

Cato Institute Policy Analysis No. 180: A Society of Suspects: The War on Drugs and Civil Liberties

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Executive Summary

Every friend of freedom . . . must be as revolted as I am by the prospect of turning the U.S. into an armed camp, by the vision of jails filled with casual drug users and of an army of enforcers empowered to invade the liberty of citizens on slight evidence.

-- Milton Friedman^[1]

On December 15, 1991, America celebrated the 200th anniversary of the Bill of Rights. On October 2, 1992, we mark the 10th anniversary of an antithetical undertaking--the War on Drugs, declared by President Reagan in 1982^[2] and aggressively escalated by President Bush in 1989.^[3] This country's Founders would be disappointed with what we have done to their legacy of liberty: The War on Drugs, by its very nature, is a war on the Bill of Rights.

When the Founders rebelled against British tyranny, they grounded their cause in a belief in the natural rights of the individual and the Enlightenment ideas of progress through reason. Understanding the dangers of an excessive concentration of political power, they divided and limited the reach of that power through a federal structure with the states, the separation of powers among the three branches, and the guarantees of personal freedom in the Constitution itself and in the Bill of Rights.

With the War on Drugs, however, the wisdom of the Founders has been cast aside. In their shortsighted zeal to create a "Drug-Free America" by 1995,^[4] our political leaders--state and federal, elected and appointed--have acted as though the end justifies the means, repudiating our heritage of limited government and individual freedoms while endowing the bureaucratic state with unprecedented powers.

That the danger to our freedom is real and not just a case of crying wolf is confirmed by the warnings of a few judges, liberals and conservatives alike, who, insulated from elective politics, have the independence to be critical. Supreme Court Justice Antonin Scalia, for example, denounced compulsory urinalysis of Customs Service employees "in the front line" of the War on Drugs as an "invasion of their privacy and an affront to their dignity."^[5] In another case, Justice John Paul Stevens lamented that "this Court has become a loyal foot soldier" in the War on Drugs.^[6] For his part, Justice Thurgood Marshall was moved to remind the Court that there is "no drug exception" to the Constitution.^[7]

But these have been futile dissents. In a rare majority opinion, the Court of Appeals for the Ninth Circuit declared that

[t]he drug crisis does not license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the "War on Drugs."^[8]

In that observation, the court echoed a ringing dissent of the chief justice of the Florida Supreme Court:

If the zeal to eliminate drugs leads this state and nation to forsake its ancient heritage of constitutional liberty, then we will have suffered a far greater injury than drugs ever inflict upon us. Drugs injure some of us. The loss of liberty injures us all.^[9]

Unfortunately, those warnings are cries in the wilderness, unable to stop the relentless buildup of law enforcement authority at every level of government. In fact, the trend toward greater police powers has only accelerated; one summary of the Supreme Court's 1990-91 term observed that its criminal law decisions "mark the beginning of significant change in the relationship between the citizens of this country and its police."^[10]

Despite such warnings, most Americans have yet to appreciate that the War on Drugs is necessarily a war on the rights of all of us. It could not be otherwise, for it is directed not against inanimate drugs but against people--those who are suspected of using, dealing in, or otherwise being involved with illegal drugs. Because the drug industry arises from the voluntary transactions of tens of millions of people--all of whom try to keep their actions secret--the aggressive law enforcement schemes that constitute the war must aim at penetrating the private lives of those millions. And because nearly anyone may be a drug user or seller of drugs or an aider and abettor of the drug industry, virtually everyone has become a suspect. All must be observed, checked, screened, tested, and admonished--the guilty and innocent alike.

The tragic irony is that while the War on Drugs has failed completely to halt the influx of cocaine and heroin, both of which are cheaper, purer, and more abundant than ever,^[11] the one success it can claim is in curtailing the liberty and privacy of the American people. In just 10 years, Americans have suffered a marked reduction in their freedoms in ways both obvious and subtle.

Among the grossest of indicators is that the war leads to the arrest of an estimated 1.2 million suspected drug offenders each year, most for simple possession or petty sale.^[12] Because both arrest rates and incarceration rates rose for drug offenders throughout the 1980s, the war has succeeded dramatically in increasing^[13] our full-time prison population. That has doubled since 1982 to more than 800,000,^[14] giving the United States the highest rate of incarceration in the industrialized world.^[15]

For those not behind bars, it is now established that law enforcement officials--now joined by the military forces of the United States--have the power, with few limits, to snoop, sniff, survey, and detain, without warrant or probable cause, in the war against drug trafficking. Property may be seized on slight evidence and forfeited to the state or federal government without proof of the personal guilt of the owner.^[16] Finally, to leverage its power, an increasingly imperial federal government has applied intimidating pressures to shop owners and others in the private sector to help implement federal drug policy.^[17]

Ironically, and tragically, just as the winds of freedom are blowing throughout central and eastern Europe, most Americans and most American politicians say that the solution to "the drug problem" is more repression--and the Bill of Rights be damned. As Peter Rodino, former chairman of the House Judiciary Committee, said in expressing his anger at the excesses of the Anti-Drug Abuse Act of 1986, "We have been fighting the war on drugs, but now it seems to me the attack is on the Constitution of the United States."^[18]

The Crackdown: Executive, Legislative, and Judicial

How did we descend from the world's beacon of liberty to a land where

- on a nationwide television broadcast, the drug czar endorses the idea of beheading drug dealers;^[19]
- the full Senate votes to shoot down suspected drug planes;^[20]
- a congressman offers an "Arctic Penitentiary Act," a bill to create "an American Gulag" of remote prison camps for drug offenders;^[21]
- a man who rapes a teenager, hacks off her hands, and leaves her to die in the desert serves less time in prison than a first-offender mother of two who accepts \$1,000 to carry a kilo of cocaine from one city to another;^[22]
- cocaine gigolos are paid by the government to entice lonely-hearts divorcees into an illegal drug transaction so that they can then be prosecuted;^[23]
- the sheriff of Broward County, Florida, manufactures his own crack cocaine for undercover cops to sell to buyers in order to arrest them;^[24]
- the House of Representatives resolves that the president should deploy the armed forces of the United States to seal off the borders to "substantially halt the influx of drugs" into the United States within 45 days;^[25]
- the U.S. invades a sovereign nation causing the deaths of hundreds of people and causing millions of dollars in property damage, to gain jurisdiction over the head of its government, General Manuel Noriega, for alleged drug trafficking;^[26]
- several million staid civil servants and applicants for the civil service have to urinate into a bottle, sometimes under the close observation of a monitor, so they may be pronounced fit to file papers and answer telephones;^[27]
- we pursue policies that Justice Scalia aptly described as the "immolation of privacy and human dignity in symbolic opposition to drug use."^[28]

A short history of the War on Drugs provides the answer. It shows how all three branches of the federal government have joined in the crackdown on drugs, sacrificing individual freedom in the process.

After the baby boom drug scene (and scare) of the 1960s, American society was well on its way to reaching an accommodation with marijuana. Prodded by the National Commission on Marihuana and Drug Abuse, 10 states and a number of localities had adopted some form of decriminalization of marijuana. Mainstream professional organizations such as the American Medical Association, the American Bar Association, and the American Public Health Association had passed resolutions endorsing some form of decriminalization of marijuana.^[29] The reform movement reached its apogee in 1977 when President Carter endorsed a similar proposal.^[30]

The backlash was not long in coming. The advent of cocaine^[31]--a 1981 Time magazine cover featured a martini glass of white powder, topped by an olive, and captioned "Cocaine: Middle Class High?"--changed public perceptions and had a lot to do with the political shift. In 1982 President Reagan, moved by congressional pressure^[32] and widespread community support,^[33] committed his administration to a "war" on drugs:

The mood towards drugs is changing in this country and the momentum is with us. We are making no excuses for drugs--hard, soft, or otherwise. Drugs are bad and we are going after them.^[34]

The president continued this hard-line rhetoric in a second speech just 12 days later, pledging an "unshakable" commitment "to do what is necessary to end the drug menace" and "to cripple the power of the mob in America."^[35]

There ensued the greatest buildup and mobilization of law enforcement resources in American history. Not only were the obvious law enforcement agencies--the Drug Enforcement Agency, Federal Bureau of Investigation, Coast Guard, and Customs Service, to say nothing of state and local police forces--pressed into greater antidrug service, but a vast number of other agencies were mobilized as well: the Central Intelligence Agency (gathering of drug intelligence declared by presidential order to be a national security matter), the State Department (negotiation of crop destruction initiatives, mutual assistance treaties, and the like), the U.S. Navy (providing aid to Coast Guard interdiction boarding parties), and the National Aeronautics and Space Administration (satellite surveillance of coca and marijuana fields), among others.^[36] All those agencies and more were deployed by the president in what would prove to be a futile effort to stem the influx of drugs into the United States.

Congress, for its part, fell right in step with the drumbeat of war. It repeatedly raised and reraised the drug enforcement budget. Over the decade that budget rose almost tenfold, from about \$1.2 billion in FY 1981 to about \$11.7 billion in FY 1992, and it is still growing.^[37] But Congress did not limit itself merely to voting money. It also showed a breathtaking legislative zeal in passing major antidrug bills in the preelection Octobers of 1984, 1986, and 1988. As Justice William H. Rehnquist had written for the Court in 1981:

The history of the narcotics legislation in this country reveals the determination of Congress to turn the screw of the criminal machinery--detection, prosecution and punishment--tighter and tighter.^[38]

Rehnquist's comment both epitomized the past and foretold the future, for the antidrug packages of the 1980s repealed or diminished many of the protections previously guaranteed to those accused of crime, such as pretrial release on bail,^[39] and significantly expanded the reach of federal investigative power.

Symbolic of the crackdown--because Congress lacks the power to limit Fourth Amendment protections--were literally hundreds of bills aimed at abolishing or limiting the judicially crafted exclusionary rule, which bars the use at trial of evidence seized in violation of the Fourth Amendment. In the same vein, Congress (along with many of the states) actually succeeded in ratcheting penalties for most drug offenses up to levels exceeding those customarily meted out for the most serious crimes of violence: robbery, rape, and noncapital murder.^[40]

When we turn to the federal judiciary--the "least dangerous branch,"^[41] in Alexander Hamilton's immortal phrase, with life tenure and an institutional commitment to decisions based on fact and principle--we find reason overwhelmed by the same antidrug fervor. One federal judge, denouncing drug crimes as "unforgivable," adumbrated the jurisprudence of hostility when he condemned drug dealers as "merchants of misery, destruction and death" whose greed has wrought "hideous evil" and "unimaginable sorrow" upon the nation.^[42]

Nor is this hot rhetoric an aberration. On the contrary, it draws upon a judicial tradition rich in extremism.^[43] One federal court called narcotics "worse than poisons" because they make men and women "moral perverts."^[44] Even the most freethinking judges have succumbed to this easy labelling in place of analysis. Justice William O. Douglas, for example, wrote in a concurring opinion that "to be a confirmed drug addict is to be one of the walking dead . . .,"^[45] and he continued with a parade of horrors having no basis in reality, citing only a legal newspaper by way of authority.^[46]

Almost never do appellate judges rely on the rich scientific literature on the use and abuse of alcohol, tobacco, and other drugs, which would provide a factual basis for decisions. The U.S. Supreme Court has never cited a single one of the classic studies on drugs and drug control.^[47] Instead of reasoned analysis, the courts have tended to rely on superstitious imagery, as in this Fifth Circuit opinion:

Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's

evil image--others who create others still, across our land and down our generations, sparing not even the unborn.^[48]

Driven by such imagery, the court concluded that "[c]ompared to the effect of drug traffic in society, isolated violent crimes may well be considered the lesser of the two evils."^[49] Again, this is not an isolated example. More recently, the Supreme Court reached essentially the same conclusion in *Harmelin v. Michigan*, its mandatory life sentence decision of 1991:

Petitioner's suggestion that his crime was nonviolent and victimless . . . is false to the point of absurdity. . . . [A] rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill.^[50]

The "Drug Exception" to the Bill of Rights

The crackdown mentality has thus permeated every branch of government and every aspect of our criminal justice system--legislation, investigation, prosecution, adjudication, and punishment. It reaches even casual users. It threatens the freedom of everyone. And it forms the basis for the growing "drug exception" to the Bill of Rights.^[51]

Invoking the language of war, federal judges have concluded that there is a need "to combat a national drug problem of epidemic proportion"^[52] and that "the federal government's efforts to contain and beat back the drug scourge . . . depend importantly on convincing all Americans that drug use is as much a danger to them and to our country as is an external enemy."^[53] In short, the government must be able to invoke wartime emergency powers to do whatever is necessary to repel the drug invasion. Thus the courts have rejected virtually every constitutional challenge to drug enforcement laws and practices, no matter how extreme. For example, they have accepted

--the kidnapping of American citizens and foreign nationals from foreign soil to stand trial in American courts, even when such action may violate general principles of international law;^[54]

--the Customs Service's power to conduct rectal examinations of travelers to the United States;^[55] and

--the enactment of a mandatory life sentence without parole for first-time offenders for possession of more than 650 grams [less than two pounds] of cocaine.^[56]

Occasionally, a court will issue a warning about the importance of taking "great pains to ensure that the Constitution does not become the first casualty in the 'War on Drugs.'"^[57] For the most part, however, the courts have sanctioned ever more repressive measures.

It would be a Faustian bargain if this repression succeeded in significantly reducing drug supplies or the violence and corruption engendered by the black market in drugs. But it has not done even that. Throughout the 1980s, cocaine^[58] and heroin^[59] flowed into this country with apparent ease, in record quantities, and at lower prices and higher purity. The sole exception was marijuana, with interdiction of foreign-grown crops leading to a thriving domestic agriculture, thereby making the cannabis plant a leading American cash crop.^[60] And while middle-class drug use fell off sharply in the pre-drug war period,^[61] intensified law enforcement went hand-in-hand with an increase in the numbers of addicted, or hard-core, users of cocaine and heroin.^[62]

The specter of a drug supply out of control was only compounded by the destructive effects of drug money and drug trafficking: the rise of "narcoterrorism" in our major cities, burglaries and robberies committed by addicts in search of the next score or fix; drive-by shootings and warfare between competing drug gangs in the struggle for control of urban turf; and the destruction of families and neighborhoods. All these resulted from the laws of supply and demand: drugs made expensive (and lucrative) by being made illegal.^[63]

The nation's capital came to lead America's cities in the rate of homicides, most of them said to be drug-related. In foreign affairs, drug violence threatened struggling democratic governments in Latin America, as Colombia and Peru^[65] teetered on the edge of drug-financed civil war, thus undermining one of America's major foreign policy goals.^[66] And our own institutions--police, courts, banks, and others--were corrupted by the fabulous lucre of the drug industry.^[67]

Thus, by the close of the decade, after numerous escalations, domestic and foreign, of the War on Drugs, and the expenditure of tens of billions of dollars on that war, the drug problem was widely perceived to be out of control. Politicians exploited public fears; following President Bush's nationally televised address on the drug problem in September 1989, the percentage of poll respondents that ranked drugs as the nation's number one problem tripled.^[68] Most also thought that the curtailment of personal freedoms was justified as a means of solving the problem. A Washington Post poll^[69] showed that 52 percent of respondents agreed that police should be allowed to search the homes of suspected drug dealers without a search warrant, 67 percent were willing to have their cars stopped and searched without a warrant, and 83 percent approved of reporting family members to the police.^[70]

Responding to this atmosphere of crisis, President Bush, who had previously pledged war on cocaine, "the scourge of this Hemisphere,"^[71] declared a further escalation of the general war.^[72] The familiar public policy cycle was thus complete: crackdown, failure, frustration, anger and fear, escalation, failure, and so on, ad infinitum. Wartime images provide powerful motivations for the masses, as George Orwell showed in his classic book, *Nineteen Eighty-Four*. It is thus no accident that politicians have resorted to martial rhetoric to exhort the public to support the perpetual war effort and their endless expansions of power.

Such exhortations are difficult to oppose without appearing "soft" on drugs. Because of that political risk, the "Great Endarkenment" in American political life has come to pass: it is now good politics for public officials, elected and appointed alike, to compete over who is simultaneously tougher on drugs and less respectful of the Bill of Rights. Edward Koch, when mayor of New York, advocated strip searching all travelers from South America and Asia.^[73] Governor Douglas Wilder of Virginia advocated mandatory drug testing of all college students.^[74] Chicago police superintendent LeRoy Martin argued for lifting the constitutional prohibition against random searches of people to help police do a better job.^[75]

Thus, if the Bill of Rights, political tradition,^[76] or other legal protections slow down law enforcement operations, the prevailing attitude is to get rid of those impediments. It was just this spirit that animated Rep. Earl Hutto's (D-Fla.) lament in Congress that "in the war on narcotics, we have met the enemy, and he is the U.S. Code. I have never seen such a maze of laws and hangups. . . ."^[77] That due-process-be-damned attitude came to the fore again in a memorandum from Attorney General Richard Thornburgh directing federal prosecutors to disregard state ethics rules because they impose "a substantial burden on the law enforcement process."^[78] His spokesman, Associate Deputy Attorney General Margaret Love, described the ethical restriction on ex parte prosecutorial contact with a defendant represented by counsel as "a distraction" from the Department of Justice's mission of getting "the bad guys."^[79]

What has become open season on the Constitution probably began in good faith, if not naivete. After all, what could be more reasonable than to think it possible to frighten prospective drug dealers by getting tough, by upping the ante. Turning the screw--increasing the risks of detection, apprehension, and punishment--would, so it seemed, make the drug business less attractive to many "by significantly increasing the risk of conviction and certainty of long prison sentences."^[80]

But incentives and the operation of the law of supply and demand are rather more complex in the case of so-called victimless crimes. Because there are no complainants--indeed, there are only willing parties--the acts and exchanges that are criminalized continue to take place, but at a price that reflects the risks and costs of arrest and punishment. Far from significantly reducing those acts or exchanges, therefore, the criminalization that brings about the higher prices only creates market opportunities for those willing to run the risks.

No realistic level of enforcement can make a difference in the dynamics of this market, as we learned in the era of national prohibition. Yet, despite clear economic principles, buttressed by historical evidence, political leaders in both parties have found it easier to believe or say that the drug business, unlike the alcohol business, would yield to force majeure. What has yielded instead is our liberty and the integrity of our civil institutions.

A Society of Suspects

In the beginning, the War on Drugs focused primarily on drug supplies and drug suppliers, but in time it spread its tentacles into the lives of the citizenry at large. Control at the source was the first thrust of antidrug policy--destruction of coca and marijuana plants in South America, crop substitution programs for the campesinos, and aid to law enforcement agencies in source countries such as Colombia, Peru, Bolivia, and Mexico.

Because this aspect of drug policy had no discernible, lasting success, a second initiative aimed to improve the efficiency of border interdiction of drug shipments that had escaped control at the source. But there too, success was elusive. Record numbers of drug seizures--up to 22 tons of cocaine in a single raid on a Los Angeles warehouse, for example,^[81]--seemed only to mirror a record volume of drug shipments to the United States. By 1991 the amount of cocaine seized by federal authorities had risen to 134 metric tons, with an additional amount estimated at between 263 and 443 tons escaping into the U.S. black market per year.^[82]

As source control and border interdiction proved futile, a third prong of the attack was undertaken: long-term, proactive conspiracy investigations targeted at suspected high-level drug traffickers and their adjuncts in the professional and financial worlds--lawyers, accountants, bankers, currency exchange operators, and the like. This third leg of the policy has involved repeated and systematic attacks by the federal government on the criminal defense bar, raising dark implications for the integrity of our adversarial system of justice. Defense lawyers have been subjected to grand jury subpoenas, on pain of criminal contempt, for the purpose of compelling disclosures about their clients. Informants have been placed in the defense camp to obtain confidential information. In each instance, the effect has been to undermine the protections traditionally afforded by the attorney/client relationship.

One notorious example of tampering with the attorney/client relationship involved prosecutor Scott Turow, author of *Presumed Innocent*.^[83] Turow was criticized by the Court of Appeals for the Eleventh Circuit for "reprehensible" conduct for making a deal with a lawyer named Glass who, to avoid being indicted himself, offered to sell out his drug defendant client. Wearing a recording device, Glass informed on his client over a period of months before finally withdrawing as defense counsel.^[84] Although the court stated that Turow might have committed obstruction of justice and asked the Department of Justice to investigate, he escaped reprimand or prosecution.^[85] And the betrayed client's conviction was upheld on appeal.

Although this case is perhaps the most notorious incident of its kind, it demonstrates the anything-goes-in-the-War-on-Drugs attitude of the Department of Justice, which publicly defended using lawyers as informants as "a perfectly valid" law enforcement tool.^[86]

Invading Privacy

As these expanding law enforcement efforts--directed at source of supply, transportation, and the upper levels of the drug industry--yielded only marginal results, the war was widened to the general populace. In effect, the government opened up a domestic front in the War on Drugs, invading the privacy of people generally through the use of investigative techniques such as urine testing, road blocks, bus boardings, and helicopter overflights. Those are dragnet methods: to catch the guilty, everyone has to be watched and screened.

Drug testing in the workplace. Perhaps the most widespread intrusion on privacy arises from pre- or postemployment drug screening, which is practiced by 80 percent of Fortune 500 companies and 43 percent of companies employing 1,000 people or more,^[87] and is rapidly spreading.^[88] Strictly speaking, drug testing by a private employer does not implicate the Fourth Amendment, which protects only against government action. But much of the private drug testing has come about through government example and government pressure.^[89] The 1988 Anti-Drug Abuse Act,^[90] for

example, prohibits the award of a federal grant or contract to an employer who does not take specified steps to provide a drug-free workplace. As a result of these and other pressures, tens of millions of job applicants and employees are subjected to the indignities of urinating into a bottle, sometimes under the eyes of a monitor watching to ensure that clean urine is not surreptitiously smuggled into the toilet.

In the arena of public employment, where Fourth Amendment protections apply, the courts have largely rejected constitutional challenges to drug testing programs. In two cases to reach the U.S. Supreme Court, the testing programs were substantially upheld despite, as Justice Scalia wrote in dissent in one of the cases, a complete absence of "real evidence of a real problem that will be solved by urine testing of customs service employees."^[91] In that case the Customs Service had implemented a drug testing program to screen all job applicants and employees engaged in drug interdiction activities, carrying firearms, or handling classified material. Noting that "drug abuse is one of the most serious problems confronting our society today,"^[92] Justice Anthony Kennedy concluded that

the government has demonstrated that its compelling interest in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.^[93]

Accordingly, the Court held that the testing of such applicants and employees is "reasonable" even without probable cause or individualized suspicion against any particular person, the Fourth Amendment standard.

For Justice Scalia, however, the testing of Customs Service employees was quite different from the testing of railroad employees involved in train accidents, which had been found constitutional in the companion case.^[94] In the railroad case there was substantial evidence over the course of many years that the use of alcohol had been implicated in causing railroad accidents, including a 1979 study finding that "23 percent of the operating personnel were problem drinkers."^[95]

What is absent in the government's justifications --notably absent, revealingly absent, and as far as I am concerned dispositively absent--is the recitation of even a single instance in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribe-taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.^[96]

Searches and seizures. Other dragnet techniques that invade the privacy of the innocent as well as the guilty have been upheld by the Supreme Court. In the tug-of-war between the government's search and seizure powers and the privacy rights of individuals, for example, the Court throughout the 1980s almost always upheld the government's assertion of power: the power of drug agents to use the airport drug courier profile to stop, detain, and question people without warrant or probable cause;^[97] to subject a traveler's luggage to a sniffing examination by a drug-detector dog without warrant or probable cause;^[98] to search without warrant or probable cause the purse of a public school student;^[99] and to search at will ships in inland waterways.^[100]

The right of privacy in the home was seriously curtailed in decisions permitting police to obtain a search warrant of a home based on an anonymous informant's tip;^[101] to use illegally seized evidence under a "good faith exception" to the exclusionary rule (for searches of a home made pursuant to a defective warrant issued without probable cause);^[102] to make a trespassory search, without a warrant, in "open fields" surrounded by fences and no trespassing signs^[103] and of a barn adjacent to a residence;^[104] to conduct a warrantless search of a motor home occupied as a residence;^[105] to conduct a warrantless search of a home on the consent of an occasional visitor lacking legal authority over the premises;^[106] and to conduct a search without warrant of the foreign residence of a person held for trial in the United States.^[107] The Court also validated warrantless aerial surveillance over private property^[108]--by fixed-wing aircraft at an altitude of 1,000 feet and by helicopter at 400 feet.^[109]

Similarly, the Court significantly enlarged the powers of police to stop, question, and detain drivers of vehicles on the highways on suspicion with less than probable cause^[110] or with no suspicion at all at fixed checkpoints or

roadblocks;^[111] to make warrantless searches of automobiles and closed containers therein;^[112] and to conduct surveillance of suspects by placing transmitters or beepers on vehicles or in containers therein.^[113]

The foregoing list is by no means comprehensive, but it does indicate the sweeping expansions the Court has permitted in the investigative powers of government. More recently, in what has been described as "the most important case of 1991,"^[114] the Court reviewed the constitutionality of the interrogation of a passenger and the "consensual" search of his baggage by armed officers in the close confines of a Greyhound bus.^[115] Raising profound questions about "what kind of a nation we are,"^[116] the case led one observer to note:

If the police are free to enter any bus at any time and ask any person for permission to search, they are also presumably free to station themselves at toll booths on turnpikes or rest areas on interstates and ask anybody about whom they are suspicious for permission to search his or her car. It is unlikely that large numbers of innocent people are going to deny the policeman's "request" . . . [because of their] belief that they will be better off to yield to the policeman than to challenge him.^[117]

Viewing the issue in a similar light, the Florida Supreme Court had ruled that the defendant's Fourth Amendment rights had been violated:

The evidence in this case has evoked images of other days under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the government. The specter of American citizens being asked, by badge-wielding police, for identification, travel papers . . . is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa.^[118]

Yet, when reviewed by the U.S. Supreme Court, this intrusive exercise of police power was upheld, like almost every other search and seizure case reviewed by the Court during the War on Drugs.

Indeed, from 1982 through the end of the 1991 term, the Supreme Court upheld government search and seizure authority in approximately 90 percent of the cases. The message is unmistakable: the Fourth Amendment prohibits only "unreasonable" searches and seizures, and what is reasonable in the milieu of a War on Drugs is construed very broadly in favor of local police and federal drug agents.

Surveillance of U.S. mail. Another casualty of the War on Drugs is the privacy of the mail. With the Anti-Drug Abuse Act of 1988, the U.S. Postal Service was given broad law enforcement authority. Using a profile, investigators identify what they deem to be suspicious packages and place them before drug-sniffing dogs. A dog alert is deemed probable cause to apply for a federal search warrant. If an opened package does not contain drugs, it is resealed and sent to its destination with a copy of the search warrant. Using this technique, the Postal Service since January 1990 arrested 2,330 persons for sending drugs through the mail.^[119] The number of innocent packages opened has not been reported.

Wiretapping. As a result of the War on Drugs, Americans are increasingly being overheard. Although human monitors are supposed to minimize the interception of calls unrelated to the purpose of their investigation by listening only long enough to determine the relevance of the conversation, wiretaps open all conversations on the wiretapped line to scrutiny. In the early 1980s court-authorized wiretaps rose 60 percent, primarily in cases of suspected drug trafficking.^[120]

All of the 872 wiretap applications submitted to federal and state judges in 1990 were approved, representing a 14 percent increase in wiretaps over 1989. The proportion of them aimed at drug offenders rose significantly--from 50 percent in 1989 to 60 percent in 1990. Most of the intercepts--39 percent--were for single-family homes, 17 percent for apartments, and 18 percent for businesses. Of 2,057 people arrested as a direct result of electronic surveillance in 1990, 420 were convicted.^[121] Some of the remaining cases are still pending.

Court-authorized wiretaps are doubtless necessary in some criminal cases. In drug cases, however, they are made necessary because the "crimes" arise from voluntary transactions, in which there are no complainants to assist detection. The potential is great, therefore, for abuse and for illegal overuse. The full extent of illegal wiretapping by law enforcement officials can never be fully known, of course. However, one example came to light in the report that "Connecticut State Police have for 15 years been recording virtually all telephone calls to and from police barracks . . . including attorney client conversations, without judicial authorization. . . ." [\[122\]](#) Even if the number of such wiretaps is not large, the practice is a serious invasion of privacy.

Stopping cars on public highways. It is commonplace for police patrols to stop "suspicious" vehicles on the highway in the hope that interrogation of the driver or passengers will turn up enough to bootstrap the initial detention into a full-blown search. Because the required "articulable suspicion" [\[123\]](#) can rarely be achieved by observation on the road, police often rely on a minor traffic violation--a burned-out tag light, a tire touching the white line--to supply a pretext for the initial stop. [\[124\]](#) In the Alice-in-Wonderland world of roving drug patrols, however, even lawful behavior can be used to justify a stop. The Florida Highway Patrol Drug Courier Profile, for example, cautioned troopers to be suspicious of "scrupulous obedience to traffic laws." [\[125\]](#)

Another tactic sometimes used is the roadblock. Police set up a barrier, stop every vehicle at a given location, and check each driver's license and registration. While one officer checks the paperwork, another walks around the car with a trained drug-detector dog. One journalist reported that

under the watchful eyes of government attorneys, nearly 1,500 vehicles stopped last month by the Florida Highway Patrol for safety inspections were also checked for hidden contraband by drug-sniffing police dogs. . . . One drug arrest was made. Lady Luck and Citizen Band radios were suggested as possible causes for the lack of more arrests. [\[126\]](#)

The law does not regard the dog's sniffing as the equivalent of a search on the theory that there is no legitimate expectation of privacy in the odor of contraband, an exterior olfactory clue in the public domain. As a result, no right of privacy is invaded by the sniff, so the police do not need a search warrant or even "probable cause" to use the dog on a citizen. If the dog "alerts," moreover, that supplies the "cause" requirement for further investigation of the driver or vehicle for drugs.

Monitoring and stigmatizing. In the world of antidrug investigations, a large role is played by rumors, tips, and suspicions. The Drug Enforcement Administration keeps computer files on more than 1.5 million persons, including U.S. congressmen, entertainers, clergymen, industry leaders, and foreign dignitaries. Many persons named in the computerized index system, known as NADDIS (Narcotics and Dangerous Drug Information System), are the subject of "unsubstantiated allegations of illegal activity." Of the 1.5 million persons whose names have been added to NADDIS since 1974, less than 5 percent, or 7,500, are under investigation by DEA as suspected narcotic traffickers. Nevertheless, NADDIS maintains data from all such informants, surveillance, and intelligence reports compiled by DEA and other agencies. [\[127\]](#)

The information on NADDIS is available to federal drug enforcement officials in other agencies, such as the Federal Bureau of Investigation, the Customs Service, and the Internal Revenue Service. State law enforcement officials can probably also gain access on request. Obviously, this method of oversight has troubling implications for one's personal interest in privacy and good reputation, especially for the 95 percent named who are not under active investigation.

Another creative enforcement tactic sought to bring about public embarrassment by publishing a list of people caught bringing small amounts of drugs into the United States. The punish-by-publishing list, or "drug blotter," was supplied to news organizations. It included only smallscale smugglers who were neither arrested nor prosecuted for their alleged crimes. [\[128\]](#)

Military surveillance. Further surveillance of the citizenry comes from the increasing militarization of drug law enforcement. The process began in 1981, when Congress relaxed the Civil War era restrictions of the Posse Comitatus Act on the use of the armed forces as a police agency. [\[129\]](#) The military "support" role for the Coast Guard, Customs

Service, and other antidrug agencies created by the 1981 amendments expanded throughout the 1980s^[130] to the point that the U.S. Navy was using large military vessels--including, in one case, a nuclear-powered aircraft carrier--to interdict suspected drug smuggling ships on the high seas.

By 1989 Congress designated the Department of Defense as the "single lead agency of the federal government for the detection and monitoring of aerial and maritime smuggling into the United States."^[131] DOD employs its vast radar network in an attempt to identify drug smugglers among the 300 million people who enter the United States each year in 94 million vehicles and 600,000 aircraft. Joint task forces of military and civilian personnel were established and equipped with high-tech computer systems that provide instantaneous communication among all federal agencies tracking or apprehending drug traffickers.^[132]

While most of the military effort is directed at coastal "defense" and foreign operations,^[133] some 3,000 National Guard troops are currently engaged in some aspect of domestic counter drug activity.^[134] The National Guard conducted a total of 5,815 domestic marijuana eradication missions in all 54 states and territories in FY 1991.^[135]

The enlarged antidrug mission of the military forces of the United States sets a dangerous precedent. The whole point of the Posse Comitatus Act was to make clear that military forces and police forces are very different institutions with different roles to play. The purpose of the military is to prevent or defend against attack by a foreign power and to wage war where necessary. The Constitution makes the president commander-in-chief, thus centralizing control of all the military forces in one person. Police forces, by contrast, are intended to enforce the law, primarily against domestic threats, and primarily at the city, county, and state levels; they are thus subject to local control by the tens of thousands of communities throughout the nation.

To the extent that the drug enforcement role of the armed forces is expanded, there is a direct increase in the concentration of political power in the president who commands them and in the Congress that authorizes and funds their police activities. This arrangement is a severe injury to the federal structure of our democratic institutions. Indeed, the deployment of national military forces as domestic police embarrasses the United States in the international arena by likening us to a Third World country, whose soldiers stand guard in city streets, rifles at the ready, for ordinary security purposes. The United States demeans itself by following their example. Ted Galen Carpenter notes that

one of [America's] greatest strengths is that the military is responsive to civilian authority and that we do not allow the Army, Navy, and the Marines and the Air Force to be a police force. History is replete with countries that allowed that to happen. Disaster is the result.^[136]

Finally, the dual military/policing role is also a danger to the liberties of all citizens. A likely military approach to the drug problem would be to set up roadblocks, checkpoints, roving patrols on the highways, railroads and coastal waters, and to carry out search and destroy missions of domestic drug agriculture or laboratory production. What could be more destructive to the people's sense of personal privacy and mobility than to see such deployments by Big Brother?

Increasing Retribution

These are some of the many ways that the War on Drugs has cut deeply--and threatens to cut deeper still--into our privacy, eroding what Justice Louis D. Brandeis described as "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men."^[137] Working hand-in-hand with the political branches, the courts have diminished constitutional restraints on the exercise of law enforcement power. In addition to expanded powers of surveillance, investigation, and prosecution, punishment has been loosed with a vengeance, against enemy and bystander alike.

Excessive punishments: Excessive and mandatory prison terms. Punishments have become draconian in part because of permission conferred by Justice Rehnquist's circular dictum: "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."^[138] The statutory penalties have become so extreme, especially since the 1987 enactment of the Uniform

Sentencing Guidelines,^[139] that many federal judges, required by law to impose them on real human beings, have begun to recoil. U.S. district court Judge J. Lawrence Irving of San Diego, a Reagan appointee, announced his resignation in protest over the excessive mandatory penalties he was required to mete out to low-level offenders, most of them poor young minorities. Complaining of "unconscionable" sentences, the judge said that "Congress has dehumanized the sentencing process. I can't in good conscience sit on the bench and mete out sentences that are unfair."^[140]

In another case, U.S. district court Judge William W. Schwarzer cried as he sentenced a first offender to 10 years in prison for his role in driving an acquaintance to a crack deal involving over 100 grams. The judge called the sentence "a grave miscarriage of justice" and criticized the laws that "make judges clerks, or . . . computers automatically imposing sentences without regard to what is just and right."^[141]

Judge Harold Greene of the District of Columbia went so far as to refuse to impose the minimum guideline sentence of 17.5 years on a defendant convicted of the street sale of a single Dilaudid tablet, pointing to the "enormous disparity" between the crime and the penalty. In the judge's view, the minimum was "cruel and unusual" and "barbaric."^[142] Fourth circuit Judge William W. Wilkins objected to mandatory penalties because "they do not permit consideration of an offender's possibly limited peripheral role in the offense."^[143] Agreeing with that thinking, the judicial conferences of the District of Columbia, Second, Third, Seventh, Eighth, Ninth, and Tenth circuits have adopted resolutions opposing mandatory minimums.^[144]

Excessive punishments: Punishing drug users without trial. As drug control policymakers came to realize that drug dealers were, in an economic sense, merely entrepreneurs responding to market opportunities, they learned that attacks on dealers and their supplies could never succeed as long as there was demand for the products. Thus, they would have to focus on consumers as well as on suppliers. President Reagan's 1986 Executive Order encouraging or requiring widespread urine testing marked a step in that direction. By 1988 administration policy was being conducted under the rubric of "zero tolerance." In that spirit, Attorney General Edwin Meese sent a memorandum to all U.S. Attorneys on March 30, 1988, encouraging the selective prosecution of "middle and upper class users" in order to "send the message that there is no such thing as 'recreational' drug use. . . ."^[145]

Because of the volume of more serious trafficking cases, however, it was not remotely realistic, as the Attorney General must have known, to implement such a policy. Indeed, in the offices of many U.S. Attorneys, there were minimum weight or money-volume standards for prosecution, and the possession and small-sale drug cases were routinely shunted off to state authorities. In fact, in many districts the crush of drug cases, which rose from 3,130 in 1980 to 12,592 in 1990,^[146] was so great that the adjudication of ordinary civil cases had virtually ceased. The courthouse doors were all but closed to civil litigants.^[147]

In the name of zero tolerance, however, Congress purposely began enacting legislation that did not have to meet the constitutional standard of proof beyond a reasonable doubt in criminal proceedings. In 1988 Congress enacted a system of "civil" fines of up to \$10,000, imposed administratively under the authority of the attorney general,^[148] without the necessity of a trial, although the individual may request an administrative hearing.^[149] To soften the blow to due process, judicial review of an adverse administrative finding is permitted, but the individual bears the burden of retaining counsel and paying court filing fees.^[150] For those unable to finance a court challenge, this system will amount to punishment without trial.

Punishment without trial is a new and rather imaginative use of the law. It has been augmented by a provision in the Anti-Drug Abuse Act of 1988 that may suspend for one year an offender's federal benefits, contracts, grants, student loans, mortgage guarantees, and licenses upon conviction for a first offense of possession.^[151]

Both sanctions are a form of legal piling on. The legislative intent is to punish the minor offender more severely than is authorized by the criminal law alone. Thus, the maximum penalty under federal criminal law for a first offense of simple possession of a controlled substance is one year in prison and a \$5,000 fine, with a minimum fine of^[152]

\$1,000. Fines up to \$10,000 plus loss of federal benefits quite obviously exceed what Congress thought was fit and proper punishment for the underlying offense itself.

The most recent innovation of this kind is a form of greenmail, a law that cuts off highway funds to states that do not suspend the driver's licenses of those convicted of possession of illegal drugs.^[153] The potential loss of work for those so punished and the adverse consequences on their families are not considered. The suspension is mandatory.

Excessive punishments: Punishing the innocent. The War on Drugs not only punishes drug users, it also penalizes those who are innocent and those who are on the periphery of wrongdoing. The most notable example is the widespread and accelerating practice, federal and state, of seizing and forfeiting cars, planes, boats, houses, money, or property of any other kind carrying even minute amounts of illegal drugs, used to facilitate a transaction in drugs, or representing the proceeds of drugs. Forfeiture is authorized, and enforced, without regard to the personal guilt of the owner. It matters not whether a person is tried and acquitted; the owner need not even be arrested. The property is nonetheless forfeitable because of a centuries-old legal fiction that says the property itself is "guilty."^[154]

Relying on that legal fiction, the federal government in March 1988 initiated highly publicized zero tolerance seizures of property. Such seizures included the following:

--On April 30, 1988, the Coast Guard boarded and seized the motor yacht *Ark Royal*, valued at \$2.5 million, because 10 marijuana seeds and two stems were found on board. Public criticism prompted a return of the boat, but not before payment of \$1,600 in fines and fees by the owner;^[155]

--The 52-foot *Mindy* was impounded for a week because cocaine dust in a rolled up dollar bill was found on board;^[156]

--The \$80 million oceanographic research vessel *Atlantis II* was seized in San Diego when the Coast Guard found 0.01 ounce of marijuana in a crewman's shaving kit. The vessel was eventually returned;^[157]

--A Michigan couple returning from a Canadian vacation lost a 1987 Mercury Cougar when customs agents found two marijuana cigarettes in one of their pockets. No criminal charges were filed, but the car was kept by the government;^[158]

--In Key West, Florida, David Phelps, a shrimp fisherman, lost his 73-foot shrimper to the Coast Guard, which found three grams of cannabis seeds and stems on board. Under the law, the boat was forfeitable whether or not Phelps had any responsibility for the drugs.^[159]

Not surprisingly, cases like the foregoing generated a public backlash--perhaps the only significant backlash since the War on Drugs was declared in 1982. That backlash pressured Congress into creating what is known as the "innocent owner defense" to such in rem forfeitures.^[160] But even that gesture of reasonableness is largely illusory.

First, the defense does not redress the gross imbalance between the value of property forfeited and the personal culpability of the owner. For example, a Vermont man was found guilty of growing six marijuana plants, for which he received a suspended sentence; but he and his family lost their 49-acre farm.^[161] Similarly, a New York man forfeited his \$145,000 condominium because he sold cocaine to an informant for the total sum of \$250.^[162] The law provides no limit to the value of property subject to forfeiture, even for very minor drug offenses.

Second, the innocent owner defense places the burden on the property claimant to demonstrate that he acted or failed to act without "knowledge, consent or willful blindness" of the drug activities of the offender.^[163] Thus, the federal government instituted forfeiture proceedings in the Delray Beach, Florida, area against "numerous properties" containing convenience stores or other businesses where drug transactions took place; the government claimed that the owners "made insufficient efforts to prevent drug dealings."^[164]

Placing the burden on the claimant imposes expense and inconvenience because the claimant must hire a lawyer to mount a challenge to the seizure. Moreover, many cases involve the family house or car, and it is often difficult to prove that one family member had no knowledge of or did not consent to the illegal activities of another. For example, a Florida court recently held that a claimant did not use reasonable care to prevent her husband from using her automobile in criminal activity and thus she was not entitled to the innocent owner defense.^[165] Thus, innocent people are not immune to this form of punishment.

Excessive punishments: Punishing families and children. A particularly cruel application of this kind of vicarious responsibility for the wrongs of another is seen in the government's policy of evicting impoverished families from public housing because of the drug activities of one unruly child.^[166] The Anti-Drug Abuse Act of 1988 specifically states that a tenant's lease is a forfeitable property interest and that public housing agencies have the authority to hire investigators to determine whether drug laws are being broken. The act authorizes eviction if a tenant, a member of his household, a guest, or other person under his control is engaged in drug-related activity on or near public housing premises.^[167]

To carry out these provisions, the act funded a pilot enforcement program. And in 1990 the Departments of Justice and Housing and Urban Development announced a Public Housing Asset Forfeiture Demonstration Project in 23 states.^[168] The project pursued lease forfeitures and generated quite a bit of publicity.

In passing this law, it must have been obvious to Congress that many innocent family members would suffer along with the guilty. Perhaps it was thought decent nonetheless, as a way of protecting other families from drugs in public housing projects. As experience proves, however, even evicted dealers continue to deal in and around the projects. It is hard to take public housing lease forfeitures seriously, therefore, other than as a symbolic statement of the government's tough stand against illegal drugs.

The symbolic value of such evictions should be weighed against the destruction of family units: eviction often means that the parent(s) will lose custody of small children because they are thereby made homeless. Without provision for shelter, child protection services will often be compelled to declare the children dependent and place them in a state or foster home in the "best interests" of the children. These effects are unnoticed or ignored by lawmakers.

Destructive consequences: Damage to public health. A policy that destroys families, takes property from the innocent, makes suspects of us all, and, more generally, tramples the basic criminal law principles of personal responsibility, proportionality, and fairness is not easily contained. It has spillover effects into other public policy domains.

One area in which the fanaticism of the drug warriors is perhaps most evident is public health. Drugs such as marijuana and heroin have well-known medical uses. Yet, so zealous are the antidrug forces that even these therapeutic uses have been effectively banned.

Marijuana, for example, has many applications as a safe and effective therapeutic agent.^[169] Among them are relief of the intraocular pressure caused by glaucoma and relief of the nausea caused by chemotherapy.^[170] Some AIDS patients have also obtained relief from using cannabis.^[171]

But marijuana is classified, politically, by the attorney general of the United States, not the surgeon general, as a Schedule I drug--one having a high potential for abuse, no currently accepted medical use, and lack of accepted safety for use. It is thereby deemed beyond the scope of legitimate medical practice and is thus not generally available to medical practitioners. However, a Harvard University survey found that almost half of 1,035 oncologists said they would prescribe marijuana if it were legal.^[172]

The only exception was an extremely limited program of compassionate treatment of the terminally or seriously ill. But even that program has been eliminated for political reasons. Assistant Secretary James O. Mason of the Department of Health and Human Services announced in 1991 that the Public Health Service's provision of marijuana to patients seriously ill with AIDS would be discontinued because it would create a public perception that "this stuff can't be so bad."^[173] After a review caused by protests from AIDS activists, the Public Health Service decided in

March 1992 to stop supplying marijuana to any patients save the 13 then receiving it.^[174]

There are also beneficial uses for heroin. Terminal cancer patients suffering from intractable pain generally obtain quicker analgesic relief from heroin than from morphine. Many doctors believe that heroin should be an option in the pharmacopeia. Accordingly, in 1981 the American Medical Association House of Delegates adopted a resolution stating that "the management of pain relief in terminal cancer patients should be a medical decision and should take priority over concerns about drug dependence."^[175] Various bills to accomplish that goal were introduced in the 96th, 97th, and 98th Congresses. The Compassionate Pain Relief Act was brought to the House floor for a vote on September 19, 1984, but was defeated by 355 to 55. Although there were some concerns voiced about thefts from hospital pharmacies, the overwhelming concern was political and symbolic--a heroin legalization bill could not be passed in an election year and would, in any event, send the public the "wrong message."^[176]

The final and perhaps most outrageous example in this catalog of wrongs against public health is the nearly universal American refusal to permit established addicts to exchange used needles for sterile ones in order to prevent AIDS transmission from intravenous drug users to other drug users. Needle exchange is prohibited by law in most jurisdictions. In 1991, however, the National Commission on AIDS recommended the removal of legal barriers to the purchase and possession of intravenous drug injection equipment. The commission found that 32 percent of all adult and adolescent AIDS cases were related to intravenous drug use and that 70 percent of mother-to-child AIDS infections resulted from intravenous drug use by the mother or her sexual partner. Moreover, the commission found no evidence that denial of access to sterile needles reduced drug abuse but concluded that it did encourage the sharing of contaminated needles and the spread of the AIDS virus.^[177] Notwithstanding the commission's criticism of the government's "myopic criminal justice approach" to the drug problem, the prevailing view is that needle exchange programs encourage drug abuse by sending the wrong message.

Destructive consequences: Loss of public safety. Public safety is sacrificed when nationwide over 18,000 local, sheriff's, and state police officers, in addition to thousands of federal agents, are devoted full time to special drug units.^[178] As a result, countless hours and dollars are diverted from detecting and preventing more serious violent crimes. Thirty percent of an estimated 1.1 million drug-related arrests made during 1990 were marijuana offenses.^[179] Of that 30 percent, nearly four out of five marijuana arrests were for mere possession.^[180] Tax dollars would be better spent if the resources it took to make approximately 264,000 arrests for possession of marijuana were dedicated to protecting the general public from violent crime.

The intensive pursuit of drug offenders has generated an enormous population of convicts who are held in prison for very long periods of time as a result of excessive and/or mandatory prison terms. It is widely estimated that the operating cost [without amortizing the capital outlay] of maintaining a prisoner ranges from \$20,000 to \$40,000 per year, depending upon the location and level of security at a particular prison. With over 800,000 men and women in American prisons today,^[181] the nationwide cost approaches \$30 billion per year.^[182] This is a major diversion of scarce resources.

But these financial burdens are only part of the costs incurred as a result of the relentless drive to achieve higher and higher body counts. More frightening and more damaging are the injuries and losses caused by the early release of violent criminals owing to prison overcrowding. Commonly, court orders impose population caps on prisons, so prison authorities accelerate release of violent felons serving nonmandatory prison terms in order to free up beds for nonviolent drug offenders serving mandatory, nonparoleable terms.

This crowding-out effect is well documented.^[183] To stay abreast of its rapidly growing prison population, for example, Florida launched one of the nation's most ambitious early release programs. But prisoners serving mandatory terms--most of them drug offenders, who now comprise 36 percent of the total prison population--are ineligible. As a result, the average length of sentence declined dramatically for violent offenders while it rose for drug offenders.^[184] In concrete terms, murderers, robbers, and rapists often serve less real time than a "cocaine mule" carrying a kilo on a bus from, say, Miami to Baltimore, who gets a mandatory 15-year term and serves about 8 years.

What follows from this? Recidivism, of course. A Department of Justice survey showed that 43 percent of state felons on probation were rearrested for a felony within three years of sentencing;^[185] parolees are, presumably, no better. In short, violent criminals are released early to commit more crimes of violence so that their beds can be occupied by nonviolent drug criminals, who are often first offenders. Civil libertarians are not often heard defending a societal right to be secure from violent criminals, much less a right of victims to see just punishment meted out to offenders. In this they are as shortsighted as their law-and-order counterparts. The War on Drugs is a public safety disaster, making victims of us all.

Squelching Religious and Expressive Freedoms

Religious liberty. For centuries, the Klamath Indians, a tribe living on the West Coast of the United States, have used peyote in their religious ceremonies, much as Roman Catholics use wine in theirs. But peyote is a controlled substance under federal law. A 66-year-old Klamath Indian, one Alfred Smith, was ordered by his employer not to participate in an upcoming weekend Native American Church ceremony because it included the ingestion of peyote. After participating in the ceremony, Smith informed his employer that he had indeed ingested the peyote. Smith was discharged that same day after refusing to enter an employee assistance program, saying that there was nothing wrong with him. After he was fired for failing to be drug-free, Oregon denied him unemployment compensation. Smith challenged the denial of unemployment benefits, and the Oregon Supreme Court ruled in his favor, declaring his religious practice ultimately to be protected by the free exercise clause of the First Amendment.^[186] The U.S. Supreme Court, restricting precedents favorable to Smith,^[187] reversed and upheld the denial of benefits.^[188]

Freedom of expression. A direct attack on critics of the War on Drugs is illustrated by a federal investigation of *High Times*, a monthly magazine devoted to legalization of marijuana and ridicule of the drug war.^[189] The magazine has been banned in Canada. But in the United States, where such overt suppression is presumably barred by the First Amendment,^[190] more oblique methods may achieve the same goal. As part of the investigation, federal agents subpoenaed the names, addresses, and phone numbers of every past and current employee. *High Times* advertisers, especially those who sell horticultural equipment that may also be used to cultivate marijuana, were raided in October 1989, pursuant to search warrant, and their business records were confiscated.^[191] The magazine's advertising revenues dropped substantially.

This type of attack has not been limited to *High Times*. Customers of horticultural mail order houses have also been brought under scrutiny.^[192] In one case, a man who grew orchids with equipment he had bought from a horticultural advertiser suffered a warrantless search of his home.^[193] Newspapers report that "federal drug agents are demanding that garden suppliers across the country turn over lists of their best customers."^[194]

Another example of the chilling effect of the War on Drugs is provided by the case of Judge Robert Sweet of the Southern District of New York, who was the first federal judge in the nation to reveal his opposition not just to harsh penalties but to the war itself.^[195] In thoughtful, well-reasoned speeches, Judge Sweet advocated the legalization of drugs in conjunction with a number of other important social reforms. For this advocacy, he was the victim of a judicial ethics complaint filed by the Washington Legal Foundation.^[196] Although he was not required to answer and the complaint was ultimately dismissed,^[197] press coverage of the complaint may lead other potential reformers without life tenure to remain silent, especially when career advancement is taken into account. The war's chilling effect on actual and potential reformers is thus very real.

Conclusion

However uncomfortable it may be to admit, the undeniable reality is that drugs always have been and always will be a presence in society. Although we should do what we can to prevent and minimize the harmful consequences of substance abuse, no friend of freedom can ignore the connection between choice about drug use and personal autonomy and privacy.^[198] Americans have been paying too high a price for the government's War on Drugs. As one federal judge has said, "It behooves us to think that it may profit us very little to win the war on drugs if in the process
^[199]

we lose our soul."

Notes

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[1] Milton Friedman, "Open Letter to Bill Bennett," *The Wall Street Journal*, September 7, 1989, p. 14.

[2] Ronald Reagan, "President's Radio Address to the Nation," (October 2, 1982), *Weekly Compilation of Presidential Documents*, vol. 18, p. 1249. Reagan's War on Drugs is the most recent in a long line of wars on drugs. The original war was fought by U.S. Treasury agents in the decade following passage of the Harrison Narcotics Act of 1914, which brought cocaine and opiates under federal control for the first time. Edward Epstein, *Agency of Fear* (New York: G. P. Putnam's Sons, 1977), p. 103.

A second war was organized around the Marihuana Tax Act of 1937, which Federal Bureau of Narcotics Commissioner Harry Anslinger told Congress was necessary to stop the "marihuana menace" exemplified by teenage gangs who became violent and murderous after smoking marijuana. *Ibid.*, p. 33.

A third drug war was officially declared by President Richard Nixon. In a message to Congress, he portrayed drug abuse as a "national emergency," branding it "public enemy number one," and calling for a "total offensive." *Ibid.*, p. 178.

[3] "We need, fully and completely, to marshal the nation's energy and intelligence in a true all-out war against drugs." Quoted in "Excerpts from News Session by Bush, Watkins and Bennett," *New York Times*, January 13, 1989, p. D16 (Statement by President Bush).

[4] "It is the declared policy of the United States Government to create a Drug-Free America by 1995." 21 U.S.C. sec. 1502(b) (1988).

[5] *National Treasury Employees v. Von Raab*, 489 U.S. 656, 683 (1989)(Scalia, J., dissenting).

[6] *California v. Acevedo*, 111 S. Ct. 1982, 2002 (1991)(Stevens, J., dissenting).

[7] *Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

[8] *United States v. Solivan*, 937 F.2d 1146, 1153 (9th Cir. 1991).

[9] *Cresswell v. Florida*, 564 So. 2d 480, 484-85 (Fla. 1990) (Kogan, J., dissenting).

[10] Ira Mickenberg, "Criminal Rulings Granted the State Broad New Power," *National Law Journal* 13, no. 50 (August 19, 1991): 510. The summary also noted:

In the span of nine months, the court has authorized police to chase down citizens whom they have no reason to believe have committed a crime, permitted random interrogation and requests to search people who use public transportation, and specifically allowed state legislatures to establish harsh sentencing schemes that are grossly disproportionate to the crimes to which they are applied.

Ibid., p. 14.

[11] According to the National Narcotics Intelligence Consumers Committee annual report for 1991, cocaine and heroin are readily available in U.S. cities. "Use of Heroin and Cocaine Increased, Says Intelligence Report," *Drug Enforcement Report* (New York: Pace Publications, August 10, 1992), p. 4. See also notes [58](#) and [59](#) below.

[12] John Powell and Ellen Hershenov, "Hostage to the Drug War: The National Purse, The Constitution and the Black Community," *University of California at Davis Law Review* 24 (1991): 557. About one-third of those arrests in 1989

were for marijuana offenses, and 80 percent of those (320,000) were for simple possession.

[13] According to the Bureau of Justice Statistics' National Judicial Reporting Program, of an estimated 667,366 persons convicted of a felony in state courts in 1988, 111,950 persons (17 percent) were convicted of drug trafficking. This figure is approximately 50 percent greater than the number convicted in 1986, the year the survey had last been conducted. And 17 percent of all convictions in 1988 were for felony drug possession. Drugs and Crime Data Center and Clearinghouse, *Drugs and Crime Data* (November 1991), p. 2.

At the state level, for example, Florida experienced a dramatic rise in the total number of drug incarcerations, from 2,013 in FY 1985 to 16,160 in FY 1990. This equals 36.3 percent of the total number of persons incarcerated for felonies. Robyn Blumner, "Drug Czar Appointment Promises More of the Same," *The Drug Policy Letter* (Washington: Drug Policy Foundation, January/February 1991), p. 4.

[14] Ted Gest, "The Prison Boom Bust," *U.S. News & World Report*, May 4, 1992, p. 28.

[15] The Sentencing Project, "Americans Behind Bars," reported in *BNA Criminal Practice Manual*, vol. 5 (January 23, 1991), p. 28.

[16] H. Jane Lehman, "Expanded War on Drugs May Threaten Landlords," *Washington Post*, November 17, 1990, p. E1; Michael Isikoff, "Drug Raids Net Much Valuable Property--and Legal Uproar," *Washington Post*, April 1, 1991, p. A1.

[17] Keith Harrison, "Push Comes to Shove: Store Told to Report Drugs or Face Closing," *Washington Post*, March 23, 1991, p. C3.

[18] Quoted in Edward Walsh, "House Votes Antidrug Legislation," *Washington Post*, September 12, 1986, p. A1.

[19] "The Larry King Show," June 15, 1989 (Cable News Network broadcast), quoted in "Crackmire," *The New Republic*, September 11, 1989, p. 7.

[20] "Senate Votes Permission to Shoot Down Drug Planes," (LEXIS, NEXIS Library, United Press International file), August 1, 1989.

[21] H.R. 7112. *Congressional Record*, 97th Cong., 2d sess., 1982, 128: 7088.

[22] Larry Singleton had raped a teenager, hacked off her arms between wrist and elbow, and left her for dead in the desert. He was convicted and given the maximum sentence of 14 years. *People v. Singleton*, 169 Cal. Rptr. 333 (Cal. App. 3rd, 1980). He served 8 years.

Compare the 10-year mandatory term meted out to a 26-year-old mother and sole supporter of two small children for carrying a kilo of cocaine on an Amtrak train from Los Angeles to Kansas City for \$1,000. *News Briefs* (Washington: National Drug Strategy Network, July 1991), p. 6.

[23] Cocaine gigolos can be of either sex. An example involves a woman who set up at least 40 men in South Florida. Her tactics included seducing an intended defendant and establishing a sexual relationship. After a few weeks of gentle pressure, she would arrange a drug deal between her reluctant boyfriend and drug enforcement agents. The boyfriend would be busted, and the woman would get paid. Magistrate Peter Nimkoff recorded his disapproval by recommending dismissal of cocaine charges against a defendant victimized by this technique. *United States v. Eugenio Llamera*, No. 84-167-Cr (S.D. Fla. 1984). See also *Acosta v. State*, 477 So. 2d 9 (Fla. 3d Dist. Ct. App. 1985).

[24] Larry Keller, "Sheriff's Office Makes Own Crack for Drug Stings," *Fort Lauderdale News & Sun Sentinel*, April 18, 1989, p. A1. In *Kelly v. Florida*, 593 So. 2d 1060 (Fla. Dist. Ct. App. 1992), the court held the manufacture of crack cocaine for police sting operations to be illegal.

[25] H.R. 5484. *Congressional Record*. 99th Cong., 2d sess., 1986, 132: 459.

- [26] Warren Richey, "U.S. Plotted Invasion, Group Says," *Fort Lauderdale News & Sun Sentinel*, April 3, 1990, p. A3.
- [27] The House Civil Service Subcommittee reported that about 0.5 percent of 24,559 applicants and 28,872 employees tested positive for drugs, mostly cannabis, in the period between March 1988 and March 1990. Sharon LaFraniere, "Court Upholds Drug Testing of Justice Department Applicants," *Washington Post*, March 30, 1991, p. A5.
- [28] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989)(Scalia, J., dissenting).
- [29] Steven Wisotsky, "Not Thinking Like a Lawyer: The Case of Drugs in the Courts," *Notre Dame Journal of Law, Ethics & Public Policy* 5 (1991): 671.
- [30] Joseph Treater, "20 Years of War on Drugs, and No Victory," *New York Times*, June 14, 1992, sec. 4, p. 7.
- [31] Cocaine use peaked in 1982 and stayed on a plateau through 1985 before turning sharply downward. National Institute of Drug Abuse (NIDA), National Household Survey, 1990. See note [61](#) below.
- [32] The House Select Committee on Narcotics Abuse and Control had urged the president to declare war on drugs, H. Rept. No. 418, 97th Cong., 2d sess., 1982, pts. 1 and 2, p. 50. Twenty-eight Senators had banded together in the Drug Enforcement Caucus to "establish drug enforcement as a Senate priority." Charter of Senate Drug Enforcement Caucus, 1982.
- [33] Approximately 3,000 parents groups had organized across the nation under the aegis of the National Federation of Parents for Drug Free Youth. Laurence Gonzalez, "The War on Drugs: A Special Report," *Playboy*, April 1982, p. 134. Pamphlets of Informed Parents of Dade put the number of such groups at nearly 6,000 in the 1985-86 period.
- [34] See note [2](#) above.
- [35] "President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime," (October 14, 1982), *Weekly Compilation of Presidential Documents*, vol. 18, pp. 1311, 1313-14. The president called for (and got): (1) more personnel--1,020 law enforcement agents for the Drug Enforcement Agency, Federal Bureau of Investigation, and other agencies, 200 assistant U.S. attorneys, and 340 clerical staff; (2) more aggressive law enforcement--creating 12 regional prosecutorial task forces across the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises;" (3) more money--\$127.5 million in additional funding and a substantial reallocation of the existing \$702.8 million budget from prevention, treatment, and research programs to law enforcement programs; (4) more prison bed space--the addition of 1,260 beds at 11 federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws--a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture, and the exclusionary rule; (6) better interagency coordination--bringing together all federal law enforcement agencies in "a comprehensive attack on drug trafficking and organized crime" under a cabinet-level committee chaired by the attorney general; and (7) improved federal/state coordination, including federal assistance to state agencies by training their agents.
- [36] These initiatives are reviewed in Steven Wisotsky, "Crackdown: The Emerging 'Drug Exception' to the Bill of Rights," *Hastings Law Journal* 38 (1987): 889.
- [37] *1984 National Strategy for Prevention of Drug Abuse and Drug Trafficking*, p. 121. President Bush's budget request for FY 1993 was \$12.7 billion. Office of National Drug Control Policy, *1992 National Drug Control Strategy Budget Summary*, p. 3. (State expenditures on drug enforcement and imprisonments collectively exceed that amount.)
- [38] *Albernaz v. United States*, 450 U.S. 333, 343 (1981).
- [39] The Comprehensive Crime Control Act of 1984, for example, created a presumption in favor of pretrial detention for any person accused of a 10-year drug felony. 18 U.S.C. sec. 3142(g) (1988). See generally Wisotsky, "Crackdown."
- [40] For example, 21 U.S.C. sec. 841(b)(1) (1988) provides a mandatory minimum term of 10 years to life for sale of

50 grams or more of crack on a first offense. 21 U.S.C. sec. 848(a) (1988) imposes a mandatory minimum sentence of 20 years to life upon a first conviction for continuing criminal enterprises (CCE), defined as a "series" of drug violations; and 21 U.S.C. sec. 848(b) (1988) imposes a mandatory life sentence upon conviction for CCE meeting certain minimum weights or dollar values. The death penalty can also be imposed for an intentional killing connected to such violations. 21 U.S.C. sec. 848(e)(1) (1988).

By comparison, Florida Statute 794.011(5)(1991) punishes "simple rape" by a maximum prison term of 15 years, and in practice, much less. Florida Statute 782.04(2)(1991) punishes second-degree murder with no mandatory minimum and a maximum of life in prison. Florida Statute 775.082(1) (1991) punishes first-degree murder, when the death sentence is not imposed, with a mandatory minimum penalty of 25 years in prison before becoming eligible for parole. Florida Statute 893.135(1)(b)(2)(1991) punishes trafficking in cocaine by life imprisonment "without possibility of parole."

[41] *The Federalist Papers* no. 78 (New York: C. Rossiter, ed., 1961) (A. Hamilton).

[42] *United States v. Miranda*, 442 F. Supp. 786, 795 (S.D. Fla. 1977).

[43] See generally Wisotsky, "Not Thinking Like a Lawyer."

[44] *Burke v. Kansas State Osteopathic Association, Inc.*, 111 F.2d 250, 256 (10th Cir. 1940).

[45] *Robinson v. California*, 370 U.S. 660, 672 (1962).

[46] Compare Arnold Trebach, *The Heroin Solution* (New Haven, Conn.: Yale University Press, 1982), p. 104, summarizing the *Brain Committee Report*, a classic study by a distinguished group of British physicians, who, after "careful scrutiny of the histories of more than one hundred persons classified as addicts," concluded that "many of them who have been taking small and regular doses for years . . . are often leading reasonably satisfactory lives."

[47] Among the many classic studies are those conducted by or known as the National Commission on Marihuana and Drug Abuse; the Mayor's Committee on the Marihuana Problem in the City of New York; the Panama Canal Zone Military Investigations; the Indian Hemp Drugs Commission, *Marijuana, 1893-94*; Departmental Committee on Morphine and Heroin Addiction (*Rolleston Report*) (1926); Joint Committee of the American Bar Association and the American Medical Association on Narcotic Drugs, *Drug Addiction: Crime or Disease?* (interim and final reports, 1961); Interdepartmental Committee, *Drug Addiction (Brain I)* (1961); Interdepartmental Committee, *Drug Addiction (Brain II)*, (second report, 1965); Advisory Committee on Drug Dependence, *Cannabis (Wooton Report)* (1968); Canadian Government's Commission of Inquiry, *Non-Medical Use of Drugs (LeDain Report)* (interim report, 1970). National Research Council of the National Academy of Sciences, *An Analysis of Marijuana Policy* (1982).

[48] *Terrebone v. Butler*, 848 F.2d 500, 504 (5th Cir. 1988). The vampire language was quoted by the court in *Young v. Miller*, 883 F.2d 1276, 1283 (6th Cir. 1989), upholding mandatory sentence of life without parole for a first offender, the same punishment as for first-degree murder.

[49] *Terrebone*, 624 F.2d 1363, 1369 (5th Cir. 1980). (This is an earlier opinion in the same case cited in note 48 above.)

[50] *Harmelin v. Michigan*, 111 S. Ct. 2680, 2706 (1991).

[51] See Wisotsky, "Crackdown."

[52] *United States v. Property Known as 6109 Grubb Road*, 890 F.2d 659, 665 (3rd Cir. 1989) (Greenburg, J., dissenting). Justice Kennedy used substantially similar language to up hold the Customs Service's drug testing program in *Von Raab*, 489 U.S. 656, 674.

[53] *Harmon v. Thornburgh*, 878 F.2d 484, 497 (D.C. Cir. 1989)(Silberman, J., concurring in part and dissenting in part). Judge Silberman thought that the majority had unduly restricted the scope of the government's drug testing

program while personally expressing "grave doubts that the criminal law is the most effective way of dealing with our drug problem. . . ." Ibid., note 1.

[54] *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). The Court held that a Mexican citizen could be forcibly kidnapped from Mexico and made to stand trial in the United States because the bilateral extradition treaty was silent on the subject of kidnapping, even if it violated general principles of international law.

[55] *United States v. de Hernandez*, 473 U.S. 531 (1985).

[56] *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). See note 40 above.

[57] *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218 (9th Cir. 1987). The caution went unheeded when the Supreme Court reversed the court of appeals in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[58] In 1980 a kilo of cocaine cost \$50,000-\$55,000 delivered in Miami; by 1986 the price had fallen to the range of \$12,000-\$20,000, and it has hovered in that zone to the present day. In 1980-81, a typical gram of cocaine cost \$100 and averaged 12 percent purity at street level. By 1986 the price had fallen to \$80 (\$50 in Miami), and the purity had risen to more than 50 percent. National Narcotics Intelligence Consumers Committee, *The Supply of Illicit Drugs to the U.S. for Foreign and Domestic Sources*. See also the National Drug Policy Board, *Federal Drug Enforcement Progress Report 1986* (April 1986), p. 7.

By 1990 the amount of cocaine seized by federal authorities had risen to 101 metric tons (more than 200,000 pounds), with an additional amount estimated at between 263 and 443 tons escaping into the U.S. black market. Office of National Drug Control Policy study (1991), cited in *Drug Enforcement Report*, June 24, 1991, p. 5.

During 1991, federal agencies seized more than 134 tons of cocaine in the United States, according to the annual report of the National Narcotics Intelligence Consumers Committee. Cited in *Drug Enforcement Report*, August 10, 1992, p. 4.

[59] A National Institute on Drug Abuse household survey estimated that in 1991 there were 700,000 heroin users as compared to 471,000 in 1990. "Use of Heroin and Cocaine Increased, Says Intelligence Report," *Drug Enforcement Report*, August 10, 1992, p. 4.

An abundance of heroin--cheap and potent enough to be smoked or snorted rather than injected--has emerged in the nineties. Michael Isikoff, "Hospital Data Indicate Rise in Hard Core Drug Abuse," *Washington Post*, May 13, 1992, p. A1.

According to the Drug Enforcement Administration, the average purity of heroin available on the streets has quadrupled, from 6 percent to 24 percent, in the last five years. Increasing supplies of pure heroin have led traffickers to cut the street price of the drug, making it more available. *Drug Enforcement Report*, April 23, 1992, p. 6.

[60] The National Organization for the Reform of Marijuana Laws has for years estimated that marijuana is among the top three or four crops by dollar value in the United States. David Johnston, "Illegal Drug Sales in Nation Put at \$40 Billion," *New York Times*, June 20, 1991, p. A20.

Domestic eradication programs by police and National Guard units have led clever growers to abandon open fields and forests in favor of virtually undetectable indoor locations such as warehouses and underground structures.

[61] Marijuana use peaked in 1979, three years before President Reagan declared the War on Drugs. Cocaine use peaked in 1982 and stayed level through 1985 before turning sharply downward.

The latest NIDA National Household Survey data, released in 1990, confirm the sharp decline in middle-class drug use: 27 million people had tried some illegal drug, down 25 percent from 1985. Monthly cocaine users dropped 45 percent to 1.6 million and monthly cannabis users dropped 12 percent to 10.2 million. Cocaine use blipped up in 1991 to 1.9 million users. "Use of Heroin and Cocaine Increased, Says Intelligence Report," *Drug Enforcement Report*,

August 10, 1992, p. 4.

[62] "Cocaine-related hospital emergencies have increased in number for the third consecutive quarter, . . . bringing them to the same level as when President Bush took office vowing to end the 'scourge' of drug abuse." Isikoff, "Hospital Data." See also Sam Medlin, "Drug Users Choose Heroin More Often," *USA Today*, March 24, 1992, p. A3.

[63] See, for example, David Boaz, "The Consequences of Prohibition," in *The Crisis in Drug Prohibition*, ed. David Boaz (Washington: Cato Institute, 1990), p. 108; Kurt L. Schmoke, "A Problem of Health and Economics," in *The Crisis in Drug Prohibition*, pp. 10-11.

[64] In 1991 one-third of Washington, D.C.'s 489 homicides were estimated by police to be the work of youthful gangs of drug enforcers. Pierre Thomas and Michael York, "Enforcers Are D.C.'s Dealers of Death," *Washington Post*, May 18, 1992, p. A1.

[65] See Enrique Ghersi, "The Drug War and the Renaissance of Peruvian Militarism," paper delivered at the conference entitled "Liberty in the Americas: Free Trade and Beyond," Mexico City, May 19-22, 1992. The event was a hemisphere-wide conference cosponsored by the Cato Institute and the Centro de Investigaciones Sobre la Libre Empresa (CISLE), in cooperation with the Instituto Cultural Ludwig von Mises (ICUMI).

[66] See Ted Carpenter, "Coercion for Export: Washington's Hemispheric Drug War," paper delivered at the conference entitled "Liberty in the Americas: Free Trade and Beyond," Mexico City, May 19-22, 1992.

[67] Examples of corruption are too numerous to cite individually but are reviewed in Steven Wisotsky, *Beyond the War on Drugs* (Buffalo, N.Y.: Prometheus Books, 1990), p. 145.

[68] In a *New York Times*/CBS poll based on telephone interviews conducted September 6-8, 1989, 64 percent cited drugs as the most important problem facing the nation--triple the percentage that had so responded in July 1989. Sixty-one percent favored drug testing of workers generally. Most respondents agreed that restrictions on individual rights were justified by the drug crisis. Richard Berke, "Poll Finds Most in U.S. Back Bush Strategy on Drugs," *New York Times*, September 12, 1989, p. B8.

[69] Richard Morin, "Many in Poll Say Bush Plan Is Not Stringent Enough," *Washington Post*, September 8, 1989, p. A1.

[70] An 11-year-old boy who told authorities he didn't want his mother hurt by "bad stuff" turned her and her boyfriend in for smoking marijuana and using cocaine. Associated Press, "Son Turns in Mom, Friend for Drug Use," *Miami Herald* (Gulf edition only), September 3, 1987, p. A20.

[71] Tom Fiedler and Richard Wallace, "Bush Vows War on Cocaine Trade," *Miami Herald*, April 28, 1989, p. A1.

[72] In a televised speech on September 5, 1989, the president announced the impending dispatch of military equipment to Colombia to support a less rhetorical war against the cocaine cartels of Medellin and Cali. Later diplomatic initiatives offered additional funds for eradication of coca and related law enforcement operations in Colombia, Peru, and Bolivia.

[73] Arnold S. Trebach, *The Great Drug War* (New York: Macmillan, 1987), p. 166.

[74] Donald Baker and John Harris, "Wilder Eyes Drug Tests on Campus," *Washington Post*, April 3, 1991, p. A1.

[75] Lauren Ina, "To Fight Crime, Official Would Suspend Rights," *Washington Post*, July 13, 1991, p. A6.

[76] An important example of a political tradition cast aside in the rush to make war on drugs is the Posse Comitatus Act, a post-Civil War law that keeps military forces out of civilian law enforcement except in cases of rebellion or insurrection. Beginning in 1981, the government breached that line of demarcation, bringing the military, especially the U.S. Navy, into an active support role in interdiction on the high seas. Wisotsky, "Crackdown," pp. 892-93.

[77] *Financial Investigation of Drug Trafficking: Hearing Before the House Select Committee on Narcotics Abuse and Control*, 97th Cong., 1st sess., 1981, p. 58 (statement of Representative Hutto). The entire Congress apparently shared that perception, becoming a prolific source of antidrug initiatives. In just the first year of the 97th Congress, over 100 bills proposing to "reform" some aspect of the criminal justice system were filed; more than three-fourths specifically proposed harsher treatment for drug of fenses or drug offenders. A survey of those bills appears in Wisotsky, "Exposing The War on Cocaine: The Futility and Destructiveness of Prohibition," *Wisconsin Law Review* 6 (1983): 1386-88.

[78] Quoted in National Association of Criminal Defense Lawyers, *Washington Digest*, January 12, 1990.

[79] *Ibid.*

[80] *Sentencing Practices and Alternatives in Narcotics Cases: Hearings Before the House Select Committee on Narcotics Abuse and Control*, 97th Cong., 1st Sess., 1981, p. 3 (statement of Representative Beard [R.-Tenn.]).

[81] John Moody Bogota, "Colombia; Noble Battle, Terrible Toll," *Time*, December 18, 1989, p. 33.

[82] See note 58 above.

[83] See *United States v. Ofshe*, 817 F.2d 1508, 1516, n. 6 (11th Cir. 1987).

[84] *Ibid.*, at 1511.

[85] Robert Kuntz, "When Lawyers Wear Wires, Where Can Clients Turn?" *The Connecticut Law Tribune*, August 12, 1991, p. 10.

[86] See Robert Kuntz, "When Lawyers Snitch," *Miami Review*, July 26, 1991, p. A1.

[87] *News Briefs* (Washington: National Drug Strategy Network April 1991), p. 6, summarizing a 1989 Bureau of Labor Statistics study and a report by the Institute for a Drug Free Workplace. See generally "Drug Testing in the American Workplace" (symposium), *Nova Law Journal* 11 (1987): 891.

[88] The American Management Association survey of its member firms, representing 25 percent of the total workforce, revealed that 75 percent of the 1,200 responding companies test for controlled substances but not alcohol. This represents a 250 percent increase over the 1987 baseline survey. Barbara Noble, "Testing Employees for Drugs," *New York Times*, April 12, 1992, sec. 3, p. 27.

[89] In September 1986 President Reagan issued Executive Order no. 12,564, mandating drug testing of federal applicants and workers in a variety of circumstances. The order implemented in part a more sweeping recommendation of the President's Commission on Organized Crime, aimed at all federal, state, and local government employees and employees of federal contractors. See Steven Wisotsky, "The Ideology of Drug Testing," *Nova Law Journal* 11 (1987): 763.

[90] 53 Federal Register 11979, sec. 2.29(f)(13), (16)(1988).

[91] *Von Raab*, at 681.

[92] *Ibid.*, at 674.

[93] *Ibid.*, at 677.

[94] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989).

[95] *Ibid.*, at 607.

[96] *Von Raab*, at 683. Justice Scalia continued to note the ideological basis for the testing:

The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service Employees announcing the program: "Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security." . . . What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is "clean," and--most important of all--will demonstrate the determination of the Government to eliminate this scourge of our society! *Ibid.*, at 686.

[97] *Florida v. Royer*, 460 U.S. 491, 498 (1983); see also *United States v. Montoya*, 473 U.S. 531 (1985); *Florida v. Rodriguez*, 469 U.S. 1, 5 (1984). Drug courier profiles vary, but all are based on a compilation of supposed common traits. They have been criticized for allowing impermissible intrusions on Fourth Amendment rights based solely on an agent's hunch. See "Drug Courier Profiles in Airport Stops," *Southern University Law Review* 14 (1984): 316-17.

[98] *United States v. Place*, 462 U.S. 606, 706 (1983).

[99] *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

[100] *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983).

[101] *Illinois v. Gates*, 462 U.S. 213 (1983). *Gates* rejected the two-prong test for probable cause established in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), in favor of a more loosely structured "totality of the circumstances" test. *Gates*, at 230.

[102] *United States v. Leon*, 468 U.S. 897, 905 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). To similar effect is *Maryland v. Garrison*, 480 U.S. 79 (1987).

[103] *Oliver v. United States*, 466 U.S. 170 (1984).

[104] *United States v. Dunn*, 480 U.S. 294 (1987).

[105] *California v. Carney*, 471 U.S. 386, 390 (1985).

[106] *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

[107] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[108] *California v. Ciraolo*, 476 U.S. 207 (1986).

[109] *Florida v. Riley*, 488 U.S. 445 (1989).

[110] *United States v. Sharpe*, 470 U.S. 675 (1985).

[111] *Texas v. Brown*, 460 U.S. 730 (1983); *Michigan v. Sitz*, 496 U.S. 444 (1990).

[112] *California v. Acevedo*, 111 S. Ct. 1982 (1991).

[113] *United States v. Knotts*, 460 U.S. 276, 284 (1983); *United States v. Karo*, 468 U.S. 705, 721 (1984).

[114] Arnold H. Loewy, "The Most Important Case of 1991," *Section on Criminal Justice Newsletter*, April 1991, p. 5.

[115] *Florida v. Bostick*, 111 S. Ct. 2382 (1991). See generally Ira Mickenberg, "Criminal Rulings Granted the State Board New Power," *National Law Review* 13 (August 19, 1991).

[116] Loewy.

[117] *Ibid.*

[118] *Florida v. Bostick*, 554 So. 2d 1153, 1158 (Fla. 1989) (emphasis in original).

[119] Postal Service Steps Up Effort Against Drugs," *New York Times*, July 15, 1991, p. B7.

[120] Pete Early, "Wiretaps Up 60 Percent, Reports Say," *Miami Herald*, June 16, 1984, p. A1.

[121] Marianne Lavelle, Fred Strasser, and Marcia Coyle, "Wiretaps Up," *National Law Journal*, May 27, 1991, p. 18.

[122] See, for example, "Police Wiretapping Scandal Exposed," National Association of Criminal Defense Lawyers, Washington Digest, January 12, 1990.

[123] *Terry v. Ohio*, 392 U.S. 1 (1968).

[124] Mark Leban, "Pretext Traffic Stops," *Florida Bar Journal* (February 1991), p. 51.

[125] Florida Department of Highway Safety and Motor Vehicles, Office of General Counsel, *Common Characteristics of Drug Couriers* (1984), sec. I.A.4.

[126] Mark Prendergast, "Highway Drug Searches Raise Questions," *Fort Lauderdale News & Sun-Sentinel*, February 26, 1984, p. A16.

[127] Dan Christensen, "Congressmen, Celebrities Included in U.S. Drug Files," *Fort Lauderdale News & Sun-Sentinel*, July 3, 1984, p. A1.

[128] Karen Payne, "U.S. List of Small Drug Deals Criticized," *Miami Herald*, March 26, 1985, p. D1.

[129] See note 79 above. Amendments to the Posse Comitatus Act, 18 U.S.C. sec. 1385, allow the military to gather information, advise, lend equipment, and deploy personnel at the request of local law enforcement officials with jurisdiction over drug or immigration offenses. Public Law No. 91-86, 95 Stat. 1114 (1981) (codified at 10 U.S.C. secs. 371-385 (1982)).

The U.S. Navy was partially exempted from the restrictions of the Posse Comitatus Act by regulations implementing the 1981 amendments, and naval vessels typically assist in drug interdiction operations by transporting Coast Guard officers to a target vessel and towing seized ships back to port. See *United States v. Del Prado-Montero*, 740 F.2d 113, 116 (1st Cir. 1984); 32 C.F.R. sec. 213.10(c) (1982).

[130] The Defense Drug Interdiction Assistance Act of 1986 continued this trend by authorizing a substantial increase in funding for interdiction efforts and greater use of military resources. Public Law No. 99-570, sec. 3052, reprinted in *U.S. Code Congressional and Administrative News* (1986), no. 10A.

[131] 10 U.S.C. sec. 124(a) (1989).

[132] "Defense Department's Impact on Reducing Cocaine Flow Has Been 'Negligible', Says Reports," *Drug Enforcement Report*, October 8, 1991, pp. 1, 4-5.

[133] Peter Copeland and Andrew Schneider, "When Civilians Call the Shots," *Washington Times*, July 7, 1992, p. A1, reports that Gen. George Joulwan, who oversees military operations in Latin America, has 10,000 troops at his disposal full time for counterdrug operations.

[134] "Proposed National Guard Cuts Will Not Affect Anti-Drug Efforts, Says ONDCP," *Drug Enforcement Report*, March 23, 1992, p. 7.

[135] Dick Cheney (secretary of defense), "Annual Report to the President and the Congress, Part III, Defense Components, Counterdrug Program" (February 1992), cited in *News Briefs* (Washington: National Drug Strategy Network, April 1992), p. 9.

[136] Ted Galen Carpenter and R. Channing Rouse, "Perilous Panacea: The Military in the Drug War," [Cato Policy Analysis no. 128](#), February 15, 1990, p. 8.

[137] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[138] *Albernaz v. United States*, 450 U.S. 333, 334 (1981). Note that at least one state court has rejected Rehnquist's analysis. Compare *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991)(life sentence for possession of cocaine found to be permissible under the federal Constitution) with *People v. Bullock*, No. 89661 (Mich. S. Ct., June 16, 1992)(life sentence for possessing cocaine found to be a violation of the Michigan constitution).

[139] The guidelines were upheld against constitutional challenge in *Mistretta v. United States*, 488 U.S. 361 (1989).

[140] Quoted in Zeese, "Mandatory Minimum Sentencing," *The Drug Policy Letter* (March/April 1991), p. 7. Judge Irving also mused about the possibility that in some future tribunal he and other federal judges might have to invoke the Nuremberg defense that they were only "following orders." *Ibid*.

[141] Quoted in *ibid*.

[142] *United States v. Hunter*, DDC, Cr. No. 90-938, reported in *BNA Criminal Practice Manual* (February 20, 1991), p. 89.

[143] Quoted in Michael Isikoff and Tracy Thompson, "Getting too Tough on Drugs," *Washington Post*, November 4, 1990, p. C1.

[144] See Garry Sturgess, "Mandatory Minimum Sentences under Attack," *New Jersey Law Journal*, June 13, 1991, p. 11.

[145] Lyle Denniston, "Mixed Signals Sent on Priority for User Prosecutions," *Drug Enforcement Report*, May 23, 1988, p. 4.

[146] "Criminal Drug Cases Soar" (graphic), *USA Today*, January 22, 1991.

[147] James Lawrence King, then chief judge of the southern district of Florida, one of the nation's premier drug circuits, was quoted as saying, "We're very close to not having a civil court. The ordinary citizen then has no place to go if his spouse has contracted asbestosis working in a Navy shipyard and is dying. . . ." Valerie Greenberg Itkoff, "Judges' Time Tilts to Crime," *Broward Review*, February 21, 1991, p. 3.

That point was actually reached in the middle district of Florida, where the court simply stopped hearing civil cases while it concentrated on its backlog of criminal cases. *Ibid*.

[148] 21 U.S.C. sec. 844a(a)(1988).

[149] 21 U.S.C. sec. 844(a)(g)(1988).

[150] *Ibid*.

[151] 21 U.S.C. sec. 853(a)(1988).

[152] 21 U.S.C. sec. 844(a) (1988). Probation and withholding adjudication of guilt are authorized.

[153] 23 U.S.C. sec. 104(a)(2) (1988).

- [154] See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).
- [155] Jon Nordheimer, "Tighter Federal Drug Dragnet Yields Cars, Boats, and Protests," *New York Times*, May 22, 1988, p. Y1.
- [156] Sallie Hughes, "Customs Decides Today Whether To Return Yacht," *Miami Herald*, May 12, 1988, p. A19.
- [157] Mark Thompson, "'Zero Tolerance' Pioneer Criticizes Recent Yacht Seizures," *Drug Enforcement Report*, June 8, 1988, p. D4.
- [158] Aaron Epstein, "'Zero Tolerance' Backlash Brings Fury, Threatened Suit," *Miami Herald*, May 25, 1988, p. D8.
- [159] Nordheimer, "Tighter Federal Drug Dragnet Yields Cars, Boats, and Protests."
- [160] 21 U.S.C. sec. 881(a)(4)(C) (1988).
- [161] Andrew Schneider and Mary Pat Flaherty, "Presumed Guilty," *Pittsburgh Press*, August 11-16, 1991 (reprint). The reprint reports on the many abuses involved in enforcement of the forfeiture laws. See "Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment (Note)," *Michigan Law Review* 89 (October 1990): 166.
- [162] *United States v. Certain Real Property and Premises Known as 38 Whalers Cover Drive*, 954 F.2d 29 (2d Cir. 1992).
- [163] 21 U.S.C. sec. 881(a)(4)(C) (1988).
- [164] *United States v. 1012 Germantown Road*, 963 F.2d 1496, 1499 (11th Cir. 1992).
- [165] *In re Forfeiture of 1981 Oldsmobile, VIN #1G3AZ57N2BE32296*, 593 So. 2d 1087 (Fla. App. 1st 1992).
- [166] See Powell and Hershenov, "Hostage to the Drug War."
- [167] 21 U.S.C. sec. 881 (a)(7) (1988).
- [168] PR Newswire Association, Inc., "HUD and Justice Announce Strike Against Drug Dealers in Public Housing," June 25, 1990.
- [169] Drug Enforcement Administration chief administrative law judge Francis Young so found. Michael Isikoff, "Administrative Judge Urges Medicinal Use of Marijuana; DEA Expected to Reject Call for Limited Legalization," *Washington Post*, September 7, 1988, p. A2.
- [170] Lester Grinspoon and James Bakalar, "Medical Uses of Illicit Drugs," in *Dealing with Drugs: Consequences of Government Control*, Ronald Hamowy, ed., (Lexington, Mass.: Lexington Books, 1987).
- [171] Michael Isikoff, "U.S. Provides Marijuana for Some AIDS Patients," *Washington Post*, March 24, 1991, p. A3.
- [172] "The Last Smoke," *The Economist*, March 28, 1992, p. 24. For a doctor to use the drug, a special protocol must be submitted to the Food and Drug Administration, and the Drug Enforcement Administration must issue a special license. Only about 30 such special arrangements have been made.
- [173] Quoted in Michael Isikoff, "HHS to Phase Out Marijuana Program: Officials Fear Sending 'Bad Signal' by Giving Drug to Seriously Ill," *Washington Post*, June 22, 1991, p. A14.
- [174] "The Last Smoke," *The Economist*, March 28, 1992, pp. 23-24.
- [175] Congressional Research Service, "Heroin: Legalization for Medical Use," January 28, 1988.

- [176] Canada legalized the use of heroin for the relief of pain in terminal cancer patients in 1984, but the drug's use is restricted by protocol. Ric Dolphin, "A Blistering Debate," *MacLean's*, February 27, 1989, p. 41.
- [177] "AIDS Commission Calls for End to Needle Restrictions," *Drug Enforcement Report*, August 23, 1991, pp. 1-2.
- [178] Brian A. Reaves, *Drug Enforcement by Police and Sheriffs' Departments, 1990* (Bureau of Justice Statistics, May 1992), p. 1.
- [179] *Ibid.*, p. 2.
- [180] *Ibid.*
- [181] Ted Gest, "The Prison Boom Bust," *U.S. News & World Report*, May 4, 1992, p. 28.
- [182] Fox Butterfield, "Are American Jails Becoming Shelters from the Storms?" *New York Times*, July 19, 1992, p. E4.
- [183] Testimony of James Austin, Ph.D., Confirmation Hearings of Robert Martinez, 102nd Cong., 1st sess. (1991), microformed on CIS no. 91-S524-1 (Congressional Information Service).
- [184] *Ibid.*
- [185] Patrick Langan and Mark Cuniff, "Recidivism of Felons on Probation, 1986-89" (special report) (Bureau of Justice Statistics, February 1992).
- [186] *Smith v. Oregon*, 721 P.2d. 445 (Or. 1986).
- [187] See, for example, *Sherbert v. Verner*, 374 U.S. 398 (1963).
- [188] *Oregon v. Smith*, 494 U.S. 872 (1990).
- [189] Dennis Cauchon, "Feds Target 'High Times' Magazine," *USA Today*, June 25, 1990, p. B1. See also Paul Finkleman, "The Latest Front in the War on Drugs: The First Amendment," *Drug Law Report*, March-April 1991.
- [190] But note that Sen. Dennis DeConcini introduced legislation aimed at publications like *High Times*. It would create a new four-year felony for any printed or published advertisement for a Schedule I controlled substance. The amendment's sponsor specifically mentions ads for marijuana seeds in the magazine *High Times*. The amendment exempts "material which merely advocates the use of a similar material, which advocates a position or practice, and which does not attempt to propose or facilitate" an actual drug transaction. DeConcini (D-Ariz.) amendment, June 27, 1991 (*Congressional Record*, p. S8897).
- [191] Peter Gorman, "Marijuana McCarthyism," *New York Times*, December 30, 1989, sec. 1, p. 25.
- [192] Katherine Bishop, "Business Data Is Sought in Marijuana Crackdown: Drug Agents Use Files to Go after Large-Scale Gardeners," *New York Times*, May 24, 1991.
- [194] See, for example, Dexter Filkins, "Garden Suppliers Caught in the Middle of War on Pot," *Miami Herald*, October 21, 1991, p. A1.
- [195] Michael Isikoff, "Legalize Drugs? Debate Grows Louder, Hotter; Proposal 'Scandalous,' Bennet Says; Present Policy 'Has Failed,' Federal Judge Asserts," *Washington Post*, December 13, 1989, p. A4.
- [196] "Sweet Revenge," *Legal Times*, January 29, 1990, p.21.
- [197] *Ibid.*

[198] Thomas Szasz, *Our Right to Drugs: The Case for a Free Market* (New York: Praeger, 1992); David Boaz, "A Drug Free America--or a Free America?" *University of California at Davis Law Review* 24 (1991): 617.

[199] Stuart Taylor, Jr., "Ten Years for Ten Ounces," *The American Lawyer*, March 1990, p. 65. (Quoting Judge William Schwarzer.)