Drug Rhetoric, Courts, and the Law: A Response to Professor Rudovsky

James B. Zagel
James.Zagel@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol1994/iss1/11

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Drug Rhetoric, Courts, and the Law: A Response to Professor Rudovsky

James B. Zagel†

Effective expression, the persuasive use of language, rhetoric—all lawyers use it. I certainly did, and I do, and I am about to do it again. A judge has a different perspective on rhetoric because the judge is usually its target or, when a jury sits, its referee. And I write now as though I were the target and the referee of Professor Rudovsky's rhetoric.¹

In a setting designed to produce "rational" policy, rhetoric should follow proof, not precede it. Rhetoric is technique, not substance, except when, like hearsay, it is not offered for its truth. Those who disagree with my adage about rhetoric should consider that rhetoric is like money: it does not care who owns it. One's opponents may have better rhetoric, a larger, brighter, and bloodier shirt to wave. The choice of rhetoric is like the choice to argue fact or law; it is a strategic choice that can be quite wrong aside from the merits of one's argument.

In his article on the impact of the War on Drugs, Professor Rudovsky uses a lot of rhetoric: The "symbolically important[ ] 'war' metaphor" has, "[i]n no small part," driven the Supreme Court's "abdication to Executive authority."² The Court's Fourth Amendment decisions "cannot be explained as a good faith attempt to limit the costs of the exclusionary rule" but reflect an ambitious agenda to reduce the Fourth Amendment to "little more than an honor code."³ The jurisprudence has been "highly result-oriented,"⁴ as demonstrated by the manipulation of "heralded" precedent by a "differently constituted Court."⁵ Indeed, "[t]he Court has deferred to virtually every police and prosecutorial demand to limit Fourth Amendment rights and to eliminate

---

† Judge, United States District Court for the Northern District of Illinois.
² Id at 238.
³ Id at 262.
⁴ Id at 259.
⁵ Rudovsky, 1994 U Chi Legal F at 253 (cited in note 1).
or ease judicial oversight of searches, seizures, and arrests." Furthermore, driven by its "fear of reality" and of "too much justice," the Court's response to the criminal justice system's disparate impact on whites and African-Americans has been to adopt a "hands-off posture" and avoid the issue. This rhetoric is heavy artillery; Professor Rudovsky fires ammunition of lesser calibre, and at other targets, as well. He alleges a growing concern that some prosecutors act out of "improper ideological motivation."

But imagine one of these prosecutors saying that Professor Rudovsky, afraid of too much justice and afraid to face the realities of the American street and the anarchy and soul destruction that drugs bring, has adopted an ambitious agenda to cripple law enforcement. Rather than addressing the catastrophic consequences of rampant crime—for example, the pain and fear felt most acutely in our poorest and least empowered communities—Professor Rudovsky is driven by an improper ideological motivation to persuade us all that the Constitution is a suicide pact. In this mission, he has been aided by the "result-oriented" Warren Court which, because it was differently constituted, destroyed one hundred years of established law.

This response is not hard to imagine; I have heard it. And there is more than a little irony (perhaps intended) in Professor Rudovsky's use of "result-oriented" and "differently constituted" to criticize the Supreme Court. The phrases were often used by those who criticized the Warren Court decisions on which Professor Rudovsky relies, Mapp, Miranda, Massiah, and others.

---

6 Id at 240.
7 Id at 271.
9 Rudovsky, 1994 U Chi Legal F at 270 (cited in note 1).
10 Id at 264.
11 Mapp v Ohio, 367 US 643 (1961) (applying the exclusionary rule to prosecutions in state courts).
12 Miranda v Arizona, 384 US 436 (1966) (requiring the exclusion of statements obtained during custodial interrogations unless the suspect was first informed of his rights).
13 Massiah v United States, 377 US 201 (1964) (excluding incriminating statements obtained post-indictment by an undercover agent).
Where does all this leave the judge? Both here and in the courtroom, it leaves him keeping a straight face while thinking savage thoughts about the law professors who educated these advocates. And after the storms are over, the better judge reformulates the argument in less florid declarative sentences and looks to what substance there is that might tend to prove the declarations.

I. PROFESSOR RUDOVSKY’S RHETORIC

If we ignore the name calling, Professor Rudovsky’s argument consists of two moves and a number of general assertions.

A. Move 1: Constitutional Principles Are Defined as Principles of Fairness

Professor Rudovsky makes this move without fanfare when he writes in the closing paragraph of his introduction, “I discuss those issues of procedural fairness that are most affected by our current drug prohibition policies.”15 Focusing on fairness rather than the Constitution allows Professor Rudovsky to launch an easier attack on the Court than he might have if he had been required to ground his position in the words of the Constitution and the entire corpus of cases interpreting it. “Unfair” is an easier word to use than “unconstitutional,” at least among those trained as lawyers. This maneuver is often used. Lawyers have, for as long as I can see, been allowed to argue “fairness” without being required to find some warrant for it in the text of the Constitution. Many think fairness was the only idea that guided Chief Justice Warren.16 But fairness cuts both ways, so Professor Rudovsky’s opponents can fairly meet him on this field. The weight one should give fairness arguments may be questioned but, today at least, they are admissible.

B. Move 2: Professor Rudovsky Embraces the “War on Drugs” Metaphor

Professor Rudovsky argues that we are literally engaged in a war, and this leads us to do the same stupid things that we have done in other wars, namely to deny civil liberties, as with

---

15 Rudovsky, 1994 U Chi Legal F at 239 (cited in note 1).
16 See Miranda, 384 US at 519 n 16 (Harlan dissenting).
Roosevelt's World War II internment of Japanese-Americans\textsuperscript{17} and Lincoln's Civil War suspension of the writ of habeas corpus.\textsuperscript{18} This assertion really is the heart of Professor Rudovsky's brief: "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."\textsuperscript{19} Professor Rudovsky's argument has power, but it also contains some general flaws. "War on Drugs" is a metaphor; we do not fight a real war on drugs. We do not blow away planes and boats, or routinely bomb factories or communications centers, or annihilate our enemies by the thousands, as we would in a real war. The stakes of a real war are very high and immediately apparent, and it is in real wars that real civil liberty disasters have occurred. But not all wartime incursions on civil liberties are wrong. Lincoln's conduct during the Civil War has many defenders, and many would agree that war justifies some press censorship and some involuntary servitude in the government. Indeed, in outlining the historiography of civil liberties during the Civil War, one author recently noted that the first academic historian to write a biography of Lincoln praised his "defense of the 'right of the President to assume in emergency vast authority' and ridiculed [Lincoln's] enemies as 'rhetorical visionaries,' 'fanatics,' and 'parasites' who were not 'fully conscious of the Nation as a whole.'\textsuperscript{20} Most important, it is not the use of the war metaphor that matters, but the public's acceptance of that metaphor. Arguably, the public waited too long to accept in World War II that there was a war. And the public never bought President Carter's "moral equivalent of war" for the energy crisis.

If Professor Rudovsky thinks that we are in a pickle because a few politicians use the war metaphor, then he is wrong. He simply provides no proof of widespread public acceptance that we ought to be fighting a real war against drugs, nor, as Justice Roberts announced in 1932, that we ought to be "at war with the criminal classes."\textsuperscript{21} Professor Rudovsky is also wrong on two counts about judicial abdication to the Executive. First, if judicial abdication has occurred, it has been abdication to both Congress

\textsuperscript{17} See Rudovsky, 1994 U Chi Legal F at 238 (cited in note 1).
\textsuperscript{18} Id.
\textsuperscript{19} Id (citation omitted).
\textsuperscript{21} Sorrells v United States, 287 US 435, 453 (1932) (Roberts dissenting).
and the Executive Branch. Second, no judge I know feels carried along by war fever, and the only judges Professor Rudovsky quotes are those who publicly condemn the “war.” This is not the season for Korematsu.\footnote{Korematsu v United States, 323 US 214 (1944) (upholding Roosevelt’s World War II internment of Japanese-Americans).}

I have spoken to many judges over many years in circumstances that suggested they were being candid. I have encountered none who sit on reviewing courts who are blinded by the dazzling importance of the War on Drugs. To be sure, a few have signed up, but the judges who actually make the law seldom enlist. The nature of the judicial experience usually compels this sort of attitude. A judge’s life is filled with lawyers’ voices and briefs pressing positions that are not only good for their clients, but essential to the survival of the American Way. We are told over and over again that commerce, property, religion, or civic virtue will decline if we put our foot down wrong. Perhaps some judges believe this for a while; only a very few blessed souls believe it for long, and they nearly never wind up on courts of last resort. Judges are not above using War on Drugs rhetoric to support a decision, but, in my experience, the rhetoric does not control the decision. In fact, I suspect support for legalization is far higher among judges than the general public. No one should infer that a lawyer who evokes the War on Drugs wins the case because of that argument. Judges usually know campaign rhetoric when they hear it.

II. CIVIL LIBERTY DISASTERS

Having identified constitutional principles with fairness and having accepted the “war” metaphor, Professor Rudovsky asserts that the War on Drugs has caused several civil liberty disasters, including: the declining importance of individualized suspicion as the basis of police encounters with the public;\footnote{Rudovsky, 1994 U Chi Legal F at 243-53 (cited in note 1).} the evisceration, or at least severe intrusions into, our rightful expectations of privacy;\footnote{Id at 263-66.} an attack on the criminal defendant’s right to counsel;\footnote{Id at 253-63.} and unconstrained racial discrimination throughout the criminal
justice system—all made possible by the Court's agenda of abdication to and complicity with law enforcement.

A. The Fourth Amendment

The "Court's decisions on Fourth Amendment issues have been sharply one-sided." And yet much depends on where the observer stands. For every case in which, from Professor Rudovsky's point of view, the Court has taken a chunk out of the exclusionary rule, there exists a differently situated observer who sees a desperate effort not to overrule Mapp v Ohio and resurrect Wolf v Colorado. United States v Leon is such a case. Consider also Minnesota v Dickerson. While extending the "plain-view" doctrine to "plain feel" during a lawful Terry frisk, the Dickerson Court maintained a strict conception of what "plain" means in these contexts. In Dickerson, five justices, including Justice Scalia, joined Justice White's opinion holding that a lump of crack cocaine was not within the officer's "plain feel" because he had to squeeze, slide, and otherwise manipulate the item in the defendant's pocket before determining what it was. The Court held that for a seizure to be proper under a "plain feel" theory, the incriminating nature of the item seized must be "immediately apparent." Even the dissenters did not question the rigidity of the "immediately apparent" standard, nor the tight restriction on the scope of a Terry frisk; they merely objected that the factual findings on the record provided an insufficient basis for decision and warranted a remand.

But I would not dissent from Professor Rudovsky's proposition that rules have been changed to the prosecutor's advantage. Illinois v Gates, McCray v Illinois, Oliver v United States, 27

27 Id at 247-51, 269-71.
28 Rudovsky, 1994 U Chi Legal F at 240.
29 367 US 643 (1961) (applying the exclusionary rule to prosecutions in state courts).
30 338 US 25 (1949) (holding that, unlike federal courts, state courts were free to admit evidence seized through unreasonable search and seizure).
31 468 US 897 (1984) (holding admissible reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate even though the warrant was ultimately found invalid).
32 113 S Ct 2130 (1993).
33 Terry v Ohio, 392 US 1 (1968) (holding that officers may frisk individuals they believe are armed and dangerous for weapons).
34 Dickerson, 113 S Ct at 2138-39.
35 Id at 2139.
36 Id at 2141 (Rehnquist dissenting).
37 462 US 213 (1983) (stating that the issuing magistrate may look at the totality of
California v Ciraolo, Florida v Riley, and California v Acevedo may each be viewed as pro law enforcement. Not one of them, however, should be seen as a striking departure from well-established rules whose correctness and ambit were beyond question. It was not Marbury v Madison that was modified by Illinois v Gates. Several of the decisions Professor Rudovsky dislikes affirmed lower court decisions.

Like most lawyers and scholars, Professor Rudovsky reads into each important case a set of consequences and expectations. He concludes that, if those expectations are not fulfilled, then the Court has strayed, although it never set itself on any specific course in the first place. At times, Professor Rudovsky’s arguments, like many lawyer’s arguments I have heard, remind me of Pascal’s remark: “Those who construct antitheses by forcing the use of words are like those who put in false windows for the sake of symmetry. Their rule is not correct speech but correct figures of speech.”

Leaving to one side the one-sidedness question, Professor Rudovsky first says that “[i]creasingly, enforcement on the

---

circumstances to determine whether a fair probability exists that contraband or evidence of a crime will be found in a particular place).

38 386 US 300 (1967) (holding that police officers need not disclose an informant’s identity at a suppression hearing).

39 466 US 170 (1984) (reaffirming open-fields doctrine that police entry and examination of a field is free of any Fourth Amendment restraint).

40 476 US 207 (1986) (holding that the police were not required to obtain a warrant before conducting a naked-eye observation of a fenced backyard from a private plane flying at an altitude of one thousand feet).

41 488 US 445 (1989) (holding that no warrant was necessary for police to observe the interior of a partially covered greenhouse in a residential backyard from a helicopter located 400 feet above).

42 500 US 565 (1991) (holding that the police may open a closed container in a movable vehicle without first obtaining a warrant if the search is supported by probable cause).

43 5 US 137 (1803).


45 The Court could quote the words that movie director Mel Brooks put into the mouth of the author of “Springtime for Hitler” in his movie The Producers: “I am the author, you are the audience. I outrank you.” Mel Brooks, The Producers (Avco Embassy Pictures, 1968) (said by the character Franz Leipchen). Thus Mel Brooks stands Derrida on his head.

46 I have cited the English version. The quote appears in Blaise Pascal, Pensees et Opuscules 27 (Librairie Hachette, 1963).
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 will result in positive finds in a certain percentage of the stops.\textsuperscript{47} A nice point, but where is the proof that the use of such methods has increased in any greater proportion than the crime problem? Quoting the opinion of a judge or a law professor is not proof. Street-level enforcement, in my experience as both a prosecutor and state police director, has always depended on the police "tossing" a large number of cars and people without much more than an educated hunch. Maybe my experience is atypical, but I would like proof one way or the other about "increasingly" before acting on Professor Rudovsky's claim.

Professor Rudovsky next argues that because the Founding Fathers adopted the Fourth Amendment in reaction to the colonial Writs of Assistance,\textsuperscript{48} which issued without a showing of cause or judicial authority, individualized cause is the key to the Fourth Amendment.\textsuperscript{49} That the Fourth Amendment was adopted in reaction to the Writs of Assistance seems to me a point that Professor Rudovsky's opponent would make. The Writs of Assistance authorized home searches as part of a rational effort to cut down on widespread violations of customs laws and evasions of duties on goods.\textsuperscript{50} This means that the Founding Fathers may have intended the Fourth Amendment to foreclose the enforcement of widely despised customs laws. If this is so, then why should the Fourth Amendment be applied to widely applauded drug enforcement, and why, in any event, to searches outside the home? Maybe the Founding Fathers would have approved of the Fourth Amendment as a control upon the Customs Service or the IRS, but not upon the drug warriors. The social circumstances in existence at the time the Bill of Rights was adopted usually offer little or no support to positions like the one Professor Rudovsky advocates, and he ought to look elsewhere for solace. Of course, Professor Rudovsky could turn to the text of the Fourth Amendment, but he introduced history as a relevant consideration.

Professor Rudovsky then describes several law enforcement stops that depend upon profiles rather than individualized suspi-

\textsuperscript{47} Rudovsky, 1994 U Chi Legal F at 241 (cited in note 1) (emphasis added).
\textsuperscript{48} Id at 242-43.
\textsuperscript{49} Id at 242.
\textsuperscript{50} For a general discussion of the Writs of Assistance, see Maurice H. Smith, The Writs of Assistance Case (University of California Press, 1978).
cion. He may not understand how important “profile” or background knowledge is in individualized suspicion cases. For example, in *Terry v Ohio,* the existence of individualized suspicion depended upon the fact that the officer, judging the circumstances in light of his experience, thought that Terry's actions were consistent with a man casing stores for a robbery. Professor Rudovsky also implies that judges are influenced by their lack of knowledge that thousands of unproductive stops are made. And yet, this idea is no less a profile for having arisen from experience rather than a statistical survey or a psychological analysis. There is, of course, no proof that judges are “influenced” by such ignorance. But Professor Rudovsky’s criticism of profiles (or, more properly, Judge Pratt’s criticism) is forceful, and he makes the point (stripped of its rhetoric) that these practices are allowed because it is hard to suppress reliable evidence.

Professor Rudovsky continues by arguing, as if the stops themselves were not bad enough, that further doctrines permit findings of “voluntary consent” to search by persons stopped by the police on the basis of a general profile. He quotes Justice Marshall’s strong dissent in *Florida v Bostick,* ridiculing the idea of voluntary consent. I like Professor Rudovsky’s argument in the abstract, but “voluntary consent” is, and has always been, a term of art in the law, or another legal fiction. I have seen nearly a thousand pleas of guilty; perhaps three were voluntary in the same sense that one voluntarily chooses to marry or chooses Pepsi rather than Coke. Courts have turned their faces against the common understanding of voluntary consent, and they did so long ago. *Bumper v North Carolina* tells us that consent must be proven, but few courts have ever required much proof or much consent.

Police can use a valid traffic stop as a pretext for a drug investigation. Professor Rudovsky criticizes this rule partly be-

---

51 Rudovsky, 1994 U Chi Legal F at 243-51 (cited in note 1).
52 392 US 1 (1968).
53 Id at 5-7.
54 Rudovsky, 1994 U Chi Legal F at 245 (cited in note 1).
55 *United States v Hooper,* 935 F2d 484, 499 (2d Cir 1991) (Pratt dissenting).
56 Rudovsky, 1994 U Chi Legal F at 249-50 (cited in note 1).
58 391 US 543 (1968) (holding that to prove that consent to a search was freely and voluntarily given, consent must not have been premised on a claim of legal authority).
59 Of course, the police need probable cause to search. *Colorado v Bannister,* 449 US
cause it excuses many of the usual requirements for cause in search and seizure. This is not saying very much; much of search-and-seizure law consists of doctrines that excuse cause for one reason or another.

The Fourth Amendment has a fourfold structure: in a warrant application, the police must show that there is probable cause (1) to believe that there is a crime (2) committed by a particular person, and (3) evidence of the crime to be seized (4) at a place to be searched. Many doctrines excuse these usual requirements: "Search Incident to Arrest" excuses all but the second requirement; "Stop and Frisk" and "Administrative Search" both excuse the requirement of probable cause that there is a crime, committed by a particular person, before allowing a search, and either dispense with or modify the warrant requirement; "Plain View and Consent" excuses everything but seizure, probable cause and consent may excuse seizure as well. "Abandoned Property," "Motor Vehicle Searches," "Plain View," and "Open Fields" all excuse some aspect of the paradigm search-warrant process. And these doctrines were (arguably) formulated for purposes other than the War on Drugs and, except for "Stop and Frisk," were formulated well before the "war fever" heated up. "Stop and Frisk" is, by its own terms, directed at weapons rather than drugs, as the Court reminded us in Minnesota v Dickerson.

What makes all of this especially bad for Professor Rudovsky is that "as a practical matter racial motivation is very difficult to

---

1 (1980) (unanimous Court concluded that where probable cause to search developed after a car was stopped for a traffic violation, it was not necessary to obtain a warrant before searching).

60 Rudovsky, 1994 U Chi Legal F at 251 (cited in note 1).
62 See United States v Robinson, 414 US 218 (1973) (holding that if a custodial arrest was lawful, then a subsequent full search constitutes an exception to the warrant requirement and is "reasonable"); Chimel v California, 395 US 752 (1969) (holding that a warrantless search incident to an arrest is not justified for areas not under the arrestee's control).
63 See Terry, 392 US at 20-27 (stop and frisk); Camara v Municipal Court, 387 US 523 (1967) (administrative search involving safety inspections of dwellings).
64 Haddad, 68 J Crim L & Criminol at 217 (cited in note 59).
65 Id at 217, 222.
66 See generally id.
67 President Reagan did not institute the War on Drugs until twelve years ago. See Leslie Maitland, President Gives Plan to Combat Drug Networks, NY Times A1 (Oct 15, 1982).
68 113 S Ct at 2137.
prove. But proof is the key. When enough evidence exists that a stop was made on the basis of impermissible racial factors, then the officer who made the stop ought to be sanctioned. Until enough evidence exists, though, Professor Rudovsky is like a prosecutor of whom he would disapprove—a prosecutor who arrests a drug dealer on an unproven charge because it is easy to do and is popular with the prosecutor's constituency. You can accuse, but until you prove that this officer in this case did something wrong, suppression of evidence, or damages, or even discipline, is unlikely. Accepting that many officers near Philadelphia and in Volusia County make unjustified, racially based stops, most judges still will not be persuaded that all profile stops should be banned in Minneapolis or even in Philadelphia. The remedy for these violations is being sought where it ought to be sought, in civil damages or injunctive proceedings. There is an odd dissonance between Professor Rudovsky's condemnation of searches based on group membership and his advocacy of broad rules to be applied to all members of a group (the police), whether or not their actions transgress the law. There is the same dissonance in his condemnation of general profile searches where police make seven arrests out of one hundred stops and his apparent disapproval of Rizzo v Goode, which decided that twenty bad incidents in an area with three million people and 7,500 police officers did not establish grounds for injunctive relief. The question must always be how good is the profile and for what purposes ought it be used.

Professor Rudovsky is especially critical of the way the Court has construed "reasonable" expectation of privacy. He thinks one should have privacy rights in the telephone numbers one dials; the garbage one discards; and the marijuana one grows behind a ten-foot fence, or in a greenhouse with a hole in the roof, or in open fields, both fenced and posted. All this, Professor Rudovsky claims, is inconsistent with Katz's reasonable-expectation-of-privacy approach, and he has a point. But

69 Rudovsky, 1994 U Chi Legal F at 247 (cited in note 1).
71 Id at 373-77.
72 Rudovsky, 1994 U Chi Legal F at 253-58 (cited in note 1).
73 Id at 254, criticizing Smith v Maryland, 447 US 735 (1979).
75 Id at 255-56, criticizing California v Ciraolo, 476 US 207 (1986).
Katz itself was a new approach, and it was not often read by the Supreme Court in the way that Professor Rudovsky reads it. Katz can and has been relied upon to exclude from the definition of searches things that, before Katz, would clearly have been searches. It may not be the War on Drugs that diminishes Katz; it may be that Katz is the same sort of mostly dead-letter opinion that we have seen before in many areas of the law including this one. Bram v United States comes to mind.

The rest of Professor Rudovsky’s criticisms of Fourth Amendment law are not particularly tied to the War on Drugs and are not new. Although his criticism of United States v Leon is nicely put, Professor Rudovsky fails to set out facts from California v Hodari D. (as he did for virtually every other case he analyzes) to support his criticism that the Court approved “arbitrary” police action. A judge who sees this in a brief will wrinkle his brow and look up the case. The officers in Hodari D. drove a patrol car around the corner. A group of youths saw them and fled, arousing the officers’ suspicions and triggering a chase. This is not “arbitrary” police conduct, unless by “arbitrary” one means that the officers could have chosen to do other than what they did.

B. Privacy

Professor Rudovsky believes that cost-benefit analysis allows the Court to subordinate privacy values to the demands of law enforcement. But I think a court with an ambitious agenda of abdicating to the other branches of government would not need cost-benefit analysis; prosecutors have long argued the flip side of those “fairness” theories that Professor Rudovsky uses. “The criminal [should not] go free because the constable blundered”

---

79 168 US 532, 564 (1897) (holding that in criminal trials in federal courts, the voluntariness of a confession is controlled by the self-incrimination portion of the Fifth Amendment). For a close analysis of Bram, see Laurence A. Benner, Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective, 67 Wash U L Q 59, 107-13 (1989); Stephen A. Saltzburg, Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat, 26 Washburn L J 1, 4-14 (1986).
82 Hodari D., 499 US at 621-23.
83 Rudovsky, 1994 U Chi Legal F at 260-61 (cited in note 1).
84 People v Defore, 242 NY 13, 21, 150 NE2d 585 (1926).
could be a "fairness" argument, not a cost-benefit argument. I am not very sure whether Professor Rudovsky stands with Bentham or Kant. I think he is offering a deontological (Keats would have loved the word) view that the rights of each to be free from certain government impositions are goods that cannot be trumped by a War on Drugs. But it may be that Professor Rudovsky regards these rights as having great value (utility) to a free society and believes that their diminution is not offset by the benefits of the War on Drugs. At this stage, I think Professor Rudovsky would accept either view. By using the ideas of both philosophical camps, in a vague way, Professor Rudovsky has two chances to ring a bell in the judge's mind. This is good advocacy.

Professor Rudovsky argues that those who condemn the exclusionary rule because they think that better means exist for deterring police misconduct have no business using cost-benefit analysis because any other effective deterrent will maintain or increase the loss of incriminating evidence. Professor Rudovsky correctly notes that his opponents might not like this result, and he correctly concludes they want rules that increase the right of the police to acquire evidence. Professor Rudovsky does not consider, however, the argument that some civil remedies might be designed partly to deter and partly to compensate violations of rights. Under this view, rights against improper searches could be taken by the government in exchange for compensation, just as the government can now take rights to hold property. I offer this non-deontological argument without exploring it, but I also acknowledge at least two obvious counterarguments. First, the Constitution expressly authorizes takings of property for just compensation, but it contains no analogous provision for the taking of other rights. Second, we can measure "just compensation" for property against market value, but forced sales of liberty or privacy at prices set by governments or juries seem more problematic.

C. Procedural Fairness

Professor Rudovsky criticizes the decline in procedural fairness because he believes it is a terrible cost (or wrong) imposed upon us by the War on Drugs. Professor Rudovsky points to "an increasing number of persons (from quite different political
camps) questioning the very premises of prohibiting drugs in our society, but he declines to join that debate in his article. Of course, in one way Professor Rudovsky has joined the debate, as does anyone who points out the costs or benefits of drug enforcement. But, most importantly, Professor Rudovsky questions the very point of his own article when he tells us, "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." I would like to know why it is hard to ignore.

The War on Crime antedates the War on Drugs. It will last long after we have won or lost or forgotten the War on Drugs. In the era that began with Mapp v Ohio, decided in 1961, all crime has escalated dramatically. Streets seem to be much less safe and, in very many cases, they are. It is true that much of the anti-drug rhetoric attributes this general rise in crime and decline in safety to drugs, but I doubt Professor Rudovsky would like to rely on that rhetoric, and I do not find it any more persuasive than he does. Moreover, I do not see much evidence that it actually took much pressure to shift the Court. All of the big decisions—Mapp, Miranda, Wade-Gilbert, Berger,
A RESPONSE TO PROFESSOR RUDOVSKY

Katz—were decided over a very short period by sharply divided Courts. The image of a solid edifice of legal doctrine slowly crumbling as the War on Drugs (or the War on Crime) shakes the earth does not fit the facts; some poorly built structures fall in a light wind.

D. Forfeiture and Right to Counsel

Forfeiture concerns Professor Rudovsky, and here the problem is probably related to the War on Drugs. Yet forfeiture is becoming a more prevalent feature of law enforcement against all forms of criminal profit. Forfeiture bothers Professor Rudovsky because it impinges on the ability to obtain first-rate defense counsel. Of course, if first-rate defense counsel charged less, the problem would be diminished, but private lawyers are entitled to charge what the market will bear. And if the prosecutor's case were very weak, then the problem would disappear because defense counsel would have a good chance of collecting the fee anyway. But drug cases are rarely weak, and, when they are, this fact will not normally be apparent to defense counsel at the time the lawyer must decide whether to take the case. So forfeiture may leave a defendant with counsel who charges less (and may be less able).

But Professor Rudovsky's focus on a defendant's ability to pay counsel fees seems to be the less striking line of attack on forfeiture. A lawyer who argues for the importance of lawyers and their fees generates an aura of special pleading, which is not all that bad when the case is pled to another lawyer wearing a

---

trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel, unless the in-court identifications had an independent origin. Wade, 388 US at 239-43. Gilbert imposed a per se exclusionary rule as to testimony about a lineup identification made in the absence of counsel. Gilbert, 388 US at 272-74.


94 One paradox is that forfeiture in drug cases offers more protection to innocent owners than does non-drug forfeiture. A statutory drug-forfeiture defense exists for innocent owners that is far broader than the judicially created defense in other sorts of cases. Compare the forfeiture provisions of the Drug Abuse Prevention and Control Act of 1970, codified at 21 USC § 881 (1988), with those targeted against racketeering organizations, codified at 18 USC § 1955(d) (1988). See also Calero-Toledo v Pearson Yacht Leasing Co, 416 US 663 (1974); Austin v United States, 113 S Ct 2801 (1993) (holding that the Eighth Amendment's Excessive Fines Clause applies to in rem civil forfeiture proceedings).

94 These cases are rarely weak because prosecutors have so many drug cases that they must focus their resources on prosecuting the stronger ones.
black robe, but not all that good when the argument is made to a jury.

Most defendants in forfeiture cases worry more about financial ruin than about counsel fees, particularly when they have families (at least this is what they say to me). And history teaches that forfeiture may be too dangerous a weapon for widespread use. When I think of forfeiture, what comes to mind is the Monasterio de Santo Tomas in the outskirts of Avila, Spain. Tomas de Torquemada is buried in the sacristy of this splendid place, built with treasure forfeited from those condemned by the Inquisition. I also think of the terrible ruins of the enormous Glastonbury Abbey, destroyed because Henry VIII wanted the treasure of the monasteries.

Men and women are put in prison because we think, rightly or wrongly, that they deserve it. But we might forfeit their property just because we need it. Government is expensive. If one cares only about liberty rights, then forfeiture hurts the occasional defendant who would do better with a more expensive defense investigation of his case and a more expensive lawyer to go along with it. If one cares about property rights, then forfeiture is a serious threat to many. It also threatens good law enforcement, because police who benefit directly from forfeiture in terms of better funding have a motivation to maximize forfeiture. This is fine if maximum forfeiture is the most effective weapon against the drug trade. If it is not the most effective weapon, then the financial attractions of forfeiture may shift law enforcement's focus away from more effective methods.

Professor Rudovsky mentions nothing of this; his view is, to coin a phrase, "lawyero-centric." There has never been universal acceptance of the kind of sacrosanct importance accorded to lawyers and their tools that Professor Rudovsky suggests.

Professor Rudovsky's best line of reasoning in the forfeiture area is this: "By driving the more capable lawyers from the market, the government is able to weaken the collective strength of

---

95 See United States v Good, 114 S Ct 492, 502 n 2 (1993) (acknowledging the Government's reliance on forfeitures to defray law enforcement expenses).

96 Prohibition created incentives for large numbers of criminals to organize and then to acquire large amounts of capital. When Prohibition ended, the gangs and their money remained intact, and we still pay for this. Forfeitures of ill-gotten gains, if carried out, could alleviate this problem, although some say it is pointless because criminal gangs now own an entire nation or two.

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." This argument would be interesting if it were proven that better defense counsel were abandoning drug cases (and I suspect it could be proved) and that the withdrawal was affecting, or likely to affect, the outcome of those cases. This last element might be hard to prove directly, but one could assess a representative sampling of drug cases where significant forfeitures occurred and then determine whether the cases were or were not very strong. One would also need to know what is the proper balance of power. I know most defense counsel would pause before they characterized themselves as any sort of factor in any game of power, but perhaps balance of power is just a bad metaphor to use here.

E. Disparate Racial Impact of Drug-Offender Sentencing and Bail Practices

Professor Rudovsky next challenges drug-offender sentencing and bail practices as not only harsh, but also racially skewed. Disparate impact exists because

[p]olice 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. Tactics that would not be tolerated in the suburbs are everyday fare in the inner city, and powerless minorities have little means of remediing illegal arrests and searches.

Furthermore, Professor Rudovsky notes that we punish crack offenses more severely than powder cocaine offenses, and crack cocaine is primarily used by African-Americans.

Professor Rudovsky’s arguments have weight if so many African-Americans are in jail because enforcement policies focus

---

98 Rudovsky, 1994 U Chi Legal F at 266 (cited in note 1).
99 Professor Rudovsky notes, as many have before him, that we imprison at a rate much higher than they do in South Africa but, other than the fact that South Africa is a race-relations nightmare, we are not told what to make of this. Id at 267. Without saying more, Professor Rudovsky’s juxtaposition of the United States and South Africa is name-calling, not enlightening.
100 Id at 270-71.
101 Id at 270.
on them. But he ought to confront the possibility that African Americans, proportionately, commit more crime. Perhaps high rates of incarceration of African-American males suggest that we have a dire social problem that must be directly addressed, not by tinkering with Fourth Amendment jurisprudence so that fewer guilty persons are caught, but by restoring social structure in some African-American communities where it has been lost. Of course, it is easier to tinker with the Fourth Amendment than to repair the damage done to African-American communities. If one endorses Professor Rudovsky’s approach, it would be proven beyond doubt that criminal law enforcement profoundly discriminates against men, who are perhaps 75 to 85 percent of defendants although they constitute less than half of the population. And the arrest/conviction data do not rule out economic rather than racial explanations.

I once heard a lawyer argue that the true proof of socio-economic (and perhaps racial) bias in the law was the difference between the very stiff requirements for a wiretap and the far easier requirements for a search. The subjects of wiretaps are far more likely to be peers of politicians and judges than are the subjects of searches. Indeed, politicians and judges have been subjects of wiretaps. Perhaps Professor Rudovsky does not use this argument because it does not speak to the question of whether the wiretap threshold is too high or the search threshold is too low.

Cities may tolerate street-sweep procedures not often seen in suburbs, but large open-air drug bazaars are not often seen in suburbs. And this fact is quite significant because barely concealed drug markets are not only a law enforcement problem but also an order-maintenance problem. Additionally, urban communities usually exert far more pressure to act against criminal conduct perceived as a neighborhood blight. Professor Rudovsky seems to take no account of the possible desires of African-American communities for high levels of street enforcement. While it is

\[102\] In 1983, 7.3 million men were arrested in the United States, compared to 1.5 million women. However, the women are catching up. In 1992, arrests of men rose 16.9 percent, to 8.6 million, while arrests of women rose 37.5 percent, to 2.0 million. Women lead men in only two categories of arrests tabulated by the FBI; sadly, these are the two in which the perpetrators are most clearly the principal victims: “prostitution and commercialized vice” and “runaways.” Federal Bureau of Investigation, 1992 Uniform Crime Reports 222 (cited in note 89).


hard to see how majoritarian preference can justify the abroga-
tion of individual constitutional rights, rational law enforcement
policy must try to respond to the deep frustration felt by resi-
dents of Chicago's Robert Taylor Homes when a federal court
recently enjoined the execution of warrantless search-and-seizure
sweeps in that crime-ridden housing project.\footnote{Matt O'Connor and Mitchell Locin, \textit{Judge Upholds Search Bar; Clinton Volunteers Help}, Chi Trib 2-1 (Apr 8, 1994).}

Professor Rudovsky cites the dreadful statistic that "[i]n
1990, 25 percent of all African-American men between the ages of
twenty and twenty-nine were incarcerated or on parole or proba-
tion supervision,"\footnote{Rudovsky, 1994 U Chi Legal F at 269 (cited in note 1).} but this means that 75 percent were not.
Protecting these 75 percent, in addition to those African-Ameri-
cans who are neither males nor between the ages of twenty and
twenty-nine, may require continuing and even going beyond cur-
rent policies. Even if radical change is not required, this question
at least ought to be addressed. Professor Rudovsky admires the
Minnesota Supreme Court for voiding, on equal protection
grounds, a statute that imposes greater sentences for crack than
powder cocaine.\footnote{Id at 271. See \textit{State v Russell}, 477 NW2d 886 (Minn 1991).} I express no view on the correctness of the
decision, but one might question how much good the earlier re-
turn of crack users would be for the African-American communi-
ties from which they came.\footnote{I know of no clear evidence either way on the question of whether withdrawal from
the War on Drugs by legalizing drugs would be disproportionately harmful to people of

**CONCLUSION**

I have criticized Professor Rudovsky's article because he has
not proved, or tried to prove, his case. Drug policy has been influ-
enced by emotion induced by real life as well as rhetoric. If it has
gone awry, I think the public will accept change, but both the
need for change and the wisdom of the change must first be prov-
en. Yet the criminal procedure issues Professor Rudovsky dis-
cusses (except for forfeiture) should have little bearing on how we
evaluate our drug policy.
Numbers are very important and professionals are supposed to know the numbers in their fields. Numbers appearing in popular literature or places usually devoted to more genteel subjects signal unusual public consciousness. For example, in the course of my own regular reading over just three weeks, I encountered the following: In Harvard Magazine, David Barry wrote:

Detroit's homicide tally climbed from 130 in 1953 to 726 in 1992 while the population declined. . . . New York City recorded 321 homicides in 1953 compared with 1,665 in 1993, again, with a population decline . . . . In Los Angeles County, the 1953 homicide total was 82. In 1992, with a population almost doubled, the total was 2,512.109

In New York, Craig Horowitz asks, "How Bad Is It?" In answering the question, he recites that "there were 44 handgun murders fifty years ago in the city . . . . Last year there were 1,499." He then laments not only murders but misdemeanors as well and concludes that the quality of life in New York may have "sunk too low."110

The pressure to permit stops and searches will not lessen if the War on Drugs goes away. Even if one cuts murder, robbery, and theft by half on the grounds that half are drug-related,111 the levels will, I believe, still be unacceptable. There is a certain new predatory quality to our society that will not disappear if the problem of illegal drugs disappears, and I think that police will be given more authority to deal with it to serve the goals of law enforcement and order maintenance (by which I mean the appearance of safe and orderly streets). Law enforcement will not by itself stop the predators from coming over the years, but we will need it to put away the predators now prowling among us. If

---

109 David Barry, Screen Violence: It's Killing Us, 96 Harv Magazine 38 (Nov/Dec 1993) (noting the 1957 New York City "war on teen street crime").
law enforcement fails to achieve this end, no broader, deeper effort to forfend the predators of the future will succeed.

There is no end in sight for airport screening and, perhaps, other group searches.\textsuperscript{112} Even if drugs were fully legalized, there would still be drug testing for some occupations. And now there is talk about treating handgun violence as a health problem.\textsuperscript{113} If we came to think of handguns as a health problem, we might restrict gun sales, but we might also justify random stops of young people in cars in any neighborhood having a drive-by shooting in the last six months as an administrative search, perhaps likened to airport screening: you can avoid the search if you avoid driving on the street. Essentially, if guns, violence, or any crime is characterized as a "public health" problem, then the Fourth Amendment standards that apply to controls and prevention will be those found in \textit{Camara v Municipal Court}\textsuperscript{114} and \textit{See v City of Seattle},\textsuperscript{115} rather than the more rigorous rules applied in conventional criminal cases.

If a rational drug policy is found,\textsuperscript{116} and if drugs become a diminishing problem, Professor Rudovsky will probably continue to express some deep and legitimate concerns about procedural

\begin{footnotes}
\item[112] But see \textit{McGann v METRA}, 8 F3d 1174 (7th Cir 1993). Metra posted a sign on its parking lot warning that all vehicles entering or exiting Metra property were subject to search by Metra police. Id at 1176. Metra employees did not have to park in the lot in order to get to work, but the employees said that parking in the lot was all but a "necessity" if the employee hoped to avoid property damage and personal attacks in a high-crime neighborhood. Id at 1176-77. Metra argued that by parking in the lot, the employees implied their consent to be searched. Id at 1177. Writing for the court, Judge Cudahy stated:
To be sure, searches taken to further security concerns like those present in airports, courthouses and prisons are not the only ones that fall within the implied consent exception. Other interests might well support a search, so long as, among other things, the intrusiveness of the search corresponds to the relative significance of the interest at stake. As we indicated before undertaking our analysis, however, Metra has refused to proffer any reason for the search—even when repeatedly invited to do so. By failing to articulate the purpose of the search, Metra has not shown that the search clearly fits within the implied consent exception to the warrant requirement and that it is therefore entitled to judgment as a matter of law. The issue is therefore a matter for trial. Id at 1183 (emphasis added).
\item[114] 387 US 523 (1967) (upholding warrants for area inspections of dwellings).
\item[115] 387 US 541 (1967) (applying \textit{Camara} to safety inspections of commercial structures used as private residences).
\item[116] There are decent arguments for legalization and decent arguments for more treatment and less law enforcement. See Thomas Szasz, \textit{Our Right to Drugs: The Case For a Free Market} (Praeger Publishers, 1992). But I doubt this Administration can accept very many of them, for the same reasons that President Kennedy could not to go to China and President Nixon could.
\end{footnotes}
fairness. The calculus we use to decide what to do about drugs should not focus too much on the issues of procedural fairness raised by Professor Rudovsky. Murder, rape, and even car theft will continue to press us to decide constitutional questions of criminal procedure.