11

Framing the War on Drugs

Judith Butler and Legal Rhetorical Analysis

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11.1 INTRODUCTION

Legal rhetorical study draws our attention to the constitutive power of legislation and judicial decisions. These documents not only establish legal precedent but mold our social and cultural realities via rhetorical and material means. Judith Butler's work explores this interaction between the rhetorical and the material, the discursive and the bodily. Though Butler is most widely known for their theories on gender (which certainly have important legal applications), I focus on Butler's later work on state power. In this work, Butler provides a theoretical framework for understanding law's constitutive power and its role in human lives. This framework can reveal how law constitutes social norms and how those in power deploy the law to protect those norms.

In this chapter, I use Butler's concepts of *frames of war* and *precarious life* to analyze the 1986 Anti-Drug Abuse Act (ADAA), which infamously mandated the same minimum sentence for the possession of 100 times as much powder cocaine as crack cocaine. The two forms of the drug are pharmacologically equivalent and yet, with this 100:1 ratio, they were (and still are) treated very differently by federal law. This difference is not chemical but social and rhetorical, as the two forms are associated with distinct socioeconomic and racial groups: powder cocaine with wealthy, white drug users and crack cocaine with poor, black drug users. Using Butler's theories to examine the ADAA and the contemporary political discourse on the War on Drugs, we can see how this law reinforced racist structures in the United States and how it gained public support.

After a brief introduction to Butler's body of work, particularly as it pertains to law, I turn to an overview of the ADAA, its features, and the legislative changes since it was passed in 1986. I then use Butler's frames of war and precarious life to demonstrate how these concepts shed light on the rhetorical strategies used by the state, as well as how they are useful in legal criticism more broadly. These concepts highlight not only the rhetorical strategies used within the ADAA and the political

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discourse surrounding it but also illuminate how the ADAA is itself a rhetorical strategy for reproducing norms and maintaining a racist status quo. This case demonstrates how Butler's work provides tools for legal criticism that can help us to understand law's social and cultural power, as well as its revolutionary potential to challenge the entrenched norms of racism and division.

11.2 BUTLER'S THEORETICAL FRAMEWORK

It is important first to elucidate central concepts in Butler's work: the formation of the subject and the function of cultural norms. For Butler, there is no a priori subject. Charlotte Chadderton, who examines how Butler's theories can be applied in the study of racism and education, explains that Butler sees the individual as "subjectivated, or rendered a subject, through norms and discourses. Identity is a normative ideal rather than a descriptive feature or experience" (Chadderton, 2018, p. 48). These "norms and discourses" come from the cultural, social, political – and legal – contexts surrounding the individual. As each person encounters these norms, they respond to them, and it is in this response that subjecthood forms.

Within their discussion of gender and identity formation, Butler explains how we act out gender and other aspects of identity as though acting out a play:

> The act that one does, the act that one performs, is, in a sense, an act that has been going on before one arrived on the scene. Hence, gender is an act which has been rehearsed, much as a script survives the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced as reality once again. (Butler, 1990, p. 272)

Thus, the "scripts" or norms of our cultural context constrain our performances and use us to maintain their power. It is by our acting out a "script" that the script lives on. Butler (2011, p. xxi) explains that "Performativity is thus not a singular 'act,' for it is always a reiteration of a norm or set of norms, and to the extent that it acquires an act-like status in the present, it conceals or dissimulates the conventions of which it is a repetition." Performativity, then, not only reifies the cultural codes in which we live, but also obscures these codes behind a façade of individual action or choice. The play we are performing may seem and feel original, because we are unconscious of the codes to which we are responding.

As in the construction of gender as a performative act, in which individuals enact (or reject) the cultural codes prescribed to them, Butler sees the formation of all aspects of self or subject in the same way. They explain that "in the first instance, a subject only becomes discrete through excluding other possible subject formations, a host of 'not-me's'" (Butler, 2008, p. 141). The subject is then formed by defining itself in contrast to others – choosing which "scripts" to perform and which to reject. By creating and performing these identifications and disidentifications, subjects define themselves, their gender, their race, and so on. In this process, "subject-

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positions are produced in and through a logic of repudiation and abjection, the specificity of identity is purchased through the loss and degradation of connection" (Butler, 2011, p. 114). The creation of identity is thus performed by the continued navigation of possible scripts.

Law is a uniquely powerful source of such scripts and norms. Unlike with most texts we encounter, legal interpretation, in Robert Cover's (1986, p. 1601) famous words, "takes place in a field of pain and death." It is this power of law over human lives that most concerns Butler. In Elena Loizidou's interpretation of Butler's views on law, she writes: "*[W]hen* the law and norms become one, or at least are presented as one … then the possibility for survival as humans becomes delimited. A very small space for resistance remains" (Loizidou, 2007, p. 125). It is here in the human experience that Butler engages with the law. They write: "I am not interested in the rule of law per se, however, but rather in the place of law in the articulation of an international conception of rights and obligations that limit and condition claims of state sovereignty" (Butler, 2004, p. 98). This exploration of legal and state power and its limitation (or lack thereof) comprises much of Butler's work in recent decades.

Butler's work illuminates the broader function of discourse in determining the public's reaction to and interpretation of violence enacted by the state. In *Frames of War: When Is Life Grievable?*, Butler (2008) decries the suspension of habeas corpus and the many humanitarian abuses at Guantanamo Bay and other detention sites. Here, Butler helps us better understand how attitudes about war and the people involved are shaped rhetorically by the state. *Frames of War* focuses on the counter-terrorism policies of the United States post-9/11 and provides insight into how the idea of war functions rhetorically to gain public support. Generally, Butler uses *frames* to describe the social, cultural, and political norms that color our perspectives. It is the frame of war that leads us to interpret an act of violence in a state-sanctioned military action differently from how we might interpret or define the same act in another context – say two soldiers shooting at one another in battle versus two civilians shooting at one another in a personal conflict. We understand these two actions in different ways, use different terms to describe them, and apply different moral codes to evaluate them. The former, one might call battle, an act of patriotic duty; the latter, one might call murder, an act of evil criminality. Butler argues that "the frame works both to preclude certain kinds of questions, certain kinds of historical inquiries, and to function as a moral justification for retaliation" (Butler, 2008, p. 4). In essence, imposing the frame of war alters the moral and ethical rules by which we judge an event, policy, or action.

In a related work, *Precarious Life: The Powers of Mourning and Violence*, Butler (2004) focuses on the mechanism by which social hierarchies and divisions are established and maintained. One such mechanism, crucial to the frame of war, is the theory of precarious life. Butler (2008, p. 15) defines precariousness as the awareness of the fragility and value of life: "Precisely because a living being may die, it is necessary to care for that being so that it may live. Only under conditions in

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which the loss would matter does the value of the life appear." All humans die, yet not all human lives are viewed as precarious or protected from that precarity. Lives that the cultural, social, and legal structures seek to protect from precarity are those considered grievable. Butler explains that the "apprehension of grievability precedes and makes possible the apprehension of precarious life. Grievability precedes and makes possible the apprehension of the living being as living, exposed to non-life from the start" (Butler, 2008, p. 15). So, a life is only truly considered a life if its death would be grieved. The mosquito you reflexively squash when it bites you is not considered (by most people) a grievable life. Yes, we recognize that it was alive and is now dead, but that death is not grieved – it may even be celebrated, as the mosquito's life may be a threat to the human. However, cultures do not equate grievability with humanity. Cultural scripts, including and especially those in the law, enshrine the grievability of some human lives while denying the grievability of others, deeming them threats to the grievable population.

The lines separating the precarious lives from those not valued are created by establishing boundaries of disidentification. One draws these lines by choosing to recognize certain people or groups and by disavowing others. Butler (2011, p. 114) explains that the "repeated repudiation by which the subject installs its boundary . . . is not a buried identification that is left behind in a forgotten past, but an identification that must be leveled and buried again and again, the compulsive repudiation by which the subject incessantly sustains his/her boundary." If we apply this view of individual subjecthood to our national identity, we can see how identifications and disidentifications have been continuously performed. This need for "repeated repudiation" has driven the various American institutions that have upheld the norms of race and racism (slavery, segregation, mass incarceration) and "sustained" traditional "boundaries." Thus, Butler can help us understand how, despite social and legal progress, the racist disidentifications central to many of our cultural norms persist. Each time one form of dehumanization and segregation loses its legal status, another rises to take its place and maintain the boundaries of precarious, grievable life.

It is this reestablishment of boundaries that we see rhetorically enacted in the ADAA. This law did not solve our drug problem, but it did reestablish black Americans as an ungrievable population. In the dehumanizing political discourse surrounding the War on Drugs and in the mass incarceration of poor black and minority Americans, the ADAA is a new performance of a familiar script. The ADAA may be considered a failure in curbing drug use and related crime, but it was a rhetorical success in shoring up racial boundaries in the late twentieth century. After the gains of the 1960s, the ADAA redrew lines that had begun to blur, creating a revised system of division and disidentification. Butler can help us better understand this reestablishment of the racist norms expressed in (and imposed by) the ADAA as a performative, rhetorical act of federal law that defines national identity.

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11.3 THE ADAA

Butler's concern for legal matters is ultimately a concern for the human beings on which the law operates. In Loizidou's (2007, p. 89) reading, Butler "is asking foremost about its [law's] place in relation to the question of life. Can it, in other words, promote and sustain a mode of life that is livable and viable?" As a powerful expression of cultural norms, law plays a role in the formation of us as individual subjects and of our national identity. In this way, the law – and the norms it expresses – can indeed help us create "a mode of life that is livable" for everyone, or one that continues to be "livable and viable" only for select groups. The 1986 ADAA is a clear example of legislation that has made life "livable and viable" for only some segments of the population. Legislation that was supposed to target high-level offenders instead became one of the engines driving mass incarceration.

For most of the twentieth century, prison rates were largely stable, at about 110 prisoners per every 100,000 people. However, from 1975 to 2005, incarceration rates in the United States more than quadrupled (Raphael & Stoll, 2009a, p. 3). Such a drastic increase in imprisonment would seem to indicate a significant increase in crime, yet the opposite is true. Crime rates were actually much higher in the early twentieth century than in later decades. Increased rates of incarceration were tied not to crime but to policy. Indeed, in "all but one crime category, the policy variables accounted for nearly 90 percent of the increase in incarceration rates" (Weiman & Weiss, 2009, p. 74). The policy changes that resulted in this drastic increase in incarceration included harsher drug laws and severe restrictions on judicial discretion. These tougher policies did coincide with other shifts, such as "changes in illicit drug markets, the deinstitutionalization of the mentally ill, [and] the declining labor-market opportunities for low-skilled men" (Raphael & Stoll, 2009b, p. 28). However, though they are significant, "the collective influence of these factors is minor relative to the impact of changes in sentencing and corrections policy choices" (p. 28).

The transformation of drug laws began in New York in the 1970s with the imposition of the Rockefeller laws, which ushered in similar measures across the country. Though the War on Drugs has been supported by both sides of the aisle, the 1981–1989 Reagan administration prioritized stricter federal drug laws, resulting in "mandatory prison sentences of five years for drug possession of shockingly small amounts (for example, 5 grams of crack cocaine)" (Clear, 2007, p. 51). Drug possession and small-scale distribution had previously been relatively minor crimes. For example, the sale of one ounce of cocaine or heroin used to be a class C felony offense. During the 1980s, these crimes were upgraded to a class A-1 drug felony, which is on the same level as "homicide, first-degree kidnapping, and arson" (Weiman & Weiss, 2009, p. 86). Therefore, individuals convicted of previously minor drug offenses began to be sentenced to lengthy prison terms, and drug crimes were implicitly likened to violent offenses such as murder and arson.

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The ADAA is the legal centerpiece of the War on Drugs at the federal level. Its infamously harsh and uneven mandatory minimums continue to reverberate today. Prior to the late 1980s, the maximum sentence for any drug possession charge was one year (Alexander, 2012, p. 54). In fact, the Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed mandatory minimums for most drug crimes (United States Sentencing Commission [USSC], 2011, p. 22), but this was reversed by a series of state and federal legislative changes following the Rockefeller laws. The ADAA reached new extremes that greatly expanded the carceral state by increasing the number of prisoners as well as the length of their sentences via mandatory minimums. Just prior to the ADAA, in 1984, Congress passed the Sentencing Reform Act. It eliminated parole in the federal system and established the United States Sentencing Commission (USSC), which is tasked with developing sentencing guidelines to counter bias in judicial discretion (Osler & Bennett, 2014, p. 121). The ADAA was partially the result of the USSC's work. The intent of implementing mandatory minimums was to erase judicial bias and sentencing discrepancies (p. 121). However, rather than avoid bias, the ADAA mandated it. A salient feature of this law is the extreme disparity; there is a 100:1 ratio of powder to crack cocaine in the amounts that trigger the same mandatory prison sentence. This disparity falls conspicuously along racial lines; most of those convicted of crack cocaine crimes were (and are) black. Black crack offenders made up 91.4 percent of all crack offenders in 1992 and 87.4 percent in 2000 (USSC, 2002, p. 62).

The harsh punishments in the ADAA were increased in the subsequent Anti-Drug Abuse Act of 1988, which created a five-year mandatory minimum for simple possession of crack (Osler & Bennett, 2014, p. 134). In addition to further expanding the quantity and length of prison sentences, the 1988 Act is also significant for establishing crack as the *only* substance for which simple possession triggers a mandatory sentence. These minimum sentences in the ADAA were legally mandatory until 2005. In the landmark case *United States v. Booker*, the Supreme Court altered the guidelines from mandatory to advisory. Legislative action, however, did not come until the Fair Sentencing Act of 2010, which changed the powder-to-crack ratio to 18:1 and got rid of minimum sentences for simple possession of crack – though it also created twelve new enhancements (Osler & Bennett, 2014, p. 158). Since 1994, there has also been a safety valve that can result in a lesser sentence if a first-time offender meets a list of criteria, but for the most part, the ADAA mandatory minimums decide the defendant's fate, not the judge. This is especially true for crack defendants, who "are less likely to receive the benefit of the safety valve than any other drug type" (Bennett, 2014, p. 882).

The problems in the ADAA have not gone unnoticed. The law that was supposed to target high-level traffickers has instead imprisoned everyday crack users. In 2002, the USSC reported that 79 percent of federal crack cocaine offenders had not performed the trafficking functions "described in the legislative history of the 1986 Act" (USSC, 2002, p. vii). Furthermore, the racial divide has been widely criticized.

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In its 1995 report, the USSC recommended that Congress reconsider the 100:1 ratio, and in its reports to Congress in 1997, 2002, and 2007, it explicitly called for a revised 1:1 powder-to-crack ratio. While the USSC declared in 1997 that "there is no evidence of racial bias" and in 2002 that "this assertion [of racist motives] cannot be scientifically evaluated," the racial bias in the mechanized law is all too apparent if one considers the demographics associated with the two forms of cocaine. The reasoning for the distinction between crack and powder cocaine was the perception (or misperception) about the drugs and the contexts in which they circulated. In their 1997 report to Congress, the USSC explained that "crack cocaine is more often associated with systemic crime – crime related to its marketing and distribution – particularly the type of violent street crime so often connected with gangs, guns, serious injury, and death" (USSC, 1997, p. 4). These "associations," however, have proven to be incorrect when examined. In 2000 (during which the 100:1 ratio was still mandatory), only a quarter of federal crack offenders had any weapon and just 2.3 percent actually fired a weapon (USSC, 2002, p. vii).

In their discussion of the ADAA, legal scholar Mark Osler and retired federal judge Mark W. Bennett explain that at the center of these sentencing policies is "the myth that most of the Guidelines, including the drug guidelines, are based on empirical historical data, alleged special expertise of the Sentencing Commission, and the Sentencing Commission's exercise of its characteristic institutional role – when in fact they are not" (Osler & Bennett, 2014, p. 156). Racist attitudes permeate the construction and reviews of the ADAA, as well as its implementation. On top of the imbalanced regulations, black defendants "were indicted and convicted at much higher rates than whites ... and they were more likely to receive longer sentences" (Weiman & Weiss, 2009, p. 84). Even traffickers are sentenced differently: Street-level crack dealers receive sentences 300 times more severe than higher-level powder importers (Bennett, 2014, p. 894). As the USSC wrote in its 2002 report to Congress, the "overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000" (USSC, 2002, p. viii). The years following the ADAA saw an immense spike in the incarceration of black men that continues today – all enabled by a simple, seemingly innocuous list of weights.

11.4 FRAMES OF WAR

The 1986 ADAA was a key weapon in the War on Drugs. This concept of a "war" on drugs and the use of explicitly militaristic discourse in discussions of drug policy may now seem so normal to us as to go unnoticed, but this ubiquity makes it all the more worthy of our consideration. Butler's discussion of the frame of war is therefore especially relevant to our analysis of the ADAA, as it became the cornerstone of the federal *War* on Drugs. The very term *War* tells us how to understand the issue – which frame to use. Other possible frames – such as "drug-related crimes" or "public

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health crisis" – would create a very different set of norms through which to interpret and evaluate the phenomenon itself as well at the state's reaction.

In the case of the ADAA, President Reagan and other officials have used the frame of war to gain public support for their efforts to maintain normative disidentifications. However, this frame is not merely a convenient metaphor to inspire public support. The frame of war not only sells the ADAA, it ideologically produces the ADAA and other legal manifestations of racial division. In other words, the strategic frame of war functions not only in the campaign to gain support for the legislation – it functions also in the mindset that created the ADAA and laws like it. These laws are themselves rhetorical tools for communicating ideologically and materially with the American people. The ideological motivation becomes clearer when we consider that the War on Drugs – presented as a response to a crisis – actually predates (and, some argue, created) that crisis. The notion of a "War on Drugs" began during the Nixon administration but hit its stride during Reagan's presidency. Curiously, as Michelle Alexander explains, the timeline demonstrates that "President Ronald Reagan officially announced the current drug war in 1982, before crack became an issue in the media or a crisis in poor black neighborhoods … The Reagan administration hired staff to publicize the emergence of crack cocaine in 1985 as part of a strategic effort to build public and legislative support for the war" (Alexander, 2012, p. 5). The crack epidemic began in poor, urban neighborhoods *after* the announcement of the War on Drugs, which emphasizes the War itself as a strategic rhetorical move rather than a practical response.

We see Reagan deploying the frame of war in speeches given around the passing of the ADAA. On September 14, 1986, six weeks before the signing, President Reagan and Nancy Reagan addressed the nation from the White House. The speech proclaims the dire need for a "crusade against drugs." Reagan declares that the "American people want their government to get tough and to go on the offensive. And that's exactly what we intend, with more ferocity than ever before" (Reagan, 1986, para. 4). Here we see the militaristic diction expanding beyond the title of the war to describe going "on the offensive" with "ferocity." Even moments that suggest another possible frame are quickly pulled back into war. Reagan says, "Today there's a new epidemic: smokable cocaine, otherwise known as crack" (para. 6). Here, "epidemic" seems to gesture toward a public health frame, but he immediately returns to the military language by following with "It is an explosively destructive and often lethal substance which is crushing its users. It is an uncontrolled fire" (para. 6). The likening of crack to explosives here positions the drug itself as a weapon of war. If crack is a "crushing," "lethal" weapon that has been deployed on American soil, a War on Drugs is the only possible recourse.

The frame of war is reinforced by the comparison of the War on Drugs to other conflicts in US history. In the 1986 address delivered with Nancy, Reagan explicitly links the War on Drugs to World War II and the Civil War. In calling for support, he says, "My generation will remember how America swung into action when we were

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attacked in World War II. . . . Well, now we're in another war for our freedom, and it's time for all of us to pull together again" (Reagan, 1986, para. 20). Later on, he comments that he's just down the hall from the Lincoln Bedroom, which Lincoln used as his office during the Civil War. He muses, "Memory fills that room, and more than anything that memory drives us to see vividly what President Lincoln sought to save" (para. 28). Here, crack is figured not as an "epidemic" but as an enemy force. Crack is Nazi Germany or civil war, and we all must band together to support the state's efforts toward victory.

If crack is an "explosive" deployed by the enemy, the ADAA is the defensive wall thrown up against it. The frame of war manifested quite literally in earlier versions of the bills that became the ADAA. The first version that passed in the House included "a death penalty provision, which would have applied to major drug dealers who committed murder" and "required deploying the military to stop drug smuggling at the borders" (Greenhouse, 1986, p. 1). These controversial elements were eliminated to secure Senate approval. Yet, even though these measures are not in the ADAA, we can see here how war is far more than convenient metaphor. The War on Drugs is imagined as an actual war, calling for military deployment and the killing of its enemies. Though these measures did not become part of the law, the majority of the House of Representatives supported them. In this frame of war, drugs (crack in particular) take on a level of danger that is beyond the risks to health and safety presented by any number of substances. In Butler's discussion of the suspension of rights for detainees in Guantanamo, they explain that "what counts as 'dangerous' is what is deemed dangerous by the state" (Butler, 2004, p. 76). This declaration of danger is what the state uses, in the case of the War on Terror, "for its own preemption and usurpation of the law" (p. 76). In the War on Drugs, the state is not suspending or transgressing the law, but using danger to create the law.

When seen through this frame of war, mandatory minimums are a necessary defensive strategy. Mandatory sentences have existed in the United States since its beginnings as a nation. However, they were formerly reserved for the most extreme crimes. The 1790 Crimes Act listed twenty-three such federal crimes, including "treason, murder, three offenses relating to piracy, forgery of a public security of the United States, and the rescue of a person convicted of a capital crime" (USSC, 2011, p. 7). Throughout their history, mandatory minimums have applied to crimes related to the conflicts of that period. During the Civil War, for example, mandatory minimums against Confederate allies were enacted – and it is worth noting that the minimum penalty for colluding with Confederates was only six months in prison, far shorter than minimum penalties for possessing 5 grams of crack under the ADAA (USSC, 2011, p. 13). Perhaps more important to observe is the implication of adding drug crimes to a list that formerly consisted of treasonous offenses; even low-level drug offenders are put on par with traitors and spies. The mandatory minimums solidify the War on Drugs as a true war.

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The discursive efforts in the law and the speeches backing it were successful in gaining public support for the War on Drugs. Crime became a key concern for voters. As political scientist Marie Gottschalk notes, in polls during the mid-1990s, the public listed crime as a high concern, despite the fact that actual crime rates had dropped significantly (Gottschalk, 2006, p. 27). Politically popular "tough on crime" policies led politicians from both parties to support these measures, regardless of actual crime rates. This disconnect between crime rates and incarceration rates resulted in public misperception of the reality of crime that dramatically impacted policy: More prisoners implied more crime and justified harsher laws – leading to more prisoners.

Some scholars argue that such misperceptions were intentionally constructed, and some evidence suggests that the Nixon administration, whose second campaign heralded the "tough on crime" refrain that continues today (Clear, 2007, p. 50), intentionally used drug legislation to target minority communities. In a 2016 article for CNN, Tom LoBianco writes about a twenty-two-year-old interview with previously unreleased quotations from John Erlichman. Erlichman, who worked on domestic policy for the Nixon administration, stated: "We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities" (LoBianco, 2016, para. 3). Though some contest this account, it is significant to see an insider so blatantly describe the use of drug policy as a means of social control.

The War on Drugs, foremost among so-called tough on crime efforts, was successful in maintaining this social control – provoking fear of crack users, as well as acceptance of the state's policies and practices. Even around the time the ADAA was on the floor, news coverage largely focused on the debate over the inclusion of death penalty measures and the political maneuvering to get the bill through the Senate. *New York Times* headlines covering the ADAA in the fall of 1986 state: "Issue of Financing the Key Obstacle for Antidrug Plan" (Roberts, 1986, p. A1) and "Congress Approves Anti-Drug Bill As Senate Bars a Death Provision" (Greenhouse, 1986, p. 1). The glaring disparity between two forms of the same substance was not spotlighted, nor were there accusations of racism. This lack of attention is perhaps a testament to the strength of the frame of war. As Gottschalk (2006, p. 19) explains, "the carceral state has been a largely invisible feature of American political development, not a contested site of American politics." I argue that it has not been a "contested site" because the frame of war has persuaded many to see incarcerated persons as the enemy. As cited above, Butler's frame of war "works both to preclude certain kinds of questions, certain kinds of historical inquiries, and to function as a moral justification for retaliation" (Butler, 2004, p. 4). We accept, and even welcome, things in the context of war that would be unimaginable in any other frame. The wartime rhetoric persuaded the American public to accept and support the ADAA and similar measures as necessary in

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combat. Butler's frame of war elucidates both the strategies used to garner support for the ADAA and how the ADAA is itself a rhetorical strategy seeking to persuade the American public how we ought to view drugs – and drug users.

11.5 PRECARIOUS LIFE

Using the frame of war has an important consequence that is crucial in understanding the ADAA and its rhetorical function. If the War on Drugs is indeed a war, then there must be an enemy. And that enemy is the drug user – especially the crack user. Alexander (2012, p. 105) explains that "although explicitly racial political appeals remained rare," in public discourse "the calls for 'war' at a time when the media was saturated with images of black drug crime left little doubt about who the enemy was in the War on Drugs and exactly what he looked like." The fear of drugs became an easy proxy for embedded cultural fears of racial minorities and black Americans in particular.

Here, Butler's concepts of grievability and precarious life can illuminate the state's rhetorical strategies. The question Butler poses is this: Which human lives are precarious? For not all are considered grievable according to cultural norms. To return to the frame of war, enemies in wartime are not grievable life. The fallen enemies are viewed not as precarious, grievable life but as a threat to such life. Thus, the frame of war divides "populations into those who are grievable and those who are not" (Butler, 2008, p. 38).

To kill an enemy while maintaining legal and moral authority, the state must transform the enemy into "ungrievable life." The War on Drugs, therefore, insists that drug users (especially black crack users) are ungrievable. This frame then reinforces the racist hierarchy. The black crack user is not merely an evil or enemy subject; they are not a human subject at all. The ADAA and the discourse of the War on Drugs draw clear boundaries between grievable and ungrievable lives to uphold the racist status quo that had been threatened by the progress of the mid-twentieth century.

These questions of who "matters" ring familiar to those of us in the age of the Black Lives Matter movement. In a *New York Times* blog with George Yancy, Butler speaks directly to this issue:

> If black lives do not matter, then they are not really regarded as lives, since a life is supposed to matter. So what we see is that some lives matter more than others, that some lives matter so much that they need to be protected at all costs, and that other lives matter less, or not at all. And when that becomes the situation, then the lives that do not matter so much, or do not matter at all, can be killed or lost, can be exposed to conditions of destitution, and there is no concern, or even worse, that is regarded as the way it is supposed to be. (Yancy & Butler, 2015, para. 2)

The last line here can help us understand the way in which racist policies tap into notions of grievable and ungrievable life. The ADAA can protect the majority

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(white) population from the enemy (black) crack user; therefore it is a moral and ethical tool according to our cultural norms and in the frame of war – it's "the way it is supposed to be."

The ADAA and the warlike discourse surrounding it draw clear lines between grievable and ungrievable life. In his remarks upon signing the ADAA into law, Reagan professes his concern and compassion for the drug user:

> We must be intolerant of drugs not because we want to punish drug users, but because we care about them and want to help them. This legislation is not intended as a means of filling our jails with drug users. What we must do as a society is identify those who use drugs, reach out to them, help them quit, and give them the support they need to live right. (Reagan, 1986, para. 2)

This statement of concern and assurance that the goal is to offer "help" and "support" rather than "filling our jails with drug users" is belied by the fact that the latter is precisely what the ADAA did. As a result of the ADAA and similar policy changes at the state level, the incarceration rate skyrocketed as prisons became overpopulated with nonviolent drug offenders. The number of people imprisoned for drug crimes in 2001 was ten times greater than it was in 1980 (Clear, 2007, p. 54). Put another way, in 1980, drug offenders made up 9 percent of all inmates; by 1988, they comprised 25.4 percent of the total prison population and 37 percent of new prisoners (Weiman & Weiss, 2009, p. 89). Even recently, in 2019, people incarcerated for drug offenses made up 46 percent of the total incarcerated population (both state and federal) (The Sentencing Project, 2021, p. 9) and at the time of writing, 45.2 percent of people in federal prisons were incarcerated for drug offenses (Federal Bureau of Prisons, 2022, Chart 1). Despite Reagan's assurances, the United States has indeed been "filling our jails with drug users" for decades.

Furthermore, Reagan's assurance of sympathy for the drug user is at odds with the vilification in the rest of his remarks. He states: "I ask each American to be strong in your intolerance of illegal drug use and firm in your commitment to a drug-free America. United, together, we can see to it that there's no sanctuary for the drug criminals who are pilfering human dignity and pandering despair" (Reagan, 1986, para. 5). The idea that drug criminals are "pilfering human dignity" implies that they are outside of this category of human – that they are a group apart. This image of criminals taking advantage of the "despair" of others implies that Reagan is directing his anger exclusively toward drug *dealers* – as the ADAA indeed promised to do. However, despite his claims that this new policy is aimed at high-level dealers, he makes no such distinction in stating, "Drug abuse is a repudiation of everything America is" (Reagan & Reagan, 1986, para. 23). Here, drug use itself – and by implication the drug user – is un-American. There is a "repudiation" here of the drug user (not only the dealer) as fundamentally *not* us, *not* American, and *not* a valued human person. Particularly in the late Cold War context during which these

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remarks were made, to be un-American was to be a wartime enemy – and a wartime enemy is not a grievable life.

Two years after the ADAA was passed, in a radio address on economic growth and the War on Drugs (perhaps a telling juxtaposition), Reagan uses even stronger dehumanizing language. Reagan (1988, para. 4) avows that "we will no longer tolerate those who sell drugs and those who buy drugs. All Americans of good will are determined to stamp out those parasites who survive and even prosper by feeding off the energy and vitality and humanity of others." Here, not only drug sellers but also users are "parasites" who are "feeding off" of "humanity." Quite explicitly, drug users are not human; furthermore, they are a danger to and enemy of humanity. In this way, drug users are crafted into what Butler (2008, p. 31) describes as "populations [that] are 'lose-able' … cast as threats to human life as we know it rather than as living populations in need of protection." The ADAA itself may be less colorful in its language but is just as clear in establishing who this enemy, this "threat to human life," is. The drug user, yes, but the most dangerous enemy is specifically the crack user. The ADAA's most infamous provisions, the wildly disparate mandatory minimums for crack and powder cocaine, are stated thus:

> (1) (A) In the case of a violation of subsection (a) of this section involving – …
> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –
> (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed …
> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base …
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. (ADAA, 1986, p. 2)

The subsequent section is identical, except for the amounts: 500 grams of cocaine or 5 grams of cocaine base results in a prison sentence not less than five years (p. 3). The ADAA states that "such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life" (p. 2). The enemy, or "such person," is defined primarily by the quantities and substances listed in the ADAA. Racial categories are, of course, absent from these descriptions. Yet we see how the drug user is framed as already violent, since the added penalty for "death or serious bodily injury" simply doubles the penalty attached to the substance alone. Imposing the severest penalties on crack users implies that they are the worst on the list, and the American public in 1986 and today knows who the implied crack user is.

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These perceptions of crack as more dangerous and its trade more violent than its more expensive counterpart do not come from empirical data. Instead, they are directly indicative of racist attitudes toward the users of crack cocaine. Due to cost differences and relative availability, crack cocaine has been used more often by poor minorities, whereas powder cocaine has more often been used by wealthier whites (Alexander, 2012, p. 53). As this was the case prior to the ADAA, it is doubtful that Congress members could have been unaware of the demographic implications of their legislation. Therefore, the logical conclusion, as Clear (2007, p. 55) states, is that "the rules regarding drug-law enforcement were gerrymandered to show an even greater bias against poor minorities." This is one of the many patterns of bias within the legal system, which Yancy and Butler (2015, para. 24) argue "is engaged in reproducing whiteness when it decides that the black person can and will be punished more severely than the white person who commits the same infraction." A law that effectively allowed white drug offenders to have 100 times more of the same substance as black offenders to earn the same punishment draws a clear boundary between the lives that are precarious and grievable and those that are not.

As we consider the ADAA, we can see how it is this division, and not the purported efforts to target high-level players in the drug trade, that is its function. The ADAA does not allow consideration for one's role in the drug trade but is based entirely on weight. Osler and Bennett (2014, p. 164) describe these mandatory minimums as "a foolishness based on a lie, that lie being that the weight of narcotics at issue serves as a valid proxy for the relative culpability of a defendant." Foolishness indeed, if the goal is to dismantle the drug trade from the top. If, as Reagan says, the "legislation is not intended as a means of filling our jails with drug users," it was a colossal failure. However, if the goal is to maintain a white supremacist status quo, then the ADAA has been a rousing success. Black crack users are rhetorically constructed as the enemies in a War on that is excusing the state's policies. The ungrievable lives of "enemy" black drug users file into the prison system, maintaining the normative racial hierarchy that the ADAA reproduces.

11.6 REPRODUCING NORMS

Thus, the ADAA is another script that defines who is cast as an American citizen and who is left off the list. It is yet another rhetorical mechanism for delineating grievability along color lines. As Butler (2008, p. 24) explains, "Forms of racism instituted and active at the level of perception tend to produce iconic versions of populations who are eminently grievable, and others whose loss is no loss, and who remain ungrievable." Crowding the prison system with black drug users is "no loss" but instead necessary in the "war" to protect the grievable population. Sociologist Loïc Wacquant similarly argues that mass incarceration and other oppressive institutions are "instruments for the conjoint *extraction of labor* and *social ostracization* of an outcast group deemed unassimilable" (Wacquant, 2000, p. 379). The boom in

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imprisonment that began in the 1970s and hit its stride in the 1980s has overwhelmingly affected young black men from disadvantaged urban areas who have been targeted by the legal actions that created mass incarceration. Other racial minority groups and the urban poor more generally have also been impacted. Even with the subsequent changes to the ADAA, and the overall decrease in incarceration rates since they reached a peak in 2009, these disparities continue. The Bureau of Justice Statistics reports that 1,182,166 people were sentenced (in state or federal courts) to a prison term of more than one year in 2020. Of this group, 389,500 (30 percent) were black, 275,300 (23 percent) were Hispanic, and 358,900 (30 percent) were white (Carson, 2021, p. 10). We can better understand the significance of these ratios by comparing them to the United States as a whole. The 2020 US Census found that those identifying as black or African American (alone or in combination with other racial identities) make up 14.2 percent of the total population (Jones et al., 2021). Put another way, the imprisonment rates in the year 2020 were 223 per 100,000 white Americans and 1,234 per 100,000 black Americans (Carson, 2021, p. 14).

As Alexander (2012) and many other scholars have discussed, mass incarceration is yet another policy in a long line of efforts to maintain white supremacy in the United States. Slavery, segregation, and incarceration have all been efforts to deny the precarity of black American lives. Alexander concludes that "what has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. . . . Rather than rely on race, we use our criminal justice systems to label people of color 'criminals' and then engage in all the practices we supposedly left behind" (Alexander, 2012, p. 2). They are performances of the same script of racial hierarchy, seeking to define American identity by disidentifying from black Americans. In their explanation of frames of war, Butler (2008, p. 24) explains that all "frames are subject to an iterable structure – they can only circulate by virtue of their reproducibility, and that very reproducibility introduces a structural risk for the identity of the frame itself. The frame breaks with itself in order to reproduce itself, and its reproduction becomes the site where a politically consequential break is possible." Each norm that has been "broken" (slavery, segregation) has opened up a "politically consequential" moment, an opportunity to create new norms and frames. As Wacquant (2000, p. 384) observes, "by the end of the 1970s, then, as the racial and class backlash against the democratic advances won by the social movements of the preceding decade got into full swing, the prison abruptly returned to the forefront of American society and offered itself as the universal and simplex solution to all manners of social problems." Mass incarceration resulting from the War on Drugs, in that it targets primarily nonviolent offenders, functions not to preserve public safety, but to remove huge percentages of black and other minority populations from free society. This removal reinforces norms of precarious life and the racist boundaries between those lives that are grievable and those that are not. Therefore, mass incarceration of black and other minority Americans following the ADAA and similar legislation is itself rhetorical.

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The incarceration and subsequent absence of those people from American families, neighborhoods, and towns or cities rhetorically shapes the nation and who comprises it.

11.7 CHALLENGING NORMS

Through the example of the ADAA and the surrounding discourse of the War on Drugs, we have seen how Butler's concepts of frames of war and precarious life enable us to interpret the law and its role in reproducing cultural norms and boundaries. The frame of war denies the precariousness of black lives as the state works to shape our views of one another. However, Butler (2008, p. 5) also argues that "what we are able to apprehend is surely facilitated by norms of recognition, but it would be a mistake to say that we are utterly limited by existing norms of recognition when we apprehend a life." We are deeply affected by the norms surrounding us, but we are not wholly determined by them. We can choose to challenge, adapt, or reject these norms. Indeed, this resistance is key to the formation of one's self and one's agency. The norms of racism supported by the ADAA seem insurmountable, because they have been so entrenched in our cultural, political, and social experiences. In their discussion of sex, Butler (2011, p. xix) explains that

> As a sedimented effect of a reiterative or ritual practice, sex acquires a naturalized effect, and, yet, it is also by virtue of this reiteration that gaps and fissures are opened up as the constitutive instabilities in such constructions, as that which escapes or exceeds the norm, as that which cannot be wholly defined or fixed by the repetitive labor of that norm.

Other identity categories and cultural concepts, like race, have become similarly "sedimented." What now appears to be solid stone is in fact the compressed layers of "ritual practice" performed over and over. Yet this sediment is not as stable as it may appear. As with the frame of war, these norms must be "reiterated" again and again, but these reiterations open "gaps and fissures" – opportunities for us to question these norms.

In this, I believe that Butler's work is not only useful in social and legal critique, but also in developing a productive, critical optimism. They tell us that "the problem is not merely how to include more people within existing norms, but to consider how existing norms allocate recognition differentially. What new norms are possible, and how are they wrought?" (Butler, 2008, p. 6). If norms – including those enforced by law – are ultimately shaped by our own performative acts, then these norms are rhetorically constructed. This recognition is always an empowering one, as anything we have created through discourse can thus be amended, altered, or overturned by discourse. Despite their criticism of law, Butler also sees law's discursive possibilities. Loizidou (2007, p. 125) explains that "law ... becomes for Butler the only vehicle for resistance and, specifically through the practice of the trial, the

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only force for dissent." Though I don't see law as the only such vehicle, it is an undeniably powerful and far-reaching mechanism. Laws like the ADAA play a powerful role in shaping norms and performances as well as materially impacting our lives.

Just as Butler's ideas can help us interpret our legal history, they can also shed light on our current moment. In the last few years, restrictions on voting rights, which once seemed like a pre-Civil Rights artifact, have made a significant resurgence. Butler can aid us in seeing this resurgence as yet another performance of the script of white supremacy and to understand these moves as ultimately rhetorical rather than a response to a practical problem. According to researchers with the Brennan Center for Justice at NYU School of Law, nearly 400 restrictive voting bills were introduced in legislatures across the United States in 2021 and early 2022. In an extensive study, they found that, while the majority of these bills are Republican-sponsored, not every Republican-controlled state has seen the introduction of restrictive voting laws; instead, restrictive voting laws are "most prevalent in states where they [Republicans] have control *and where there are significant non-white populations*." Legislators who introduce such bills are "concentrated in the whitest parts of the most diverse states" (Morris, 2022, para. 32). In addition to this demographic analysis, the Brennan Center included data from the 2020 Cooperative Election Study, which found that these areas in which the restrictive voting bills were concentrated also had high racial resentment scores (Morris, 2022).

If we examine these recent legal trends through the lenses of precarious life and grievability, a familiar picture emerges. Much like the ADAA, these laws do not explicitly announce a racist agenda. Instead, they emphasize the need for measures to curb election fraud – despite the absence of evidence that such fraud is an actual problem. This absence calls into question the purpose of these bills and demonstrates how they are ultimately rhetorical tools rather than practical solutions. Instead of solving a fraud problem, these bills would disproportionally limit black and brown Americans' ability to vote. Measures such as requiring ID, limiting voting hours, and limiting or eliminating early and mail-in voting all have a greater effect on voters of color than on white voters (Brennan Center for Justice, 2022). Just as the ADAA has done, these bills make a clear argument of division and disidentification. They tell us whose voices should be included in our democracy and whose voices should be silenced yet again – whose lives are precarious and whose are ungrievable.

While the very existence of such bigoted legislation is disheartening, Butler enables us to understand legal and cultural norms as sedimented practices, rather than the bedrock they seem to be. The idea of unstable ground can be unsettling, but instability also signals possibility. If law can reinscribe the norms that create division and limit the scope of grievable life, it can also challenge those norms and reshape a broad and inclusive view of precarious life. Butler's work, then, can provide tools for analyzing our legal past and imagining our legal future.

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