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The Impact of the War on Drugs on Procedural Fairness and Racial Equality

David Rudovsky†

Twelve years ago, President Reagan declared yet another War on Drugs.¹ Today, after the expenditure of billions of dollars on a policy built primarily on the coercion and punishment of drug distributors and users, the War on Drugs has failed to reduce significantly, much less eliminate, drugs as a problem in our society.² There have been scattered successes, but even with enormous expenditures of resources, the major evils associated with drug use and drug trafficking have not been ameliorated, and we continue to experience widespread abuse of drugs, high levels of violence, and disintegration of urban life.³ To make matters worse, as I will argue in this Article, the War on Drugs has had a debilitating impact on our system of constitutional rights.

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and on equality for racial minorities. As a result of the aggressive law enforcement component of the War on Drugs and the acquiescence of the courts, constitutional principles have been undermined.

There is widespread debate over virtually every aspect of the War on Drugs, with an increasing number of persons (from quite different political camps) questioning the very premises of prohibiting drugs in our society. I too believe that current policies have aggravated rather than alleviated the problem, but in this Article I limit my comments to the impact of the War on Drugs on specific constitutional rights and to its differential impact on people of color.

It might be expected that the strategies in a war on crime would discount the interest in protecting civil liberties. On the front lines, adherence to constitutional restrictions is often understood as unnecessary and dangerous, placing questionable limits on police power and discretion. Because self-restraint is hardly a realistic way to ensure compliance with constitutional commands, the degree to which the appropriate balance is struck depends in large part on the independence and integrity of the courts.

From the beginning, the War on Drugs has in too many instances led to judicial abdication to Executive authority. In no small part this is due to the overused, but symbolically important, "war" metaphor. Historically, wars (both hot and cold) have placed great stress on constitutional rights, and these pressures have led the courts to countenance substantial limitations on liberty. The internment of Japanese-Americans during World War II, the suspension of the writ of habeas corpus during the Civil War, the imprisonment of strikers and dissidents during World War I, and the McCarthy tactics of the Cold War were all jus-

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4 See A Symposium on Drug Decriminalization, 18 Hofstra L Rev 457 (1990) (cited in note 3); Ethan A. Nadelmann, The Case For Legalization, 92 Public Int 3 (Summer 1988); William F. Buckley, Jr., The Futile War on Drugs May be Destroying Rather Than Saving Our Society, Houston Chronicle A13 (Mar 16, 1993); Milton Friedman, An Open Letter to Bill Bennett, Wall St Journal 1-14 (Sept 7, 1989).

5 See text at 240-63. See also Paul Finkelman, The Second Casualty of War: Civil Liberties and the War on Drugs, 66 S Cal L Rev 1389 (1993); Steven Wisotsky, Crackdown: The Emerging "Drug Exception" to the Bill of Rights, 38 Hastings L J 889 (1987).


8 See, for example, Debs v United States, 249 US 211, 212-13 (1919); Schenck v United States, 249 US 47, 52 (1919).

9 See, for example, Dennis v United States, 341 US 494 (1951); Norman Dorsen, Paul
tified in the name of war. During each of these periods, the Supreme Court gave virtually complete deference to inflated Executive claims of imminent danger to the country. In retrospect, we are highly critical of the excesses of the past, but we fail to use the same angle of vision to confront the current assault on individual rights. Yet the new constitutional mosaic is in many respects even more disturbing than those drawn during earlier periods.10

Drug prohibition policies implicate a broad range of constitutional rights. Laws prohibiting longstanding religious practices that involve symbolic uses of drugs challenge the free exercise of religious rights;11 new patterns of law enforcement that target large groups of persons, often without individualized cause or suspicion, affect individual rights to privacy;12 forfeiture laws and regulations that impede access to counsel undermine Sixth Amendment rights to a fair trial;13 laws that permit preventive detention and draconian punishment for drug possession denigrate Eighth Amendment rights to bail and sentences that are not cruel and unusual;14 and racially-disparate legislative policies, prosecutorial practices, new investigative techniques, and forfeiture laws erode Fourteenth Amendment rights to equality and due process.

In the following sections, I discuss those issues of procedural fairness that are most affected by our current drug prohibition policies. I focus first on the Fourth Amendment, as individual privacy is the area most fundamentally affected by expanded law enforcement authority. I then consider the impact of the War on Drugs on the constitutional rights to counsel and racial equality.


10 See generally Finkelman, 66 S Cal L Rev at 1389 (cited in note 5); Wisotsky, 38 Hastings L J at 889 (cited in note 5).

11 See, for example, Employment Division v Smith, 494 US 872 (1990) (upholding the denial of unemployment benefits to a Native American whose beliefs required him to use peyote in religious ceremonies).

12 See, for example, National Treasury Employees Union v Von Raab, 489 US 656 (1989) (upholding suspicionless drug testing as a mandatory condition of placement in certain positions of the United States Customs Service); United States v Sokolow, 490 US 1 (1989) (finding a reasonable basis to stop the defendant on factors that were included in drug courier profile).

13 See, for example, Caplin & Drysdale, Chartered v United States, 491 US 617 (1989) (stating that the federal forfeiture statute may be invoked even if a defendant is left without funds to retain counsel).

14 See, for example, United States v Salerno, 481 US 739 (1987); Harmelin v Michigan, 501 US 957 (1991).
I. THE FOURTH AMENDMENT: "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS ... [SHALL NOT EXTEND TO DRUG CASES]."

The conspicuous trend in the Supreme Court to limit constitutional rights has been most emphatic in the area of arrest, search, and seizure. The heavy reliance we place on the criminal sanction side of drug policy places a premium on police seizures of controlled substances and the apprehension and arrest of those involved in their distribution and possession. Accordingly, just as the First Amendment became the battleground for laws restricting free speech during the First World War and the Cold War with the Soviet Union, the Fourth Amendment has become the focal point for resolving issues of governmental power in implementing the War on Drugs.

The Court's decisions on Fourth Amendment issues have been sharply one-sided. The Court has deferred to virtually every police and prosecutorial demand to limit Fourth Amendment rights and to eliminate or ease judicial oversight of searches, seizures, and arrests. The net effect of these cases is to withdraw from Fourth Amendment coverage a broad range of police activity, to reduce the privacy protections of the Fourth Amendment, and to permit the police to use an assortment of pretextual encounters to validate otherwise unlawful intrusions. It may be that even absent the special pressures that have been generated by the War on Drugs, the Court would eventually have reached the same results, but it is hard to ignore the special weight given to the "drug crisis" and the perceived needs of law enforcement in this war.

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17 See text at 249-51.

18 In his reply to this Article, Professor Grano argues that many of the Court's crimi-
Increasingly, enforcement on the street depends upon making large numbers of stops and searches without the kind of individualized justification normally required by the Fourth Amendment, on the theory that the abundance of drugs in our society will result in positive finds in a certain percentage of the stops. This net ensnares the innocent and guilty alike, but it has avoided critical scrutiny because the police have been correct in their cynical assumptions: those who are stopped and searched but found without drugs generally do not complain, and those who are found with drugs have little or no credibility in court to challenge the legality of the seizure and arrest.

19 The use of drug courier profiles, random targeting of bus or train passengers to attempt to gain consent for searches, and pretextual stops of cars, discussed below at 243-53, are police policies specifically adopted for the War on Drugs. See, for example, Florida v Bostick, 501 US 429 (1991); United States v Sokolow, 490 US 1 (1989).

20 Where the police intrusion is relatively moderate, the costs and difficulties of civil litigation make a civil rights suit highly improbable. See David Rudovsky, Police Abuse: Can the Violence Be Contained?, 27 Harv CR-CL L Rev 465, 490-92 (1992); Maclin, 35 Wm & Mary L Rev at 243-46 (cited in note 15).

On the issue of the resolving credibility on motions-to-suppress evidence, see Alan Dershowitz, The Best Defense xxii-xxiii (Random House, 1982):

The Rules of the Justice Game . . .
Rule I: Almost all criminal defendants are, in fact, guilty.
Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.
Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.
Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.
Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV.
Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.
Rule VII: All judges are aware of Rule VI.
Rule VIII: Most trial judges pretend to believe police officers who they know are lying.
Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.
Rule X: Most judges disbelieve defendants about whether their constitutional rights have been violated, even if they are telling the truth.
The Fourth Amendment was adopted in large part in reaction to the abuses of the English enforcement measures in the colonies, including the notorious Writs of Assistance. The Writs of Assistance permitted British soldiers to enter colonial residences to search for violations of the customs and duties provisions. They were issued by agents of the Crown without a showing of cause; no judicial authorization was required to search a colonial residence. The Supreme Court has explained the significance of the colonial experience in the adoption of the Fourth Amendment:

These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever “be secure in their persons, houses, papers, and effects” from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,” because they placed “the liberty of every man in the hands of every petty officer.” The historic occasion of that denunciation, in 1761 at Boston, has been characterized as “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. ‘Then and there,’ said John Adams,

Rule XI: Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).
Rule XII: Rule XI does not apply to members of organized crime, drug dealers, career criminals, or potential informers.
Rule XIII: Nobody really wants justice.


23 Id.
then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”

One should understand that the Writs of Assistance were neither irrational nor used solely to harass the colonists. In fact, there were widespread violations of the customs laws, and the colonists were engaged in a large-scale conspiracy to thwart the collection of duties. It was predictable, therefore, that mass searches would turn up evidence in a large number of cases.

In some respects, the War on Drugs is the contemporary equivalent of the Writs of Assistance. As I discuss below, drug courier profile stops, random stops of bus and train passengers, and pretextual car stops are based on the same underlying assumptions that informed the English enforcement of the customs provisions: widespread searches conducted without individualized suspicion will produce evidence of criminal conduct. In both situations, it is law enforcement by serendipity; without cause that any particular individual is involved in the drug trade, police use group “profiles” or other broad-based criteria—the antithesis of individualized cause—to effect stops and searches.

A. Drug Courier Profile and Pretext Arrests: The Modern Writs of Assistance

Law enforcement authorities have used drug courier profile encounters as a weapon in the War on Drugs for the past twenty years. Law enforcement authorities use drug courier profiles to select which persons to stop and investigate as suspected drug couriers in areas where large numbers of persons travel. The profile model is conceptually quite different from the model of police investigation that relies upon individualized suspicion based on specific information and observations as a predicate for stops or searches. The profile model relies on factors that are not

26 See Commonwealth v Lewis, 625 Pa 501, 512, 636 A2d 619, 625 (Pa 1994) (“The facile reliance on drug courier profiles is reminiscent of the generalized suspicions historically used to justify the general warrants of the British.”). See also text at 243-48.
criminal in nature and that are usually characteristic of the activities of law-abiding persons. 29

Drug courier profiles are remarkably vague, indeterminate, and overbroad. Judge George C. Pratt of the United States Court of Appeals for the Second Circuit has correctly compared the use of drug courier profiles to Alice-in-Wonderland logic. 30 In a case upholding a stop based on several of the drug courier profile characteristics, Judge Pratt, in dissent, demonstrated the fluidity of each factor. Judge Pratt began with the disputed “source city” concept:

To justify their seizure of Hooper’s bag the agents testified he had come from a “source city” and fit the DEA’s “drug courier profile”. Yet the government conceded at oral argument that a “source city” for drug traffic was virtually any city with a major airport, a concession that was met with deserved laughter in the courtroom. 31

Judge Pratt went on to discuss the “chameleon-like” nature of the other profile factors. 32 It is apparently significant if the suspect: arrived late at night 33 or early in the morning; 34 was one of the first to deplane 35 or one of the last to deplane; 36 used a one-way ticket 37 or a round-trip ticket; 38 carried brand-new luggage 39 or a small gym bag; 40 travelled alone 41 or with a companion; 42 acted nervously; 43 wore expensive clothing and gold jewelry, 44 or dressed in black corduroys, a white pullover shirt, and loafers without socks, 45 or in dark slacks, a work shirt, and a hat, 46 or

29 Cloud, 65 BU L Rev at 852 (cited in note 27).
30 United States v Hooper, 935 F2d 484, 499 (2d Cir 1991) (Pratt dissenting).
31 Id.
32 Id.
33 United States v Nurse, 916 F2d 20, 24 (DC Cir 1990).
34 Reid v Georgia, 448 US 438, 441 (1980).
35 United States v Moore, 675 F2d 802, 803 (6th Cir 1982).
36 United States v Mendenhall, 446 US 544, 547 n 1 (1980).
37 United States v Johnson, 910 F2d 1506, 1507 (7th Cir 1990).
42 United States v Garcia, 905 F2d 557, 559 (1st Cir 1990).
43 United States v Montilla, 928 F2d 583, 585 (2d Cir 1991).
44 United States v Chambers, 918 F2d 1455, 1462 (9th Cir 1990).
46 Taylor, 917 F2d at 1403.
PROCEDURAL FAIRNESS AND RACIAL EQUALITY

in a brown leather aviator jacket, gold chain, with hair down to the shoulders, or in a loose-fitting sweatshirt and denim jacket; and walked rapidly through the airport, or walked aimlessly through the airport.

Given these imprecise and fluid characteristics, it is not surprising that profile stops are extraordinarily overinclusive. Profiles encourage stops based on non-criminal behavior and personal appearance and include characteristics shared by a large number of innocent people. In the operations at the Buffalo Airport discussed by Judge Pratt, the police were "correct" in their stops in fewer than 2 percent of their profile encounters: of the six hundred people stopped, only ten were carrying drugs. Similar results typify other profile investigations. Yet the courts continue to credit these stops, rarely even considering the empirical evidence to the contrary.

In part, the approval of profile stops is a predictable consequence of the kinds of cases that actually reach the courts. For the most part, judges see only those cases in which drugs or other contraband are seized. In these cases, enormous pressure exists to ignore constitutional violations, thereby preventing suppression of the evidence. In the thousands of cases where the individual stopped is completely innocent, even if that person was detained and searched illegally, it is unlikely that she will pursue legal remedies. Thus, the case law develops on a highly skewed notion of reality, subject to the distorting effect of the discovery of contraband in the specific case.

It is true that merely approaching someone to obtain information is not a seizure under the Fourth Amendment unless it would appear to a reasonable person that she was not free to leave or to refuse to answer police inquiries. But the profile

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47 United States v Millan, 912 F2d 1014, 1015 (8th Cir 1990).
49 Millan, 912 F2d at 1017.
50 United States v Gomez-Norena, 908 F2d 497, 498 (9th Cir 1990).
51 Hooper, 935 F2d at 500.
53 See Maclin, 35 WM & Mary L Rev at 244-45 (cited in note 15). See also note 20.
54 See, for example, Florida v Riley, 488 US 445, 463 (1989) (Brennan dissenting) ("It is difficult to avoid the conclusion that the plurality has allowed its analysis . . . to be colored by its distaste for the activity in which [the defendant was involved].").
encounter is just the first step in the process. What often follows is questioning designed to obtain "consent" or cause for a full search.\(^{56}\) A disturbing example of the Court's willingness to overlook coercive tactics is \textit{Florida v Bostick}.\(^{57}\) Bostick involved a search conducted by police officers who boarded a bus at an intermediate stop on an interstate trip and, without any cause or suspicion, selected Bostick and another passenger, both seated in the back of the bus, as investigative targets.\(^{58}\) One officer asked Bostick for identification while another stood nearby, carrying a pistol in a zipper pouch, the equivalent of carrying a gun in a holster.\(^{59}\) After Bostick produced identification and his ticket (which matched), the police requested permission to search his luggage.\(^{60}\) "Permission" was granted, and the search disclosed narcotics in one of his suitcases.\(^{61}\)

The Supreme Court ruled that this police tactic ("working the buses") was not \textit{per se} unconstitutional.\(^{62}\) The Court found no Fourth Amendment violation in police boarding buses and targeting individuals without any cause or suspicion, because one would not necessarily feel constrained by the police in this situation.\(^{63}\) It is on this latter point that the Court's opinion, driven by the exigencies of the War on Drugs, departs from reality. Bostick, a black man, was confronted by armed police officers. He was seated in the back of an interstate bus, at a stop in a remote area, and could only leave by breaking the barrier created by the officers. His choices were indeed limited. If he left the bus, he would be stranded at that stop without his luggage. He was faced with armed officers in a crowded area of the bus seeking to search his belongings. To find that he was not seized (i.e., that he reasonably believed he could leave) or that his permission was fully voluntary and consensual is to drain those terms of any meaning. As Justice Marshall noted in his dissent:

\begin{quote}
This reasoning borders on sophism and trivializes the values that underlie the Fourth Amendment. Obvi-
\end{quote}

\(^{56}\) See \textit{United States v Mendenhall}, 446 US 544, 557-58 (1980).
\(^{58}\) Id at 431-33.
\(^{59}\) Id.
\(^{60}\) Id.
\(^{62}\) Id at 440. It should be noted that questioning of bus passengers like that in \textit{Bostick} is even more random than airport profile stops, since the police have nothing other than a pure hunch as to which passenger(s) they should approach. See id at 431-32.
\(^{63}\) Id at 433-37.
ously, a person's "voluntary decision" to place himself in a room with only one exit does not authorize the police to force an encounter upon him by placing themselves in front of the exit. It is no more acceptable for the police to force an encounter on a person by exploiting his "voluntary decision" to expose himself to perfectly legitimate personal or social constraints. By consciously deciding to single out persons who have undertaken interstate or intrastate travel, officers who conduct suspicionless, dragnet-style sweeps put passengers to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. It is exactly because this "choice" is no "choice" at all that police engage this technique.

In my view, the Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of interstate or intrastate buses. Withdrawing this particular weapon from the government's drug-war arsenal would hardly leave the police without any means of combating the use of buses as instrumentalities of the drug trade. The police would remain free, for example, to approach passengers whom they have a reasonable, articulable basis to suspect of criminal wrongdoing.\(^4\)

The authorization to conduct sweeps of buses, airports, and train stations is seemingly unlimited. As long as the initial encounter is not a "seizure" of the person, the basis for the stop is immaterial. Theoretically, it cannot be based solely on race, but as a practical matter racial motivation is very difficult to prove.\(^5\) For example, in *United States v Taylor*,\(^6\) the defendant, who was "poorly attired," was the only black to emerge in the initial group of passengers exiting from a plane that arrived in Memphis from Miami.\(^7\) The Sixth Circuit decided that because the encounter that led to his arrest and conviction on cocaine charges was "consensual," it did not need to consider whether Taylor was stopped because of his race or whether the

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\(^4\) Id at 450.


\(^6\) 956 F2d 572 (6th Cir 1992) (en banc).

\(^7\) Id at 574.
incorporation of a racial component into the Drug Enforcement Administration's ("DEA") drug courier profile would violate equal protection and due process guarantees. The court did state that if the defendant could show that he was targeted for a consensual stop "because he was an African-American," or if the police "implemented a general practice or pattern that primarily targets minorities," equal protection would be implicated. But as the dissent demonstrated, the failure of the court to find racial motivation on this record revealed an inadequate equal protection standard.

The available evidence demonstrates the unreasonableness of the sweep-and-profile techniques, both in concept and in result. Thousands of wholly innocent travelers have been confronted by armed police and have had their personal belongings subjected to an intensive search. Furthermore, the percentage of successful interdiction is often very low. In one case, officers "swept" one hundred buses and effected only seven arrests. What appears to be a police officer's magical "sixth sense" in a criminal case arising from a successful interdiction is, in reality, the inevitable and often isolated positive result of a search that was based on nothing more than a hunch.

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68 Id at 578.
69 Id at 578-79. See also United States v Weaver, 966 F2d 391 (8th Cir 1992); Travis, 837 F Supp at 1392.
70 Taylor, 956 F2d at 581-83 (Keith dissenting). See also Jones v DEA, 819 F Supp 698, 723 (M D Tenn 1993); United States v Prandy-Binett, 995 F2d 1069, 1075 n 2 (DC Cir 1993) (Edwards dissenting).
72 United States v Flowers, 912 F2d 707, 710 (4th Cir 1990).

Use of drug courier profiles has also been questioned since its ability to accurately predict criminal activity and not intrude on citizens who are not engaging in unlawful behavior has not been conclusively established. The sparse statistical data that has been reported hardly champions the continued application of profiles. For instance, the Pittsburgh Press reported the results of Common Pleas Judge Walter R. Little's order for an Allegheny County narcotics detective to set forth statistics regarding the race of passengers he has investigated in his 2 and 1/2 years on the interdiction team. He reported that about fifty per cent of the 96 travelers he has questioned or arrested have been black, six per cent were Hispanic, and forty-four per cent were white. "Courts eye rights violations by drug-busters at airport." Even more startling, however, is the pathetic lack of success the profile reportedly had notwithstanding its repeated use. The same article revealed that since July of 1988, police working the airport drug interdiction unit interdicted 1,542 travelers and arrested 131 suspected drug couriers—a mere eight per cent. Clearly, if these statistics are correct, the drug couri-
There is yet another police tactic—the pretextual stop of automobiles—that is based on a rationale similar to that which animates drug courier profile stops. Police use traffic violation stops as a way to gain consent, plain view, or other justification for a search or seizure.\(^7\) Highway officers are encouraged to stop cars on alleged traffic or motor vehicle offenses to establish the requisite cause to search for drugs.\(^7\) In many instances, the stop is based on “profile” characteristics or is otherwise pretextual, done with the expectation that in a certain number of cases the stop will enable the officer to obtain consent, observe contraband in plain view, or develop other cause for a search.\(^7\)

Having stopped an automobile for an alleged traffic violation, the police may, without any cause or suspicion, use dogs to sniff the occupants and the vehicle to determine whether drugs are present.\(^7\) Moreover, as in the bus, rail station, and airport scenarios, the police are free to attempt to secure consent for the search. The problem here, of course, is determining after the fact whether the police coerced the permission or whether it was gained voluntarily. And, where drugs are found and the issue must be determined in a suppression context, the pressures to credit the police version are significant.

\(^7\) Cloud, 65 BU L Rev at 854-55, 875-76 (cited in note 27).


\(^9\) See, for example, United States v Place, 462 US 696, 707 (1993). State courts, applying their own Constitutions, have increasingly granted individuals more privacy protections. See, for example, Commonwealth v Martin, 554 Pa 136, 143-44, 626 A2d 556, 560 (Pa 1993) (holding that a dog sniff of a person or personal items requires probable cause). See text at 263.
Defendants' claims that they were targeted because of race or alienage, that consent was coerced, or that the search was made with no consent are, as noted above, not always treated fairly in the criminal prosecution context. Occasionally, however, litigation offers a larger perspective of the practices involved. A federal district court has certified a class action on the issues of whether police are stopping motorists on Interstate 95 near Philadelphia without cause, on the basis of race, and whether searches of the cars are being conducted by coerced consent.\textsuperscript{78} Civil discovery rules have enabled the plaintiffs to obtain records of stops of motorists by the township's police department. These documents and follow-up interviews with persons subjected to these stops reveal several problematic characteristics of these stops. First, the interdiction program is based on the power to make a pretextual traffic stop.\textsuperscript{79} Numerous vehicles have been stopped, for example, for having small items tied to their rearview mirrors, for outdated inspection stickers, or for other minor violations, all supposedly observed as the car passed the police at sixty miles per hour.\textsuperscript{80} Second, the stops are racially disproportionate.\textsuperscript{81} Third, claims of consent are rebutted by numerous innocent individuals who give consistent accounts of being told that they would have to wait for a police dog, have their car towed, or suffer other types of roadside detention unless they consented to a search.\textsuperscript{82} Finally, a significant number of those stopped claim that the police searched without any permission whatsoever.\textsuperscript{83}

These discovery results are not unique. In Volusia County, Florida, videotapes and other documents relating to stops on Interstate 95, made by the Sheriff's drug squad, disclosed that highway stops were based in large measure on the race of the driver.\textsuperscript{84} Seventy percent of the motorists stopped were black or

\textsuperscript{78} Wilson v Tinicum Township, 1993 WL 280205 (E D Pa 1992).
\textsuperscript{79} See discovery material in Wilson v Tinicum, 1993 WL 280205 (E D Pa 1992) (on file with the University of Chicago Legal Forum).
\textsuperscript{80} See discovery material in Wilson (cited in note 79).
\textsuperscript{81} See discovery material in Wilson (cited in note 79). Of all cars stopped in which the records indicate the race of the driver, over 60 percent were of racial minorities. Of all persons searched, over 70 percent were racial minorities.
\textsuperscript{82} See discovery material in Wilson (cited in note 79). See also Plaintiff's Motion for Class Certification and Memorandum of Law in Wilson (on file with the University of Chicago Legal Forum).
\textsuperscript{83} See discovery material in Wilson (cited in note 79); Plaintiff's Brief in Wilson.
\textsuperscript{84} Jeff Brazil and Steve Berry, Color of Driver Is Key to Stops in I-95 Videos, Orlando Sentinel A1 (Aug 23, 1992).
Hispanic; 80 percent of the cars that were searched were driven by blacks or Hispanics; only 1 percent of those stopped received a traffic citation; and over five hundred motorists were subjected to searches and frisks without any cause or suspicion. By comparison, only 5 percent of the drivers on this stretch of Interstate 95 were black or Hispanic, and only 15 percent of all persons convicted in Florida for traffic violations during this period were of a minority race.

The practice of using pretextual stops has been validated by most federal courts, thus giving the police a largely unreviewable way to avoid Fourth Amendment scrutiny. The courts justify this approach by citing the objective reasonableness of the stops: as long as there was cause for the police action, it does not matter that the police were using their powers as a pretext to conduct a drug investigation that was at the time unsupported by cause or suspicion. The Supreme Court's acceptance of pretextual stops, searches, and detentions preterms most challenges to the highly random and, in many circumstances, arbitrary targeting of persons. It does not matter that the ultimate purpose of the police action has nothing to do with the "legal" reason for the intrusion and everything to do with the search for drugs. Whatever the correct doctrinal interpretation of the Fourth Amendment on this issue, it must at least be recognized that the pretext doctrine, as currently interpreted, sanctions search and seizure practices that can be conducted without individualized suspicion or cause.

The Supreme Court has also sanctioned searches of thousands of innocent persons without cause, suspicion, or judicial warrant. To augment drug detection and drug enforcement policies, drug testing in the workplace has become a popular measure for both governmental and private employers. This process involves targeting entire groups of persons, most of whom we know will be free of drugs. The Supreme Court has sustained

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85 Id.
86 Id.
87 See, for example, United States v Trigg, 878 F2d 1037, 1041 (7th Cir 1989); United States v Causey, 834 F2d 1179, 1181 (5th Cir 1987) (en banc); United States v Hawkins, 811 F2d 210, 213 (3d Cir 1987); Comment, 137 U Pa L Rev at 1791 (cited in note 74). One case that limits the use of pretextual stops or arrests is United States v Guzman, 864 F2d 1512, 1516-17 (10th Cir 1988).
88 See Trigg, 878 F2d at 1040-41; Hawkins, 811 F2d at 215; Causey, 834 F2d at 1183-84.
drug testing of employees without suspicion or any particularized evidence of improper drug use on the "special needs" exception to the Fourth Amendment, thus creating a broad range of searches that are exempt from any meaningful constitutional scrutiny. Analysis of the drug-testing opinions makes clear the impact that the War on Drugs has had on the fundamental shift from the insistence on cause and prior judicial approval to Executive and legislatively authorized suspicionless searches and seizures of entire classes of persons. Justice Scalia, dissenting in National Treasury Employees Union v Von Raab, succinctly exposed the flaws in the Court's approach:

The only plausible explanation [for the drug-testing rules] . . . [is that] 'if a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends.' 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! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

The Fourth Amendment has always allowed law enforcement officials substantial discretion in the investigation of criminal activity. The requirements of cause and judicial warrants place

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84 Id at 686-87 (Scalia dissenting) (citations omitted).
important, but not onerous, limitations on police power. The Court's enthusiastic embrace of the tactics that police have developed in the War on Drugs—profile and pretextual stops, sweeps of buses, drug testing without suspicion—abruptly upsets the balance previously struck. No longer is individualized cause or suspicion the hallmark of the Fourth Amendment. Today, simply fitting the vague contour of profiles or police hunches justifies intrusions on personal privacy.

B. Reasonable Expectations of Privacy: A Doctrine of Infinite Malleability

In *Katz v United States*, the Court ruled that the "Fourth Amendment protects people, not places." In this case, the Federal Bureau of Investigation recorded telephone conversations made by the petitioner from a public telephone. Earlier cases had established that a search in violation of the Fourth Amendment occurs only when government officials physically invade a "constitutionally protected area" such as one's person, house, papers, and effects. *Katz* rejected the limited scope of previous decisions, stating that the "correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'." Justice Harlan, in an influential concurring opinion, found the Fourth Amendment applicable "if a person . . . exhibit[s] an actual (subjective) expectation of privacy and . . . [if] the expectation [is] one that society is prepared to recognize as 'reasonable'."

By redefining the basis upon which it can be said that a search and seizure has taken place, the Court expanded Fourth Amendment protections. The "reasonable expectation of privacy" inquiry was heralded as a "watershed in Fourth Amendment jurisprudence" and rapidly became the basis of a new formula of Fourth Amendment protections. It did not take long, however, for a differently constituted Court to manipulate *Katz* to limit privacy rights. Applying notions of "assumption of the risk" and

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95 389 US 347 (1967).
96 Id at 351.
97 See *Katz v United States*, 369 F2d 130, 131 (9th Cir 1966).
100 Id at 361 (Harlan concurring).
"knowing exposure" of information or conduct, the Court severely limited both the physical areas and personal conduct entitled to Fourth Amendment protection.\textsuperscript{102}

In\textit{ Smith v Maryland},\textsuperscript{103} the Court concluded that one does not have a legitimate expectation of privacy in the numbers one dials on the telephone in one's home.\textsuperscript{104} One is not entitled to expect these numbers to remain confidential because "[w]hen he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."\textsuperscript{105} Smith "assumed the risk" that the company would reveal this information to law enforcement officers.\textsuperscript{106} Of course, Smith did not intend his disclosure to the phone company to be a disclosure to the government. Nonetheless, because of Smith's "knowing exposure," the installation and use of a pen, register specifically for criminal investigations was deemed not to be a "search," and therefore no warrant was required.\textsuperscript{107}

In\textit{ California v Greenwood},\textsuperscript{108} the Court ruled that persons who leave their garbage out on the curb for public collection have "exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection."\textsuperscript{109} This result was based on the common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so.\textsuperscript{110}

This reasoning is both myopic and mystifying. Initially, it should be noted that trash can contain the most private and embarrassing information, including highly personal writings and

\textsuperscript{102} See text at 256-59.
\textsuperscript{103} 442 US 735 (1979).
\textsuperscript{104} Id at 742-43.
\textsuperscript{105} Id at 744.
\textsuperscript{106} Id.
\textsuperscript{107}\textit{Smith}, 442 US at 744-45.
\textsuperscript{109} Id at 40.
\textsuperscript{110} Id.
financial records, material that may have the highest privacy value. The fact that other people may steal, vandalize, or enter our property to take this material can hardly provide legitimate grounds for permitting the police to do the same. Furthermore, there may be no other legal or practical way to dispose of trash. The CIA and the FBI are well-equipped with burn bags and sophisticated paper shredders, but most citizens would be hard pressed to take these extravagant steps to protect their privacy. But even assuming that there was in *Greenwood* a disclosure to others who might sort through the trash, do we as a society not have a reasonable expectation that the police will not do so?

It is also unnecessary to obtain a warrant before employing airplanes and helicopters to investigate conduct that is hidden from ground-level observation but is in plain view from the air. *California v Ciraolo* 476 US 207 (1986) upheld the warrantless aerial surveillance at an altitude of 1,000 feet of marijuana plants growing in the enclosed backyard of a private residence. Although the homeowner had purposefully shielded his yard from public view by erecting a ten-foot fence around his property, and although he clearly expected that his privacy would be preserved, the Court found an expectation of privacy from all observations (that is, those made from the sky) to be unreasonable. The expectation was unreasonable because “a 10 foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a two-level bus.”

According to the Court, Ciraolo’s expectation that his garden would be protected from aerial observation was simply not one that society is prepared to recognize. This is because the officers could have made naked-eye observations from publicly navigable airspace, and “[a]ny member of the public flying in this airspace who glanced down could have seen everything that [the] officers observed.” Relying on general knowledge of the frequency of private and commercial air traffic, the Court refused to interpret the Fourth Amendment as demanding that “police travelling in the public airways at [1,000 feet] obtain a warrant in order to observe what is visible to the naked eye.”

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112 Id at 215.
113 Id at 212-15.
114 Id at 211 (emphasis added).
116 Id (emphasis added).
117 Id at 215.
Authority to use aerial surveillance was extended in *Florida v Riley*,\(^{118}\) which held that helicopter surveillance of a partially covered greenhouse at an altitude of only 400 feet was not a search in violation of the Fourth Amendment.\(^{119}\) Even though the defendant clearly intended to exclude public observation of his greenhouse by enclosing the sides and roof, his expectation of privacy was defeated by the fact that two of the roofing panels (about one-tenth of the roof) were dislodged and exposed the interior.\(^{120}\) The helicopter enabled the police to peer through and detect marijuana plants growing inside.\(^{121}\)

The Court’s analysis of the privacy component of the Fourth Amendment is based almost entirely on the actions of the individual, namely whether she completely excluded any possibility of others viewing her property. According to the Court, the purpose of the government agent is irrelevant. Thus, the Court holds as one and the same the intentional view of one’s home, yard, or trash by a police officer deliberately seeking evidence of a crime and the possibility that an airline passenger at 25,000 feet would make the same observations or that a street person would rummage through one’s trash. This view disregards the Fourth Amendment’s special role in limiting official invasions of privacy. It is difficult to perceive the basis—other than an uncritical deference to law enforcement’s efforts in the drug war—upon which the Court makes the legal/social judgment that our private activities, including perfectly innocent and intimate conduct, should not be protected from governmental snooping because we have failed to draw our curtains tightly, to cover every skylight in our house, or (impossibly) to cover our backyards.\(^{122}\)

The Court’s opinion in *Oliver v United States*\(^{123}\) demonstrates just how far the Court has departed from the privacy-enhancing principles of *Katz*. Oliver owned a 2,000 acre farm. The police, acting on an anonymous tip that Oliver was cultivating marijuana in his fields, entered his property without a warrant.\(^{124}\) They ignored a “No-Trespassing” sign and proceeded

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\(^{119}\) Id.

\(^{120}\) Id at 447-50.

\(^{121}\) Id at 448-50.


\(^{124}\) Id at 173.
down a private road on the property. Near Oliver's house they walked around a fence and gate and looked inside a parked camper situated on the property. They eventually found a field of marijuana on Oliver's property, over a mile from his house.

Applying the reasonable expectation of privacy test, the Court rejected Oliver's claim of a Fourth Amendment violation, ruling that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." As Professor Saltzburg has commented, this is pure "ipse dixit." Oliver did not claim that all "open fields" were protected by the Fourth Amendment. Instead, consistent with Katz, he claimed that his fields were not in fact open and, therefore, were entitled to privacy protections. Oliver had done everything in his power to preserve his privacy interests, including posting "No-Trespassing" signs, using fences and gates, and keeping his property secluded from the general public. Oliver did nothing to disclose his activities and manifested a clear intent to keep unauthorized visitors from traversing his land. Thus, Oliver had done exactly what Katz did when he closed the door to the public telephone booth: both Oliver and Katz sought, however imperfectly, to exclude the public from their private affairs.

To avoid applying privacy principles in Oliver, the Court distorted both the record and judicial doctrine. The Court rationalized its conclusion that Oliver had no privacy interest in his fields by asserting that the area could be viewed from an airplane, disregarding the fact that there was no evidence that the marijuana in the field in question could actually have been seen from the air. If exposure to a determined snooper is sufficient to defeat a privacy interest, then Katz is wrongly decided, because a lipreader could determine what Katz was saying.

Unwittingly, the Court revealed its true stance when it concluded that the Fourth Amendment was not intended to "shelter
criminal activity . . . [by the] erection of barriers and [the] posting of 'No Trespassing' signs. In fact, the opposite is true: the Fourth Amendment should be understood as a qualified "shelter" of all activity, criminal and innocent alike, that may only be breached with the requisite showing of cause and prior judicial approval. If one's land or fields should be treated differently than one's home or possessions, then the Court should provide a principled reason for this distinction. And if the Court is correct, then police can break down fences and roam freely on private property. It is difficult to believe that this reflects what our society would consider reasonable.

C. Reducing Privacy by Definitional and Doctrinal Devices

By adopting a relatively narrow definition of what constitutes a search or seizure, the Court has placed another set of arbitrary practices by the police outside the parameters of the Fourth Amendment. In California v Hodari D., the Court ruled that a police chase and "cornering" of a suspect, made without the cause or suspicion necessary to effect a forcible stop, was not grounds to suppress evidence discarded by the suspect during a chase because there had been no "seizure" under the Fourth Amendment at the time the defendant threw the evidence. The Court had previously ruled that a "seizure" of the person occurs when the suspect would reasonably believe that he was not free to leave. Of course, by requiring an actual physical seizure (or submission to authority), the Court can avoid Fourth Amendment consequences for a range of police conduct that was unjustified from its inception.

Hodari D. reflects the Court's narrow, "atomistic" view of the Fourth Amendment. By focusing on the question of whether an individual was physically seized, the Court permits a range of police practices that are offensive to Fourth Amendment values. For example, in Hodari D., if the suspect had acquiesced in the

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134 Oliver, 446 US at 182 n 13.
136 Id at 629.
137 In United States v Mendenhall, 446 US 544, 554 (1980) (plurality opinion), Justice Stewart wrote that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." See also Michigan v Chesternut, 486 US 567, 573 (1988).
138 For a discussion of the atomistic view of the Fourth Amendment, see Amsterdam, 58 Minn L Rev at 367-72 (cited in note 101).
police show of authority, then any evidence obtained would have been unlawful as a product of the unlawful seizure. It makes little sense for the applicability of the Fourth Amendment to turn on this fortuitous factor when the purpose of the Amendment is to limit certain kinds of police practices without particular reference to the reaction of a suspect.

Indeed, where it suits the Court’s agenda of limiting Fourth Amendment protections, the Court has not hesitated to reject the individual-rights model to stress the importance of regulation and deterrence. Thus, in several areas, including grand jury proceedings, habeas corpus actions, and “good faith” applications for search warrants, the Court has refused any remedy for constitutional violations on the theory that deterrence would not be served. Whether or not a unified theory of Fourth Amendment jurisprudence is possible, the Court’s current approach is entirely unsatisfactory; it is highly result-oriented and organized emphatically to expand governmental power of investigation.

In United States v Leon, the Court adopted a good faith exception to the exclusionary rule in search warrant cases. The Court ruled that even when a search warrant fails to state probable cause, the Fourth Amendment does not require that the evidence be suppressed if the officer who secured the warrant believed in reasonable good faith that the facts asserted were sufficient to establish probable cause. Just one year before Leon, in Illinois v Gates, another drug case, the Court redefined the standards for assessing whether a warrant states probable cause, adopting a “totality of the circumstances” test that permits a magistrate to issue a warrant where there is a “fair probability” to believe that contraband or evidence of a crime will be found. Furthermore, the Court limited the review powers of the district court on suppression motions to determining whether
the magistrate had a “substantial basis” for issuing the warrant.\textsuperscript{149}

Gates reduced the level of cause required to issue search warrants, first by relaxing the *Aguilar-Spinelli* two-pronged test\textsuperscript{150} and, second, by limiting judicial review of the magistrate’s determination.\textsuperscript{151} Thus, Gates and Leon provided the police with a two-step discount from historically established standards of probable cause. Now, as long as a court can determine that the magistrate who issued the warrant had a “substantial basis” for believing that cause existed and that a reasonable officer could have believed that probable cause was stated—a standard that permits searches on not much more than the barest suspicion—the warrant will be sustained.\textsuperscript{152}

What should not be lost in the debates over the exclusionary rule and judicial review of police practices is the practical effect that the doctrine of good faith will have on the substance of constitutional rights. Where judicial remedies for conduct that violates Fourth Amendment standards are withdrawn, the operative standard (that is, the one followed by the police) will be something far short of probable cause. The results in these cases are defended on the ground that suppression of highly relevant evidence is not justified where police have acted in good faith or where it is unlikely that the goal of deterrence will be served.\textsuperscript{153}

Applying a cost-benefit analysis, the Court can easily subordinate privacy values to the demands of law enforcement.\textsuperscript{154} This cost-benefit approach has generated a good deal of debate, and a

\textsuperscript{149} Id.

\textsuperscript{150} See *Aguilar v Texas*, 378 US 108 (1964); *Spinelli v United States*, 393 US 410 (1969). Under the two-pronged test, the warrant was valid only if the affidavit independently demonstrated the reliability of the informer and the factual basis for the informer’s assertions.

\textsuperscript{151} *Gates*, 462 US at 236-37.

\textsuperscript{152} See *United States v Pless*, 982 F2d 1118, 1124 (7th Cir 1992) (stating that “the standard of review for such probable cause determinations [is] . . . affirmation absent clear error by the issuing magistrate”). See also *United States v Spinosa*, 982 F2d 620, 625-26 (1st Cir 1992).


\textsuperscript{154} See Cloud, 41 UCLA L Rev at 199 (cited in note 91).
strong case has been made that it is an inappropriate jurisprudential tool in the Fourth Amendment setting. But whatever the merits of that issue, there is strong reason to be skeptical of those who attack the suppression remedy on cost-benefit grounds while still expressing allegiance to the principles of the Fourth Amendment. If the true concern was simply to avoid suppressing evidence at criminal trials, but at the same time to protect the values of the Fourth Amendment, then one would expect that other remedies for constitutional violations would be strengthened. To the contrary, however, the courts, at the urging of law enforcement officials, have significantly restricted civil remedies for constitutional violations. The Supreme Court has granted absolute immunity from suit to judges and prosecutors for any actions taken in their official roles, and it has provided a qualified immunity from damages liability to police officers, thereby insulating them from suit for a wide range of illegal conduct. The Court has also placed severe restrictions on injunctive actions and has limited recovery from governmental entities. Accordingly, civil remedies provide quite limited means to enforce the Fourth Amendment.

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156 See, for example, Laurence H. Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 Harv L Rev 592 (1985).
156 See, for example, Stump v Sparkman, 435 US 349, 355-57 (1978); Pierson v Ray, 386 US 547, 555-57 (1967).
157 See, for example, Buckley v Fitzsimmons, 113 S Ct 2606, 2615-17 (1993); Imbler v Pachtman, 424 US 409, 421 (1976).
159 See, for example, City of Los Angeles v Lyons, 461 US 95, 101 (1983); Rizzo v Goode, 423 US 362 (1976).
160 See, for example, City of Canton v Harris, 489 US 378 (1989); City of St. Louis v Praportnik, 485 US 112, 128 (1988) (plurality opinion). As a practical matter, if the governmental employer is not liable, there may be significant difficulty in collecting a judgment from the individual officer, thus providing a disincentive to sue.
161 In recent years, there have been serious complaints concerning the manner in which drug raids are conducted. In documented cases, police ignore knock-and-announce requirements, storm houses in the early morning hours with heavily armed officers, terrorize the occupants, including those who are entirely innocent, and destroy property. See, for example, Sara Rimer, Minister Who Sought Peace Dies in a Botched Drug Raid, NY Times Al (Mar 28, 1994); McDonald v Haskins, 966 F2d 292 (7th Cir 1992). Unfortunately, even in these situations, remedies are restricted. See generally Rudovsky, 27 Harv CR-CL L Rev 465 (cited in note 20). Even more troubling is the widespread acceptance of these tactics, a reaction that is molded by the "war theory" and the fact that these raids occur almost exclusively in poor and minority communities.
If we were able to calibrate perfectly a range of effective deterrents to improper arrests, searches, and seizures (through measures like civil penalties and internal discipline) so that no violations of the Fourth Amendment occurred, there would be no need for an exclusionary rule, since no evidence would be tainted by a constitutional violation. Privacy would in some circumstances trump "truth," which is exactly the consequence envisioned by the Fourth Amendment. The exclusionary rule is an easy target for those whose real dispute is with the Fourth Amendment itself.182

The Court's decisions in the criminal context cannot be explained as a good faith attempt to limit the costs of the exclusionary rule. The Court's agenda is far more ambitious; it is grounded in the notion that constitutional rights, and not just remedies, must be curtailed in the War on Drugs. Taken in combination, the Court's decisions in the search and seizure field leave the Fourth Amendment as little more than an honor code, stripped of substantive protections, with its constitutional values to be determined by the very forces it was meant to control. There is more than historical irony to this development. The notion that the reduction of privacy protections is a necessary component of the War on Drugs is false, and the implicit promise that restricting individual rights will make us safer is illusory. We are no safer from the ravages of drugs, but we are far less secure from arbitrary government practices.

There is another related and significant judicial development in this area that bears some discussion. In reaction to the Supreme Court's conservative criminal justice jurisprudence, state courts have developed state constitutional theories to provide more protection to privacy and other constitutional rights.183 Some jurisdictions have wholly defected from the constitutional doctrines articulated by the United States Supreme Court.184

The manifestations of federal/state judicial conflict over the interpretation of constitutional provisions have been particularly

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184 See id.
sharp in the Fourth Amendment area. The most fundamental questions that the Supreme Court has addressed—the scope of the Amendment's coverage, the application of the exclusionary rule, and the theoretical underpinnings of the Amendment—have all been independently examined, and in many cases resolved differently, by state courts. Just as significantly, state courts are beginning to question the consequences of the War on Drugs on constitutional doctrine. As the Pennsylvania Supreme Court recently stated:

We are mindful that government has a compelling interest in eliminating the flow of illegal drugs into our society, and we do not seek to frustrate the effort to rid society of this scourge. But all things are not permissible even in the pursuit of a compelling state interest. The Constitution does not cease to exist merely because the government's interest is compelling. A police state does not arise whenever crime gets out of hand. In fact, all today's holding requires is what police should themselves insist on: probable cause to believe that a crime has been committed or contraband is to be found before there is a police intrusion . . . . [A] free society cannot remain free if police may use drug detection dogs or any other crime detection device without restraint. The restraint which we today impose on the use of drug detection dog searches of persons is modest enough, in light of our constitutional mandate.

Given the politicized state of constitutional decisionmaking, it is perhaps inevitable that differences would evolve in the application of federal and state constitutional guarantees. But the fact that the most intense differences have emerged on Fourth Amendment issues demonstrates from another vantage point the potent and pervasive impact of the War on Drugs.

II. THE SIXTH AMENDMENT: THE LAWYER AS THE PROBLEM

As we have seen, the Court has provided the police with extraordinary powers of investigation, search, and seizure. At the same time, Congress has greatly expanded the reach of criminal statutes used to prosecute drug offenses. Not content with

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165 See id.
167 See, for example, 18 USC §§ 1956-57 (1988) (establishing criminal sanctions for
these changes, the government has opened another front in the War on Drugs—this one aimed at defense lawyers. In the past decade, prosecutors have moved to restrict the zealous advocacy of criminal defense attorneys (and particularly those engaged to represent persons charged in major drug cases), defending their tactics as nothing more than even-handed treatment of lawyers who are suspected of illegal or unethical conduct. 168 There is growing concern, however, that there is an improper ideological motivation for these measures, one that is grounded in the belief that the criminal defense lawyer is part of the enemy camp. 169

The attack on the right to counsel has involved several strategies. First, a dramatic increase has occurred in the use of grand jury subpoenas to lawyers for information relating to clients, including clients currently under criminal investigation or indictment. 170 When they enforce these subpoenas, the courts give insufficient weight to the burdens they place on the attorney-client relationship.

Second, the government and the courts have developed highly differentiated ethical standards for prosecutors and defense lawyers. Federal prosecutors claim the right to exempt themselves from state ethical rules that forbid contact with persons represented by counsel and from issuing subpoenas to lawyers without prior judicial approval. 171 Prosecutors also seek to dis-
qualify defense counsel on asserted conflicts of interest even where clients waive this right and where the prosecutors' principal motive is to divide defendants, thereby enabling the government to use one or more defendants as prosecution witnesses.\footnote{172} Prosecutors have even wired lawyers to record conversations with their clients.\footnote{173} For the most part, the courts have upheld these practices, mechanically subordinating the rights of defendants to "compelling interests" of the government.\footnote{174} One need not quarrel with the government's legitimate interest in regulating or prosecuting corrupt lawyers to realize also that these practices reflect an attitude that vigorous advocacy of constitutional rights is in part to blame for our high levels of crime.

Illustrative of the new restrictions is the practice of fee forfeiture. Under the Comprehensive Forfeiture Act of 1984 (the "CFA"),\footnote{175} a court, upon motion of the government, may issue a restraining order that prohibits a criminal defendant from disbursing assets that derive from certain criminal activity. The relation-back provision of the CFA allows the government to seek a post-conviction forfeiture of property transferred to a third person, including counsel fees.\footnote{176} Under the CFA, the mere allegation in the indictment that the defendant has assets that derive from, or are the proceeds of, certain criminal enterprises allows the government to seek an \textit{ex parte} restraining order to prevent the defendant from disposing of those assets.\footnote{177} Lawyers are thus on notice that if they lose the case, their fee can be forfeited to the government. Thus, by the power of indictment, the government can forfeit the defendant's right to counsel of choice, for no lawyer will take the case on a contingency basis; indeed, it would be unethical to do so.\footnote{178}

In \textit{Caplin & Drysdale, Chartered v United States}\footnote{179} and \textit{United States v Monsanto},\footnote{180} the Court sustained the CFA as...
applied to the forfeiture of assets that would be used to retain counsel.\textsuperscript{181} The Court recognized that in some cases forfeiture would deprive a defendant of his counsel of choice, but it concluded that the “strong governmental interest in obtaining full recovery of all forfeitable assets . . . overrides any Sixth Amendment interest in permitting criminals to use . . . forfeitable [assets] . . .”\textsuperscript{182}

This reasoning subordinates important Sixth Amendment interests. First, it ignores the contingency inherent in a criminal forfeiture proceeding. Whether or not the assets are “tainted” depends on the outcome of the proceeding for which the defendant seeks to retain counsel. Second, the argument ignores the impact of the forfeiture option upon our adversary system. By merely alleging in an indictment that assets are tainted, the prosecution could preclude any criminal defendant from retaining counsel of choice. Third, it ignores the reality that lawyers are not fungible. Some criminal charges are so complex that specialized and well-paid advocates are essential to a fair defense.

Finally, there is the institutional concern. By using its forfeiture power, the government is able to exert substantial power over defendants’ ability to choose defense counsel, which allows the government to prevent the most capable lawyers from representing certain defendants. By driving the more capable lawyers from the market, the government is able to weaken the collective strength of the defense bar in the process, which inevitably distorts the adversary system by skewing the balance of power in favor of the government in these—and many other—criminal prosecutions.\textsuperscript{183}

\textsuperscript{181} Id at 606-07; Caplin & Drysdale, 491 US at 622-23.

\textsuperscript{182} Id at 631.

\textsuperscript{183} Morgan Cloud, Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights, 1987 Wis L Rev 1, 35.

There should be concern as well with the tactics employed by drug enforcement agents in undercover operations and the use of informers. A recent case provides a good example of how hard it is to shock the conscience of the federal courts. \textit{United States v Edenfield}, 995 F2d 197 (11th Cir 1993), involved an informer who approached a local sheriff and offered to provide information on one of the sheriff’s political enemies. The sheriff agreed to pay the informer, but only for “results.” The informer then purchased small amounts of drugs from the sheriff’s political enemy (the defendant in Edenfield) for which the sheriff paid the informer $3,600. Id at 197-98.

The sheriff then explained that his goal was to “bust” the defendant with over an ounce of cocaine. Id at 199. The sheriff said that if the informer could get one of the defendants in a car with more than an ounce of cocaine, the sheriff would pay him $4,000 in advance and $6,000 afterwards. Id. The informer agreed, and the sheriff paid the advance, part of which he personally borrowed from a bank. \textit{Edenfield}, 995 US at 199. The infor-
III. EIGHTH AND FOURTEENTH AMENDMENTS: SHALL NOT APPLY TO CRUEL OR RACIALLY DISPARATE POLICE PRACTICES OR SENTENCING

From the start, the War on Drugs has emphasized law enforcement and the criminal process to control and regulate drug abuse.\(^{184}\) As a result of these policies, rates of arrest, prosecutions, forfeitures of property, and incarceration have all spiraled.\(^{185}\) The legislative response to the drug crisis has been not only reflexively to expand powers of investigation, but also to ease the way for imprisonment, both before and after trial, often in ways that present serious constitutional questions under the Eighth and Fourteenth Amendments.

The statistics demonstrate the scope and impact of these punishment initiatives. Fueled by the War on Drugs, arrests, prosecutions, and imprisonments have increased by dramatic proportions. In 1992, there were over 1.1 million persons confined in the United States, a population that has increased three-fold in the past fifteen years.\(^{186}\) The United States' rate of incarceration is now over 455 per 100,000,\(^{187}\) by comparison, the rate in South Africa is 311 per 100,000.\(^{188}\) In 1990, over 4.3 million individuals were under some form of correctional supervision.\(^{189}\) We incarcerate more people for longer periods of time than any other industrialized nation, and our rates are ten times higher than those of Japan or any country in Western Europe.\(^{190}\)


\(^{185}\) See Bureau of Justice Statistics, *Drugs, Crime and the Justice System* 74-126 (cited in note 2); Fox Butterfield, *Are American Jails Becoming Shelters from the Storm?*, NY Times 4-4 (July 19, 1992).


\(^{188}\) Mauer, *Americans Behind Bars* at 2 (cited in note 185).

\(^{189}\) Id at 1.

\(^{189}\) Id.

\(^{190}\) ABA Report at 5 (cited in note 185).

\(^{190}\) Mauer, *Americans Behind Bars* at 5 (cited in note 185).
A large part of this increase is attributable to persons convicted of drug charges only. Nationally, over one-third of all new inmates are drug offenders. Over 60 percent of those in federal prisons have been convicted of drug offenses. Between 1986 and 1991, adult arrests for drug offenses rose 25 percent, and persons imprisoned for these offenses rose 327 percent.

Increases in arrests are not the only reason for this explosion in the incarceration rates for drug offenses; the widespread use of mandatory minimum and guideline sentences is equally significant. Federal law, for example, requires a minimum five-year sentence for possession of more than five grams of crack cocaine, five hundred grams of cocaine powder, one hundred grams of heroin, one hundred kilograms of marijuana, or one gram of LSD. (A gram is about half the weight of a dime.) The weight is determined by including the carrier for the drug (for example, a sugar cube for LSD) and the weight of any diluting substance. The Supreme Court upheld this provision even though the differences in weight for the same amount of LSD can be over 2,000 percent, based solely on the manner of marketing.

Mandatory sentencing raises a host of serious problems. This process results in arbitrary and senseless sentences, so much so that federal judges have either retired from the bench or, as Senior Judges, have refused to hear these cases. Senior Judges Jack B. Weinstein and Whitman Knapp, in public protest over mandatory minimum sentencing statutes and federal sentencing guidelines, announced that they would no longer preside over drug cases. According to Judge William Schwarzer, director

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196 Id at 467-76 (Stevens dissenting).
197 Taifa, 8 Natl Prison Project J at 5-6 (cited in note 192).
198 See Joseph B. Treaster, *2 Judges Decline Drug Cases Protesting Sentencing Rules*, NY Times 1-1 (Apr 17, 1993); Cris Carmody, *Revolt to Sentencing Is Gaining Momentum*, Natl Law J 10 (May 17, 1993). Judge Weinstein stated: “I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade.” Judge Knapp said: “Each day more money is spent and more people go to prison, but there are more drugs on the street. It makes no sense.” Aaron Epstein, *Anger Over Bigger Crimes*
of the Federal Judicial Center, such incidents are just the tip of the iceberg: "This has been coming for a long time. There's been a very strong undercurrent . . . reflecting the realization that these laws are not working."199

The most troubling aspect of these recent trends is the manifest racial disparities in the rates of arrests and incarceration. In 1990, 25 percent of all African-American men between the ages of twenty and twenty-nine were incarcerated or on parole or probation supervision.200 This incarceration rate is five times that of black South Africans.201 African-Americans are 12 percent of the population but constitute 44 percent of the American prison population.202

The most dramatic—indeed, scandalous—disparities are found in drug arrests and incarceration rates. According to national drug abuse studies, minorities possess and use drugs just slightly more than whites. For blacks, the rate is 16 percent; for whites, 12 percent.203 The Chief of the Drug Enforcement Agency has stated that it is "probably safe to say whites . . . [constitute] the majority of traffickers."204 Former "Drug Czar" William J. Bennett stated that "[t]he typical cocaine user is white, male, a high school graduate employed full time and living in a small metropolitan area or suburb."205 In a fair system of enforcement, it would therefore be expected that far fewer blacks (who make up 12 percent of the population) would be arrested as compared to whites. Just the opposite is true. Blacks are four times more likely to be arrested on drug charges than whites.206 A USA Today study showed that blacks are twenty-two times more likely to be arrested in Minneapolis, thirteen times as likely in Seattle, and eighteen times as likely in Columbus, Ohio.207

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199 Carmody, Natl Law J at 10 (cited in note 198).
201 Mauer, Americans Behind Bars at 1 (cited in note 185).
202 Butterfield, NY Times at 4-4 (cited in note 184).
204 Id.
205 Id.
207 Meddis, USA Today at A1 (cited in note 203).
These results can be explained only by understanding that police and sentencing practices often reflect racial factors. Police target minority communities for drug arrests, use racial factors in their profiles, and, by using the indiscriminate arrest and search methods described above, place their primary focus on people of color.\textsuperscript{208} Tactics that would not be tolerated in the suburbs are everyday fare in the inner city, and powerless minorities have little means of remedying illegal arrests and searches.\textsuperscript{209}

Some sentencing statutes also appear to be racially biased. Perhaps the most notorious example is the differential treatment of possession of crack as opposed to powdered cocaine. In 1988, Congress amended the drug laws to provide that a first-time possession conviction for five grams of crack cocaine would result in a five-year mandatory sentence.\textsuperscript{210} For cocaine in powdered form, however, one would have to possess one hundred times this amount (five hundred grams) to be subject to this punishment.\textsuperscript{211} The available evidence indicates that crack cocaine is used principally by African-Americans, while powder cocaine is used primarily by Caucasians.\textsuperscript{212} Of all the defendants sentenced for federal crack cocaine offenses in 1992, 92.6 percent were black.\textsuperscript{213} The statistics from this disparate sentencing scheme raise grave concerns about its negative impact on African-Americans, who are subject to long mandatory minimum sentences for simple possession of small amounts of crack, while first-time offenders convicted of possessing a much larger amount of cocaine powder are subject to lighter sentences.

To date, the Court has not directly confronted the racial disparities in drug case arrests and sentencing, but its approach to the race issue in capital sentencing gives a clear indication of its hands-off posture. In \textit{McCleskey v Kemp},\textsuperscript{214} the Court considered a racial discrimination challenge to capital sentencing in Georgia. To support his claims, the defendant submitted a statistical study of over 2,000 murder cases with data about the victims' race, the defendants' race, and the combined effect of the

\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} 21 USC § 841(b)(1)(B)(iii).
\textsuperscript{211} 21 USC § 841(b)(1)(B)(ii).
\textsuperscript{212} \textit{State v Russell}, 477 NW2d 886, 887 (Minn 1991); \textit{United States v Clary}, 846 F Supp 768, 786 (E D Mo 1994), overruled, 34 F3d 709 (8th Cir 1994); \textit{United States v Walls}, 841 F Supp 24 (D DC 1994).
\textsuperscript{213} \textit{Clary}, 846 F Supp at 786.
\textsuperscript{214} 481 US 279 (1987).
race of the parties. The study concluded that defendants who kill white victims are eleven times as likely to receive the death penalty as those who murder blacks, and that blacks who kill whites are twenty times more likely to be punished by death than those who kill blacks. The Court rejected the claim, ruling that these statistics did not prove a system of intentional discrimination and that McCleskey did not prove that racial bias affected the jury's decision in his case. Anticipating potential equal protection claims based on differentials in arrests and sentencing in drug cases, the Court stated that these broad-based claims would call "into serious question the principles that underlie our entire criminal justice system."

The Court's rejection of the compelling statistical evidence of deep seated racial discrimination represents an unwillingness to confront a problem that continues to plague all aspects of our criminal justice system. The Court's candidly stated fear that crediting this evidence would invite other challenges to sentencing practices is, as Justice Brennan responded, "a fear of too much justice." Moreover, it reveals a fear of reality: a perspective that places the continued operation of the criminal justice system paramount even as against the constitutional mandate of non-discrimination. To label the statistics constitutionally irrelevant is simply to wish the problem away.

In light of McCleskey, there is a substantial question whether the federal courts will carefully scrutinize the racial implications of drug sentencing laws. To date, several courts have rejected equal protection challenges to crack cocaine sentencing statutes. By contrast, several district courts and the Minnesota Supreme Court have ruled that crack cocaine sentencing schemes deny equal protection of the laws.

218 Id at 286. The study was conducted by Professor David C. Baldus, a prominent sociologist and statistician.
216 Id at 312-13, 319.
217 Id at 315.
218 See text at 250-51.
219 McCleskey, 481 US at 339 (Brennan dissenting).
220 United States v Marshall, 998 F2d 634 (8th Cir 1993); United States v Jones, 979 F2d 317 (3d Cir 1992) (race issue not presented); United States v Cyrus, 890 F2d 1245 (DC Cir 1989); Marcia G. Shein, Racial Disparity in "Crack" Cocaine Sentencing, 8 Criminal Justice 28 (Summer 1993).
Laws pertaining to pre-trial confinement and sentencing are responsible for a significant part of the increase in incarcerations. In 1984, Congress enacted a Bail Reform Act (the "Act")\(^2\) that, for the first time in our history, provided for preventive detention.\(^2\) Under this Act, a defendant may be detained without bail if "no condition or combination of conditions will reasonably assure appearance [at trial] . . . and the safety of any other person and the community . . . ."\(^2\) The Act requires consideration of a number of factors to determine whether one should be released or detained, but it creates a rebuttable presumption that a defendant charged with an offense under the Controlled Substances Act should be detained under the above-stated criteria where the maximum sentence is ten years or more.\(^2\) The Act worked a fundamental change in the bail system and for the first time authorized the pre-trial imprisonment of a person innocent of any crime on the theory that she would likely commit other crimes while awaiting trial.

In *United States v Salerno*,\(^2\) the Court rejected a challenge to the constitutionality of the Act, ruling that pre-trial confinement to ensure appearance at trial or to protect the public is not "punishment" but rather is regulatory in nature.\(^2\) Thus, in balancing the individual's interest in liberty and the government's interest in preventing danger to the community, the Court determined that there is no absolute ban to detaining individuals for compelling societal needs.\(^2\) The Court also ruled that the Eighth Amendment's proscription of "excessive bail" does not guarantee the absolute right to bail (only that bail, if granted, not be excessive).\(^2\)

Putting aside the fundamental issues presented by any regime of preventive detention,\(^2\) it is notable here that one can be held without bail under this Act not on any direct proof that one presents a danger to the community, but rather on the presumption that because one has been charged with a drug offense carrying a ten-year sentence, one must constitute such a dan-

\(^{222}\) 18 USC § 3141 et seq.
\(^{224}\) 18 USC § 3142(e).
\(^{225}\) Id.
\(^{226}\) 481 US 739 (1987).
\(^{227}\) Id at 746-47.
\(^{228}\) Id at 750-51.
\(^{229}\) Id at 752-55.
\(^{230}\) See Miller and Guggenheim, 75 Minn L Rev at 335 (cited in note 223).
Accordingly, the Act authorizes pre-trial imprisonment based simply on a finding of probable cause for certain drug offenses. Thousands of drug defendants have been incarcerated under these provisions.

Sentences for drug offenses can be draconian. Severe mandatory minimum sentences are mandated by federal and state laws, and the harshness of some courts has led even conservative commentators to compare certain individual cases with the "evil" practices of Germany's justice system under Hitler. Substantively, the only possible constitutional break on excessive sentences is the Eighth Amendment's prohibition on cruel and unusual punishment. In *Solem v Helm*, the Court ruled that a criminal sentence must be proportionate to the crime for which the defendant has been convicted, and it overturned a life sentence without parole for a repeat offender convicted of writing a worthless $100 check. The Court compared the harshness of the sentence with the gravity of the offense, the punishment imposed by that state for other crimes, and punishments imposed by other states for the same crime. Yet, when this issue was presented in the context of a life sentence for possession of 650 grams of cocaine, the Supreme Court rejected a challenge that the sentence violated the Eighth Amendment's proscription against cruel and unusual punishment. "Severe mandatory penalties may be cruel," Justice Scalia stated, "but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." A majority of the justices did reject the argument that no proportionality review was required by the Eighth Amendment, but these justices, echoing the litany of evils associated with drugs, had little difficulty in finding this sentence to be constitutional.

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231 See 18 USC § 3142(e).
232 Miller and Guggenheim, 75 Minn L Rev at 335 (cited in note 223).
233 See, for example, Anti-Drug Abuse Act of 1988, Pub L No 100-690, 102 Stat 4181 (1988).
236 Id at 285-90.
237 Id at 281-83, 303.
238 Id at 285-300.
240 Id at 2701 (rejecting the argument that a mandatory life sentence cannot be imposed without consideration of mitigating factors).
241 Id at 2706-08 (Kennedy, O'Connor, and Souter concurring).
CONCLUSION

The abuse of drugs presents profound problems in our society. We have for many years relied principally upon interdiction, prosecution, and criminal sanctions to reduce the flow of drugs, but in so doing we have embraced law enforcement policies that undermine a wide range of constitutional rights. In our zeal to win this war, we have compromised rights to privacy, autonomy, liberty, and racial equality. Executive and law enforcement officials have shown little regard for constitutional rights where these rights are perceived to interfere with the logistical demands of the War on Drugs. Unfortunately, the judiciary has all too often deferred to Executive authority, thereby subordinating constitutional protections to the prerogatives of law enforcement. If this pattern continues, we risk the loss not only of the War on Drugs but also significant parts of our constitutional heritage as well.