Drug War Reparations*

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Abstract: Public officials should compensate the victims of wrongful conviction and enforcement. The same considerations in favor of compensating people for wrongful conviction and enforcement in other cases support officials’ payment of reparations to the victims of unjust enforcement practices related to the drug war. First, we defend the claim that people who are convicted and incarcerated because of an unjust law are wrongfully convicted. Although their convictions do not currently qualify as wrongful convictions in the legal sense, we argue that the same reasons for legally recognizing other wrongful convictions support conceiving of these cases as wrongful convictions. If so, then people who suffered wrongful convictions associated with unjust laws, like others who were wrongfully convicted, are entitled to compensation and reparation. We then argue that America’s drug laws are unjust laws. Therefore, people who were convicted of nonviolent drug offenses are entitled to compensation.

Public officials should compensate the victims of wrongful conviction and enforcement. The same considerations in favor of compensating people for wrongful conviction and enforcement in general support the payment of reparations to the victims of unjust enforcement and sentencing policies related to the drug war. Currently, governmental agencies can owe compensation for wrongful conviction when a person’s conviction is a result of officials’ negligence, recklessness, or wrongdoing. For example, if sloppy investigative practices cause officials to make factual mistakes that lead to wrongful imprisonment, then they would owe compensation. But officials also wrongfully convict people when they negligently or knowingly make moral mistakes that cause imprisonment. So if agencies owe compensation when officials wrongfully convict or imprison, then they ought to compensate those who are harmed by their mistaken enforcement of drug prohibitions.

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In some cases, officials who participated in the enforcement of recreational drug prohibition committed profound injustices against entire communities, and the harmful effects of mass incarceration persist. In such cases, cities or states may owe reparation to members of those communities as well. For example, some law enforcement officers unjustifiably inflicted substantial economic losses on communities of color and prevented those communities from developing the human capital that is necessary for intergenerational mobility. In these cases, even those who were not the direct victims of wrongful conviction or imprisonment could be entitled to reparation for the indirect harms enforcing drug laws.

Reparations for the drug war can take many forms. In the city of Oakland, California, for example, the equity permit program prioritizes people who were convicted of nonviolent drug offenses in the distribution of permits to sell medical marijuana (Ravani 2019). More generally, many states pay the victims of wrongful conviction cash and provide them with social services that aim to offset the lost wages and opportunities people suffered as a result of incarceration. At the community level, policy initiatives such as Barack Obama’s My Brother’s Keeper program, which explicitly focuses on creating opportunities for young men of color, may be justified on reparative grounds.¹

Our methodological approach is ecumenical. We build the case for drug war reparations from premises that are implicit in actual practices (e.g., compensating people for wrongful convictions) and broadly acceptable to philosophers with a range of viewpoints (from self-ownership libertarians to relational egalitarians). And while our conclusion is in some sense revisionary, we argue that drug war reparations align with many existing policies and priorities.

The case for reparations proceeds as follows. In Section 1 and Section 2 we develop a more general argument, which is that people who are convicted and incarcerated because of an unjust law are wrongfully convicted. Although their convictions do not currently qualify as wrongful convictions in the legal sense, we argue that the same reasons for legally recognizing other wrongful convictions support conceiving of these cases as wrongful convictions too. And if so, then people who suffered wrongful convictions associated with unjust laws, like others who were wrongfully convicted, are entitled to compensation and reparation. In Section 3, we argue that a wide range of principles imply that America’s drug laws are unjust laws. Therefore, people who were convicted of nonviolent drug offenses are the victims of wrongful conviction and are entitled to compensation. In Section 4, we discuss proposals for individual reparations for wrongful drug-related convictions.

We then consider the objections in Section 5 that compensating all the individual victims of the drug war would be too costly and that it would

¹ For more information about this program, see Obama Foundation 2019.
set a bad precedent. In response, we argue that these objections cannot be sustained without also undermining most other practices of public reparation and compensation, and since public reparation and compensation are generally justified, these objections do not undermine the case for drug war reparations. Individuals who are incarcerated are not the only victims of the drug war. In Section 6, we argue that communities may also be entitled to community reparations, and we describe some models for community reparation. Section 7 concludes.

1 Two Puzzles About Wrongful Conviction

The first thesis we defend is that people who were incarcerated because of America’s war on drugs are entitled to reparations on the grounds of wrongful conviction. Under existing standards of wrongful conviction, the victims of America’s war on drugs are not entitled to reparations. Existing standards include only actual innocence of committing a crime or procedural injustice during the defendant’s investigation, trial, or sentencing. After all, many of the people who have been incarcerated for drug crimes probably did technically commit a crime and receive a fair trial. We argue that actual innocence and procedural injustice should not be the only grounds for establishing wrongful conviction. Convictions under unjust laws should qualify as wrongful convictions as well.

Consider two puzzles related to the existing standards for wrongful conviction. First, the standard of actual innocence refers to actual innocence of committing a crime and not actual innocence of wrongdoing. Presumably, the same reasons in favor of exonerating and releasing defendants on the grounds of actual innocence of committing a crime also justify exoneration and release of defendants who are morally innocent.²

Second, existing standards of wrongful conviction entail that some mistakes by public officials constitute grounds for a judgment of wrongful conviction, while others do not. Yet the same reasons in favor of characterizing instances of gross procedural injustice during investigation, trial, and sentencing phases of conviction as wrongful convictions also support a practice of characterizing instances of gross procedural injustices within the executive and legislative branches as wrongful convictions.

In this section, we argue that officials ought to resolve these puzzles by rethinking existing standards of wrongful conviction to include actual moral innocence and gross procedural injustice at the legislative and executive level as well as within the judiciary. With this revised conception of wrongful conviction in hand, we then make the case that people who are convicted for crimes related to America’s war on drugs are wrongfully convicted because they are morally innocent and because they are the victims of procedural injustices within the legislative and executive branches.

² For a similar analysis, see Tomlin 2013, 52–54.
Actual innocence is the most powerful and reliable grounds for wrongful conviction. If a defendant can establish on the basis of further evidence that he did not commit the crime, then his conviction for that crime can be overturned on the grounds that he is actually innocent. For example, in the United States, more than 300 people have been exonerated on the basis of DNA evidence. In most cases, the standard-for-wrongful-conviction focus on actual innocence of committing a crime aligns with actual innocence of wrongdoing. But the two cases come apart when a person is innocent of wrongdoing yet not innocent of committing a crime. Answering questions about whether standards of wrongful conviction should extend to people who did commit a crime but who did nothing wrong requires further engagement with the moral basis of the criminal law.

Criminal law is typically justified on the grounds that it prohibits people from doing things that are morally wrong. A primary function of the criminal law is to prevent and punish wrongdoing. The preventative function of the criminal law is justified because crimes are violations of people's enforceable rights and people are therefore entitled to issue threats in order to protect their own or other's rights. The punitive function of the criminal law is justified because criminals deserve to be punished when they violate other's enforceable rights. Relatedly, the criminal law also serves an expressive function—criminal penalties express disapproval for wrongdoing.

If these justifications for the criminal law are correct, then the reason that a person who is mistakenly convicted of a crime he didn’t commit ought to be released is that he didn’t do anything wrong, and therefore was not liable to be punished. It is not that he didn’t technically commit a crime. By focusing on lawbreaking and not moral wrongdoing, existing standards of wrongful conviction communicate greater disapproval for lawbreaking than for wrongdoing, since public officials are willing to rescind their disapproval when it becomes clear that a person did not break the law but they are unwilling to rescind disapproval when it is clear that a person did not act wrongly. So too with punishment. Existing standards of wrongful conviction subject people to punishment when it becomes clear that they did not act wrongly but cease punishment when it becomes clear that they did not break a law.

Since the best justifications for the criminal law appeal to the fact that criminals act wrongly when they violate other people’s enforceable rights, standards of wrongful conviction should reflect the fact that it is wrong to convict a person of a crime when he has not violated anyone’s enforceable rights or otherwise acted wrongly. A narrow focus on mere lawbreaking is inconsistent with the underlying moral justification for the criminal law, which does not appeal to the wrongfulness of breaking the law per se.

This justification for the criminal law can be defended on broadly consequentialist or deontological grounds—both appeal to the imperative of preventing and punishing wrongful conduct. See Edwards 2018.
Instead, conviction is justified when a person deserves punishment for acting wrongfully or when his conduct merits the political community’s disapproval.

The argument in favor of expanding standards of wrongful conviction to include actual moral innocence in addition to innocence of committing a crime does not rely on the claim that all convictions and punishment for mala prohibita offenses are wrongful, though this claim would support our conclusion. It relies only on the claim that people should not be convicted and punished for mala prohibita offenses in at least some cases, including offenses related to America’s war on drugs. Even if arguments for the criminalization of some mala prohibita offenses succeeded (e.g., if lawbreaking were wrong in some cases and effective and proportionate punishment for lawbreaking were possible), such arguments could not justify criminal penalties for people who buy, sell, and use drugs.

Consider first the argument that all convictions for offenses that are not independently wrongful are themselves wrongful convictions. Michael Huemer (2013) provides a compelling defense of this position. Essentially, Huemer’s argument is that the enforcement of criminal penalties is backed by force and threats of force. It is permissible to use force and to threaten people with force only if they are liable to be interfered with. People are not liable to be threatened or imprisoned unless they act wrongly. Therefore, only mala in se offenses should be subject to criminal penalties. On Huemer’s account, it is never wrong in itself to break a law, and people have no duty to obey the law simply because it is the law. So any conviction for a crime that was not independently wrongful would qualify as a wrongful conviction. Huemer advocates for jury nullification on these grounds, but the same arguments would also support exoneration for morally innocent people who are convicted of lawbreaking.

One needn’t go as far as Huemer in order to support the claim that some convictions for mala prohibita offenses are wrongful. Douglas Husak (2008), for example, agrees that the moral foundation of the criminal law is that it punishes people who act wrongly and deserve punishment, but allows that in some circumstances the mere act of committing a mala prohibita offense could be sufficiently wrong as to justify punishing an offender. Husak requires only that “Governments should not infringe the right not to be punished without a substantial reason,” and “criminal statutes must directly advance the state’s interest and should be no more extensive than necessary to satisfy their objective” (2008, 130). For mala in se offenses, the fact that a criminal statute prohibits people from wrongfully harming each other qualifies as a substantial enough reason to justify criminal statutes. For mala prohibita offenses, Husak considers three kinds of reasons that could be substantial enough to justify criminal penalties in the absence of a mala in se justification. First, criminal statutes may be enforced to solve coordination problems, such as laws that require drivers to stay on the right side of the road. Second, criminal statutes may be used to enforce
promissory obligations, such as the duties that people incur when they apply for licenses to hunt or drive. Third, criminal statutes may be used to uphold a principle of fair play, where people who accept benefits are required to contribute.

Perhaps convictions for some mala prohibita offenses could meet these conditions, but Husak is skeptical that the range of mala prohibita offenses that are currently subject to criminal sanctions could be justified on these grounds. For example, Husak points out that many mala prohibita statutes do not benefit the people who are subject to them, so principles of fair play could not justify these statutes. In cases where enforcing a criminal statute cannot meet these conditions, public officials cannot justify infringing on people’s general right against being punished. In these cases, excessive enforcement of criminal statutes that do not advance the state’s interests are wrongful convictions.

Husak and Huemer agree that lawbreaking in itself is not pro tanto wrong. This claim is controversial. Yet even if we grant that lawbreaking may be pro tanto wrong, it still wouldn’t follow that convicting people for some mala prohibita offenses cannot be wrongful. For example, even if citizens had duties to obey all laws passed by legitimate procedures in a reasonably just society, it could still be wrong in some cases to uphold convictions for morally innocent people when their convictions are disproportionate to the wrongfulness of lawbreaking or when specific laws are the result of gross procedural injustices within the executive and legislative branches. And even if people did have duties to comply with laws that served the public interest or solved collective action problems, at least some existing laws do not meet these conditions, so such an underlying justification for a presumptive duty to obey the law, which would ground the legitimacy of punishment, would not apply in these cases.

Richard Dagger (1993, 2008) develops a defense of the fair play justification for criminalizing mala prohibita offenses that, unlike Husak’s defense, focuses on the benefits that citizens accept from living under a legal system rather than the benefits of particular laws. Dagger’s argument only establishes a pro tanto justification for punishing mala prohibita offenses though, and this justification can be outweighed by other morally weighty considerations.

Three considerations can outweigh officials’ pro tanto justification for punishment on Dagger’s account. First, if a person has duties of justice to commit a mala prohibita offense, then she should not be punished for complying with her duties of justice. For example, it would be wrong to punish people for breaking a law that requires citizens to report sightings of runaway slaves. Second, if avoiding a mala prohibita offense violates one’s duties of self-respect, then public officials should not convict people for those offenses. For example, public officials should not punish people for homosexual acts or interracial marriage, and people’s duties to obey the law in these cases are not only outweighed by considerations of justice but
also by duties of self-respect. Third, if proportionate criminal enforcement commensurate with the pro tanto wrongfulness of committing a mala prohibita offense is impossible, then punishment is wrongful because the justification for punishment is outweighed by other moral considerations, such as people’s pro tanto rights against being imprisoned.

Huemer (2009) and Husak (2003) are both explicit that their accounts entail that it is generally wrong for public officials to convict and imprison people for drug-related offenses. Others reject the criminalization of drugs on the grounds that such policies violate a principle of self-ownership—roughly, a right of exclusive discretionary control over one’s person. Another reason to reject the criminalization of drug use is that “sexual freedom and the liberty to use alcohol or drugs” are “important forms of liberty” that officials should respect (Hart 1973, 541). And even consequentialists who are skeptical of natural bodily rights and friendly to paternalism have opposed drug prohibition on the grounds that prohibitive policies have done more harm than good. One may be sympathetic to drug prohibition and yet allow that incarcerating people for drug-related offenses is often procedurally unjust or the punishment is disproportionate to the offense. For this reason, even if incarceration for drug crimes could be justified in principle, there is broad consensus that the practice of drug enforcement is not always justified.

Thus, our argument does not rely on a controversial conception of self-ownership or the view that incarcerating people for drug-related offenses is always wrong. Rather, our claim is that where drug prohibition is unjust, compensation is required. In cases where drug prohibition is just (if any), then no doubt compensation would be unwarranted. But to the extent that it is plausible that at least some people have been wrongfully imprisoned as a result of prohibitive drug policies, it is worth investigating the appropriateness of compensation for drug-related incarceration.

Moreover, even on Dagger’s account, which establishes strong presumptive reasons to obey a system of laws, citizens’ duty to obey any particular law can still be outweighed by other morally weighty considerations. And in the case of drug policy, it is very plausible that other considerations outweigh the duty to obey drug prohibitions because drug policy is often used as a tool of injustice. For example, the enforcement of drug policy exacerbates existing patterns of racial injustice and undermines relations of equality between citizens. Historically, drug laws have been explicitly used to repress communities of color (Courtwright 2012). Complying with drug policies may in some cases be incompatible with duties of self-respect and

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4 On self-ownership, see, for example, Vallentyne et al. 2005.
5 See, for instance, Conly 2013, 120.
6 For example, it could be that some licensing requirements or administrative oversight over the distribution of drugs could be just. Even if this were the case, the current system of drug prohibition exceeds licensing requirements and, unlike typical violations of licensing requirements, includes incarceration.
resistance, to the extent that drug policies violate people’s basic rights to make decisions about their own bodies. In the same way that violating laws that prohibited homosexual sex challenged officials’ authority to regulate people’s intimate and personal decisions, so too may violating drug laws challenge the authority of the state to regulate intimate bodily choices.

Even if it were wrong to violate drug laws though, existing practices of drug policy enforcement are so excessively punitive that existing convictions are clearly incommensurate with the wrongfulness of violating drug laws, on any account that holds that violating drug laws is wrong. To maintain that punishing people who commit criminal offenses is justified, simply on the grounds that they committed a crime, would license an extraordinary amount of criminal punishment by public officials. Most adults in America commit multiple felonies per day in the course of their daily routine (Silverglate 2011). So if the enforcement of all mala prohibita offenses were justified, then it would not be wrong for public officials to convict and imprison any and almost all citizens at any time. Yet it would be wrong for public officials to convict and imprison all citizens for committing major felony offenses. For one thing, if officials did convict people for all mala prohibita offenses, then the legal system would not be presumptively beneficial to citizens, nor would it serve the purpose of protecting people’s basic rights. So given that it would be wrong for public officials to turn America into a police state, it must be the case that at least some instances or frequencies of criminal conviction would qualify as wrongful.

Continuing with this thought experiment, if public officials could legitimately punish people for all mala prohibita offenses, but only chose to punish a socially marginalized or politically vulnerable group of people for those offenses, then such a pattern of punishment would be wrongful for the additional reason that punishment was being used as a tool of injustice. This relates to the point that standards of wrongful convictions should accommodate convictions that result from gross procedural injustices within the executive and legislative branches. The racist patterns of legislation and enforcement that have historically characterized and currently characterize America’s war on drugs meet these conditions. Therefore, of all the mala prohibita offenses that provide dubious grounds for punishment in the first place, it is especially likely that punishment for drug-related offenses is wrongful.

For these reasons, even those who maintain that public officials have the authority to coercively enforce laws as a general matter should reject the claim that all lawful convictions are authoritative. The mere fact that there happened to be a law on the books at the time of conviction doesn’t establish, without further justification for the law, that officials permissibly

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7 Vincent Chiao (2017) makes a similar but more general point, arguing that a deontological framework alone cannot capture objections to mass incarceration, which requires a conception of non-reducible aggregate harm, and which also requires accounting for externalities.
enforce it. Rather, officials derive the moral authority to convict people from their more general authority to prevent and deter wrongdoing.

Some proponents of political authority may nevertheless maintain that public officials have at least some authority to convict people of crimes just in virtue of the fact that crimes, by their nature, are violations of a democratically supported system of law. But laws change in democratic societies. And when the legal status of an action changes it would be unclear, on this view, whether officials should privilege previous laws or the present state of the law. In these circumstances, even if it were true that public officials had the moral authority to enforce convictions for all legal offenses when choosing whether to consider an act as a legal offense, they also ought to decide in a way that would reduce the possibility of wrongful conviction and enforcement. Just as officials do not convict people for criminal acts that were committed before those acts were crimes, they ought not maintain convictions for criminal acts that are no longer crimes.

The main idea is that public officials should not consider innocence of lawbreaking to be a necessary condition for a judgment of wrongful conviction and wrongful imprisonment. This idea, together with the observation that most political communities likely fall short of the optimal level of criminalization, casts doubt on officials’ authority to enforce many convictions. To illustrate this point further, apply a reversal test to existing levels of criminalization. If a state’s existing set of criminal penalties is justified, then one might think that officials would act within their rights if they adopted additional penalties as well. But presumably there is some limit to the extent that officials can impose penalties on people. Those who would view heightened criminalization as excessive should then consider whether the same objections would apply to existing levels of criminalization as well.

For these reasons, officials very likely enforce some criminal penalties that they are not justified in enforcing. Some officials wrongfully enforce these policies because of moral ignorance, and others do because of factual ignorance. Officials are culpable for both kinds of ignorance. As Rosen (2004), Zimmerman (2002, 2009), and others show, empirical and moral ignorance bear on a person’s culpability in similar ways. Like other people who act from ignorance, officials may be excused for their ignorance if

8 Daniel Viehoff (2014), for example, argues that in a society with fair and egalitarian democratic procedures, the law has authority over all citizens and that the rule of law has fewer “authority gaps” where the laws are not binding on subjects. Viehoff concedes that existing societies might not meet this standard, but in an egalitarian society he argues that citizens would have a duty to comply with laws that had a truly democratic provenance.

9 We are arguing that officials should honor the present state of the law. For an argument against this interpretation of democratic authority, see Rubenfeld 2001.

10 A reversal test is a heuristic used to overcome status quo bias by reversing one’s opposition to a change and considering if there are reasons in favor of deviating from the status quo in the opposite direction, thereby shifting the burden of proof to establish that the status quo is an optimal policy. See Bostrom and Ord 2006.
they were not culpable for their ignorance and did not act recklessly or negligently. Even if officials are excused, they are still not justified in enforcing wrongful criminal penalties. Officials who deliberate about the justice of criminal law but reach the wrong conclusion are like those who do due diligence in fact-finding about a case but are deceived or blamelessly misled about the case. Plausibly, many public officials are also influenced by psychological biases that make them overly deferential to authority, or implicit or explicit racial biases which are beyond their volitional control but which influence their behavior. Though officials in these circumstances may be excused, they are not justified in enforcing criminal sanctions.

When we consider the perspective of the victims of wrongful conviction, this point is especially salient. As Scanlon (2008) argues, a wrongdoer’s intention does not bear on the permissibility of her action, though it may be relevant for assessments of blame. If wrongful conviction is impermissible, it is impermissible whether officials are aware of their wrongdoing or not. When officials are culpable for their moral ignorance (e.g., when they recklessly fail to consider whether the laws they are enforcing are just laws), they are blameworthy just as a corrupt official would be blameworthy for arranging a wrongful conviction. In these cases, not only is compensation warranted, but officials also may rightly be sanctioned or otherwise held accountable for their role in a wrongful conviction.

2 Reparation

If public officials wrongfully convict or imprison people or negligently commit mistakes that lead them to unknowingly wrongfully convict or imprison people, then they ought to compensate those who are harmed by their negligence or ignorance. Some jurisdictions in the United States do compensate for wrongful conviction, and the federal government’s policy is to pay $50,000 to $100,000 per year on death row for people who were wrongfully convicted of federal capital offenses (Rodd 2017). States vary in their levels of compensation. Florida allows for up to $2 million dollars in wrongful conviction compensation from the state, whereas 24 states offer no money for wrongful conviction (CNN 2012).

In addition to compensation for incarceration, public officials are legally required to compensate victims in some cases of wrongful law enforcement, but not others. For example, some courts award compensation for the victims of no-knock raids, which cause injuries, damage property, or kill pets (Messenger 2019). Victims of wrongful enforcement are entitled to damages for police misconduct like false arrest or assault and battery, but in court it’s generally very difficult to establish that these offenses occurred.

11 See, for example, Warren et al. 2006; Howard 2019.
Although existing policies do not offer compensation for all cases of wrongful conviction and enforcement, they should, for several reasons. First, at the most basic level, people are entitled to compensation when their rights are violated and they are harmed. A wrongful conviction violates the rights of the convicted. From the standpoint of victims of rights violations, it doesn’t matter if their rights were violated by a man in uniform or a judge; what matters is that they were wronged. Public officials are not exempt from the moral standards that they enforce for other people. Were public officials to claim that they were exempt from the requirement to compensate victims of their wrongdoing, they would be denying their own moral equality with other citizens and acting hypocritically—holding ordinary citizens to standards that they do not apply to themselves.

In addition, offering compensation for wrongful conviction and enforcement has expressive benefits. An institutional commitment to compensation and reparation conveys the sentiment that public officials are fallible, yet sincere in their desire to do the right thing. By expressing a willingness to admit to wrongdoing and by making efforts to amend wrongdoing, officials also add legitimacy to the enforcement of just laws and the incarceration of wrongdoers. It is an open empirical question whether compensation would strengthen or undermine people’s faith in the criminal justice system. However, by demonstrating officials’ ongoing efforts to avoid injustice a system of compensation would make overtures to those who have historically had very little reason to trust the legitimacy of the criminal justice system.

In practice, this argument implies that people who are convicted and punished for violating unjust laws are entitled to reparations and compensation. For example, in 1952, the computer scientist and code breaker Alan Turing was convicted of gross indecency for having sex with a man. He was chemically castrated as punishment and ended his life in 1954. Today, it is clear that Alan Turing was wrongfully convicted, not because homosexuality was in fact legal in 1950s England and not because of a technical error related to his trial, but because men who have sex with men are morally innocent and not liable to be subject to criminal penalties. In 2013, the Queen issued a royal pardon for Turing. In 2017, the British Parliament passed the Alan Turing law, which pardoned all men who were punished by previous laws against homosexuality.

One might object to the claim that public officials should compensate the victims of wrongful enforcement of unjust laws on the grounds that it is overly punitive toward public officials. On this view, one could argue that officials are relevantly similar to Good Samaritans, who should not be...
punished for their mistakes when they are trying to assist people. In many jurisdictions, Good Samaritan laws protect people from charges of assault or battery when they try to provide assistance to those in need, as long as the Good Samaritans acted in good faith. By analogy, perhaps officials who act in good faith should be protected from adverse legal consequences for their efforts at enforcement.

In some ways, this analogy is apt. In the United States, the doctrine of qualified immunity protects most officers from liability, including “all but the plainly incompetent or those who knowingly violate the law” (Malley v. Briggs, 475 U.S. 335 [1986]). Even without the protection of qualified immunity, officers are also protected from liability through their employers’ indemnification policies (Armacost 1998, Leong 2009).

Yet the analogy to good Samaritans falls short when we consider whether public officials should be shielded from liability in these ways. First, Good Samaritan laws are in place in part to reassure people that they will not be punished for trying to assist when emergency services are unavailable. In contrast, first responders, such as police, should not require such an incentive to motivate them to act on their professional duties to promote public safety.

Second, the analogy to good Samaritans is inapt because existing standards of immunity for public officials extend far beyond the protections that are granted by good Samaritan protections. Our argument builds on a growing legal consensus that existing standards of immunity for public officials are too permissive of unjust enforcement policies and police violence. For example, qualified immunity currently shields officers from liability even for cases of seemingly extreme misconduct, such as the use of excessive force, warrantless searches, and censoring political protestors (Sharp 2017). And as Joanna Schwartz (2017) argues, qualified immunity has no basis in the common law, does not achieve its intended effects, and undermines existing protections for citizens’ constitutional rights. Moreover, existing applications of qualified immunity may also be unlawful by the lights of the statute that the doctrine is based on (Baude 2018). Our argument extends the case against existing standards of immunity by adding that officials also should not enjoy extensive immunity when they unjustly enforcing law because the law itself is unjust.

Third, even if we were to grant that officials who enforce the law in good faith should be protected from adverse legal consequences, a system of compensation for wrongful conviction and enforcement of laws does not necessitate a rejection of qualified immunity or indemnification provisions in public employees’ labor agreements. Rather, institutions could pay the bill for officials’ roles in wrongful conviction and enforcement.

When the United Nations intervenes or provides services in a member state, it retains immunity from the jurisdiction of the member state on these grounds. For a critical discussion of the justification for this policy and an argument in favor of partial immunity, see Boon 2016.
If officials are not held personally responsible for wrongful conviction and enforcement, though, one can object to paying compensation for wrongful conviction on the grounds that it is unfair to ask citizens to pay for the misconduct of officials. Yet this objection overlooks the myriad ways that citizens already finance compensation or reimbursement for debts incurred by public officials, including the aforementioned indemnification policies that currently protect most officials from the costs of litigation or monetary penalties. In addition, citizens already pay compensation to the victims of police violence or wrongful conviction. Thus, our argument aims only to expand the scope of compensation that is warranted. The claim that it is wrong to require taxpayers to pay financial damages for public officials’ wrongdoing not only casts doubt on our argument, but also on existing remedies to wrongful conviction and police misconduct.

Even if taxpayers are not personally responsible for enforcing unjust laws and contributing to wrongful convictions more generally, at least some of them are nevertheless culpable. Some express support for unjust laws and political actors who enforce them. Other citizens may facilitate the enforcement of unjust laws by calling the police or testifying against their compatriots who are accused of violating an unjust law. And others perpetuate the false moral and factual beliefs that are used to justify unjust laws in the first place.

Here one might draw on Eric Beerbohm’s (2012) account of citizens’ complicity in political injustice. Beerbohm argues that citizens are “accessories to injustice” insofar as they “select lawmakers and sponsor the state exercise of power that produces political injustice” (2012, 64). On this view, citizens who vote or campaign for legislators who support unjust laws, like drug prohibition, bear at least some moral responsibility for the injustices brought about by those laws.

Beerbohm also believes that a citizen can be a “coprincipal” if she takes part “in a coordinated enterprise with lawmakers in aiming for unjustifiable basic structures” (2012, 64). Groups that actively lobbied for and profited from the drug war, such as pharmaceutical companies, private prisons, and police unions, would thus be culpable for their contributions to wrongful convictions.13

Some citizens, however, may genuinely be immune from blame for the enforcement of unjust laws.14 Yet these citizens also pay for public health care (e.g., Medicaid, Medicare), and in so doing are asked to indirectly subsidize negligent doctors’ legal costs and fund public hospitals that are required to compensate patients for medical errors. Taxpayers also pay for schools and thereby assume the liability that schools assume if students

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13 For a useful overview, see Fang 2014.
14 This is somewhat similar to Nahshon Perez’s (2012) separateness of persons objection to reparations for intergenerational injustices.
are negligently injured. Publicly funded law enforcement services are no different.\footnote{For more on this point, see Valls 2011.}

One might object that these existing practices involve an injustice. It is unfair that a morally innocent citizen must pay for a public school teacher’s negligence. Even so, we suggest that these are the kinds of unfortunate cases in which we have no choice but to weigh competing injustices. It is an injustice if morally innocent citizens pay marginally higher tax rates because of the wrongdoing of others; it’s a greater injustice if the victims of the wrongdoing are not made whole. Moreover, the injustice is mitigated if the state can extract differential compensation from those groups that lobbied for and profited from the drug war. Since the groups’ gains from the drug war were acquired unjustly, they were not entitled to those gains in the first place. The general idea that groups ought not profit from the injustices they perpetrated against other groups has been defended in other contexts (Sparrow 2000, Kukathas 2003, McCarthy 2004). Moreover, this idea has historical precedent, as private companies have paid compensation to groups wronged by their injustices.\footnote{See, for example, Williams 1998.}

More generally, almost any government policy imposed on a diverse public will treat some particular people unjustly. Ideally, the state would extract compensation from only the parties responsible for the wrongdoing. Given that this approach is infeasible, reparations will involve treating some citizens unjustly, like many other justifiable public policies. For instance, it is unjust to deprive a rational, competent 17-year-old of the right to vote or drink, but functional laws cannot allow exceptions on a case-by-case basis.

Lastly, we will also stress that the drug war itself isn’t free. The enforcement of drug prohibition in the United States costs over $47 billion per year (Miron 2018). And if drugs were legalized and taxed like tobacco and alcohol, they’d generate about $58 billion in annual revenue (Miron 2018). All told, then, drug legalization could yield over $100 billion in budgetary gains per year. At a minimum, the state could begin funding reparations by tapping these revenue streams.

3 The Drug War

So far we have defended a revisionary conception of wrongful conviction. On our view, if a person is incarcerated because she was convicted of violating an unjust law, then she should be exonerated and compensated. In this section, we argue that people who are incarcerated because of possession or distribution of drugs were convicted of violating an unjust law. Therefore, people who are or were in jail for drug crimes are owed reparations.
Today, about a fifth of all incarcerated people are locked up for a drug offense (Sawyer and Wagner 2019). There is some controversy about whether some of these prisoners are incarcerated because of a drug offense or because of a violent offense that they pled down to a lesser charge (Pfaff 2017). But to the extent that people are currently incarcerated because of drug offenses, they are the victims of wrongful enforcement. To establish that they are the victims of wrongful enforcement, we appeal to the premise that the laws that prohibit possessing and distributing drugs are unjust laws. In support of this premise, let’s briefly review the reasons that existing laws that prohibit possessing and distributing drugs are unjust laws. Namely, drug prohibition punishes people for conduct that is not wrong, drug prohibition disproportionately harms people who are socially marginalized or poor, and officials’ justifications for drug prohibition are either false or immoral.

The first reason that drug laws are unjust is because they are enforced in ways that result in the incarceration of people who are not liable to be incarcerated. We have argued that a variety of plausible and widely accepted principles imply that it’s not wrong to use recreational drugs—the decision to do so is a self-regarding choice and people have rights to make even harmful decisions about their own bodies, as long as they do not violate other people’s rights. No one has a presumptive right that other people don’t use drugs. And as the foregoing discussion of the moral basis of the criminal law reveals, people should be subject to criminal penalties only when they engage in wrongful conduct. So since it’s not wrong to use drugs, and people should not be incarcerated for using drugs. The same goes for selling drugs, since selling drugs merely consists of facilitating another person’s permissible choice.

This argument is controversial. Many philosophers, public officials, and public health experts argue that people do not have rights to use or sell recreational drugs or that drug use is wrong. Others argue that even if people do have rights to use or sell drugs and even if using and selling drugs is not wrong, that officials can nevertheless incarcerate drug users and dealers as long as they do so in a way that is procedurally fair and the result of a legitimate legislative process.

Those who argue that people do not have rights to sell or use drugs or that selling or using drugs is morally wrong will reject reforms that decriminalize or legalize drugs like marijuana in places like Portugal; Washington, D.C.; or Colorado. Such a position is difficult to sustain without also decrying the end of alcohol prohibition and the legal permission to use tobacco products. In many ways, existing drug policy is a historic accident, that does not reflect a coherent moral assessment of recreational substance use. Those who defend the current system of prohibition on the grounds that using drugs is immoral must also reject existing permissive policies that allow alcohol and tobacco use to sustain their principled argument against permitting recreational drug use.
Another argument against the claim that drug policy is unjust is one that doesn’t take a stand on whether people have a moral right to use drugs, but instead focuses on the fact that drug policy is the result of a legitimate legislative process and therefore has authority over people. Even if this argument succeeded in establishing that officials had the moral authority to incarcerate drug users and dealers (we’re skeptical), it still would not establish that officials should be incarcerating drug users and dealers, nor would it bear on questions about compensation. Historically, public officials in seemingly legitimate societies have used democratic procedures to make unjust laws. If elected officials choose to wage an unjust war or to ban interracial marriage, they still make an unjust choice and could still owe compensation to the victims of their mistaken policy, even if they were in some sense authorized to enforce it.

At a minimum, procedural legitimacy is not sufficient to immunize the state against compensatory obligation. Note, for instance, that the U.S. Supreme Court upheld the internment of Japanese Americans during World War II, yet later the government paid reparations to “acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II” (Restitution for World War II Internment of Japanese-Americans and Aleuts, U.S. Code 52 [2020]). That the Supreme Court initially ruled internment constitutional did not render the internment just, nor did it absolve the state of a later duty to compensate its victims. Consider also that U.S. Supreme Court ruled in favor of the constitutionality of state-enforced sterilization in *Buck v. Bell*, but here again, subsequent legislation affirmed the appropriateness of compensation for the victims (Virginia Department of Behavioral Health and Developmental Services 2020). The broader point is that sufficiently significant and harmful rights violations—of which we believe drug prohibition is one—can warrant reparation even when they result from legitimate political processes.

The second reason that drug laws are unjust is that enforcing drug laws disproportionately harms people who are socially marginalized or poor, and it is unjust when institutions structurally disadvantage groups of people on the basis of their race or class. For example, 65 percent of nonviolent offenders serving life without parole are black (American Civil Liberties Union 2019). In part, this is attributable to standards for sentencing that disadvantage black defendants. Black Americans are more likely to be arrested and incarcerated than white Americans on drug charges (Drug Policy Alliance 2019). They receive harsher sentences.17 These disparities are at least partly explained by policies that reliably place black Americans at a disadvantage relative to similarly situated whites.18

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17 On the finding that prosecutors are more likely to file charges that carry mandatory minimums in the case of black citizens, see Starr and Rehavi 2014. For figures on the average length of sentences for drug offenses, see United States Sentencing Commission 2017.

18 It is difficult to estimate the magnitude of this effect. For further discussion, see Pfaff 2017.
Here we draw an analogy to institutional arguments for death penalty abolitionism. One may accept, as a matter of moral principle, that execution is a fitting punishment for murder, while at the same time advocating for an abolition of the death penalty in practice. The discriminatory application of the death penalty furnishes moral reason to oppose it. One might be tempted by the thought that the unequal administration of penalties is not unjust, so long as those punished are, in fact, guilty of the crime. If a burglar steals a television, he ought to be punished—that his neighbor went unpunished for her crime does not render his own punishment unjust.

Stephen Nathanson (1985, 156) challenges this view with cases that elicit a different intuition. To adapt one, if a professor institutionalizes a policy of failing any student guilty of plagiarism, it would be wrong to enforce it in ways that disproportionately punished redheaded plagiarists and refrained from punishing blonde plagiarists. In this case, the punished plagiarists have strong grounds for complaint because punishment should not depend on morally irrelevant factors and hair color is morally irrelevant to the appropriateness of punishment.

So it goes with racially biased institutionalizations of capital punishment. The same argument applies to drug prohibition. Even if one believes in the justness of drug prohibition at the level of moral principle, its discriminatory application violates a condition of just punishment, namely that it not depend on morally irrelevant considerations—in this case, race. That the discriminatory application of punishments for drug offenses is not always, or even usually, intended, but only a foreseeable result, makes little moral difference. As Justice William O. Douglas stated in Furman v. Georgia, 408 U.S. 238 [1972]:

A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which, in the overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same.

Consider, by analogy, the finding that self-driving cars are less accurate when detecting darker-skinned pedestrians than lighter-skinned pedestrians (Wilson et al. 2019). If these cars produced a higher rate of injuries and death for darker-skinned pedestrians, then the fact that this inequality was not part of the designers’ intention would not absolve them of guilt for their disproportionate imposition of risk given that they knew that the car would kill darker-skinned pedestrians at a higher rate.

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19 This style of argument can be found in Van Den Haag 1978.
A third reason that drug laws are unjust is that officials’ justifications for drug prohibition rest on false empirical premises. Even if the question of whether a law is just or unjust did depend on officials’ justification for the law, the justifications for drug prohibition are inadequate. Although drug use can be enormously destructive to individuals and communities, so is incarceration, and officials who support drug prohibition have not shown that incarceration addresses the direct or indirect harms of drug use (Pollack and Reuter 2014). Rather, there is an enormous body of evidence showing that incarceration likely makes the problems associated with drug use worse, for four reasons. First, drug users are more likely to take risks when obtaining drugs and to use riskier drugs if drugs are illegal (Coyne and Hall 2017). Second, drug prohibition makes it more difficult for officials to implement harm-reduction policies that would promote public health on balance. Third, incarcerating drug users does not effectively prevent addiction or promote recovery. Fourth, drug prohibition prevents some people from accessing beneficial therapeutics, such as medical marijuana. For these reasons, public health scholars and advocates tend to support non-prohibited, harm-reduction approaches to recreational drug use.

If the moral and empirical arguments in support of paternalistic drug prohibition so clearly fall short, why have officials implemented these policies? Historically, officials also justified drug prohibition based on concerns about crime, and for political reasons. The crime-control justification for drug prohibition relates to the broken windows theory of policing, which held that enforcing laws that prohibited minor, nonviolent crimes would prevent more serious violent crimes as well (Lerman and Weaver 2014). Officials acting on this theory may have been well-intentioned, though it is unlikely that broken-windows policing is in fact responsible for the reduction in crime at the end of the twentieth century. In any case, even if broken-windows policing did reduce crime, in order for this consideration to support drug prohibitions officials would need to show that the broken-windows strategy was a necessary or at least minimally burdensome method reducing crime. Enforcing drug prohibition was certainly not necessary for reducing crime (especially in light of the criminal activity associated with black markets in drugs), and it was also very burdensome to the victims of unjust drug enforcement practices who were arrested and incarcerated.

Turning to the political reasons for drug prohibition, officials often pitched arguments in favor of prohibiting drugs like marijuana, crack, and opioids by vilifying politically unpopular out-groups and appealing to racist and xenophobic attitudes. There is also some evidence that suggests that officials’ enforcement of prohibitive drug policies is financially motivated.

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20 Incarceration is especially harmful when drug users are denied medication to assist in recovery. See Binswanger et al. 2007; Bukten et al. 2017; Kouyoumdjian et al. 2016.

21 For example, an official from the Nixon administration claims that the initial escalation of the war on drugs was explicitly aimed to disempower liberal anti-war activists and blacks. See Baum 2016.
in some cases. Officers and prosecutors have professional incentives to maintain high rates of arrest and conviction, even false convictions (Koppl and Sacks 2013). There is also evidence that police increase rates of drug arrests and asset forfeitures when their departments face budget cuts (Baicker and Jacobson 2007).

These arguments are fairly broad, but they establish that there is good reason to believe that many drug laws are unjust. And many people are or have been incarcerated because of drug laws. Officials who participated in the enforcement of recreational drug prohibitions and the imprisonment of nonviolent drug offenders were either knowingly culpable for wrongful imprisonment or culpable for their moral ignorance. So in light of the above argument that people who are the victims of unjust law enforcement are owed compensation, we should conclude that the victims of incarceration associated with unjust drug laws are owed compensation.

4 Forms of Compensation

Public officials should compensate victims of the drug war just as they should compensate other victims of wrongful conviction and police misconduct. So what form should compensation take?

Let’s begin by looking at existing practices of compensation. The U.S. federal government and many states have statutes that provide monetary compensation for victims of wrongful conviction (CNN 2012). Under the federal statute, those wrongfully imprisoned can receive up to $50,000 per year served. The federal government has also made cash payments as partial rectification for state-administered injustices, such as the Tuskegee experiments and Japanese internment during World War II. Monetary compensation can be important component of drug war reparation.

Officials may also have reason to supplement monetary reparations with more targeted forms of compensation (an approach that finds precedent in existing statutes governing compensation for wrongful conviction). For instance, young offenders may be deprived of educational opportunities, a loss that can be partly rectified by, for example, tuition waivers for public institutions of higher learning. To help ameliorate the damage done to offenders’ job prospects, public officials can supply or reimburse job-training programs as well as job-search and placement services. The drug war’s role in increasing addiction rates is a reason to grant victims access to rehabilitation programs and anti-addiction pharmaceuticals.

Turning to the appropriate amount of compensation, the state could compensate individual victims partly on the model of special damages, whereby wrongfully imprisoned individuals’ lost earnings, property damage, and so on, are calculated and paid. Calculating general damages is trickier, but here again, we could appeal to the rates used in other contexts for guidance, e.g., personal injury settlements.
Reparations should also include nonmaterial forms of compensation. For example, in some cases, such as cases of wrongful conviction that do not include incarceration, proportionate material compensation may be infeasible but nonmaterial compensation would still be warranted. The criminal records of drug offenders could be sealed, expunged, or downgraded. For example, in some cases, such as cases of wrongful conviction that do not include incarceration, proportionate material compensation may be infeasible but nonmaterial compensation would still be warranted. The criminal records of drug offenders could be sealed, expunged, or downgraded.22 These legal revisions would restore various rights of offenders (e.g., to vote, own a gun) and improve their socioeconomic prospects by bettering their odds of finding employment or housing.

On our view, compensation is not only warranted for unjust incarceration, but for unjust sentencing as well. If the in-principle case for drug prohibition stands but its real-world enforcement is unjust, drug offenders may still be owed compensation. Consider the case of Josephine Ledesma, who, at a family member’s request, gave an envelope of money to that family member’s friend in exchange for the delivery of cocaine. She was charged with conspiracy to distribute cocaine and received a mandatory minimum sentence of life in prison (Nation of Second Chances 2019). Ledesma served 24 years before being granted clemency by President Barack Obama. You might endorse laws prohibiting the distribution of cocaine but believe that Ledesma’s life sentence was excessive. Indeed, the First Step Act of 2018 reduces mandatory minimum sentences in certain cases of drug trafficking (Congressional Research Service 2019). Assuming, for argument’s sake, that such reforms are justified, drug offenders should be compensated, at least for the excessive sentencing and held to the existing sentencing standards. So, for example, if a person was wrongfully given a 25-year sentence and after 12 years his sentence was reduced to 10 years, then he’d be entitled to 2 years’ worth of compensation for excessive sentencing.

A formal apology to victims of the drug war, such as those issued by the U.S. government for the internment of Japanese Americans during World War II and for the Tuskegee experiments, seems appropriate as well. Pairing an apology with material compensation would help reparations serve their expressive function. As Ta-Nehisi Coates (2014) writes,

> Reparations—by which I mean the full acceptance of our collective biography and its consequences—is the price we must pay to see ourselves squarely. The recovering alcoholic may well have to live with his illness for the rest of his life. But at least he is not living a drunken lie. Reparations beckon us to reject the intoxication of hubris and see America as it is—the work of fallible humans.

The acknowledgment of past wrongs is a precondition of rectifying those wrongs and beginning a process of reconciliation. To continue with Coates’s analogy, an alcoholic may never be able to fully undo the damage he’s wrought, but repairing the material damage he’s done and apologizing for

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22 For instance, Illinois has recently expunged hundreds of thousands of marijuana convictions. See Prior 2019.
past wrongs is part of what’s required to take responsibility and reconcile with those he’s wronged.

In the same vein, given the racial injustices involved in the conception and execution of the drug war, symbolic breaks with the past may be needed as well. Jeff Spinner-Halev (2012, 83) writes:

Robust acknowledgement of enduring injustices—through museums, monuments, and so on—is one way to show that the government is committed to a new path. One problem with flying the Confederate flag over government buildings is that this suggests there is not much of a break with the racial injustice of the past. What Black Americans rightly want are signs from the government that it is no longer committed to the racist policies of the past; one way to do this is to show a break with previous governments.

As Spinner-Halev notes, these forms of compensation have expressive value; they demonstrate a public acceptance of responsibility for past wrongs and a commitment to doing things more justly in the future.

5 The Costs of Compensation

Another concern is that instituting drug war reparations would set a costly precedent. Would this proposal prompt reevaluation of every law, empowering judges to can not only invalidate the law but also demand reparation?

To start, notice that this objection applies not only to drug war reparations, but to all reparations. If reparations are at least sometimes justified, concerns about costly precedents are not dispositive. In any case, there is pro tanto reason to invalidate every unjust law and compensate its victims. We acknowledge that public resources are limited—spending them in one place means that they can’t be spent elsewhere. Our claim is that reparations are one worthy cause among others and so must compete for scarce resources. Whether officials have all things considered reason to pursue reparations depends on the severity of the injustice and the moral urgency of other spending priorities.

One might worry that this argument makes officials liable to pay compensation in too many cases. After all, many laws from the past were unjust—are we arguing that every victim of an unjust law is entitled to reparations? Yes. One virtue of this approach is that it supplies an incentive not to pass unjust laws in the first place. To the extent that many of today’s criminals should not be incarcerated, as they have not committed acts that are harmful or wrongful (e.g., sex workers, immigrants, unlicensed funeral casket makers) then many people would be entitled to compensation.

Yet the practical upshot of our view isn’t as radical as it first appears because, as we note, the opportunity costs of reparation are morally significant as well. Consider an analogous question: Should every criminal
guilty of theft be punished in proportion to their crime? Yes. Does this mean that states ought to dedicate all the institutional resources at their disposal to meeting this goal? No. Officials could spend billions hiring more police officers and thereby catch and punish a few more bike thieves, but such a policy would reroute resources away from more worthwhile projects. States can’t do everything that’s worth doing, and so they have to make hard choices about which injustices to leave unaddressed.

On the other hand, there are some forms of reparation that are relatively inexpensive, such as an official apology. And there are other forms of reparation that align with existing policy priorities, such as job training and education. In these cases, reparation would not detract from other more morally urgent priorities and it would therefore be an apt response to governmental injustices.

A more practical concern about the cost of drug war reparations is that they would perversely incentivize public officials not to reform unjust laws. If officials are liable to compensate the victims of their wrongdoing, they’re less likely to admit wrongdoing. Even if this is the case, it speaks to a problem with public officials, not drug war reparations. That A must compensate B for an injustice is not a reason for A to continue to commit injustices against B. By analogy, requiring compensation for the wrongfully convicted could encourage the fabrication of evidence to cover up wrongful convictions. Still, that’s not an argument against compensation for wrongful conviction.

Even if reparations for the drug war are justified, one can argue that they are insufficient on the grounds that money, educational opportunities, and formal apologies cannot fully compensate for victims’ losses. We grant that, as with many injustices, nothing can fully compensate for victims’ losses. Nevertheless, inadequate compensation is better than no compensation.

6 Collective Harm and Collective Reparation

So far we’ve focused on the compensation owed to direct victims of the drug war. However, the drug war is also responsible for a good deal of indirect harm. In some jurisdictions, enforcement of drug laws contributed to enduring intergenerational injustices, especially for black Americans (Alexander 2012). If public officials collectively commit injustices against communities, then their employers may owe reparation to members of those communities. In practice, this means that federal, state, or local legislators may legitimately allocate resources to address the intergenerational harm associated with unjust drug policy enforcement.

There are at least two ways for us to establish our conclusion. The first takes inspiration from the work of Bernard Boxill (2003), George Sher (2005), and Andrew I. Cohen (2009). This argument asserts that, for example, a child of slaves is due compensation while sidestepping theoretical difficulties arising from the nonidentity problem. The core
idea here is that the U.S. government is guilty of an injustice for failing to compensate wronged parents *after* the birth of their children. This claim is consistent with the claim that the U.S. government acted unjustly by failing to compensate wronged parents before the birth of their children. The point is that the government *continued* to owe this unpaid debt to the parents after the children’s birth. This approach avoids the objection that the children wouldn’t exist but for the injustice because the injustice in question occurred after those children were already conceived. And by analogy, the ongoing failure to compensate parents victimized by the drug war is an injustice that calls for compensation to the parents and children whose life prospects are worse than they would otherwise have been.

An additional argument for reparations directed to communities can be made via an analogy to global justice. Thomas Pogge (2011, 16) has argued for “a negative duty not to collaborate in designing or imposing unjust social institutions upon other human beings.” Violations of this duty call for compensation from those responsible for the injustice to those harmed by the injustice. We have argued that many Americans have violated this negative duty in virtue by participating in the design and administration of an unjust policy—viz. the drug war—and thus owe compensation to those treated unjustly.

Pogge’s argument grounds claims of compensation to communities as a whole, not simply particular individuals directly affected by the injustice. In some cases, effective community-based compensation may be impossible because the place-specific community that was initially affected by the unjust enforcement of drug policies no longer exists. This can occur, for example, if the people initially affected by unjust enforcement practices in a place no longer live there. In these cases, community-based compensation is still warranted, but it cannot be paid, similar to cases where the victims of an historical injustice no longer exist and their descendants cannot be identified. These cases highlight another sense in which our argument is conditional. If compensation can be paid, then officials have reason to give compensation. If in some cases compensating communities for prior injustices is not possible, then officials do not have a duty to compensate.

7 Conclusion

Drug war reparations can be justified across ideological divides. Reparations are a state-administered distribution of benefits which would effectively target disadvantaged and marginalized citizens for the greatest benefit. But reparations also acknowledge the importance of individual liberty, self-ownership, and the dangers of governmental over-reach.

Despite the broad appeal of reparations, one might object that our proposal is in some sense anti-democratic, on the grounds that democratically elected officials passed drug prohibitions and authorized the enforcement of these laws. We argued that officials were mistaken in passing these laws,
just as democratically elected officials were mistaken in passing laws that supported slavery or forced sterilization. And as in these cases, reparation for state-sponsored injustices is warranted. This argument does not deny that democracy can have some presumptive justificatory force. This argument only holds that there are limits to the justificatory force of democracy. Even elected officials can exceed their authority and commit injustices. When they do, compensation is warranted.

Moreover, in many jurisdictions voters and their elected officials now acknowledge that earlier approaches to drug policy were unjust or counterproductive. For example, many places are reconsidering the criminalization of recreational drugs as well as enforcement and sentencing practices like three-strikes policies, mandatory minimums, civil asset forfeiture, and stop-and-frisk policing. To the extent that policy ought to reflect democratic attitudes, such a consideration would support drug war reparations in jurisdictions that now rebuke their previous approach to drug-related crimes.

In closing, we’d like to reemphasize that while our argument implies that states have reason to compensate every victim of state wrongdoing, not all victims will be compensated in practice, either because effective and proportionate compensation is impossible or because it is too costly in light of other morally urgent policy goals. Still, there are many identifiable victims of the drug war who have been harmed and treated unjustly, and a system of compensation could provide these people with opportunities that align with other worthy policy priorities. For this reason, drug war reparations are likely warranted in a range of cases. To those who are still skeptical of reparations, this argument shifts the burden of proof to explain why officials are not under a duty to compensate people who were separated from their families, excluded from the labor force, denied privacy and freedom of movement, abused and politically disenfranchised, all as a result of unjust laws or unjust law enforcement.23

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23 We are grateful to two anonymous referees for this journal for their helpful comments on an earlier version of this article.
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