

Hostage to the Drug War: The National Purse, the Constitution and the Black Community

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INTRODUCTION

In 1982, former President Ronald Reagan declared war on drugs.¹ Six years later, in response to polls showing that Americans considered drug use the number one domestic problem, his successor, George Bush, vowed to wage the war with renewed vigor.² Over the course of the past eight years and in apparent belief that where there's war there must be victory, the commanders in chief of this war against drugs have issued proclamations eerily reminiscent of the Vietnam War, claiming repeatedly

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¹ See President's Radio Address to the Nation, 18 WEEKLY COMP. PRES. DOC. 1249, 1249 (Oct. 2, 1982); President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 18 WEEKLY COMP. PRES. DOC. 1311, 1313-14 (Oct. 14, 1982). President Reagan's call for building up drug enforcement resources was not unprecedented. President Nixon had also expanded the size and scope of the federal drug enforcement bureaucracy. For example, between June 1968 and June 1970 the Bureau of Narcotics and Dangerous Drugs increased from 615 to over 900 agents. Congress enacted legislation authorizing the addition of at least 300 more agents during the 1971 fiscal year. See H.R. REP. NO. 1444, 91st Cong., 2d Sess. 18, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4584.

² *President-Elect Bush Announces Admiral James Watkins as Secretary of Energy, and William Bennett as Director of the White House Office of National Drug Control Policy*, Federal News Serv., Jan. 12, 1989 (LEXIS, NEXIS library, Fednew file) (vowing to encourage "zero tolerance" of drugs).

that victory over the enemy is imminent.³ By now, however, it is clear that the war on drugs has not extinguished the drug trade.⁴

³ The latest of these victories-by-administrative-fiat is President Bush's December 1990 pronouncement that the Reagan-Bush drug policy has succeeded in reducing hardcore cocaine abusers (weekly users) by 72% over the past five years, resulting in an estimated nationwide total of 662,000 cocaine addicts — supposedly 200,000 *less* than the May 1990 figure. The President based his rosy view on 9,259 telephone interviews conducted by the National Institute on Drug Abuse (NIDA) with people in their homes. See Orin, *Bush Claims Drug Use Has Tumbled: But Dems Scoff at White House Figures*, N.Y. Post, Dec. 20, 1990, at 4, col. 4 (citing former Drug Czar William Bennett's skepticism of NIDA figures in general). See also U.S. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, 4-18, 61 (Feb. 1991) [hereafter 1991 NATIONAL DRUG CONTROL STRATEGY]. NIDA estimates that there are 13 million current drug users — by which they mean people who have used drugs in the past month — a decrease of 10 million from the 23 million current users reported in 1985. The 1990 NIDA survey also reported decreases of 13% in adolescent drug use since 1988; of 29% in casual use of cocaine in the same period and an 18% decrease in drug-related medical emergencies.

The credibility of the NIDA study, however, has been widely and persuasively attacked, most notably by Sen. Joseph Biden (D-Del), Chairman of the Judiciary Committee, whose staff, aided by Harvard Professor Clyman, issued their own report on drug use in the spring of 1990. Biden points out that the Bush/NIDA study failed to take into account those drug abusers who do not live in households with phones and that the study offered no independent verification of the self-reporting upon which it depends. The Biden report, which was based on data such as the incidence of positive urine tests of arrestees, reported that there were 436,000 cocaine addicts in New York State alone and up to 2.4 million — or triple the Bush/NIDA figure given — nationwide. See *Cuomo and Dinkins Find Bush Optimism on Drug Use Faulty*, N.Y. Times, Dec. 21, 1990, at B3, col. 1.

It is worth noting that the Biden figures may themselves overestimate the number of drug abusers. To the extent that the statistics depend upon positive tests, it is difficult to distinguish whether they reflect numbers of addicts, casual users, or, more likely, some combination of both. See discussion on drug testing *infra* at Part II.

⁴ As noted *supra* in note 3, estimates of how many drug abusers there are in the country differ wildly, in part because of the difficulty in defining abuse. Compare, e.g., Tackett, *Report Says 1 in 100 is a Cocaine Addict*, Chicago Tribune, May 11, 1990, § 1, at 3, col. 1 (reporting Biden finding of over 2 million hardcore users) with Isikoff, *Senate Study Triples Cocaine-User Estimate*, Washington Post, May 11, 1990, at A4, col. 1 (quoting Biden, "the nation's hard-core cocaine problem is 'far worse than any previous guesses'"). When casual users of all illicit drugs are included, it is estimated that nearly 40 million Americans illegally consume drugs each year. For a discussion regarding the drug war's failure to stem the production and importation of cocaine, heroin and marijuana, see *infra* note 17 and accompanying text.

Rather, the real victims of this war are the minority poor⁵ and the Bill of Rights. While the war against drugs potentially compromises the rights of all Americans, it has a particularly devastating impact upon the recently gained rights of minorities. In fact, the war on drugs could more aptly be called a war on the minority populations.

Minority communities incur costs from the war on drugs on many fronts. As drug traffickers battle for turf and for control of lucrative drug transactions in the community, injuries and fatalities mount. Extensive health problems result from drug use, exacerbating those already endemic to poor communities.⁶ In addition, in minority communities, there is a sense of loss of control and despair as the drug war consumes their neighborhoods. Mainstream white society largely ignores these social costs.

Virtually everyone agrees that this country has a drug problem. When the issue is examined more closely, however, it is clear that there is much less agreement on what the problem actually is. Some people are most concerned about the health and social problems related to the overuse of potentially dangerous drugs. Others are primarily concerned with the pervasive violence and

Overall governmental use of the term "cocaine epidemic" is highly suspect: According to the 1989 NIDA study *all* cocaine users made up two percent of the adult population and addicts made up less than one-quarter of one percent — hardly an epidemic. *The Federal Drugstore*, NATIONAL REVIEW, Feb. 5, 1990, at 37.

⁵ Being poor and a person of color is often interchangeable, particularly in the nation's cities. For example, 80% of New York City's 1.7 million poor people are African-American and Latino and 85% of the City's 700,000 poor children are minorities. THE CORRECTIONAL ASSOCIATION OF N.Y. & N.Y. STATE COALITION FOR CRIMINAL JUSTICE, IMPRISONED GENERATION: YOUNG MEN UNDER CRIMINAL JUSTICE CUSTODY IN NEW YORK STATE 6 (1990) [hereafter IMPRISONED GENERATION]. Over 44% of *all* African-American children and 56.7% of *all* Latino children in New York City are poor. *Id.*

⁶ As discussed *infra* in Part III, drug abuse aggravates the already disastrous health problems associated with poverty. Recently, for example, a front-page article in the New York Times quoted numerous health experts as describing the public health crisis in inner cities as "straight out of underdeveloped countries," and noting the resurgence of "diseases that haven't been seen in the United States since the turn of the century." Rosenthal, *Health Problems of Inner City Poor Reach Crisis Point*, N.Y. Times, Dec. 24, 1990, at A1, at 1, col. 6, at A24, col. 1. See also *Poverty Blamed for Blacks' High Cancer Rate*, N.Y. Times, Apr. 17, 1991, at A16, col. 1 (reporting on study by scientists at the National Cancer Institute linking cancer with low educational levels, substandard living conditions, bad nutrition and poor access to health care).

crime that is often associated with illegal drugs.⁷ The federal government, followed by state and local governments, has adopted the latter depiction of the drug problem, focusing on the crime and violence related to the use of illegal drugs and virtually ignoring the medical and social aspects of the problem. This position has apparently led it to adopt a progressively tougher law and order approach to the drug crisis.

There are a number of problems with the law and order strategy the government employs to deal with the drug problem. The strategy itself produces many of the ills it purports to address. Violence is a predictable outcome of the government law and order approach. The strategy, both in its conception and application, has troubling racial overtones.⁸ The emphasis on law enforcement is also undermining many of our fundamental constitutional rights. Euphemistically called the war on drugs, the strategy is ineffective in limiting the availability or demand for drugs, while exacting a high cost from society in general and from the minority communities in particular.

This Article will focus on some of the casualties of this misconceived war. We will argue that until we as a nation are prepared

⁷ What is dangerous from a health perspective and what is illegal are not necessarily congruent. For example, there are many more cigarette and alcohol-related deaths than drug-related deaths. An estimated 18 million Americans are reported to be either alcoholics or alcohol abusers. Nearly 100,000 deaths a year are directly caused by alcohol and another 100,000 list alcohol as a contributing factor. According to the National Council on Alcoholism and Drug Dependence, about "5000 babies are born each year with fetal alcohol syndrome, which can cause mental retardation, and 35,000 additional infants suffer from less severe effects of their mothers' drinking." *Doctors Criticized on Fetal Problem*, N.Y. Times, Dec. 11, 1990, at B10, col. 6. An estimated 434,000 people die prematurely each year as a result of tobacco consumption. Okie, *Smoking-Related Deaths Up 11% To 434,000 Yearly*, *CDC Reports*, Washington Post, Feb. 1, 1991, at A1, col. 4. By contrast, the National Council on Alcoholism reported that only 3,562 people were known to have died from the use of all illegal drugs in 1985. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 *SCIENCE* 939, 943 (1989). Moreover, the total cost of alcohol abuse (including workplace injuries) is estimated at over \$100 billion annually, far more than the costs attributed to illicit drug use. *Id.*

⁸ The law and order rhetoric has been as much a political strategy with racial overtones as a criminal justice strategy. Since 1968, Republicans have used this rhetoric to attack Democrats and to appeal to suburban whites' fears of black crime in the inner city. In Nixon's campaign for the presidency, instead of focusing on the justice of social programs, he focused on law and order. R. HARRIS, *JUSTICE* 13-39 (1970).

to examine the drug crisis in both health and socioeconomic terms, we will not be able to understand, much less begin to address the problem constructively. Not only will we be unsuccessful in curbing the use of drugs, we will also be ineffective in stopping the crime and violence. The current government strategy causes us to define the drug problem inadequately and also causes us to either minimize or completely overlook other important contributing factors to the drug crisis, such as poverty, inadequate health care, lack of opportunity, and institutionalized racism.

A number of law enforcement officials, including police chiefs, district attorneys, and corrections officials, as well as health experts, have begun to grow impatient with current government policy and to assert that we should be dealing with the underlying social issues if we are to deal effectively with the current drug crisis.⁹ Michael Letwin, a New York criminal defense attorney and President of the Union of Legal Aid Attorneys, has pointed out that poverty and racism encourage young people to turn to crack as a means to escape the perceived absence of alternatives. Abuse can be inherently destructive. The nature and scope of the crisis, however, is due to drug prohibition. The inflated drug prices caused by prohibition contribute to crime, intra-family abuse and neglect, and health-threatening sex-for-crack transactions. As during alcohol Prohibition, profit in this trade, controlled by those living far from the inner-cities, is so lucrative that many neighborhoods have been reduced to combat zones for rival traffickers.¹⁰

The misdirected effort of the law and order approach militarizes our entire civil society and treats the minority community as an occupied territory. It drains resources urgently needed for

⁹ See Drug Prohibition — An Engine For Crime, Address by Ira Glasser, Executive Director of the ACLU, to the Hoover Institution Conference on Drug Policy at Stanford University (Nov. 1990) (observing that various law enforcement officials have warned against overreliance on criminal sanctions to solve drug problems) (copy on file with U.C. Davis Law Review).

¹⁰ Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate* 18 HOFSTRA L. REV. 795, 809-16 (1990). Even the Administration has recently begun to accede to the view — as yet unmatched by its funding allocations — that “we cannot defeat drugs through law enforcement alone.” Treaster, *New Drug Chief Turns to Softer Side of Issue*, N.Y. Times, Apr. 15, 1991, at A12, col. 1 (quoting President Bush at the swearing-in ceremony of drug czar Bob Martinez).

education, treatment, rehabilitation, and other social programs. It also often misidentifies poverty and health problems as drug problems.¹¹ Yet, instead of giving needy communities more clinics, the government gives them more police and more prisons. And while prisoners may not have access to adequate medical treatment, they certainly can continue to obtain illegal drugs.

Indeed, the law and order approach aggravates the life chances of poor minorities, especially young black males.¹² This situation has lead to an increasing appeal by many to decriminalize drugs and drug use.¹³ Advocates assert that legalization will deflate nar-

¹¹ The Supreme Court, prior to being captured by the law and order rhetoric, understood addiction to be a disease, not a crime. See *Robinson v. California*, 370 U.S. 660, 667 n.8 (1962). But see *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1970) (holding that trace of illegal substance in person's blood or urine is sufficient evidence to sustain possession conviction). See generally Califano, *Addiction in America*, 8 YALE L. & POL'Y REV. 1, 1-4 (1990). One trenchant example of this misidentification is illustrated by the link medical researchers have recently found between mental illness and addiction. In the largest and most extensive study of mental health ever undertaken, the National Institute of Mental Health (NIMH) found that many substance abusers have an underlying mental disorder, and many people with mental disorders become substance abusers. See Regier, Farmer, Rae, Locke, Keith, Judd & Goodwin, *Comorbidity of Mental Disorders With Alcohol and Other Drug Abuse*, 264 J. AM. MED. A. 2511 (1990). Based on a study of 20,000 people in five cities over the course of four years, the NIMH reported that half of those with substance abuse problems also have diagnosable mental illness. *Id.* at 2514. Twenty-six percent suffer from depression, 28% from anxiety or panic disorder, 18% from anti-social personality, and 7% from schizophrenia. *Id.* at 2514-15. It is not surprising, therefore, that after mental hospitals, prison populations were found to have the highest level of co-existing mental and substance abuse problems. *Id.* at 2513.

¹² See discussion *infra* at Part III (A) and (C) noting *inter alia* that the life expectancy of black males, already significantly less than that of white males and females, is decreasing, and that one out of four young black males nationwide are under the supervision of the criminal justice system on any given day. Experts attribute both the life expectancy and criminal justice figures, in large part, to drug-related offenses and violence and, in the case of the mortality rates, to drug-caused or drug-exacerbated infant mortality rates.

¹³ The ideological "lines" are not drawn in the usual places when it comes to the legalization of drugs. For example, New York Federal District Judge Robert Sweet, prominent University of Chicago economist Milton Friedman, Baltimore Mayor Kurt Schmoke, Congressman George W. Crockett Jr. (D-Mi) and conservative pundit William F. Buckley number among those arguing for legalization or decriminalization — or, at the very least, for a debate on the issues. See, e.g., Friedman, *An Open Letter to Bill*

cotics prices¹⁴ and thus remove the economic incentives and widespread violence associated with the illegal drug trade.¹⁵

Bennett, Wall St. J., Sept. 7, 1989, § 1, at 14, col. 3 (declaring that "our experience with the prohibition of drugs is a replay of our experience with the prohibition of alcoholic beverages"). Well-known liberals such as Jesse Jackson, New York Governor Mario Cuomo, and New York Congressman Charles Rangel (D-NY), on the other hand, oppose legalization.

There is considerable suspicion in the African-American community about whether legalization would benefit that community or would instead represent a complete abdication of responsibility by the white establishment for minority health and lives. (Some African-Americans, however, such as Mayor Schmoke, a former prosecutor, and Representative Crockett, argue that legalization is the most responsible action that can be taken on behalf of their communities.) The bottom line is whether legalization would drastically increase the number of addicts. *See Richardson, Poll: Legalizing Drugs Opposed*, *Newsday*, June 26, 1988, at 3, col. 3 (a 1988 poll conducted in New York City showed support for legalization was less among African Americans (14%) and Latinos (7%) than among whites (19%)). In this respect, past experience may be instructive. Prior to 1914, when Congress enacted the Harrison Narcotic Act, ch. 1, 73 Stat. 785 (1914) (repealed 1970), drugs were legal in the United States, and the dire consequences predicted by today's foes of legalization did not materialize. Nonetheless, the vastly greater adverse health effects of alcohol and tobacco, both of which are legal, raise the specter of huge increases in drug addicts should the United States legalize currently illicit drugs. *See supra* note 7.

¹⁴ It is estimated that the cost of cocaine on the black market (approximate 25% purity) is over 100 times what it costs when legally bought for the few legitimate medicinal purposes still authorized (approximate 100% purity). S. WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* 35-36 (1986). Professor Wisotsky argues that the explicit United States policy of maintaining the price of drugs at high levels, ostensibly in order to decrease demand, has backfired. Instead, artificially inflated prices offer incentives for street level dealers who are drawn into the drug trade because of its reputed profitability. *Id.* at 36. The increase in numbers of dealers in turn leads to violent turf battles. *See discussion infra* at Part III(B).

¹⁵ There are numerous versions of what exactly the legalization of drugs would mean and how the United States would construct and regulate the drug market. At the extreme, some propose removing all criminal sanctions and taxes on the production and sale of all psychoactive drugs, with the possible caveat that sales to children be restricted. Others would limit legalization to marijuana. Still others prefer a "medical model" similar to today's methadone maintenance programs. Some supporters of legalization are quick to point out that legalization will enable the government to impose quality control on the drug market and to mandate labelling. *See, e.g., Ostrowski, Thinking About Drug Legalization* 121 *POL'Y ANALYSIS* 1, 14 (1989) (estimating that 2,400 of 3,000 annual deaths attributed to cocaine and heroin are the results of adulteration and impurities). *Cf. Nieves, After 6*

Although there are strong reasons to question the underlying motivation of the law and order approach to the drug crisis, Parts I and II will examine the current efforts to combat drugs, without directly challenging their underlying motivation. Part I of this Article provides a brief overview of the government's financial efforts in the war against drugs. It argues that the Reagan-Bush war has proven ineffective — even when judged by its own terms. Part II focuses on the constitutional costs of the war on drugs. It details how the protections against unreasonable searches and seizures guaranteed by the fourth and fourteenth amendments, as well as privacy and due process rights under the fifth and fourteenth amendments, have fallen victim to the war on drugs. In Parts I and II, this Article will argue that the current efforts are ineffective precisely because the problem is defined in law and order terms.

In Part III, we will argue that this country's drug policy has a substantially negative effect on the African-American community in particular, and will maintain that the policy cannot be understood without considering the race of its victims. Thus, while the first two Parts provide a summary of the financial and constitutional costs of the drug war, Part III surveys the human cost marking the disproportionate and devastating effect that an inept health strategy, discriminatory law enforcement, and drug trafficking have on our inner-city minority communities.

We conclude that the real victims of the drug war are our basic rights and the lives and health of the most vulnerable Americans. This is because we are attacking the drug problem through criminal sanctions, rather than through public health, education, and economic means. Our current antidrug policy is inefficient, with

Addicts Die, Police in Northeast Warn of Toxic Drug, N.Y. Times, Feb. 3, 1991, § 1, at 1, col. 1. Other officials suggest combining legal availability of some or all illicit drugs with vigorous attempts to restrict consumption by means other than resort to criminal sanctions. Many of this last group simultaneously urge greater efforts to limit tobacco consumption and alcohol abuse.

For a thorough discussion of the legalization debate, see *Legalization of Illicit Drugs, Parts I & II, Hearings Before the House Select Committee on Narcotics Abuse and Control*, 100th Cong., 2d Sess. (1988); THE DRUG POLICY FOUNDATION, *DRUG POLICY 1989-1990: A REFORMER'S CATALOGUE* (1989); S. WISOTSKY, *supra* note 14, at 197-222; Nadelmann, *supra* note 7, at 939; Ostrowski, *supra*, at 14-23; Glasser, *We Can Control Drugs, But We Can't Ban Them*, N.Y. Times, Nov. 20, 1989, at A22, col. 3.

minorities comprising the war's tragic victims.¹⁶ If the United States is serious about the drug problem, it should direct its resources to treatment, education and rehabilitation, as well as to amelioration of the underlying social and economic conditions that push individuals to drug abuse and drug trafficking.

I. OVERVIEW OF ADMINISTRATIVE, CONGRESSIONAL, AND JUDICIAL CONTRIBUTIONS TO THE "WAR EFFORT"

Under the Reagan and Bush administrations, the overarching theme of executive, legislative, and judicial responses to the drug problem has been to strengthen law enforcement activity. This Part explores some of these efforts, arguing that these responses have not only failed to curb the drug trade, but have resulted in a host of new problems.

A. Administrative Initiatives

The billions of dollars poured into the war on drugs has done little to slow, much less stem, the tide of the drug trade. The flow of illegal drugs from Latin America, Africa, and the Far East has continued unabated.¹⁷ Domestic production of marijuana has

¹⁶ Although we believe there is more than a hint of racism that explains our present drug policy of law and order, we are not advancing a simple version of a white-supremacist conspiracy. The real picture is more complex. For example, there are many advocates in the African-American communities who oppose health-related programs like clean needles which we endorse, and instead favor the law and order approach. In New York City, Mayor Dinkins has generally been in this camp, though he has verbally supported some increases in drug treatment program funding.

¹⁷ See *Bush Denies 'Payback' on Embassy*, N.Y. Times, Dec. 9, 1990, § 1, at 14, col. 4 (during visit to Venezuela President Bush observed that as much as 80 tons of cocaine a year move through Venezuela); Crossett, *U.S.-Pakistan Bone of Contention: Narcotics*, N.Y. Times, Dec. 5, 1990, at A15, col. 1 (in last several years opium production has increased from 40-50 tons to 160 tons annually and tribal families are beginning to process their own heroin); Krauss, *Anti-Drug Effort Drags Outside U.S.*, N.Y. Times, Nov. 25, 1990, at 9, col. 1 (noting that "[n]early two years after President Bush declared his war on drugs, Administration officials say they have made little progress toward blocking narcotics trafficking from Latin America into the United States"); see also Treaster, *Columbia's Move on Drugs Backed*, N.Y. Times, Dec. 21, 1990, at A11, col. 1 (U.S. drug specialists say Colombian Government's deal offering drug traffickers lenient sentences in return for turning themselves in is unlikely to cause major reduction of exports of cocaine); S. WISOTSKY, *supra* note 14, at xix (estimating that 1985 sales of

also increased.¹⁸ Interdiction strategies have, according to many experts, only served to promote “hard” drugs, such as cocaine and crack,¹⁹ at the expense of “softer” drugs, such as marijuana.²⁰ The profitability of the drug trade has attracted more dealers, a phenomenon that, when joined with the sustained flow of drugs into the country, has actually lowered the price of many drugs.²¹ Common estimates of annual black market drug sales range from \$80 to \$100 billion a year.²² The large amounts of money made in the drug trade have proven to be a corrupting force of public officials, law enforcement agents, bankers, and merchants.²³ Finally, the number of people convicted of drug

cocaine grossed \$30 billion and noting that between 1980 and 1985 United States supply of cocaine nearly tripled to exceed 100 metric tons).

As far back as 1983, the year after President Reagan inaugurated the modern-day war on drugs, his budget director, David Stockman, tried to cut the drug war budget, “arguing, as he later put it, that ‘no matter how many Coast Guard cutters or AWACs-type planes we deployed, the stuff still kept coming in, by boat, plane, and even parachutist.’” Lazare, *The Drug War Is Killing Us: Interdiction Has Made Hard Drugs Cheap and Violence Plentiful*, *The Village Voice*, Jan. 21, 1990, at 22, 26.

¹⁸ Nadelmann, *supra* note 7, at 940. Former Director of the National Office of Drug Control, William Bennett, has claimed that domestically grown marijuana constitutes 25% of the marijuana consumed in the United States. U.S. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 28 (Sept. 1989) [hereafter 1989 NATIONAL DRUG CONTROL STRATEGY]. However, this figure may well be inflated.

¹⁹ Crack, which is cocaine that has been mixed with baking soda and water and then boiled, is generally perceived as delivering more “bang for the buck.” For example, cocaine can cost \$1,000 per ounce if bought in bulk, yet one ounce of cocaine can produce one thousand vials of crack, each selling for approximately \$5 each. *The Federal Drugstore*, *supra* note 4, at 34 (interview with Michael S. Gazzaniga, Professor of Neuroscience at Dartmouth Medical School). Crack goes more quickly to the brain as a result of being smoked. *Id.* Some experts, though, dispute the horrors of crack, widely publicized as promoting crazed, violent behavior. *See id.*

²⁰ *See generally* Lazare, *supra* note 17.

²¹ The price of cocaine “has plummeted from \$50,000 per kilo in the late 1970’s to under \$10,000” in 1989. *Id.* at 22.

²² *See*, Ostrowski, *supra* note 15, at 15; Dennis, *The Economics of Legalizing Drugs*, ATLANTIC MONTHLY, Nov. 1990, at 126, 129.

²³ Throughout the industrialized world, money laundering, including profits from other than drug-related crime, is estimated at more than \$120 billion a year. *Europe in Drug Profit Plan*, N.Y. Times, Nov. 26, 1990, at D4, col. 3. *See generally*, S. WISOTSKY, *supra* note 14, at 47-48, 81-87; 7 *Los Angeles Deputies Guilty in Theft of Drug Dealers’ Cash*, N.Y. Times, Dec. 11, 1990, at B8, col. 3; *Ex-Agent on Trial in Drug-Corruption Case*, N.Y. Times, Nov. 22, 1990, at A25, col. 1; Shennon, *Enemy Within: Drug Money is Corrupting the Enforcers*,

offenses, particularly young African-American males,²⁴ continues to rise — placing huge burdens on an already overwhelmed criminal justice system and depopulating the black community of young males.

Despite this dismal record, in its fiscal 1991 budget, the Bush Administration sought \$10.6 billion and received \$10.4 billion to continue to wage war on drugs. For fiscal year 1992, the White House, in its third annual National Drug Control Strategy, has requested a total of \$11.7 billion — representing an increase of eighty-two percent since the Bush Administration first took office.²⁵ Current funding levels for the drug war represent greater than a tenfold increase since 1985. As in past years, the bulk of these funds have been earmarked for law enforcement activities.²⁶ In addition, for 1991, the law enforcement activities of state and local governments add up to another \$10 billion a year — “a conservative figure derived from the costs of arresting, prosecuting and imprisoning several hundred thousand people a

N.Y. Times, Apr. 11, 1988, at A1, col. 1 (noting that federal and state courts annually prosecute over 100 cases of drug-related corruption of public officials). In 1990 investigators from the House Ways and Means Subcommittee on Oversight posing as drug dealers approached 79 merchants, 95% of whom “willingly accepted cash purported to be drug revenue.” Letter to the Editor from Rep. Charles B. Rangel, N.Y. Times, Oct. 12, 1990, at A34, col. 3.

²⁴ Nationwide 80 to 90 percent of drug offense defendants are African American males. Stone, *African Males Threatened By Drug ‘War’*, Chicago Defender, Oct. 7, 1989, at 22. See also *infra* Part III, discussing the racism of the war on drugs.

²⁵ 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 2.

²⁶ According to the National Association of Criminal Defense Lawyers (NACDL), approximately one-quarter of the drug budget was allocated for treatment while the remainder went for law enforcement. NACDL, *The Black Community and the Cost of the “War on Drugs,”* CHAMPION, Nov. 1990, at 18, 19 [hereafter NACDL Report]. Treatment has always been a low priority of the federal government. In 1989 only 21% of the total funds allocated for drug treatment came from the federal government; 31% came from state and local sources, and 18% from private sources. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 46. For the 1992 Fiscal Year, approximately \$8.2 billion of the \$11.7 billion requested is for domestic enforcement, international efforts, and border control. Treaster, *Bush Proposes More Anti-Drug Spending*, N.Y. Times, Feb. 1, 1991, at A12, col. 1. The proportion of the Bush Administration’s fiscal 1992 budget designated for health-related programs represents a decline to 30.3% from 1991’s 31.2%. *Id.*

year for drug violations."²⁷

This emphasis on criminal investigation and prosecution is unlikely to change in the near future, in light not only of administrative budget requests, but also of the recent confirmation of former Florida Governor Bob Martinez to replace drug czar William Bennett as Director of the Office of National Drug Policy.²⁸ As governor, Martinez developed the reputation of a tough law and order official, pushing legislation through the Florida state legislature allowing the death penalty for drug kingpins,²⁹ "doubl[ing] the state's prison cells [and] stiffen[ing] penalties for drug dealers."³⁰

Law enforcement officials make approximately 1.2 million drug arrests a year.³¹ An astounding *eighty to ninety percent* of those who are eventually prosecuted for drug-related offenses are African-American males.³² Many of those convicted and housed in prison are not involved with "serious" drugs, nor are they dangerous. For one thing, a significant percentage of drug-related arrests involve marijuana, and nearly eighty-five percent of the arrests are for mere possession.³³ Nonetheless, the number of people convicted of drug-related felonies in state courts rose by sixty-

²⁷ Dennis, *supra* note 22, at 129.

²⁸ President Bush had first appointed William J. Bennett, the conservative former director of the National Endowment for the Humanities under Reagan, as drug czar in an effort to coordinate the many law enforcement agencies charged with drug-related enforcement duties. The position carried a sub-cabinet rank, which critics charged hampered Bennett's ability to exercise control over other agencies. Bennett, citing financial concerns, recently resigned his position.

²⁹ Saul, *Drug Czar Choice Criticized*, Newsday, Dec. 1, 1990, at 9, col. 2; see also Johnston, *Democrats Fault Bush Drug Nominee*, N.Y. Times, Dec. 1, 1990, at A10, col. 1.

³⁰ Treaster, *Drug Office Would Have New Voice Under Florida's Low-Key Governor*, N.Y. Times, Nov. 30, 1990, at A16, col. 1.

³¹ See *Proliferation of Gangs Burdening L.A.'s Justice System*, Montgomery Advertiser, Dec. 16, 1990, at 5H, col. 1. The number of people arrested in Los Angeles for drug law violations has more than doubled in past 10 years, from 21,746 in 1980 to 51,385 in 1989. *Id.* at col. 6. The high volume of arrests contributes to the criminal justice system's systematic coercion of innocent defendants to plead guilty by threatening extremely heavy drug offense sentences should they be convicted at trial. Without pushing for pleas in a majority of cases, the system would grind to a halt.

³² Stone, *supra* note 24, at 22.

³³ See Lazare, *supra* note 17, at 22 (reporting that of 750,000 drug busts annually, the majority were for marijuana); see also National Organization for the Reform of Marijuana Laws, 2 DRUG LAW REPORT 180 (1990) (noting

nine percent between 1986 and 1988.³⁴ By 1988, drug-related convictions represented one-third (or 227,000) of the 667,400 annual felony convictions in state courts.³⁵

By some estimates, fully one-half of new prison inmates have been convicted of drug-related crimes.³⁶ Thus, an important consequence of increased narcotics law enforcement under Reagan and Bush is the soaring inmate population. Today, approximately 755,000 men and women are incarcerated in state and federal prisons. When local and county jail populations are included, the number exceeds one million. The cost for keeping over one million people imprisoned annually is \$16 billion.³⁷ This nation's current inmate population represents a doubling of America's prison population in less than ten years.³⁸ In fact, the prison population has set a record every day since 1974³⁹ and is rising at a thirteen percent annual rate,⁴⁰ or by approximately 2,650 inmates per week.⁴¹

Moreover, *young black men compromise fully half of the total inmate population in the United States* — despite the fact that they constitute only about five percent of the country's population.⁴² If the goal of our nation's drug policy is to warehouse young minorities while militarizing the inner-city, it is indeed successful. Black men are now four times more likely to be incarcerated in the

marijuana accounted for over one-third of all drug arrests in 1988; 83.5% of marijuana arrests were for possession, rather than sale).

³⁴ *Drug-Related Felony Convictions Increase by 69% in State Courts*, N.Y. Times, Dec. 18, 1990, at A18, col. 3.

³⁵ *Id.*

³⁶ M. MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION, 2 (1990). See *Proliferation of Gangs Burdening L.A.'s Justice System*, *supra* note 31, at 5H, col. 1 (noting fully half of all defendants sentenced this year in Los Angeles Superior Court will be convicted of violating drug laws).

³⁷ *Highest Rate of Imprisonment in World*, N.Y. Times, Jan. 7, 1991, at A4, col. 1.

³⁸ M. MAUER, *supra* note 36, at 8.

³⁹ Johnson, *More Prisons Using Iron Hand to Control Inmates*, N.Y. Times, Nov. 1, 1990, A18, col. 3.

⁴⁰ Donald P. Lay, *Our Justice System, So-Called*, N.Y. Times, Oct. 22, 1990, at A19, col. 2 (Editorial/Opinion statement by Chief Judge of the Eighth Circuit Court of Appeals).

⁴¹ *Stress Points in the State Budgets*, N.Y. Times, Dec. 30, 1990, § 1, at 17, col. 2.

⁴² Stone, 'War on Drugs', *Crime Fought on Wrong Battlefields*, Chicago Defender, Oct. 31, 1989, at 22.

United States than they are in South Africa: of every 100,000 black males in the United States, 3,109 are incarcerated, while the comparable figure for South Africa is 729.⁴³ Currently there are more African-American men in prison than in college.⁴⁴ When probation and parole figures are added into the statistics, a staggering number of people, particularly minorities, are subject to the jurisdiction of the criminal justice system on any given day.⁴⁵ As a result, the black community and the criminal justice system are overwhelmed at every turn.⁴⁶

Rather than questioning the policy of warehousing people for increasingly longer periods, the Bush Administration's national drug strategy calls for huge increases in federal prison capacity,⁴⁷ with similar increases by the states.⁴⁸ Indeed, over the past dec-

⁴³ Wicker, *The Iron Medal*, N.Y. Times, Jan. 1, 1991, at A21, col. 1 (citing M. MAUER, *supra* note 36, at 2-3).

⁴⁴ See *infra* notes 220-23 and accompanying text.

⁴⁵ The Department of Justice reports that as of the end of 1989 there were 456,797 people on parole in the United States. The states with the highest parole figures were Texas (91,294), California (57,508), Pennsylvania (47,702) and New York (36,685). *Nearly Half-Million Are On Parole In USA*, USA Today, Dec. 15, 1990, at 12, col. 1.

⁴⁶ In the past 8 years, for example, New York has added 30,000 new beds to its prison system. Kolbert, *Criminal Justice: A Priority Proves Elusive for Cuomo*, N.Y. Times, Oct. 2, 1990, at B1, col. 2. Barbara Price, Dean of Graduate Studies at the John Jay College of Criminal Justice criticizes New York State's incarceration record: "We should have capped [New York's] prison population a decade ago. We should have expanded intensive probation programs and work-release programs and, obviously, we should have created more drug treatment slots." *Id.* at B5, col. 3. Kolbert notes that "while about 12,000 prisoners are now eligible for work-release programs, space in such programs exists for fewer than 3,800." *Id.* at col. 3.

New York is by no means the only city whose criminal justice system is overwhelmed in large part because of an ever-increasing caseload, most of which relates to drug prosecutions. See Applebome, *Study Faults Atlanta's System of Defending Poor*, N.Y. Times, Nov. 30, 1990, at B5, col. 3 (reporting that suspects are held in Atlanta jails as long as 3 or 4 months without seeing a lawyer; that 70 to 80 percent of defendants were unable to afford a lawyer; that Atlanta's public defenders were handling close to 500 cases a year—or double to triple national average; and that felony indictments had more than doubled in less than 5 years, largely as result of drug arrests).

⁴⁷ See 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 36.

⁴⁸ Many states have heeded this call. New York's inmate population is at an all-time-high of nearly 60,000. *A Surer Way to Control Crime*, N.Y. Times, Nov. 23, 1990, at B3, col. 1. The State of New York spent \$1.5 billion building prisons during the 1980s. *Id.* This nearly doubled the state's prison capacity—a feat that Governor Cuomo brags constitutes the biggest

ade, federal and state spending on prisons increased from \$12 billion in 1980 to approximately \$20 billion today.⁴⁹ These increases in spending, however, are unable to keep pace with the increase in the inmate population. According to the calculations of one federal judge, to do so would require the expenditure of \$100 million per week for construction of new facilities alone.⁵⁰

The Administration's focus on arresting, indicting, prosecuting, and imprisoning drug offenders precludes any significant financial commitment to treatment or rehabilitation.⁵¹ Yet, the

prison-building program in history. *Id.* Overall, in 1989-90 state and federal governments spent over \$6.7 billion on new prison construction. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 36.

⁴⁹ Johnson, *supra* note 39, at A18, col. 3.

⁵⁰ Lay, *supra* note 40, at col 1. According to a Bureau of Justice Jail Population Statistics survey issued in June 1989, 26% of all jails are already under federal or state court order or consent decree to limit the number of inmates. Many of these jails, however, are in flagrant violation of these orders. One such example is New York, where, as a result of the City's "chronic violation of court-imposed limits on overcrowding in its jails," Federal District Judge Morris Lasker announced that he "would order the city to pay \$150 to each prisoner held for more than a day in holding cells under improper living conditions." Wolff, *Penalty for Holding-Cell Delays: \$150 to Some New York Inmates*, N.Y. Times, Nov. 30, 1990, at A1, col. 1.

New York City officials acknowledged that "as many as 400 inmates at a time had been held in holding cells throughout the city for more than 24 hours, often being forced to sleep on floors because there are no beds in the cells and having no place to urinate except in shared bottles or on the floor." *Id.* at B2, col. 4. The General Accounting Office reports similar conditions:

[A]s of April 1989, 35 states and the District of Columbia faced court orders and/or consent decrees dealing with prison crowding, or the conditions caused by prison crowding, at one or more of their facilities. Eight of these states faced court orders or consent decrees dealing with crowding in their entire correctional systems.

U.S. GENERAL ACCOUNTING OFFICE, PRISON CROWDING: ISSUES FACING THE NATION'S PRISON SYSTEM, app. III, at 29 (Nov. 1989) [hereafter PRISON CROWDING].

⁵¹ For example, the National Association of State Alcohol and Drug Abuse Directors (NASADAD) reported that in 1989 approximately 4 million women needed drug addiction treatment, but only 550,000 received it. *See generally* NATIONAL ASSOCIATION OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS, TREATMENT WORKS (1990) [hereafter TREATMENT WORKS]. The report goes on to note that for each \$1 spent on treatment, \$11.54 in social costs — such as reduced crime, decreased demand for social services, AIDS prevention and increased productivity — is saved. *Id.* A similar situation exists in the states. In New York, the Division of Substance Abuse Services

annual cost of maintaining a patient in treatment programs is significantly less expensive — between one-third and one-half the annual cost of keeping an inmate in prison.⁵² Moreover, 1989 “[g]overnment expenditures for criminal justice [had] increased four times faster than for education [and] twice as fast as for health care.”⁵³ Statistically, there is now “one corrections officer for every three prison inmates . . . [but] only one teacher for every [thirty] students in our public schools”⁵⁴ — an ironic encomium for the self-styled “Education President.”⁵⁵

Moreover, the Reagan and Bush administrations have taken their heated rhetoric seriously; the “war” on drugs is just that, increasingly involving the military in domestic law enforcement. During his tenure as “drug czar,” Director of the Office of National Drug Control Policy William Bennett called for the use of military judges and prosecutors to process drug offenders in Washington, D.C. and urged the use of abandoned military stations to lock up drug offenders. Appropriations for drug interdiction conducted by the Department of *Defense* along the Mexican border grew from \$450 million in 1990 to \$1.1 billion in 1991.⁵⁶ Defense Department personnel have also been granted police

reports that of the more than 500,000 drug abusers in the City, treatment is available for only 42,000. See Treaster, *supra* note 26, at cols. 5-6.

⁵² New York State Correction Commissioner Thomas A. Coughlin III has observed that it costs approximately \$25,000 to keep one inmate in prison for a year, significantly more than the \$15,000 cost of a year’s treatment. Kolbert, *supra* note 46, at B1, col. 4; see also Roberts, *Getting Out of Prison, Off of Drugs and Staying There*, N.Y. Times, Dec. 17, 1990, at B1, col. 4 (noting residential drug treatment costs less than one-half cost of keeping an inmate in prison for one year); *A Surer Way to Control Crime*, N.Y. Times, Nov. 23, 1990, at A36, col. 2 (noting nationally it costs about \$100,000 to build one prison cell; comparable figure for building costs involved with treatment is estimated at only \$30,000). Meanwhile, in the current fiscal year, New York will spend roughly \$3 billion to cover the state prison system’s operating and construction costs — or about \$8 million a day. IMPRISONED GENERATION, *supra* note 5, at 8.

⁵³ See Stone, *supra* note 42, at 22.

⁵⁴ *Id.*

⁵⁵ There is a clear correlation between education — or rather, its absence — and drug-related and other criminal behavior. In New York State, for example, 82% of the black men in prison are high school dropouts. Hancock, *Ujamaa Means Controversy*, Village Voice, Nov. 6, 1990, at 14, col. 3. Overall, the high school drop out rate for African-American and Latino youths in New York City ranges from fifty to seventy percent. IMPRISONED GENERATION, *supra* note 5, at 6.

⁵⁶ Davidson, *Militarizing the Mexican Border*, THE NATION 406 (1991).

powers while participating in foreign drug wars, particularly in South America.

In the past several years, the Office of National Drug Control Policy has enlisted the military in a nationwide marijuana eradication effort.⁵⁷ In addition, the United States Department of the Interior, the Bureau of Land Management, and other federal, state and local agencies have increasingly adopted the techniques of the military.⁵⁸ These drug eradication operations employ sophisticated surveillance techniques, including low level helicopter overflights, while camouflaged troops conduct random and warrantless searches and seizures on the ground and through aerial surveillance.⁵⁹ Along the southwest border of the United States, drug interdiction has merged with immigration control efforts in a dangerous conflation of two policies that pose grave threats to constitutional protections.⁶⁰ Moreover, one of the

⁵⁷ 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 128.

⁵⁸ Former Virginia Governor Gerald Baliles authorized the National Guard to conduct undercover surveillance against suspected drug dealers in rural areas and the New York State National Guard has conducted ground surveillance at sites suspected of drug operations. In Washington, D.C. the Guard uses helicopters to conduct urban surveillance. Other examples abound. The National Guard widely advertises its role in defeating the new "enemy within." A current advertisement for the Guard now running proclaims:

It's War!

Lives are ruined. Families destroyed.

Children are dying in the streets.

It's the war against drugs.

And the National Guard is helping in the fight to win.

....

We're America's citizen soldiers. Dedicated to coming to your aid at a moment's notice. To protect your home. And defend our homeland.

Advertisement, USA Today, Dec. 13, 1990, at 8A (describing National Guard's participation and casualties in World War II, Korean War, Vietnam War and drug war). The Bush Administration report that Federal funding for the National Guard drug enforcement efforts rose from \$28 million in fiscal year 1989 to \$112 million fiscal year 1990. 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 30.

⁵⁹ *Id.* at 115-19.

⁶⁰ As Immigration and Naturalization Service spokesperson Verne Jeruis told the *Tucson Citizen*, "We have found that there are so many Mexican nationals, legal and illegal, transporting drugs, that the two functions are intertwined." Davidson, *supra* note 56, at 407. See Isikoff & Ifill, *U.S. Seeks Wider Anti-Drug Powers*, Washington Post, May 16, 1990 at A1, col. 5 (noting

most pervasive of military incursions into civilian life may well be the intelligence gathering and dissemination responsibilities given the Defense Department and other law enforcement agencies.⁶¹

Such activities would appear to violate the Civil War-era Posse Comitatus Act,⁶² which makes it a felony for the Army to perform the law enforcement functions of civilian authorities.⁶³ In 1981 Congress amended the Act, authorizing a greater degree of military support services to track and report the movements of criminally suspect aircraft and ships suspected of smuggling drugs.⁶⁴

The Administration's approach to the war on drugs also impacts foreign policy.⁶⁵ The United States, which consumes approximately sixty-five percent of the illicit drugs worldwide, exports its domestic policy of law enforcement to drug-supplying nations. For example, both the Reagan and Bush administrations have emphasized joint U.S.-foreign military ventures aimed at eradicating coca crops or destroying drug-processing centers in Latin American countries.⁶⁶ In stark contrast, European countries, such as the United Kingdom, Germany, and Italy, extend

Bush Administration proposes giving the INS new powers to begin summary deportations of tens of thousands of *legal* aliens convicted of drug dealing and other crimes).

⁶¹ See S. WISOTSKY, *supra* note 14, at 126-35.

⁶² 18 U.S.C. § 1375 (1988).

⁶³ The Posse Comitatus Act was originally enacted in response to Union Army excesses in disarming Confederate troops after the Civil War. Later amendments added the Air Force, Navy and Marine Corps. to the list. The Posse Comitatus Act does not apply to the National Guard.

⁶⁴ S. WISOTSKY, *supra* note 14, at 92.

⁶⁵ See Brooke, *Peru Develops Plan to Work With U.S. to Combat Drugs*, N.Y. Times, Jan. 25, 1991, at A2, col. 3 (reporting Peru asked for relief or forgiveness of \$1.2 billion debt to U.S. in return for cooperating with U.S. attempts to combat coca leaf cultivation).

⁶⁶ The United States supports crop eradication in fourteen countries and law enforcement in seventy. Mirroring its domestic priorities, about 91% of the funding for United States overseas efforts is spent on enforcement, with the remainder going toward economic development. U.S. GENERAL ACCOUNTING OFFICE, *DRUG CONTROL: HOW DRUG-CONSUMING NATIONS ARE ORGANIZED FOR THE WAR ON DRUGS* 9 (1990).

The obstacles these United States-backed efforts face are illustrated by the fact that the largely peasant populations of many source countries rely on drug-producing plants as their big cash crops. For instance, the General Accounting Office recently estimated that eliminating coca production would put 500,000 - 600,000 people out of work in Peru and Bolivia alone. *Id.*

economic aid designed to bolster and diversify drug-dependent economies.⁶⁷

These examples of executive policy are only a few of the initiatives taken in the last decade to wage the war on drugs. Despite record spending and record numbers of drug seizures, investigations, indictments, arrests, and asset forfeitures, this aggressive and expensive law enforcement effort has had little or no significant impact upon the import, sale or use of illicit drugs.⁶⁸

B. Congressional Efforts

While Executive drug policy has proven to be about as effective as tilting at windmills, Congress has nevertheless played a willing Sancho Panza, passing the sword — or, more often, the purse — upon request. Congressional contributions to the drug war arsenal include: (1) establishing a Sentencing Commission to propose new sentencing guidelines, and subsequently enacting proposed guidelines, which increase the severity and inflexibility of prison terms for drug-related crimes;⁶⁹ (2) enacting legislation that bypasses the guidelines by setting mandatory minimum sentences for specific crimes;⁷⁰ (3) amending the Continuing Criminal Enterprise statute in 1988 to allow for the imposition of the death penalty for drug dealers who kill;⁷¹ (4) strengthening the government's ability to seize and forfeit not only drug-related

⁶⁷ In a study comparing the approaches of the United States with those of the United Kingdom, West Germany and Italy, the General Accounting Office found that the latter countries focused on multilateral, rather than bilateral agreements and on humanitarian assistance to encourage supply reduction. *Id.* at 8-9.

⁶⁸ See *infra* notes 206-08 and accompanying text.

⁶⁹ 28 U.S.C. § 991(b) (1988). The guidelines do not apply to offenses committed before November 1, 1987 even if sentencing is after that date. See *United States v. Stewart*, 865 F.2d 115 (7th Cir. 1988); *United States v. Haines*, 855 F.2d 199 (5th Cir. 1988). If a conspiracy overlaps the November 1, 1987 time period, the guidelines may apply. See *United States v. White*, 869 F.2d 822 (5th Cir. 1989).

⁷⁰ See, e.g., 21 U.S.C. § 845(b) (1988) (imposing minimum mandatory period of imprisonment of one year for any person 18 years of age or older who knowingly employs or uses any person younger than 18 to violate or to conceal any violation of any provision of Title 21).

⁷¹ 21 U.S.C. § 848(e) (1988). The omnibus antidrug legislation that contained this capital provision was shepherded through Congress by "liberal" New York Congressman Charles Rangel, Chairman of the House Select Committee on Narcotics. Recently, in the first application of this capital drug-murder statute, a federal judge in Alabama imposed the death

assets, but also real property suspected of "facilitating" the drug trade;⁷² and (5) the recent "greenmailing" of states through the linkage of the receipt of federal highway funds to drug-related law enforcement efforts.⁷³ This is just a partial list. Recently, each Congressional session has also yielded numerous attempts, as yet unsuccessful, to enact additional punitive measures. These efforts include imposition of the death penalty for drug-related offenses⁷⁴ and bills imposing criminal penalties on women who take drugs while pregnant.⁷⁵

The Sentencing Guidelines and mandatory minimum sentences are particularly pernicious and play a crucial role in maintaining and aggravating the current prison overcrowding crisis. In 1984, as noted above, Congress passed the Sentencing Reform Act, which created the United States Sentencing Commission. Congress directed the Commission to fashion a comprehensive and rational sentencing system.⁷⁶ The Commission's statutorily-man-

sentence on the leader of a marijuana operation. *See First Death Sentence Under New Drug Law*, N.Y. Times, May 15, 1991, at A24, col. 5.

⁷² *See* 21 U.S.C. § 881 (1988). In addition to enacting forfeiture legislation similar to that passed by Congress, close to half of the states have imposed high fines for failure to pay taxes on the possession of illegal drugs. *See Tomasson, 21 States Imposing Drug Tax and Then Fining the Evaders*, N.Y. Times, Dec. 23, 1990, § 1, at 1, col. 1. One official of U.S. Advisory Commission on Intergovernmental Relations explained the taxes by asserting that "[t]here is absolutely no justification to giving drug dealers tax breaks just because their business is illegal." *Id.* at 18, col. 4. The tax laws, like the civil forfeiture acts, do not require that ownership of drugs be proved or that a criminal conviction result. Rather, law enforcement uses expedited procedures, leaving the owner of the cash or property seized to attempt to prove afterward that she had neither knowledge of nor control over the drugs. *See infra* note 134 and accompanying text.

⁷³ *See generally* NATIONAL DRUG STRATEGY NETWORK NEWS BRIEFS (Sept./Oct. 1990) (describing bills passed by House and Senate that would cut federal highway funds to states that do not suspend licenses of persons convicted of drug offenses).

⁷⁴ *See generally* NATIONAL DRUG STRATEGY NETWORK NEWS BRIEFS (June 1990) (describing S. 2652, introduced by Republican Minority leader Robert Dole (R-KS), which would expand list of drug crimes subject to death penalty).

⁷⁵ *See* 135 CONG. REC. S9,321 (daily ed. Aug. 1, 1989) (Child Abuse During Pregnancy Prevention Act of 1989, S. 1444 § (c)(4), 101st Cong., 1st Sess.).

⁷⁶ *See* 28 U.S.C. § 991(b) (1988). Prior to formation of the Commission, many critics had attacked the lack of uniformity of sentences imposed by different courts on similar offenders.

dated guidelines subsequently prescribed sentencing ranges for most federal crimes and took effect on November 1, 1987. Overall, the result has been to transfer discretion from judges to prosecutors.

In January 1989, the Supreme Court upheld the sentencing guidelines against numerous constitutional challenges.⁷⁷ Under the guidelines, in addition to being subject to longer prison terms, offenders who commit crimes after October 1987 are now no longer eligible for parole. The 1984 Act also sharply limits any "good time" reductions. As a result, most inmates sentenced under the guidelines now serve nearly their full terms.

Apparently unsatisfied with the stricter guidelines alone, Congress went still further down the road to more severe penalties, preempting the guidelines in several instances with severe mandatory minimum sentences for drug-related offenses.⁷⁸ These mandatory minimums have been widely criticized — most notably and insistently by the trial judges charged with their implementation. The mandatory minimums generally ignore offense and offender variables, including whether the defendant used a weapon, whether the defendant was an instigator or a follower, and the nature of the victim's injury.

The move toward more and more draconian penalties for drug-related crimes has occurred in an atmosphere of hysteria and in a vacuum of relevant information.⁷⁹ No evidence exists that stiffer sentences accomplish any significant deterrent purpose.⁸⁰ The

⁷⁷ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁷⁸ In 1988 Congress established a mandatory five-year minimum sentence for simple possession of 5 grams — barely a teaspoon — of crack. 21 U.S.C. §§ 841(b)(1)(B), 844(a) (1988). In addition, the 1986 Anti-Drug Abuse Act set mandatory minimum sentences of 10 years for the possession with intent to distribute 11 pounds of cocaine, 2.2 pounds of heroin or 1.7 pounds of crack. In 1988 Congress enacted still harsher penalties for selling crack within 100 feet of a youth center, playground, swimming pool or video arcade. For these offenses the otherwise applicable sentence is doubled.

⁷⁹ The irrationality of drug-related sentencing is born out by a recent life-without-parole sentence meted out to a twenty-two year old for possession of 5½ ounces of cocaine. See *Life Without Parole*, Binghamton Press & Sun Bulletin, Mar. 11, 1990, at 3A, col. 1. This is a far more severe sentence than that often imposed for rape or murder. In this instance, the sentence was based on a federal law that established life without parole for anyone convicted for a third time of possessing 50 grams or more of crack or similar amounts of other drugs.

⁸⁰ As members of the Supreme Court have repeatedly pointed out, there is little support for the proposition that even the most severe of penalties,

increasing number of crimes would indicate that they do not. On the other hand, these harsh laws add to the prison overcrowding problem described above. Furthermore, they have ushered in a criminal justice system in which penalties bear less and less relationship to the crime and the culpability of the offender. In fact, a growing number of federal judges are arguing that a significant percentage of defendants receive unduly harsh sentences under the mandatory minimum sentence statutes.⁸¹ There is also growing evidence that minorities receive harsher sentences than do whites convicted of the same crimes.⁸² Finally, many commentators blame the harsh sentences for the widespread recruitment by drug traffickers of juveniles who are not subject to adult prison terms.

The irrationality of the sentencing and the lack of an adequate social strategy for drug offenders may be explained in part by the fact that most of those arrested and sentenced are poor and minority. When drug raids have occurred in white middle class communities, there has been a very different public response.⁸³

C. Judicial Contributions

Perhaps the judiciary's single most destructive contribution to the drug war has been its creation of the "drug exception to the

the death sentence, has any deterrent effect on the commission of capital crimes. See *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976) (plurality opinion) (although efficacy of capital punishment as deterrent to potential offenders has been extensively studied, there is no convincing empirical evidence either supporting or refuting view that death penalty has greater deterrent effect than lesser penalties).

⁸¹ In an extreme example of judicial frustration, Federal District Judge Irving of San Diego, a Reagan appointee, recently resigned from the bench because "he could no longer impose the rules in good conscience, particularly in cases involving youthful, first-time drug offenders who were being sentenced to lengthy terms without the possibility of parole." Abrahamson, *Irving Heard Flurry of Sentence Appeals as He Left Bench*, L.A. Times, Jan. 7, 1991, at B1, col. 4.

⁸² See *infra* notes 222-24 and accompanying text.

⁸³ One recent example of this is the defensive posture immediately adopted by federal law enforcement officials who conducted a drug raid against three fraternities at the University of Virginia that are apparently all or predominantly white. See Ayres, *Drug Raids Tarnish a University That Prizes Its Ties to Jefferson*, N.Y. Times, Mar. 24, 1991, § 1, at 20, col. 5. Rarely do officials feel they must similarly justify raids and seizures in black or latino low-income housing projects.

Constitution.”⁸⁴ In their eagerness to combat drugs, the courts have departed from longstanding fourth, fifth, and fourteenth amendment protections. As a result, they have upheld (1) vague and over-inclusive search warrants;⁸⁵ (2) searches conducted in the absence of warrants and without either probable cause or individualized suspicion;⁸⁶ (3) invasive hi-tech surveillance and state-of-the-art forensic science technology increasingly employed by both domestic law enforcement agents and the military;⁸⁷ and (4) drug courier profiles, often including racial and ethnic characteristics,⁸⁸ leading to departures from the requirements of individualized suspicion, to name but a few. This Article describes these activities in greater detail in the next Part.

Paradoxically, the judiciary itself is a victim of its role in the war on drugs. Drug-related criminal cases now clog court dockets,⁸⁹ making it all but impossible to try civil cases in some

⁸⁴ *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1426 (1989) (Marshall, J., dissenting); *see also Hartness v. Bush*, 919 F.2d 170, 174 (D.C. Cir. 1990) (Edwards, J., dissenting); Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986); Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 909-10 (1987); Thompson, *Fourth Amendment is Trampled in Drug Offensive, Critics Say; More Courts Upholding Random Searches*, Washington Post, May 7, 1990, at A1, col. 1.

⁸⁵ *See, e.g., United States v. Riley*, 906 F.2d 841, 844 (2d Cir. 1990) (finding search warrant for "misc. financial records" sufficiently specific).

⁸⁶ *See, e.g., Michigan State Police v. Sitz*, 110 S. Ct. 2481 (1990) (upholding sobriety checkpoints in which all cars are stopped and drivers inspected); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1394 (1989) (upholding drug testing of federal employees who worked at the Customs Service in jobs involving drug interdiction); *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989) (upholding drug testing of railroad employees who had been involved in major train accidents). In a related area, increased civil and criminal forfeiture statutes designed to take the profits out of the drug trade explicitly reject any need to show individualized suspicion. Seizures of property and assets pursuant to such laws may be upheld even when the owner is later acquitted of drug charges or in cases never brought. In addition, the street sweep has become the most common antidrug measure, in which police teams indiscriminately take virtually all present into custody, even in the absence of evidence. *See generally Letwin, supra* note 10, at 817-26.

⁸⁷ *See generally S. WISOTSKY, supra* note 14, at 65-78; *United States v. Riley*, 906 F.2d 841 (2d Cir. 1990).

⁸⁸ *See generally Cloud, Searches and Seizures by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. REV. 843, 844 (1985).

⁸⁹ For fiscal year 1992, the Bush Administration's budget for the Federal

jurisdictions.⁹⁰

II. BATTLEFIELD CASUALTIES: THE DRUG WAR'S ASSAULT ON THE CONSTITUTION

Spurred by public clamor for more aggressive enforcement of drug laws, police officials have sought procedural short-cuts, ignoring or compromising longstanding constitutional safeguards. For the most part, an increasingly hostile federal judiciary gives its constitutional approval to such practices.⁹¹ This trend recently prompted District of Columbia Circuit Judge Harry Edwards to warn that individual rights and liberties are "falling victim to the government's 'War on Drugs.'"⁹² Edwards observed:

The War on Drugs is not the first battle in which zealous warriors, frustrated by the limits of the law, have called for the abridgement or abolition of fundamental civil liberties. We have seen other wars and other constitutional casualties. . . . And when the war is over, we find that departures from constitutional

Judiciary seeks \$424 million "for drug and related activities involving a projected 27,800 defendants and 29 percent of all felony criminal cases within the U.S. Court system." 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 33.

⁹⁰ Commenting on this, U.S. Court of Appeals Judge Edward Becker noted, "[w]e are reaching the point where well over half of our criminal cases are drug-related and where the civil side is going to be paralyzed." Wermeil, *Drug Cases Crowd Out Civil Federal Court Trials as Judge Calls Business Litigation a 'Stepchild'*, Wall St. J., Feb. 6, 1990, at A20, col. 1. Federal District Judge Robert W. Sweet, an advocate of legalization, recounts that at one point there were no juries available to the Southern District of New York to try cases other than criminal cases, "more than fifty percent of which were drug cases" Address by Judge R.W. Sweet, Cosmopolitan Club, New York City (Dec. 12, 1989) (copy on file with U.C. Davis Law Review). See also Curtin, *The Crisis in the Justice System*, A.B.A. J. 8 (Feb. 1991) (President of American Bar Association fears that massive increase in drug cases "threaten[s] to shut the courthouse doors to almost all civil litigants").

⁹¹ Unfortunately, the Administration has been able to persuade a significant number of Americans, perhaps even a majority, that it is worth giving up "a few of the freedoms we have in this country" to reduce illegal drug use significantly. See Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough*, Washington Post, Sept. 8, 1989, at A1, col. 1 (noting that majority of people favored mandatory drug tests, especially for high school students, using military to control illegal drugs within U.S., and allowing warrantless searches of homes and random stops of automobiles).

⁹² *Hartness v. Bush*, 919 F.2d 170, 174 (D.C. Cir. 1990) (Edwards, J., dissenting).

norms, legitimized by the courts, have lasting and wide-ranging effects. Constitutional principles, once abandoned, are not easily reclaimed.⁹³

The fourth amendment was one of the first provisions of the Constitution to fall victim to the drug war,⁹⁴ its once-stringent protections subjected to an increasing number of exceptions.⁹⁵

⁹³ *Id.* at 175. Judge Edwards' words in *Hartness* echo those of Justice Marshall, who warned that "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1422 (1989) (Marshall, J., dissenting). See also *Korematsu v. United States*, 323 U.S. 214 (1944) (sustaining a military order incarcerating and dispossessing all Americans of Japanese origin on the West Coast during World War II).

⁹⁴ The fourth amendment guarantees:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

⁹⁵ For example, a search may exceed its explicit limits under the "good faith exception" to the exclusionary rule of the fourth amendment. *United States v. Leon*, 468 U.S. 897 (1984) (adopting "good faith exception" to exclusionary rule where search undertaken is under a defective search warrant), to the exclusionary rule of the fourth amendment. The plain view doctrine provides another exception to the exclusionary rule. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (warrantless search by police of item within plain view during lawful search is reasonable). Warrantless searches have also been upheld under other exceptions — for example, the "open fields doctrine," see *Oliver v. United States*, 446 U.S. 170 (1983), and the "apparent authority doctrine," see *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990).

In addition to the above exceptions, courts traditionally have recognized a limited number of situations in which a warrant was unnecessary but probable cause still required. See, e.g., *Beck v. Ohio*, 379 U.S. 89 (1964).

These "exception" cases are to be distinguished from those in which challenged searches have been upheld, not because probable cause or reasonable suspicion was determined to have been present, but because the Court did not consider the challenged conduct to be a search within the meaning of the fourth amendment. Thus, in *United States v. Place*, 462 U.S. 696 (1983), the Court found that because a canine sniff of luggage was not a search, individualized suspicion was not required. Of course, court attempts to define conduct as outside the definition of a search or seizure should themselves be scrutinized warily as more evidence that the drug war is eroding the fourth amendment. Recently the Tenth Circuit relied on *Place* to hold that canine sniffs of the outside of a car stopped at a roadblock did

Perhaps most significant are the moves toward: (1) jettisoning the requirement that a state actor entertain at least a reasonable and particularized suspicion that a particular individual is engaging in criminal activity before making an investigatory stop; and (2) criminalizing possession in such a manner that it in effect penalizes a person for addiction or even casual use.⁹⁶ In addition to eroding fourth amendment protections, the war on drugs threatens property, due process, and privacy rights.

A. Assault on Reasonable Suspicion: Drug Courier Profiles, Roadblocks, Street Sweeps, and Bus Interdictions

In its past two terms, the Court has abandoned individualized suspicion in three drug-related cases — two involving drug testing⁹⁷ and the other concerning a roadblock.⁹⁸ Rather than requiring reasonable suspicion for a search or seizure in these cases, the Court resorted to a balancing test between individual

not constitute a search and thus did not require individualized suspicion. *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990). Indeed, the definition of a search has grave implications when aerial and satellite surveillance techniques are taken into account. *See California v. Ciraolo*, 476 U.S. 207 (1986) (upholding warrantless observation from plane flying at height of 1000 feet because police have right to be present in publicly navigable airspace and to make non-intrusive observations); *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter surveillance at 400 feet permissible under fourth amendment because helicopters generally fly lower than planes).

⁹⁶ Prior to the onslaught of the war on drugs there was at least one narrow exception to even the reasonable, individualized suspicion standard — namely, where no law enforcement alternatives were available and the challenged conduct was deemed to be minimally intrusive. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 557-61 (1976) (individualized suspicion not required when routine border checkpoints do not entail searches of vehicles nor their occupants).

More recently, however, fourth amendment protections have been eroded by the so-called “special needs” doctrine, in which the Court has upheld warrantless searches in the absence of probable cause. Thus, in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court ruled that a school official may search a student’s purse and, in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), that a probationer’s home may be searched without a warrant by a probation officer. These “special needs” searches, however, were arguably still triggered by individualized suspicion, even if the Court did not explicitly say so until recent drug testing decisions.

⁹⁷ *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989); *Skinner v. Railway Labor Executives’ Ass’n*, 109 S. Ct. 1402 (1989).

⁹⁸ *Michigan v. Sitz*, 110 S. Ct. 2481 (1990).

privacy interests and government interests.⁹⁹ Such balancing tests allow considerably more leeway for government abuse because the government's interest in preventing conduct that has been criminalized or that is deemed to pose a significant threat to workplace or public safety will almost always be accorded more weight, particularly when the country is up in arms against some perceived threat of mammoth proportions, be it drugs or Communism, than an individual's expectation of privacy in a car, on the job, or even in her home. Turning first to drug profiles, it was unfortunately no surprise, therefore, that in 1989 the Supreme Court upheld the authority of drug agents to stop, detain, and question individuals without probable cause simply because the individual fit a drug courier profile.¹⁰⁰

Drug courier profiles in effect substitute a general litmus test for a case-by-case assessment of suspicious behavior. The first use of profiles occurred in the context of airplane hijackings.¹⁰¹ Profiles are almost always overbroad and lead to the detention of innocent people.¹⁰² There is also substantial evidence to suggest that race is a major factor used to determine who is suspicious.¹⁰³ Law enforcement personnel claim that profiles merely codify the types of behavior or other characteristics that normally inform judgments of particularized suspicion. But, as Justice Marshall has warned, "[r]eflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention."¹⁰⁴

The use of profiles is by no means the first time law enforce-

⁹⁹ See *supra* notes 84-88 and accompanying text.

¹⁰⁰ *United States v. Sokolow*, 109 S. Ct. 1581 (1989). The Court ostensibly found that the "totality of factors known" about the detainee constituted reasonable suspicion. *Id.* The totality of the factors, however, were those characteristics listed on the drug courier profile.

¹⁰¹ See *United States v. Lopez*, 328 F. Supp 1077 (E.D.N.Y. 1971). See generally *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).

¹⁰² For example, DEA agents acknowledged stopping approximately 80 passengers a month at the Buffalo, New York bus station who fit a profile. The agents admitted that these 80 warrantless stops and searches yielded only three to four arrests a month. *United States v. Montilla*, 733 F. Supp. 579, 580 (W.D.N.Y. 1990).

¹⁰³ See *infra* notes 231-36 and accompanying text.

¹⁰⁴ *United States v. Sokolow*, 109 S. Ct. 1581, 1588 (1989) (Marshall, J., dissenting).

ment has departed from probable cause or even individualized suspicion requirements. For example, officials have long applied relaxed warrant requirements to automobile searches and seizures on the theory that a car is a place in which a person has a lesser expectation of privacy than in a home or workplace.¹⁰⁵

Until last term the Supreme Court had required that there be reasonable suspicion before stopping cars and inspecting drivers even at fixed checkpoints, which are generally considered to be less intrusive than random stops.¹⁰⁶ In *Michigan State Police v. Sitz*,¹⁰⁷ however, the Court upheld an auto sobriety checkpoint¹⁰⁸ after using a balancing test similar to one used the year before in drug-related cases.¹⁰⁹ The Court approved the practice in spite of the fact that no empirical evidence existed to show that roadblocks achieved a higher arrest rate for drunken driving or that they reduced roadway fatalities.

The use of highway drug courier profiles to justify random — as opposed to fixed — checkpoint stops significantly departs from even the relaxed standards of the recent past. Nonetheless, the Supreme Court ratified their use in *United States v. Sokolow*.¹¹⁰ Reasonable suspicion requirements have also been discarded during street sweeps, which frequently round up black males.¹¹¹

¹⁰⁵ *United States v. Robinson*, 414 U.S. 218 (1973).

¹⁰⁶ This distinction is ostensibly because there is less of a surprise factor.

¹⁰⁷ 110 S. Ct. 2481 (1990).

¹⁰⁸ *Sitz* applies to drugs as well as alcohol, as Justice Blackmun explicitly noted in his concurrence. *Id.* at 2488 (Blackmun, J., concurring).

¹⁰⁹ One reason may be that Justices believed that the police conduct in *Sitz* was only minimally intrusive. Prior to *Sitz* the only other case in which the Court had upheld a program that subjected the general public to suspicionless seizures was *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), involving the apprehension of illegal aliens. In *Martinez-Fuerte*, however, as the *Sitz* dissenters point out, there was no necessarily suspicious behavior that would alert law enforcement personnel that a particular car in heavy traffic was carrying illegal aliens. *Sitz*, 110 S. Ct. at 2489 (Brennan, J., dissenting). With drugs or alcohol, on the other hand, suspicious behavior could presumably be observed. *Id.* Moreover, the checkpoint in *Sitz* was temporary and therefore more intrusive under the governing case law, whereas the border stops in *Martinez-Fuerte* could be anticipated with a fair degree of certainty, thus lessening the surprise factor and consequent level of intrusiveness. *Id.* at 2492 (Stevens, J., dissenting). In addition, the check for identification papers or a driver's license is less intrusive than the test for alcohol or drug impairment.

¹¹⁰ 109 S. Ct. 1581 (1989).

¹¹¹ See *infra* notes 234-36 and accompanying text.

Police may also board an interstate bus or train and search its passengers at random.¹¹² The retreat from the Fourth Amendment in these profile, roadblock, street sweep, and bus interdiction cases have made all of us, but particularly African-Americans, fair game for police harassment whenever we leave our homes to travel, be it by plane, car, bus, train, or foot.

B. Drug Testing

The war on drugs is not only waged on the streets and in vehicles; it has also opened a new front — the workplace. The Reagan and Bush administrations have consistently maintained that drug use in the workplace poses a serious threat to national security, public safety, and domestic productivity.¹¹³ In 1986, undeterred

¹¹² The Supreme Court recently heard arguments in a bus interdiction case. *Florida v. Bostick*, 554 So. 2d 1153 (1989), *cert. granted*, 111 S. Ct. 241 (1990).

¹¹³ This view has been disputed by the medical community, among others. A recent article in the *Journal of the American Medical Association (JAMA)* reported a study conducted on over 2,500 postal workers. The study found that although employees who tested positive for marijuana or cocaine had higher rates of work-related accidents and absenteeism than others, the government nonetheless continually exaggerates the risks of drug use. Zwerling, Ryan & Orav, *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 J. AM. MED. A. 2639 (1990). The JAMA article cites as examples of government exaggeration a 1986 manual from the United States Office of Personnel Management and a 1983 article in *The American Psychologist* authored by then-Senator Dan Quayle. *Id.* These articles reported numbers of industrial accidents, compensable injuries, and absenteeism involving drug users that were inflated 200-300 percent, 400 percent and 1,500 percent, respectively. *Id.* at 2463.

The authors of the JAMA article acknowledged that they had been unable to distinguish between workplace accidents resulting from drugs and those resulting from alcohol use. Gladwell, *Study Downgrades Pre-Employment Drug Testing*, *Washington Post*, Nov. 28, 1990, at A5, col. 1. An editorial accompanying the JAMA article suggested that the cost-effectiveness of pre-employment drug screening programs be re-evaluated in light of the study. It also pointed out that the study "provides a measure of the association between substance abuse and job performance only if one defines any use of an illicit drug to be drug abuse." Wish, *Preemployment Drug Screening*, 264 J. AM. MED. A. 2672 (1990).

A Department of Labor (DOL) study issued last summer was unable to determine conclusively that workplace drug abuse was having a detrimental impact on many aspects of employment. See U.S. DEP'T OF LABOR, *WORKPLACE DRUG ABUSE* (1990). The study was DOL's effort to meet its responsibility under the 1986 Anti-Drug Abuse Act, which requires it to

by the considerable body of evidence showing that drug testing is frequently inaccurate, is incapable of distinguishing between addicts and casual users, and is unreliable as a measure of on-the-job impairment or performance ability, President Reagan issued Executive Order No. 12,564 creating a "drug-free Federal workplace."¹¹⁴ Pursuant to this order, various executive departments have adopted drug-free workplace programs for their constituent agencies. Many of these programs include mandatory random testing of employees.¹¹⁵ As might be expected, these regulations have spawned numerous lawsuits. Unfortunately from a civil liberties perspective, most of the major decisions have gone against the challengers.

In 1989 the United States Supreme Court issued two drug testing opinions that provide a framework for analyzing challenges to testing. *National Treasury Employees Union v. Von Raab*¹¹⁶ and *Skinner v. Railway Labor Executives' Association*¹¹⁷ established that although drug testing constitutes a search within the meaning of the fourth amendment, it does not require a warrant, probable cause, or even any level of individualized suspicion.¹¹⁸ Instead, the Court categorized drug testing as a "special needs" case¹¹⁹ that requires a balancing of the interests of the government *qua* employer on the one hand and employees' privacy interests on

gather data about the incidence and impact of drug abuse and the availability and effectiveness of employer-run programs established to help workers overcome substance abuse, the DOL concluded that there was "no established standard methodology for collecting data on the impact of substance abuse in the workplace." *Id.* Relying on a Bureau of Labor Statistics survey of employer antidrug efforts conducted during the summer of 1988, the DOL observed that employees were often reluctant to make use of a company's employee-assistance program, fearing that breaches in confidentiality would result in dismissals. *See also* Cushman, *Just a Few Drug Users Found in Aviation Industry Testing*, N.Y. Times, December 19, 1990, at A22, col. 1 (Federal Aviation Administration said that out of 120,000 drug tests administered in first 6 months of 1990, only 561, or less than one-half of one percent, had detected evidence of drug use).

¹¹⁴ 51 Fed. Reg. 32,889 (Sept. 17, 1986).

¹¹⁵ In some instances the programs require testing of all employees. In other situations, drug testing is limited to employees occupying particular positions, and in others it is triggered by events, such as an accident.

¹¹⁶ 109 S. Ct. 1384 (1989).

¹¹⁷ 109 S. Ct. 1402 (1989).

¹¹⁸ *See Von Raab*, 109 S. Ct. at 1390; *Skinner*, 109 S. Ct. at 1416-17.

¹¹⁹ *See supra* notes 84-88 and accompanying text.

the other.¹²⁰ Specifically, the Court found:

Where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.¹²¹

Von Raab recognized three valid government interests for purposes of drug testing: workforce integrity, safety, and protection of sensitive information.¹²² In its wake, many courts have attempted to draw connections between categories of employees and the types of harm threatened on the one hand and the type of testing — *e.g.*, random, reasonable suspicion, or post-accident — on the other. Thus, in a situation where a court deems the potential for harm to be minimal, it might decide to enjoin random testing but uphold testing based on reasonable suspicion.

With *Von Raab* and *Skinner*, the Supreme Court, in the name of the war on drugs and other special government needs, dealt a severe blow to workers' rights to privacy. The Court undermined a cardinal principle of fourth amendment jurisprudence, namely that "[e]ach case raising a Fourth Amendment issue must be judged on its own facts."¹²³ The repercussions of expanded drug testing in the workplace will carry beyond the workplace and be felt for a long time. An example of using drug testing to deter-

¹²⁰ *Von Raab*, 109 S. Ct. at 1390; *Skinner*, 109 S. Ct. at 1413-14.

¹²¹ *Von Raab*, 109 S. Ct. at 1390. Destructive of civil liberties as this holding was, some of the post *Von Raab* and *Skinner* developments have struck a still more ominous note. The D.C. Circuit has apparently abandoned even the *Von Raab* balancing test. In *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990) the court of appeals ruled that random drug testing of employees carrying secret national security clearances was *per se* reasonable. A *per se* rule completely undermines the basic premise of case-by-case fourth amendment judicial review. *See id.* at 174 (Edwards, J., dissenting).

¹²² Urinalysis testing has been upheld, for example, where employees have access to national security information, *see, e.g.*, *Von Raab*, 109 S. Ct. at 1396-97; *Hartness*, 919 F.2d 170 (secret clearances); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), carry firearms as part of their employment, *see, e.g.*, *National Fed'n of Federal Employees v. Cheney*, 884 F.2d 603, 612-13 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 864 (1990), have access to drugs or prosecute drug cases, *see, e.g.*, *Harmon*, 878 F.2d at 490, and control or have access to dangerous instrumentalities, *see, e.g.*, *Cheney*, 884 F.2d at 610-611.

¹²³ *United States v. Mendenhall*, 446 U.S. 544, 565 n.6 (1980) (Powell, J., concurring).

mine more than employment status is the use of positive pre-employment and employment drug testing results to bring criminal prosecutions for possession of drugs.¹²⁴

C. Civil and Criminal Forfeiture Laws

Congress and state legislatures have enacted criminal forfeiture laws calling for the seizure of the property of a person only accused of a drug crime.¹²⁵ The seizure takes place before there has been a judicial determination of guilt or innocence.¹²⁶ In addition, civil forfeiture laws allow for summary seizure and sub-

¹²⁴ The link has already been made in the other direction in some states. See *Miami Beach to Report Drug Arrests to Employers*, N.Y. Times, Jan. 25, 1991, at A15, col. 1 (Miami Beach enacted ordinance directing police to immediately report drug arrests to defendants' employers, even before courts determine guilt or innocence of defendants). Moreover, the Georgia Supreme Court has upheld a prosecution for drug possession where the only evidence was a positive drug test. *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990). In a unanimous and unprecedented opinion the Georgia court ruled that a trace of an illegal substance in a person's system is enough evidence to sustain a conviction of drug possession. *Id.* This theory is similar to that used to uphold convictions of pregnant women for transmitting drugs to fetuses. See discussion *infra* at Parts II(D) and III.

Prosecution for possession on the basis of traces of a chemical byproduct of cocaine found in urine would seem to nullify *Linder v. United States*, 268 U.S. 5 (1925), and *Robinson v. California*, 370 U.S. 660, 667 n.8 (1962), in which the U.S. Supreme Court ruled that addiction to drugs is a disease, not a crime.

¹²⁵ President Bush's national drug policy has urged that:

Real estate and other property derived from illegal drug transactions, or used to facilitate such transactions, should be subject to confiscation by law enforcement officials. Asset forfeiture laws should sanction *both casual users and drug traffickers*. They should be written to direct forfeiture proceeds to law enforcement purposes.

1989 NATIONAL DRUG CONTROL STRATEGY, *supra* note 18, app. C, at 125 (emphasis added).

¹²⁶ See N.Y. CIV. PRAC. L. & R. § 1311 (Consol. Supp. 1991). In the federal system, some circuits have held that a *civil* forfeiture action may stand despite the owner's eventual acquittal of criminal charges. See, e.g., *United States v. Currency in the Amount of \$228,536*, 895 F.2d 908 (2d Cir. 1990). Attempts to further strengthen forfeiture laws are currently in the works. For example, a drafting committee for the National Conference of Commissioners on Uniform State Laws, which has written over 200 uniform and model acts including the Uniform Commercial Code, has drafted legislation providing that a court's jurisdiction over criminal forfeiture proceedings not be affected by an unlawful seizure.

sequent forfeiture of property, including real property.¹²⁷ Forfeitures can be effected even when no criminal charges are *ever* lodged, or when they are later dropped or beaten in court, provided the property “is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation [of the drug laws].”¹²⁸

Federal law enforcement personnel laud forfeiture laws that allow the government to “seize the profits and proceeds of illegal drug trafficking, as well as the currency and property used in connection with money laundering and drug violations.”¹²⁹ They have embraced these new forfeiture laws not only as a way of

¹²⁷ Prior to a 1984 amendment adding real property to the list of forfeitable assets under the federal drug laws, property subject to forfeiture included illegal narcotics, their containers, and any materials used in their processing and manufacturing; vehicles or vessels used to transport the controlled substances; written and recorded data connected to trafficking transactions; and any currency or negotiable instruments linked to the sale, possession, or receipt of illegal drugs. 21 U.S.C. § 881(a) (1982).

Section 881(a)(7), which added real property to the assets that could be forfeited under The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881, was passed because Congress found real property to be “indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.” S. Rep. No. 225, H. Rep. No. 1030, 98th Cong., 2d Sess., 195 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3192, 3378. *See* United States v. Property Known as 6109 Grubb Rd., 886 F.2d 618, 624 (3d Cir. 1989) (noting legislative history suggests Congress saw prior criminal statutes as too limiting). The section defines real property as “any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements. . . .” 21 U.S.C. § 881 (a)(7) (1988). Before 1984, real property was only subject to criminal forfeiture under the Racketeer Influenced and Corrupt Organizations and the Continuing Criminal Enterprises statutes.

¹²⁸ 21 U.S.C. § 881(a)(7) (1988). New York’s new real property civil forfeiture law may be more lenient than its federal counterpart. The burden of proof is that of clear and convincing evidence — the highest civil standard — and such actions require: (1) actual knowledge that property was or would be used for the commission of a specified felony offense, and (2) that the owner either knowingly and unlawfully benefited from such conduct or voluntarily consented to unlawful use of that property. As a result, the majority of New York real property forfeitures may be restricted to actions against criminal defendants. N.Y. CIV. PRAC. L. & R. § 1311(3)(b)(v) (Consol. Supp. 1991).

¹²⁹ U.S. DEP’T OF JUSTICE, DRUG TRAFFICKING: A REPORT TO THE PRESIDENT OF THE UNITED STATES 49 (1989).

"tak[ing] the profitability out of criminality,"¹³⁰ but also support the new laws because proceeds from the sale of forfeited assets are earmarked in part for building prisons and supplementing state and local law enforcement budgets.¹³¹ As a result, these statutes have become a favorite weapon in the drug war arsenal; in 1989, the Bush Administration added 174 new federal prosecutors to handle asset forfeiture cases alone.¹³²

Under the civil forfeiture laws, prosecutors maintain the legal fiction that the proceedings are against the property or "res."¹³³ Therefore, the statutes do not require that authorities actually arrest the property owner for a crime. Moreover, when authorities seize property under civil forfeiture provisions, courts have found that the owners and tenants are not entitled to many of the procedural safeguards that we have come to attach to the loss of property rights. Although state and federal forfeiture statutes allow for "innocent owner"¹³⁴ defenses to be raised against forfeitures, those seeking to benefit from these defenses may find themselves without a home long before their case is heard. In many cases, defendants or others who subsequently seek to reclaim assets seized by the government do not have funds to hire lawyers, and, in some courts, face stringent standards of proof to establish that they either did not know their property or other assets "facilitated" drug trafficking or their withholding consent

¹³⁰ DeGeorge & Smart, *Grabbing Dirty Money—and Horses, Yachts, Planes, Cars . . .*, BUSINESS WEEK, June 4, 1990, at 152 (quoting U.S. Attorney General Richard L. Thornburgh).

¹³¹ In 1989 the government's take from forfeitures totaled \$1.4 billion — up from \$33 million in 1979. DeGeorge & Smart, *supra* note 130, at 152. "In Fiscal Year 1991, the Federal government transferred \$240 million in assets to State and local law enforcement agencies in all 50 states and the District of Columbia." 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 28. Under New York State's new law, the state or county receives twenty-five percent of proceeds received from judgments in forfeiture cases and can use that amount for law enforcement purposes. N.Y. CIV. PRAC. L. & R. § 1349(h)(ii) (Consol. Supp. 1991).

¹³² DeGeorge & Smart, *supra* note 130, at 152.

¹³³ "The federal statute operates on the legal fiction that it is the property which is proceeded against, and held guilty and term condemned as though it were conscious instead of inanimate and insentient." *United States v. The Leasehold Interest in 121 Nostrand Ave.*, No. 90 Civ. 1607, slip op. at 20 (E.D.N.Y. March 26, 1991) (citations omitted).

¹³⁴ See 21 U.S.C. § 841(a)(7) (1988) (allowing claimants to avoid forfeiture by establishing they had no knowledge of drug activity, or, if they had knowledge, that they did not consent to the activity).

to the use of their property for unlawful purposes.¹³⁵ As a result, tenants and owners who themselves never distributed or possessed drugs in any common sense meaning of those terms, or who possessed very small quantities of drugs for personal use, can be summarily removed from their homes and deprived of property rights or other assets.

The courts have rejected legal challenges based on the eighth amendment arguing that forfeiture is cruel and unusual punishment disproportionate to the "culpability" of the owner/tenant. The eighth amendment does not apply because the forfeitures constitute civil remedial measures, and not criminal punishment.¹³⁶ The story is further complicated with regard to due process rights. The federal forfeiture statute allows for the seizure of assets under a number of procedures that do not provide for prior notice or an opportunity to be heard.¹³⁷ Some courts, however, have rejected these summary procedures when the seized assets are real property.¹³⁸ In general, though, the courts have upheld the government's right to seize property on an expedited basis, imposing few, if any, requirements for notice and hearing.¹³⁹

¹³⁵ Defendants must prove by a preponderance of the evidence that an illegal use of property occurred either without knowledge or without consent. *United States v. Property Known as 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989). This is a higher standard than is demanded of the Government to initially justify forfeiture.

¹³⁶ See, e.g., *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396 (3d Cir. 1990); *United States v. A Parcel of Land with a Building Located Thereon at 40 Moon Hill Rd.*, 884 F.2d 41 (1st Cir. 1989); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989). But cf. *United States v. The Leasehold Interest in 121 Nostrand Ave.*, No. 90 Civ. 1607 (E.D.N.Y. March 26, 1991) (characterizing forfeiture action "as civil" does not "negate its essentially punitive nature as part of the broad initiatives taken to combat drugs").

¹³⁷ See 21 U.S.C. § 881(b) (1988).

¹³⁸ See, e.g., *United States v. Premises and Real Property at 4492 S. Livonia Rd.*, 897 F.2d 659 (2d Cir. 1990).

¹³⁹ See, e.g., *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) (fifth amendment's due process clause does not require notice and hearing prior to seizure of apartment building pursuant to *ex parte* issuance of magistrate's order where complaints of narcotics trafficking in 24 of 41 apartments were received by police over 18 month period) *cert. denied*, 111 S. Ct. 1017 (1991). Even where preseizure hearings are allowed, the government has argued that the only issue defendants may raise is whether there is probable cause for forfeiture — and not whether the owners and occupants have viable defenses.

The forfeiture laws promote outrageous behavior by law enforcement officials. The government is allowed to employ summary procedures to "remove residents from their homes and apartments without proving at least that it is more likely than not that they engaged in, or permitted, drug-related criminal activity on the premises."¹⁴⁰ Even miniscule amounts of drugs have been used to justify eviction and the seizure of assets, such as automobiles.¹⁴¹

Again, many of the real victims in this drug war initiative are the poor and minorities. The current administration believes that low-income housing, particularly public housing, has become "a staging area for the distribution of drugs and the violence related to drug trafficking and consumption."¹⁴² Because of this perception, an increasingly frequent target of leasehold forfeitures is public housing. In 1990, the Department of Justice (DOJ) and the Department of Housing and Urban Development announced a program entitled "Public Housing Asset Forfeiture Demonstration Project."¹⁴³ The project, which was to be launched in

¹⁴⁰ *United States v. The Leasehold Interest in 121 Nostrand Ave.*, No. 90 Civ. 1607, slip op. at 34 (E.D.N.Y. March 26, 1991) (citation omitted).

¹⁴¹ *See United States v. One 1986 Mercedes Benz*, 846 F.2d 2, 4-5 (2d Cir. 1988) (describing "zero tolerance" program of customs officials). Another problem caused by the drug forfeiture law has been to prevent alleged drug dealers from hiring defense attorneys. *See, e.g., United States v. Monsanto*, 109 S. Ct. 2657 (1989). Thus, forfeiture laws can undermine the ability to hire private counsel, as well as destroy presumptions of innocence.

¹⁴² 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 64. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5105, 102 Stat. 4181 (1988), amended 21 U.S.C. § 881(a)(7) to add leasehold interests to the list of property subject to forfeiture. This amendment codified "guidelines granting public housing agencies authority to evict tenants if they, their families, or their guests engage in drug-related criminal activity." 134 CONG. REC. S17,360 (daily ed. Nov. 10, 1988). Congress also amended the public housing statute to require leases to prohibit drug-related criminal activity — activity that is grounds for eviction. Section 5101 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5105, 102 Stat. 4181 (1988).

¹⁴³ The states have also used nuisance abatement laws to combat drugs in public housing. *See, e.g., Now, Cities Hit Drug Suspects Where They Live*, N.Y. Times, Jan. 25, 1991, at A16, col. 1 (describing the use of New York State's "Bawdy House Law," N.Y. Real Prop. Acts. § 715, to evict drug dealers). In addition, private landlords may bring nuisance-holdover proceedings to remove drug traffickers. *See, e.g., Kings County Dist. Attorney's Office v. Underwood*, 143 Misc. 2d 965, 543 N.Y.S.2d 247 (N.Y. Civ. Ct. 1990). Landlords may be assessed a \$5,000.00 fine if they refuse to bring the

twenty-three states, involved

the seizure of "leaseholds" and the summary eviction of families from public housing units suspected of being the sites of illegal activity. No pre-eviction notice or hearing was to be afforded to the tenants. Moreover, child protection service agents were to be on the ready to remove children from families, again without notice or hearing.¹⁴⁴

Since public housing is housing of last resort, evictions are likely to result in homelessness of entire families. Fortunately, the DOJ and HUD program has been invalidated on due process grounds. On December 19, 1990, Federal District Judge Richard L. Williams of the United States District Court for the Western District of Virginia permanently enjoined the Department of Housing and Urban Development (HUD) from evicting public housing residents without a hearing.¹⁴⁵ The Department of Justice and HUD, however, are in the process of revising their eviction procedures to give pre-seizure notice and hearing prompting concern that they intend to relaunch their assault on the residents of public housing. In addition, the federal government is encouraging the states to take legislative initiatives to eliminate drug trafficking from housing projects. Indeed, several states have already been commended by the federal government for passing laws mandating a tenant's eviction from public housing if she is convicted of a drug offense on the premises.¹⁴⁶

While the government paints an image of violent drug users to justify its efforts to terminate leaseholders' rights without adequate legal safeguards, many of those affected are neither drug dealers nor dangerous. Illustrative is a recent New York case, in

nuisance action. The nuisance-holdover program, with its threatened fines, has resulted in 220 drug-related evictions. See REPORT AND RECOMMENDATIONS TO THE MAYOR ON DRUG ABUSE IN NEW YORK CITY 39 (1990).

¹⁴⁴ L. Siegel, National Public Housing Asset Forfeiture Project (June 28, 1990) at 1 (memorandum prepared for ACLU, copy on file with U.C. Davis Law Review.).

¹⁴⁵ *Richmond Tenants Org., Inc. v. Secretary of Housing and Urban Dev.*, 753 F. Supp. 607, 610 (E.D. Va. 1990); see Lewis, *Judge Bars Plan by U.S. on Immediate Evictions*, N.Y. Times, Dec. 20, 1990, at A24, col. 5.

¹⁴⁶ See U.S. OFFICE OF NATIONAL DRUG CONTROL POLICY, STATE DRUG CONTROL STATUS REPORT 11 (Nov. 1990) (noting that seven states — Arizona, Arkansas, California, Massachusetts, Missouri, Nevada and New Jersey — have passed legislation mandating tenant eviction upon conviction for on-site drug activities).

which Federal District Judge Jack B. Weinstein refused to allow the government to evict an eighteen-member African-American family headed by a 51-year-old great-grandmother from their three-bedroom apartment in a city-run housing project.¹⁴⁷ All of the apartment's occupants depended upon public assistance for survival. Clara Smith, the leaseholder and head of this multigenerational family, was herself innocent of any drug-related activity. Two of her adult daughters, however, were shown to have dealt drugs from the apartment. In refusing to evict the family, Judge Weinstein wrote:

This case reveals some of the limitations of apartment forfeiture as a means of eliminating drugs from public housing complexes. For the poor, the shortage of livable, low-priced housing is especially acute. Tenants — and especially their minor children — who are evicted are likely to become homeless, with whatever stability their lives afforded seriously jeopardized.

... [T]he owner of the defendant leasehold is entitled to retain her home. Her children, grandchildren and great-grandchildren, who look to her for shelter as the family's matriarch, may not be dispossessed because one of them has sold drugs from their apartment.¹⁴⁸

Families like the Smiths are the "vicious drug dealers" who will be dispossessed under the government's selective application of draconian forfeiture laws. Unlike the recent raid and seizure of three fraternity houses at the University of Virginia, there was no media or community outrage over the attempted ouster of Clara Smith and her family, nor were law enforcement agents immediately asked to justify their actions.

On a front connected to drug-related forfeiture and eviction proceedings, twenty-two states as of January 1, 1990, had imposed taxes on the possession of illegal drugs.¹⁴⁹ The idea is to fine those arrested for drug offenses on the novel theory that these individuals "evaded" paying taxes on drug income.¹⁵⁰

¹⁴⁷ *United States v. The Leasehold Interest in 121 Nostrand Ave.*, No. 90 Civ. 1607 (E.D.N.Y. Mar 26, 1991).

¹⁴⁸ *Id.*

¹⁴⁹ Tomasson, *21 States Imposing Drug Tax And Then Fining the Evaders*, N.Y. Times, Dec. 23, 1990, § 1, at 1, col. 1.

¹⁵⁰ Many of these laws are now being written to allow drug possessors or dealers to pay taxes anonymously and affix a stamp so indicating on the drugs themselves. The rationale seems to be that this mechanism safeguards subsequent seizures from fifth and fourteenth amendment takings challenges. *Id.* at 18, col. 4.

Authorities are permitted to impose and collect fines from those accused of drug dealing on an expedited basis, and the fines may take the form of property, such as store inventory. Like property and other assets seized under civil forfeiture statutes, the state may retain assets seized as taxes and fines even if officials subsequently clear a suspect of criminal charges.¹⁵¹ Although the property owner may appeal the seizure, again the procedure is a difficult one.¹⁵² Of those courts that have addressed the issue, all but one state supreme court has upheld the seizure of assets under these new revenue laws.¹⁵³ These drug-related forfeiture, eviction, and revenue laws make a mockery of constitutional protections and inject a truly Orwellian element into the drug war.

D. The Drug War's Impact on the Privacy Rights of Pregnant Women

The war on drugs suggests a picture of fighting against male drug lords and male pushers. The civil forfeiture laws discussed above real the error of this perception. They are not alone in targetting whole families, including women and children. The reality is that the government policy is particularly punitive to casual users, women and children, and most aggressively to those who are poor and people of color.

Illustrative of this disproportionality are recent attempts to prosecute pregnant women who have used drugs, on the theory that they have endangered their unborn children. In 1989, Jennifer Johnson, an African-American woman living in Florida who had used cocaine while pregnant, became the first woman convicted of distributing drugs to a newborn. The theory: Johnson delivered drugs to her infant through the umbilical cord in the few moments between birth and severance of the cord. Her sentence: one year of house arrest and fourteen years of closely supervised probation. During this time, the state forbade John-

¹⁵¹ Collection officers need only establish that the owner of the property knew about the drugs and had control over them — that is, the ability to do something about them — as opposed to ownership. *Id.* at 18, col. 1. (In criminal proceedings, prosecutors must prove actual ownership.)

¹⁵² See generally Valukas & Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, LITIGATION, Winter 1988, at 31 (analyzing forfeiture procedures).

¹⁵³ Tomasson, *supra* note 149, at 18, col. 4 (South Dakota Supreme Court overturns its drug tax in 1986 on the ground that "compelling a person to register illegal activity with the tax authorities" violated the fourth amendment).

son from possessing controlled substances, associating with others who do, or entering a bar without the permission of her probation officer. If Johnson becomes pregnant during these fourteen years, she must follow a pregnancy care program that the court approves. Johnson is also subject to random urine drug tests and warrantless searches of her home during the first year of house arrest.¹⁵⁴

Although Jennifer Johnson is the first convicted, she is not the only victim of the "pregnancy police." In South Carolina, authorities have charged numerous women with criminal neglect of their fetuses.¹⁵⁵ Shortly after giving birth, women suspected of neglect were subjected to drug testing without their consent.¹⁵⁶ Women who tested positive were reported to the police by hospital authorities: The police arrested them, handcuffed, and took the women to jail.¹⁵⁷ The state took "protective custody" of their babies.¹⁵⁸ In yet another example, a Washington, D.C. judge sentenced Brenda Vaughn, a first-time offender convicted of check forgery, to an unusually long prison term when the judge learned she was pregnant and had tested positive for cocaine.¹⁵⁹ On a more hopeful note, however, a Michigan appeals court recently ruled that a woman could not be prosecuted for criminal delivery of drugs because she used crack shortly before giving birth.¹⁶⁰ A Michigan court refused to create a new crime unintended by the enacting legislature.

¹⁵⁴ Johnson's conviction was recently upheld by Florida's intermediate appeals court. See Lewin, *Appeals Court in Florida Backs Guilt For Drug Delivery by Umbilical Cord*, N.Y. Times, Apr. 20, 1991, § 1, at 6, col. 4. The ACLU, which represents Johnson, plans to appeal to the Florida State Supreme Court. See generally Siegel, *The Criminalization of Pregnant and Child-Rearing Drug Users*, 2 DRUG LAW REPORT 169 (1990).

¹⁵⁵ *Id.* at 170.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ E. Goetz, H. Fox & S. Bates, *Poor and Pregnant? Don't go to South Carolina . . .* (memorandum prepared for ACLU, copy on file with U.C. Davis Law Review).

¹⁵⁹ In Vaughn's case, Judge Peter Wolf declared, "I'm going to keep her locked up until the baby is born because she's tested positive for cocaine when she came before me. She's apparently an addictive personality and I'll be darned if I'm going to have a baby born that way." Siegel, *supra* note 154, at 170 (citing Churchville, *D.C. Judge Jails Woman As Protection for Fetus*, Washington Post, July 23, 1988).

¹⁶⁰ See *Michigan v. Hardy*, No. 128,458, slip op. (Mich Ct. App. April 2, 1991).

The prosecution of these women is the result of a peculiar conflation of the antiabortion and antidrug "movements." As American Civil Liberties Union attorney Kary Moss has pointed out, "Today's drug problem . . . has provided a new context in which state intervention into the lives of pregnant women becomes more acceptable because of the danger that drug use poses to the fetus."¹⁶¹ Over the past two years officials have brought more than fifty criminal prosecutions against pregnant women under state statutes criminalizing harmful acts committed against children.¹⁶² Prosecutors generally bring these cases under laws that make it illegal to deliver drugs to a minor or under charges of criminal neglect or child abuse.

It is not concern for the health of the baby or of the women that generates these prosecutions. It is our law and order approach to the socioeconomic and health problems of the poor minority communities. A number of studies have shown that cigarette smoking has a more damaging effect on fetal growth than either cocaine or marijuana.¹⁶³ Alcohol and cigarettes are generally a greater threat to having a healthy baby than is cocaine, and the single most important danger to having a healthy baby may be poverty.¹⁶⁴ While cocaine is undoubtedly a risk factor, by focusing on it, the government has obscured the importance of poverty and legal drugs as health factors.

The prosecution of these cases raises serious equal protection and due process concerns.¹⁶⁵ First, they involve authorities sin-

¹⁶¹ Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 278 (1990) (footnote omitted).

¹⁶² Even the Bush Administration apparently has some qualms about this strategy, "view[ing] criminal incarceration of [pregnant addicts] as a last resort." 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 53.

¹⁶³ Zuckerman, *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762-68 (1989); *see also* correspondence from Barry Zuckerman, M.D. to ACLU Attorney Joan E. Bertin, Feb. 11, 1991 (noting that "cigarette smoking has a more deleterious effect on impairing fetal growth than either cocaine or marijuana") (copy on file with U.C. Davis Law Review).

¹⁶⁴ *See* Weston, Irvins, Zuckerman, Jones & Lopez, *Drug Exposed Babies: Research and Clinical Issues*, ZERO TO THREE: BULLETIN OF THE NATIONAL CENTER FOR CLINICAL INFANT PROGRAM 1-7 (June 1989); *see also* Dugger, *Infant Mortality in New York City Declines for First Time in 4 Years*, N.Y. Times, Apr. 20, 1991, § 1, at 1, col. 3.

¹⁶⁵ These prosecutions suffer from more than constitutional infirmities. It is also not clear that prosecutors can prove that the mother actually transmitted drugs during the time between birth and the severing of the

gling out pregnant women for special prosecution. By contrast, when men and nonpregnant women arrive at a hospital, officials do not routinely test these individuals for drug use and investigate them for child abuse. Similarly, officials do not prosecute men who beat or abuse pregnant women under child protection laws as, they do pregnant women who exhibit signs of drug use.

Second, few women seeking prenatal care or medical aid during pregnancy or at birth realize they are subject to arrest. One likely consequence could be tragic: pregnant women may not seek medical assistance once they realize that hospitals are required to notify police when a woman tests positive for drugs.¹⁶⁶ Reacting to this situation, the head nurse at Greenville Memorial Hospital in North Carolina asserted, "I think these prosecutions are dangerous. The mothers won't seek medical help. If they don't seek medical help, we're going to have a lot of dead babies."¹⁶⁷

Treating addicted pregnant women as criminals misconstrues the nature of addiction by presumptively concluding that pregnant addicts are intentionally injuring their unborn children. This falsely assumes that these women could get treatment if only they desired. Yet, while we spend billions of dollars to provide enough prison beds for those sentenced for drug use, there is little effort to make beds available for poor pregnant women who want help.¹⁶⁸ Society seems to say our primary goal is to punish, not help. Once again, we are treating a public health problem as

umbilical cord. Additionally, the criminal intent usually required under the law is here lacking.

¹⁶⁶ See, e.g., Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1436 (1990) (arguing that "the fear of prosecution encourages other pregnant addicts to shun available medical care and social services").

¹⁶⁷ Siegel, *supra* note 154, at 172 (quoting Garloch, *4 Accused of Drug Use in Pregnancy*, Charlotte Observer, Aug. 17, 1989) (statement of head nurse of Greenville (N.C.) Memorial Hospital); see also Wilkerson, *Woman Cleared After Drug Use in Pregnancy*, N.Y. Times, April 3, 1991, at A15, col. 1. The public health implications of criminalizing drug use by pregnant women presumably contributes largely to why the American Medical Association, American Public Health Association, the American Medical Women's Association, the American College of Obstetricians and Gynecologists, and others have issued statements in opposition to this practice. See, e.g., Amicus Brief for Respondent, *State v. Carter*, No. 90-2261 (Fla. 1st Dist. Ct. App.) dismissal ordered July 28, 1990. The state has appealed the dismissal.

¹⁶⁸ NASADAD reports that in 1989, of an estimated 250,000 pregnant women who needed drug treatment, only 30,000 received it. See generally TREATMENT WORKS, *supra* note 51.

a law enforcement problem; in the process, we defeat both health and enforcement goals.

III. RACISM AND THE WAR ON DRUGS

Not surprisingly, the frenzy with which the war on drugs is conducted most frequently violates the constitutional rights of minorities. The government's view seems to be that because the problem is simply criminals violating the law, then the solution must be aggressive law enforcement. This distorted perception continues to ravage not only the constitutional rights, but also the lives and health of the most vulnerable Americans. The effect on minorities of drugs and the war waged against them cannot be fully understood save in the context of institutionalized racism. Not only is this country's racist past (and present) a cause of the minority communities' victimization by the drug trade, but the widespread public association of drugs with minorities in turn fuels more discrimination.¹⁶⁹ Cause becomes effect in a vicious cycle.

The drug crisis targets poor minority populations in four major ways. First, drug abuse itself exacerbates the serious health problems already endemic to poverty. Second, the war on drugs, with its emphasis on law enforcement, drains resources that would be better spent on health, social welfare, job, and education programs desperately needed in minority communities.¹⁷⁰ Third, the profitability of the drug trade, which is perpetuated by

¹⁶⁹ Even members of the Reagan Administration admit this to be the case. See, e.g., *Koop Says Bush Lags in AIDS Fight*, N.Y. Times, Dec. 5, 1990, at A25, col. 1 (quoting former Surgeon General C. Everett Koop as saying that there is "increasing discrimination against black and Hispanic people [based on the assumption that they have AIDS] because the public usually associates members of the two groups with intravenous drug abuse"). Writing in the New York Times recently, author Ishmail Reed cited a USA Today poll that showed that 15% of the drug users in American are black while 70% are white. Nonetheless, according to Black Entertainment News, "television news associates drugs with blacks 50 percent of the time, while only 32 percent of the drug stories focus on whites." Reed, *Tuning Out Network Bias*, N.Y. Times, Apr. 9, 1991, at A25, col. 2.

¹⁷⁰ Indeed, getting arrested on a drug charge can result in the denial of the very education so desperately needed by minority youth. Under federal law, over 462 federal benefits from 53 federal agencies may be denied anyone who is convicted of a drug offense by state or local authorities, including student financial aid. See 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 24.

the government's prohibition against drugs, attracts a large number of minority youths who perceive few other alternatives for achieving the "good life." These young people have the means and motivation to use violence to protect their "livelihood." Fourth, having helped to create the problem, law enforcement efforts then target minority populations for surveillance, arrest, prosecution, and incarceration. A brief overview follows, exploring the effects on minorities of drug-related health problems, drug-associated violence, and racially discriminatory law enforcement.

A. Public Health

1. Life Expectancy and Drugs

Conditions in which poor minorities live in our inner cities are comparable to those in an underdeveloped Third World country, or to those in which this country's poor lived a century ago.¹⁷¹ The Atlanta-based federal Centers for Disease Control (CDC) recently reported that life expectancy for blacks in the United States is decreasing, while that for whites has increased or remained the same.¹⁷² As of 1988, fully 7.4 years separated the life expectancy at birth of black males from that of white males; a similar comparison among women reveals a racial gap of 5.5 years. Federal health experts attribute the drop in black male life expectancy in large part to a combination of infant mortality

¹⁷¹ The figures on poverty are stark indeed. Single-mother families, which rose in number from 1.9 million in 1960 to 5.1 million in 1987, constitute approximately three-fifths of all poor families with children. G. GOLDBERG & E. KREMEN, *THE FEMINIZATION OF POVERTY: ONLY IN AMERICA?* 37, 42 (1990). Housing, where available, is substandard. In New York City, the Housing Authority owns and operates 318 developments with 179,000 apartments and 600,000 residents. There is a zero vacancy rate and more than 175,000 families are on a housing waiting list. NEW YORK CITY HOUSING AUTHORITY, 55TH ANNUAL REPORT 6 (1990) (statistics for fiscal year ended December 1989). Access to health care is largely denied, save on an emergency basis, and even then, "[t]he average emergency room wait for a bed in the nation's public hospitals is now more than five and a half hours, and in the worst cases 3 to 10 days." Hilts, *Bed at a Public Hospital Can Take Days to Get*, N.Y. Times, Jan. 30, 1991, at A20, col. 5.

¹⁷² See Hilts, *Life Expectancy for Blacks in U.S. Shows Sharp Drop*, N.Y. Times, Nov. 29, 1990, at A1, col. 4 (life expectancy at birth for black men dropped from 65.2 years to 64.9 from 1987 to 1988; for black women life expectancy dropped from 73.6 years to 73.4; for white men it rose from 72.2 in 1987 to 72.3 in 1988; for white women the figure was 78.9 in both years).

rates, increases in AIDS-related and drug-induced deaths,¹⁷³ and a homicide rate that between 1984 and 1987 rose 66.4% for young black males.¹⁷⁴ Experts blame the spiraling homicide rate, in turn, on drugs and the easy availability of guns.¹⁷⁵

2. Intravenous Drug Use, AIDS and — Now — Minority Women

Drug users and their sex partners are becoming an increasingly larger component of the Acquired Immune Deficiency Syndrome (AIDS) epidemic. An estimated twenty-five percent of all American and European AIDS cases and the majority of Human Immunodeficiency Virus (HIV) positive results now stem “directly or indirectly from illegal intravenous (IV) drug use.”¹⁷⁶ Officials estimate that HIV/AIDS infects more than half of the approximately 250,000 IV drug users in New York City.¹⁷⁷ This demographic shift of the AIDS virus from gay men to IV drug users is “pivotal . . . in the AIDS epidemic because it represents the principal bridge to other adult populations through heterosexual transmission and to children through perinatal transmission.”¹⁷⁸ Ninety percent of IV drug users are heterosexual, and thirty percent are women — ninety percent of whom are in their childbearing years.¹⁷⁹ The AIDS health scourge among IV drug users disproportionately affects minority communities.¹⁸⁰ There has

¹⁷³ Drug-induced deaths in both whites and blacks rose 11% in the years covered by the CDC study.

¹⁷⁴ This figure is as much as 20 percentage points *higher* in states such as Florida and New York, both of which show 80% increases in the homicide rate for young black males. Mydans, *Homicide Rate Up for Young Blacks*, N.Y. Times, Dec. 7, 1990, at A26, col. 1 (citing CDC report).

¹⁷⁵ For further discussion on the homicide rate of young black males, see *infra* notes 210-11 and accompanying text.

¹⁷⁶ See 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 54; Friedland & Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1127 (1987); Nadelmann, *supra* note 7, at 942. In New York City, where approximately one-half of the nation's 500,000 IV drug users reside, over 50% of new AIDS cases are drug-related. *AIDS Issues: Hearings Before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 281 (Apr. 24, 1989) (statement of Rep. Waxman).

¹⁷⁷ Stryker, *IV Drug Use and AIDS: Public Policy and Dirty Needles*, 14 J. HEALTH POL., POL'Y & L. 719 (1989).

¹⁷⁸ Friedland & Klein, *supra* note 176, at 1127.

¹⁷⁹ *Id.*

¹⁸⁰ For example, a recent study found that the HIV infection rate among

not been a similar shift in resources. While the testing and treatment for all AIDS victims is inadequate, it is particularly so for women and minority AIDS victims.¹⁸¹

More than sixty percent of the 4,000 women in New York City thus far diagnosed with AIDS are IV drug users and an additional twenty-five percent are sex partners of male drug users, or of bisexual men.¹⁸² The destruction to minority women is becoming increasingly pronounced.¹⁸³ Minority women are exhibiting a higher increase in the incidence of AIDS than men. Recently, in separate studies, the CDC and the World Health Organization reported that AIDS is likely to become the fifth leading cause of death for United States women of childbearing age by 1991, affecting more than 15,000 women.¹⁸⁴ The CDC observed that "[a]mong women, the disease is most prevalent among the poor or minorities Though black and Hispanic women make up 19 percent of all U.S. women, they represent 72 percent of women with AIDS."¹⁸⁵ According to a 1988 study, the "death rate for HIV/AIDS in black women 15 to 44 years of age was nine times the rate in white women of the same age."¹⁸⁶ The study concludes that the majority of these AIDS and HIV cases are the result of IV drug use or sex with IV drug users.¹⁸⁷

blacks applying for the military — 1 per 1,000 — was 3.4 times that for Hispanic youths and 5.9 times that for white youths. Berger, *Condoms in Schools*, N.Y. Times, Feb. 22, 1990, at A30, col. 1.

¹⁸¹ See generally Friedland & Klein, *supra* note 176, at 1127.

¹⁸² "When adjusted for population size in a comparison with whites, the rates of AIDS are 11 to 13 times higher among black and Hispanic women than white women." *Id.* at 1128.

¹⁸³ One caution is appropriate here: all too often reports in non-scientific journals use AIDS (the fullblown disease) and HIV (the presence of antibodies signalling infection by the virus) interchangeably. It is not always clear, therefore, whether they are quoting figures where the disease is already manifest, or where the individual merely has been exposed to the virus.

¹⁸⁴ *Gaining As a Cause of Death*, Newsday, Nov. 30, 1990, at 3, col. 1. These figures represent a 29% increase in AIDS in women; the comparable figure over the last year for men is 18%. *Id.* at 25, col. 2. AIDS is already the "leading cause of death among New York City women aged 20 to 39." Woodard, *AIDS Threat to Women Grows*, Newsday, Nov. 30, 1990, at 3, col. 4.

¹⁸⁵ *Id.* at 25, col. 2 (emphasis added).

¹⁸⁶ Chu, Buehler & Berkelman, *Impact of the Human Immunodeficiency Virus Epidemic on Mortality in Women of Reproductive Age, United States*, 264 J. AM. MED. A. 227 (1990).

¹⁸⁷ *Id.* at 229.

3. Children of Drug Abusers

Drug use also impacts the lives of far too many children. The National Institute on Drug Abuse estimates that 10 out of every 100 pregnant women have used or are using cocaine.¹⁸⁸ Overall, women comprise a consistently larger percentage of the drug addicts within minority communities than in white communities.¹⁸⁹ The consequences for the children of these women and for the minority community are grim for several reasons. First, according to Dr. Karen Benker, a physician and public health specialist for the Brooklyn Health Action Committee, "Lack of drug treatment for pregnant women is the major thing fueling infant mortality, the major thing fueling the foster care crisis."¹⁹⁰ Most drug treatment centers will not accept pregnant women either because they do not have obstetrical services or because they fear liability.¹⁹¹ For example, in New York City fifty-four percent of seventy-eight drug treatment programs surveyed in 1989 refused to treat pregnant women, sixty-eight percent refused to treat pregnant women on Medicaid, and fully eighty-seven percent had no services available for pregnant women on Medicaid who are

¹⁸⁸ Lee, *Pregnant Drug Abusers Tie Hope to Program*, N.Y. Times, Dec. 17, 1990, at A15, col. 4. *But cf.* Dugger, *supra* note 164, at 27, col. 3 (reporting that rate of cocaine use among pregnant women in New York is falling significantly).

¹⁸⁹ New York State Chief Judge Sol Wachtler recently cited surveys that revealed that 50% or more of crack addicts are women. In addition, urinalysis screening of female arrestees in New York City showed that almost 75% test positive for drugs, most for cocaine. *See generally* STATE OF THE JUDICIARY MESSAGE OF CHIEF JUDGE SOL WACHTLER, *reported in* N.Y.L.J., Dec. 3, 1990, at 40.

¹⁹⁰ Hemphill, *Programs for Addicts Stalled*, Newsday, Oct. 29, 1990, at 8, col. 1.

¹⁹¹ *But see* Lee, *supra* note 188, at A15, col. 4 (describing recent grand opening of Parent and Child Enrichment Program (PACE), New York City's "first comprehensive, community-based program for pregnant substance abusers, offering prenatal care, drug counseling and training in parenting skills"). In general, though, access to prenatal care and delivery services has diminished for poor and minority women in recent years — at the same time that addiction problems have worsened. Hughes, Johnson, Rosenbaum & Simons, *The Health of America's Mothers and Children: Trends in Access to Care*, 20 CLEARINGHOUSE REV. 472 (1986). *See generally* The Southern California Child Health Network, BACK TO BASICS: IMPROVING THE HEALTH OF CALIFORNIA'S NEXT GENERATION (1987) (reporting that San Diego clinics turned away 1,245 pregnant women during three-month period because of limited resources; no maternity care system available for 30% of California women who are poor and uninsured).

addicted to crack.¹⁹² Even the law discourages hospitals and residential treatment centers from providing drug treatment for pregnant women: federal law prohibits Medicaid from reimbursing facilities for these services.¹⁹³

Second, over seventy-five percent of the children in New York City under age thirteen known to have AIDS were born to mothers infected through IV drug use or sex with IV drug users.¹⁹⁴ The "overwhelming majority of [these] children are black (53 percent) or Hispanic (38 percent)."¹⁹⁵ Third, at least 100,000 "cocaine babies" are born in the United States each year.¹⁹⁶ The Mayor's Study Group on Drug Abuse estimates that 15,000 New York City women will give birth to drug-exposed babies this year.¹⁹⁷ Again, the majority of these are minority chil-

¹⁹² Moss, *supra* note 161, at 287 (citing Chavkin, *Help, Don't Jail Addicted Mothers*, N.Y. Times, July 18, 1989, at A21, col. 2)). At the end of October, 1990, in fact, there were only four pregnant women enrolled in the 5,232 residential drug treatment beds in New York City. Only two programs, Odyssey House in Manhattan and La Casita in the Bronx, accepted pregnant women and their children, while two others in the Bronx accepted pregnant women only if they are willing to surrender their children to foster care at birth.

¹⁹³ See 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 51; MAYOR'S STUDY GROUP, REPORT AND RECOMMENDATIONS TO THE MAYOR ON DRUG ABUSE IN NEW YORK CITY (1990). There is a tremendous irony here: for purposes of Medicaid reimbursement, the federal government considers substance abuse a form of mental illness, and therefore a state responsibility. Yet, at the same time, the government follows a policy of imprisoning drug addicts as criminals.

¹⁹⁴ Navarro, *AIDS Children's Foster Care: Love and Hope Conquer Fear*, N.Y. Times, Dec. 7, 1990, at A1, col. 5, B4, col. 3. In some poor areas of the South Bronx, one in every 43 infants is now born to a mother with AIDS. As a general matter, approximately one-third of the babies born to mothers with HIV/AIDS will be infected.

¹⁹⁵ *Id.* Moreover, "the overall cumulative incidences [of AIDS] in black and Hispanic children are 15.1 and 9.1 times the incidence in white children." Friedland & Klein, *supra* note 176, at 1130 (citation omitted).

¹⁹⁶ 1991 NATIONAL DRUG CONTROL STRATEGY, *supra* note 3, at 32. This figure may well be exaggerated. Given the figures for cocaine-addicted, childbearing women, it seems unlikely, to say the least, that there could be 100,000 "coke babies" born each year.

¹⁹⁷ Hemphill, *supra* note 190, at 8, col. 1. A study of Los Angeles County found that 2,400 babies a year were born addicted to drugs in 1989. See generally *Child Abuse Report Paints Dismal Picture*, Montgomery Advertiser, Nov. 15, 1990. The study, published by the Inter-Agency Council on Child Abuse and Neglect predicted that at least 24,000 drug-addicted children would enter Los Angeles public schools in the year 2000. *Id.*

dren. Although the oldest of these children are still relatively young, preliminary studies indicate that a high percentage of them experience learning and emotional disabilities.¹⁹⁸ Fourth, the presence of drug-abusing mothers — or fathers — increases the likelihood that children will be neglected or abused.¹⁹⁹ At any rate, many of these children suffer from the effects of being raised in dysfunctional families.²⁰⁰ The cumulative effect on the youth in minority communities, and therefore on the future of those communities, is nothing short of catastrophic. A generation of minority children are being born with two strikes against them. All too often the third strike is subsequently delivered by mainstream society that turns a deaf ear and blind eye to minority parents and their children's plight.

4. Further Health Problems Associated with Drug Abuse

In addition to the toll on minority communities taken by the high homicide rate, the IV drug-related AIDS epidemic, and the direct and indirect effects of drug use on children, drug abuse by itself presents a high health risk. The most common non-AIDS drug-associated diagnoses for drug abusers upon hospital admission are bacterial endocarditis (infection of the heart valves), cellulitis (infection of the skin), and complications of both.²⁰¹ These admissions require a minimum of two weeks of inpatient therapy, though a typical stay lasts four to six weeks. In New York, this therapy costs \$500 to \$800 per bed per day, exclusive of costs for special tests or complications such as treating collapsed lungs or surgically repairing heart valves. Crack abusers are particularly at risk for pulmonary complications such as tuberculosis, acute exacerbation of asthma, chronic fibrosis, and pneumonia, each of which requires a hospital stay of at least two to three weeks.

Many of these inpatient treatments require follow-up care. For

¹⁹⁸ See *Abuse Is Seen as a Leading Factor in Children's Aggressive Behavior*, N.Y. Times, Dec. 21, 1990, at A30, col. 3 (Indiana University study of 309 children found that abuse of young children at home is most powerful home influence on development of aggressive behavior).

¹⁹⁹ *Id.*

²⁰⁰ The consequent deficiencies in education, health, and social adaptability perpetuate the effects of drug-aggravated poverty, extending them to new generations.

²⁰¹ Conversations with Dr. Carmela Landes, resident at Beth Israel Medical Center's locked ward for substance abusers, November 14-15, 1990.

example, TB requires oral therapy daily for six to nine months. The rate of continued compliance with required therapies among IV drug users is so poor that there is now a rising incidence of "resistant TB," a communicable and untreatable disease.²⁰² The fact that few people in poor minority communities have access to primary, preventive health care exacerbates matters. Other communicable diseases, including venereal diseases, are widespread among drug users and their sexual partners.²⁰³

An additional health cost of the hysteria surrounding the war on drugs is its obstruction of legitimate medicinal use of certain drugs.²⁰⁴ The drug war frenzy has also prevented many cities, including New York, from adopting clean needle programs that have proven effective elsewhere.²⁰⁵ Drugs and the drug war have

²⁰² See Rosenthal, *The Return of TB: A Special Report*, N.Y. Times, July 15, 1990, § 1, at 1, col. 6.

²⁰³ These include syphilis and gonorrhea, as well as cervical cancer, which is considered a sexually transmitted disease, because it arises from a viral infection complication. The bartering of sex for crack has created the first syphilis epidemic in decades, which in turn has resulted in thousands of stillborn births and birth defects. Moran, *Crack Epidemic Spurring Increase in Congenital Syphilis*, City Sun, Oct. 18, 1989, at 9, col. 1; French, *Rise in Babies Hurt by Drugs is Predicted*, N.Y. Times, Oct. 18, 1989, at B6, col. 5. In 1988 1,017 babies in New York were born with congenital syphilis — up from only 16 in 1982. Rosenthal, *supra* note 6, § 1, at 1, col. 6.

²⁰⁴ Marijuana, for example, has proven useful in alleviating pain in some victims of multiple sclerosis and is particularly effective in reducing the nausea that accompanies chemotherapy, and may prove helpful in treating glaucoma. See Grinspoon & Bakalar, *Medical Uses of Illicit Drugs* in DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL 183 (R. Hamowy ed. 1987); Nadelmann, *supra* note 7, at 942 & 946 n.33. Marijuana is also proving effective in helping AIDS patients cope with nausea and severe weight loss; see also Isikoff, *U.S. Provides Marijuana For Some AIDS Patients*, Washington Post, Mar. 24, 1991, at A3, col. 1 (although FDA is permitting a couple with AIDS to receive marijuana under policy allowing seriously ill patients to try unapproved drugs, the couple was previously convicted for growing two marijuana plants for medical use). Heroin, too, has proven effective in helping patients to deal with severe pain; it is more powerful than morphine and can be provided in smaller doses, thus causing fewer negative side effects in some patients. See Lazare, *supra* note 17, at 26. It is legally prescribed for such purposes in Britain and Canada. The same is true of cocaine.

²⁰⁵ There is a growing body of evidence that clean needle programs reduce the incidence of infection. While the rate of infection for HIV/AIDS among New York City's IV users is estimated at more than 50%, by contrast, in the Netherlands, where the government distributes clean needles, only 9% of intravenous drug users carry the AIDS virus. Similarly, in Liverpool,

helped cause and continue to fuel a health and access-to-care crisis that is decimating parts of our population, impacting primarily people of color.

B. Violence and Drug Trafficking

The high profits enjoyed by participants in the drug trade are all the more attractive where the only alternatives are unemployment or a minimum wage menial job.²⁰⁶ A recent RAND Corporation report concluded that a young, poorly educated black man can earn approximately \$2000 per month tax-free selling drugs on the streets of Washington, D.C. — or roughly \$30 per hour.²⁰⁷ This is four times his anticipated income without the sale of drugs. The resultant proliferation of street-level dealers, along with the largely ineffective federal interdiction efforts at the national borders, keeps drugs readily available and, for the most part, affordable.²⁰⁸ Thus, government policies help to keep the

England, where medical clinics provide injectable drugs, the proportion of intravenous drug users who are HIV positive is less than 1%. *See generally* R. Newcombe & A. Parry, *The Mersey Harm-Reduction Model: A Strategy for Dealing with Drug Users* (Presentation at the International Conference on Drug Policy Reform, Bethesda, MD, Oct. 22, 1988).

As is true with the debate over legalization, however, the African-American community is split with regard to the distribution of clean needles. Much of the black community and its leadership are opposed to needle distribution for the same reasons it is against legalization — namely, that the effect would be “genocidal” for blacks.

²⁰⁶ The unemployment rate for African-American and Latino youth from New York City’s poor areas is over 50%. *See* IMPRISONED GENERATION, *supra* note 5, at 7.

²⁰⁷ NACDL Report, *supra* note 26, at 18 n.44. It is worth noting that this figure of \$2,000/month, while substantial, hardly lives up to the huge profits associated with drug dealing in the public mind. *See Crack Dealers’ Rotten Lives: the Rewards for Selling Drugs are Often Puny and the Dangers Severe*, U.S. NEWS & WORLD REPORT, Nov. 12, 1990, at 36 (reporting that in New York chances of earning \$100,000 or more in drug trade are one in 1,000; chances of earning \$30,000 are one in 200; and in Washington, D.C., 3 out of 8 dealers who worked 4 hours every day earned less than \$24,000 a year; in Chicago drug dealers typically made \$150 a week). *See generally* Finnegan, *A Reporter at Large: A Street Kid in the Drug Trade (pts I & II)*, THE NEW YORKER, Sept. 10, 1990, at 51, Sept. 17, 1990, at 60.

²⁰⁸ Because the foreign export prices are such small fractions of the retail prices in the United States, international drug control efforts do not raise the cost of illicit drugs to U.S. consumers. *See generally* DRUG ENFORCEMENT ADMINISTRATION, U.S. DEP’T OF JUSTICE, INTELLIGENCE TRENDS (1987)

profits in the drug trade, while starving the social infrastructure in the poor black ghettos.

Most experts agree that the increase in violent crime observed over recent years²⁰⁹ is largely attributable to the profit in the drug trade and to the turf wars of drug dealers.²¹⁰ A shockingly large number of street-level dealers are injured or killed. The RAND study of street-level drug dealers in Washington, D.C. from 1985 to 1987 found that these dealers stood a one in seventy chance of getting killed — a rate that was twenty times higher than for a police officer and one-hundred times higher than for the general work force. In addition, dealers had a twenty-five percent chance of suffering severe injury and a two in nine chance of being imprisoned. These figures still underestimate the violence associ-

(foreign export prices are 4% of U.S. price for cocaine, 1% for marijuana and less than 1% for heroin).

²⁰⁹ For example, between 1985 and 1989, reported murders in New York State increased 33.5%, robberies increased 16.1%, aggravated assaults increased 34.4%, larceny increased 8.6%, and motor vehicle thefts increased 60.7%. See generally STATE OF THE JUDICIARY MESSAGE OF CHIEF JUDGE SOL WACHTLER, *supra* note 189, at 40. Chief Judge Wachtler attributed these increases to the “crack years.” Increases in juvenile delinquency proceedings in New York City (41%) and the state (20%) were also blamed on the “crack epidemic.” *Id.* at 41. According to Wachtler, drugs were also in part responsible for increases reported over the last decade in child abuse and neglect cases (650%) and familial violence (400%). *Id.* at 41, 43.

²¹⁰ See James, *New York Killings Set a Record, While Other Crimes Fell in 1990*, N.Y. Times, Apr. 23, 1991, at A1, col. 4 (reporting that police commissioner attributes rise in murders and robberies to “twin evils” of drug and guns). *Many Cities Setting Records for Homicides in Year*, N.Y. Times, Dec. 9, 1990, § 1, at 41, col. 1 (guns and drugs cited most often as reason for increases in violence that led to more than a dozen cities setting records for homicides in 1990). The jump to blame drugs as the direct or sole cause of all violent crime, however, overstates and oversimplifies the case against narcotics. A recent editorial, while acknowledging that crack dealing may have indirectly contributed to rising shooting murders by making the funds available for teenagers to purchase guns, nonetheless noted:

Police find fewer murders [in 1990] related to drug dealing or addiction. In Washington, such homicides account for only 39 percent of the total, compared with 52 percent last year and 66 percent in 1988. In New York, the figure for this year is 25 percent, down from 28 percent last year and 38 percent in 1980.

Fight Guns, Not Just Drugs, N.Y. Times, Dec. 8, 1990, at A26, col. 1. This finding is supported by the most recent figures from hospital emergency rooms, which report fewer directly drug-related admissions.

ated with drug dealing because they do not include innocent bystander casualties.

The high homicide rate for young black men, which is at least partially caused by the lucrative drug trade, has risen to the point where 85 of every 100,000 young black males are killed every year.²¹¹ *Before the age of twenty-five, a black man is today more likely to die in the streets than a United States soldier was to perish in Vietnam — or in the Persian Gulf War.*²¹²

Hyperintensive law enforcement activity also contributes to police violence against African-Americans.²¹³ By one estimate there were at least fifteen incidents between January and April 1990 in which police have killed civilians — most of whom were black — during narcotics operations.²¹⁴

C. Law Enforcement Targeting of Minorities

1. Impact of Minority Targeting

Law enforcement targeting of minorities has a profound impact on every aspect of the minority community. The reverberations are felt by the young and old, men and women, drug-involved and drug-noninvolved persons alike. A particularly tragic aspect is the impact on the nation's youth. Despite the alarming statistics cited above,²¹⁵ the vast majority of minority youth are *not* involved with drugs or the drug trade. Many of these innocent young will nonetheless have their lives altered by living in militarized ghettos where their lives and liberties remain hostage to police and drug violence.

Both young and old alike who are involved with drugs, however, are likely to lose their liberty, if they do not first lose their lives, and to be warehoused in prisons for what are proving to be

²¹¹ Sternberg, *Street Violence More Deadly Than War to Black Youths*, Atlanta J. & Const., Dec. 13, 1990, at A14, col. 1 (citing 1987 figures from Centers for Disease Control's National Center for Health Statistics).

²¹² *Id.*

²¹³ See, e.g., Fried, *Stun-Gun Trial Ends With Four Being Convicted*, N.Y. Times, Feb. 25, 1988, at B2, col. 6 (reporting white officers tried and convicted of using electric shock stun guns in separate incidents involving arrests and attempted framings of African-Americans whom police wanted to admit to selling marijuana). The recent brutal beating of a black motorist in Los Angeles by a group of white policemen was originally "explained" by reports that the motorist was high on PCP. See *infra* note 235.

²¹⁴ See Letwin, *supra* note 10, at 820 n.142.

²¹⁵ See *supra* notes 209-13 and accompanying text.

increasingly long terms. A few salient statistics illustrate the catastrophic impact that the war on drugs has had on minority communities. Fully eighty to ninety percent of drug arrests nationwide involve African-American males,²¹⁶ despite the fact that separate studies by the FBI and the National Institute for Drug Abuse came to the "identical conclusion that blacks make up only 12% of the nation's drug users."²¹⁷ Drug arrests target the black community, notwithstanding the acknowledgement by former federal drug czar William Bennett that "[t]he typical cocaine user is white, male, a high school graduate employed full time, and living in a small metropolitan area or suburb."²¹⁸ Many of those arrested do not fit the image of hardened drug addicts. As already discussed, a substantial number of the arrests are for mere possession of marijuana.

Not only is the black community targeted in terms of policing and arrest for drugs, but sentencing for drug-related offenses is also racially biased. A Minnesota State trial judge recently struck down a law that punishes the possession of crack more severely than it does the possession of the same amount of cocaine.²¹⁹ The judge noted that drugs that are associated with the white community are not considered as serious as drugs more commonly associated with the black community, even when the medical evidence indicates that the effects of the drugs are the same. In this case, the judge found the disparity to be violative of both federal and state constitutional equal protection clauses.

Although young black men constitute only four percent of the country's population, they make up fifty percent of total prison population in the United States.²²⁰ In some states, the figures are still higher. Fully eighty-two percent of a population of 55,000

²¹⁶ See generally Stone, *supra* note 42.

²¹⁷ Harris, *Blacks Feel Brunt of Drug War*, L.A. Times, Apr. 22, 1990, at A1, col. 1. Whites sell most of the nation's cocaine and account for 80% of its consumption. *Id.*

²¹⁸ IMPRISONED GENERATION, *supra* note 5, at 5.

²¹⁹ *Minnesota v. Russell*, No. 89067, (Dist. Ct., 4th Judicial Dist. Dec. 27, 1990) (unpublished order); see also London, *Judge's Overruling of Crack Law Brings Turmoil*, N.Y. Times, Jan. 11, 1991, at B5, col.3; McLaren & Niederpruem, *Minorities Do More Time for Cocaine Dealing*, The Indianapolis Star, Apr. 30, 1990, at 1, col. 1 (reviewing 200 cocaine-dealing cases in Marion County, Indiana, found 57% of minority defendants to have been sentenced to prison terms, compared with only 45.8% of white defendants).

²²⁰ Stone, *supra* note 42, at 22.

inmates in New York's state prisons are black or Latino.²²¹ City figures are even higher: minorities now comprise ninety-five percent of New York City's jail population of approximately 20,000.

Recently, the Federal Sentencing Project released statistics showing that on any given day almost one in four (twenty-three percent) black men between the ages of twenty and twenty-nine in the nation is under the control of the criminal justice system; the comparable figure for white males of the same age is 6.2 percent.²²² These statistics are the same in New York State and represent twice the number of black men enrolled in all the colleges of the state.²²³ Unfortunately, this trend does not appear likely to reverse itself in the foreseeable future. "In Florida, state researchers predict that by 1994, nearly half of the black men in the 18-34 age group will be locked up or under court supervision."²²⁴

The disproportionate focus of law enforcement on black (and Latino) offenders is explained by institutionalized racism, the higher street visibility of the drug problem in minority communities, and higher rates of violence, among other things. The media and opportunistic politicians use these conditions to manufacture and nurture what has become the nation's predominant image of the drug problem, etching into the public mind a portrait of

gun-toting black teenage gangs, ghetto crack houses where unspeakable horrors take place, and depraved black women who prostitute themselves to raise money for their crack, and who give birth to tiny, drug addicted babies whose pictures are plastered all over our subway cars in extravagantly graphic public service messages warning of the dangers of drugs.²²⁵

²²¹ IMPRISONED GENERATION, *supra* note 5, at 8.

²²² *Id.* at 1 (reporting young black men are 23 times more likely to be locked up in N.Y. State than young white men; on any given day, 11% of New York's black males between the ages 20-29 are confined in state prison or local jail). In New York 12% of young Latino men are under some form of criminal justice custody in New York State. *Id.* at 2. Half of these are confined in a state prison or local jail. *Id.* at 3. See generally M. MAUER, *supra* note 36.

²²³ Glaberson, *One in 4 Young Black Men Are in Custody, Study Says*, N.Y. Times, Oct. 4, 1990, at B6, col. 5.

²²⁴ Bearak, *Big Catch: Drug War's Little Fish*, L.A. Times, May 6, 1990, at A1, col. 1.

²²⁵ L. Siegel, *The Criminalization of Pregnancy: A Paradigm of America's "Harm Maximization" Approach to Drug Use* (memorandum prepared for ACLU, copy on file with U.C. Davis Law Review).

The true story is in many ways far worse. As a recent report on the imprisonment of minorities in New York State noted, "Prisons are now the last stop along a continuum of injustice for these youths that literally starts before birth: no pre-natal care, poor health care, substandard housing, dirty streets, failing schools, drugs, joblessness, discriminatory deployment of police, and prison."²²⁶

Further, in prison there is woefully inadequate health care for those suffering from drug problems and drugs are at least as prevalent in prison as on the streets.²²⁷ The country's response to this problem thus far has been more police and more prisons. Despite more than twenty years of failure of the law and order approach to social and health problems in the minority community, the same tragic mistakes continue to be made.

2. Criminal Prosecution of Pregnant Minority Women

As discussed *supra* in Part II(D), law enforcement efforts now target not only the mythical gun-toting black man of white nightmares but are now also aimed at pregnant women. A national survey conducted by the American Civil Liberties Union (ACLU) illustrates the disproportionate effect of selective and racially discriminatory enforcement policies has on pregnant minority women. The ACLU recently examined fifty-seven criminal prosecutions brought against pregnant women in the past two years.²²⁸ The survey revealed that approximately eighty percent of the forty-seven cases in which the defendant's race could be determined were brought against women of color. A study conducted in Pinellas County, Florida by the National Association for Perinatal Addiction Research and Education (NAPARE) found that, although substance abuse was equally prevalent among white and black women, a black woman who uses drugs or alcohol during pregnancy is almost ten times more likely to be reported to state authorities than a white woman.²²⁹ In South Carolina, one ele-

²²⁶ IMPRISONED GENERATION, *supra* note 5, at 10. The study also reports on the increasing number of young women who are frequenting crack houses, trading sex for drugs.

²²⁷ PRISON CROWDING, *supra* note 50, at 23 (noting that the Federal Bureau of Prisons "must combat drug trafficking and use in prison").

²²⁸ L. Paltrow & S. Shende, State by State Summary of Criminal Prosecutions Against Pregnant Women (memorandum prepared for ACLU, Mar. 29, 1991, copy on file with U.C. Davis Law Review).

²²⁹ Chasnoff, *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and*

ment of the profile used by public hospitals to identify probable drug users is no prenatal or late prenatal care (*i.e.*, after twenty-four weeks). This profile is highly discriminatory for many reasons, including governing federal health policy. Medicaid, medical insurance for the poor, does not cover prenatal care before nineteen weeks of pregnancy, thus leaving poor women of color without the resources to seek early prenatal care even if they desire it.

3. Other Discriminatory Law Enforcement Techniques

Other examples of discriminatory deployment and methods of law enforcement personnel abound. One example already noted is the growing evidence that drug courier profiles involve the use of racial characteristics.²³⁰ For a time, the Florida Highway Patrol instructed its officers to be suspicious of drivers who “did not fit the vehicle” — such as a black driving a Porsche — or drivers who belonged to “ethnic groups associated with the drug trade.”²³¹ In New Jersey, for instance, although less than five percent of vehicles observed by the public defender’s office during the course of a week were occupied by black people and had out-of-state plates, some eighty percent of the arrests made in 1988 involved black motorists driving out-of-state vehicles.²³²

Similarly, street sweeps and “search on sight” operations conducted by the police have targeted minority neighborhoods. During street sweeps, law enforcement authorities routinely engage in mass indiscriminate arrests without probable cause.²³³ In a

Discrepancies in Mandating Reporting in Pinellas County, Florida, 322 NEW ENG. J. MED. 1201 (1990).

²³⁰ Belkin, *Airport Anti-Drug Nets Snare Many People Fitting ‘Profiles,’* N.Y. Times, Mar. 20, 1990, at A1, col. 5 (acknowledging critics’ charges that profiles are more likely to detain blacks rather than whites).

²³¹ See generally Stone, *supra* note 42.

²³² Sullivan, *New Jersey Police Are Accused of Minority Arrest Campaigns*, N.Y. Times, Feb. 19, 1990, at B3, col. 1 (noting that Rutgers University statistician found that only 4.7% of traffic was young black males driving late model cars or cars with out-of-state plates, but that 80% of arrests on highway fit that description).

²³³ New York City Legal Aid criminal defense attorney Michael Letwin reports that:

In a publicized sweep on July 19, 1989, the Chief of the Organized Crime Control Bureau (OCCB), led 150 officers to a block in upper-Manhattan’s Washington Heights. Police sealed off the block and detained virtually all of the 100 people who

recent example, the Boston police, claiming to have a "secret list of known gang members" embarked on a series of operations where they rounded up and searched minority youths.²³⁴ There have also been numerous complaints that police routinely beat those who are rounded up during drug sweeps.²³⁵ In addition, state and federal forfeiture and eviction actions impact poor and working class minority communities far more severely and frequently than white communities.²³⁶ Finally, there is a growing amount of literature supporting accusations that minorities do more prison time than do whites for the same crime.²³⁷

CONCLUSION

We have tried to show that the war on drugs is more than ineffective. The current strategy has real costs, both in constitutional

were present there for up to two hours, during which time police taped numbers on the chests of those arrested, took their pictures and had them viewed by undercover officers. By the end of the operation, police made only 24 felony and two misdemeanor narcotics arrests . . . which strongly suggests that there was no probable cause to seize those who were arrested.

Letwin, *supra* note 10, at 817 n.137 (citations omitted).

²³⁴ See *Commonwealth v. Phillips*, Nos. 080275-76 (Suffolk Sup. Ct., Sept. 19, 1989); see also Butterfield, *State Says Rights Were Violated By Police in Boston Slaying Case*, N.Y. Times, at A20, col. 5 (reporting Massachusetts Attorney General issued report stating, *inter alia*, that "[t]here is no excuse for forcing young men to lower their trousers, or for a police officer to search inside their underwear on public streets and hallways").

²³⁵ The growing evidence of police brutality against minorities has been highlighted recently by the widespread coverage of the beating of Rodney King, a black motorist, by a group of white officers from the Los Angeles Police Department. See Tobar & Berger, *Tape of L.A. Police Beating Suspect Stirs Public Furor*, L.A. Times, Mar. 6, 1991, at A1, col. 5; Wood & Fiore, *No Charges Filed Against Suspect Beaten by Police*, L.A. Times, Mar. 7, 1991, at A1, col. 5; Tobar & Stolberg, *Gates Wants Officers Prosecuted in Beating*, L.A. Times, Mar. 8, 1991, at A1, col. 2; Krikorian & Ferrell, *Impact of Beating Deals a Blow to Officers' Image*, L.A. Times, Mar. 9, 1991, at A1, col. 1.

²³⁶ See discussion *supra* at Part II(C). Recently, the chief of police responsible for the drug raid and seizure of three predominantly white fraternity houses at the University of Virginia, said that the raid was in large part motivated by what he acknowledged were racial disparities in drug enforcement. The chief admitted that "local civil rights advocates had a good point when they argued that anti-drug efforts were directed mainly toward the poor and members of minorities." Ayres, *supra* note 83, at A20, col. 5.

²³⁷ See *supra* notes 220-24 and accompanying text.

terms, and for the life opportunities of the black community. Continuing the law and order approach to the social and health problems is destructive and has serious racial overtones. An adequate discussion for an appropriate strategy for our current crisis cannot proceed without factoring in these costs.

In looking at some of the costs to our constitutional rights, and in light of the devastation in the minority community, it is legitimate to ask whether the war on drugs is itself the major crisis in our society. At the very least, the continuing existence of the examples discussed in this Article bears witness to a national policy of malignant neglect. A growing number of people, particularly African-Americans, perceive the ravages of drugs and AIDS on blacks as part of a racist conspiracy.²³⁸ Supporters of a conspiracy theory also point to high profile drug cases, such as that brought against former Washington, D.C. Mayor Marion Barry, as evidence that the government is targeting black officials in a concerted attempt to discredit and topple them.²³⁹

This charge gains strength when one compares the approach to drug use in minority communities with the different approach in the white community and also in the country's willingness to address the socioeconomic problems of the minority poor community. We continue to put billions of dollars into jail and police efforts at the direct expense of inner-city schools and health facilities. We continue to suffer attacks on our constitutional rights. We continue to drain our minority communities of their young men, their pregnant women, and their children.

The war on drugs has a disproportionate effect on the minority community, but it has real costs for all of us. We will be much more effective in combating dangerous drugs, while respecting the Constitution and the rights of minorities, when we use education, and access to adequate health care rather than jails, to fight drugs.

²³⁸ See DeParle, *Talk of Government Being Out to Get Blacks Falls on More Attentive Ears*, N.Y. Times, Oct. 29, 1990, at B7, col. 1 (finding that one quarter of blacks polled said government "deliberately makes sure that drugs are easily available in poor black neighborhoods in order to harm black people" — a statement another third of those polled said "might possibly be true").

²³⁹ *Id.* (finding that 32% of blacks polled said "the government deliberately singles out and investigates black elected officials in order to discredit them in a way it doesn't do with white officials" — a statement that an additional 45% blacks polled said "might possibly be true").

Now is the time to factor in the cost of our current strategy and to redirect our efforts towards assisting the hostages of that war — minority populations. To do otherwise is to passively bear witness to something increasingly akin to genocide.