punishment*. In

¹⁵ See generally Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141 (2014).

¹⁶ ALEXANDER, *supra* note 2, at 7 (footnotes omitted) (also noting that “if there are significant differences to be found in the surveys, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color.”).

¹⁷ Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, THE SENTENCING PROJECT 2 (2007), http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf.

¹⁸ Nor am I asserting that it is right—or at least not *wrong*—to proverbially jump off a cliff if everyone is doing it. There is a difference, however, between being *wrong* and being *subjected to harsh criminal punishment*. I do not tackle the moral question of whether using illicit drugs is “wrong.”

other words, the criminal justice system loses legitimacy when we *severely punish* admittedly criminal conduct that many people decide to commit.

Second, the ubiquity of criminal conduct poses a less significant threat to criminal justice legitimacy when that conduct is *violent* rather than *non-violent*. Without recognizing this limitation, a litany of disturbing hypothetical scenarios might play out. What if a majority of men abused their spouses? What if it were common practice for members of the racial majority to commit hate crimes against racial minorities? Would serious sanction necessarily undermine the system's legitimacy? The answer, to my mind, is clearly no. Violent conduct¹⁹ can sustain harsher punishment within a legitimate system of punishment, as it inherently involves the subjugation of another person's rights or personal security, and its severe punishment better coheres with community intuitions of fairness. Many drug offenses, such as simple or repeated possession, clearly do not fall within this understanding of violence, whatever their (disputed) social harm may be.²⁰

Third, my argument has a special, and perhaps a singular, significance in the drug context. The troika of (1) extraordinary high rates of illicit drug use; (2) historical and, in many places, continuing harsh punishment of drug offenses and the catalytic role of the drug war in the advent of mass incarceration; and (3) the non-violent nature of many drug crimes creates a perfect storm for undermining the legitimacy of the criminal law. There simply is no other type of crime in the modern criminal landscape that bears each of these characteristics; drug possession offenses are *sui generis*.

Consider other illegal conduct that is similarly pervasive. Traffic offenses, for example, are enormously widespread.²¹ To the

¹⁹ Defining "violence" is itself a fraught endeavor worthy of additional consideration. For the federal definition of a crime of violence, see 18 U.S.C. § 16 (2006).

²⁰ See, e.g., Eric Blumenson & Eva Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform*, 85 IND. L.J. 279, 283–85 (2010) (arguing that "marijuana criminalization cannot be justified on grounds of harm to others").

²¹ See generally U.S. DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, 2013 MOTOR VEHICLE CRASHES: OVERVIEW 1 (2014), <http://www-nrd.nhtsa.dot.gov/Pubs/812101.pdf>.

extent that drug use, though inherently non-violent, bears potential harmful societal consequences, traffic violations are risky, too: in 2013, 32,719 people died in traffic accidents nationwide.²² Yet American jails and prisons are not filled with legions of traffic offenders.²³ We simply do not punish traffic violations harshly except in rare circumstances where vehicular misconduct bears harmful real-world consequences.²⁴ Statutes criminalizing adultery, sodomy, and fornication similarly punish ubiquitous conduct—but, even to the extent that these prohibitions remain on the books or are constitutional,²⁵ since the mid-twentieth century, they have rarely resulted in prosecution and virtually never in severe sanctions.²⁶

On the other end of the spectrum, types of criminal conduct that do bear harsh punishment are significantly less common than illicit drug use, and much of it cannot possibly be described as non-violent. Consider serious violent crime rates: In 2013, with the United States population at over 316 million, the FBI reported 14,196 murders and non-negligent manslaughters, 79,770 rapes, 345,031 robberies, and 724,149 aggravated assaults.²⁷ In 2010, government data estimated “females nationwide experienced about 270,000 rape or sexual assault victimizations.”²⁸ Property crimes, though far more numerous than violent crimes, were nonetheless dramatically fewer than the drug usage numbers considered above, with nearly two

²² *See id.*

²³ *See generally* CRIME IN THE UNITED STATES 2013, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls (last visited Nov. 12, 2015) [hereinafter *Crime in U.S.*].

²⁴ *See id.*

²⁵ *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a Texas statute prohibiting same-sex sodomy).

²⁶ *See* Joanne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 129–30 (2014) (“Although they are probably unconstitutional violations of privacy under *Lawrence v. Texas*, adultery and fornication laws exist. Almost twenty states currently have statutes criminalizing adultery, fornication, or both.”) (footnotes omitted).

²⁷ *See Crime in U.S. supra* note 23.

²⁸ U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 1 (2013), <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (this data includes reported and non-reported instances).

million burglaries, just over six million larcenies, and just under 700,000 motor vehicle thefts.²⁹ These numbers reflect crimes, not criminals, and assuming that at least some proportion of these offenses were committed by the same individuals, there were considerably fewer law-breakers than crimes—and vastly fewer law-breakers than law-abiders.³⁰ This would be the case even assuming significant under-reporting of certain types of crimes such as sexual assault. Illicit drug use, on the other hand, operates at a different level of magnitude; and it would be impossible to accurately capture community sentiment on drugs without accounting for the vast numbers of drug users.

Finally, I recognize that the argument articulated above stands in tension with some deterrence theorists' views of criminal punishment: that, as a matter of efficacy, severe punishments are justified to quell widespread, hard-to-detect behavior.³¹ I embrace that tension. I suggest a directly opposite principle: that, as a matter of *legitimacy*, the severity of punishment should be *constrained* when the criminalized behavior is widespread. My position harmonizes with that of many modern deterrence theorists who have cast doubt on the utilitarian value of harsh, infrequent punishments, instead advocating moderate yet predictable sanctions as the more effective method of deterring problem behavior—in part because of their increased legitimacy.³²

In this essay, I claim that the ubiquity of criminal conduct, and in particular non-violent criminal conduct, undermines the legitimacy of severely punishing that conduct. Widespread illicit conduct provides an important, objective data point that community members deem the conduct unworthy of severe sanction. Moreover, when mass

²⁹ See *Crime in U.S.* *supra* note 23.

³⁰ See *id.*

³¹ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 988–89 (1991) (explaining how deterrence justifies the harsh punishment of crimes that are difficult to detect).

³² See, e.g., Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 202 (2013) (“[C]ertainty of apprehension and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent.”); see also Robinson, *supra* note 11 at 1106 (arguing for the increased utilitarian efficacy of the criminal law if “it earns a reputation as a moral authority, that is, if people come to see it as a system that reliably punishes in ways consistent with people’s intuitions of justice”).

law-breaking persists in the face of harsh punishment, it is evidence of the ineffectuality of the criminal regime. And when law-breaking extends across racial and demographic groups, but punishment is concentrated within minority populations, it provides evidence of discriminatory enforcement that undermines the legitimacy of law as a whole.

The moment is ripe for a conversation about the corrosive effects of harsh and selective punishment of behavior that is pervasive within our society. In recent years and months, dramatic steps have been taken toward drug sentencing reform,³³ even as punitive drug policies remain firmly entrenched in many parts of the country.³⁴ In this lingering era of mass incarceration, with hundreds of thousands in prison for conduct committed by tens of millions more, taking seriously the impact of mass law-breaking on law's legitimacy could open critical new avenues for reform.

³³ Four states and the District of Columbia have legalized recreational marijuana use. See Niraj Chokshi, *Alaska Legalizes Marijuana Today. Here's How Its Law Compares to All the Others*, WASH. POST (Feb. 24, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/24/alaska-legalizes-marijuana-today-heres-how-its-law-compares-to-all-the-others/>. In 2013, citing "unduly harsh sentences and perceived or actual disparities" in sentencing, as well as "rising prison costs," former Attorney General Eric Holder announced a relaxation of the Department of Justice's traditionally punitive approach toward prosecuting drug crimes. Memorandum from Eric Holder to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf> (issuing new policy against prosecutorial charging decisions triggering mandatory-minimum sentences if certain criteria are satisfied, such as a nonviolent offense, no serious criminal history, and no major connection with organized crime). President Obama has launched a major clemency initiative to alleviate historically harsh drug sentencing practices, with 46 clemency petitions granted on July 13, 2015 alone. See CLEMENCY INITIATIVE, DEPARTMENT OF JUSTICE, <http://www.justice.gov/pardon/clemency-initiative> (last updated Jan. 13, 2016); Julie Hirschfeld Davis and Gardiner Harris, *Obama Commutes Sentences for 46 Drug Offenders*, N.Y. TIMES (July 13, 2015), <http://nyti.ms/1Je2cHE>.

³⁴ See e.g., LA. REV. STAT. ANN. § 40:966(E)(2), (3) (2012) (in Louisiana, a second marijuana offense is punishable by a sentence of up to five years in prison and a third by up to 20 years in prison); LA. REV. STAT. ANN. § 15:529.1(A)(4)(aA) (2012) (a fourth marijuana offense triggers a sentence of 20 year to life).