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Crime, Drugs, and the Fourth Amendment: A Reply to Professor Rudovsky

Joseph D. Granot†

Professor Rudovsky claims in this Symposium that the war on drugs, initiated by President Reagan, is "widely regarded as a political and social failure."¹ The war on drugs is a failure, he maintains, because eleven years and billions of dollars after its declaration, "we continue to experience widespread abuse of drugs, high levels of violence, and disintegration of urban life."² Moreover, besides having aggravated the drug problem, the war on drugs "has had a debilitating impact on our system of constitutional rights and on equality for racial minorities."³ This is because the war on drugs "has in too many instances led to judicial abdication to Executive authority."⁴

Despite these criticisms, Professor Rudovsky does not enter the larger debate about legalizing drugs but instead limits his analysis to the drug war's negative effect on "specific constitutional rights" and to "its differential impact on people of color."⁵ This is a little puzzling, for if the war on drugs is responsible for the loss of both rights and equality, rectifying these wrongs might require the legalization of drugs. Alternatively, if the restoration of rights and equality is compatible with a rigorous law enforcement effort against drugs, these issues presumably could be addressed without the distraction of disparaging remarks about the drug war.

Unlike Professor Rudovsky, I believe that the crisis of crime confronting our country, not simply the war on drugs, requires that we reexamine some of our "rights," particularly those that

† Distinguished Professor of Law, Wayne State University.
¹ David Rudovsky, a panelist on the panel entitled "The Impact of the War on Drugs on Procedural Fairness and Racial Equality," delivered at the University of Chicago Legal Forum Symposium on November 13, 1993. In his article, Professor Rudovsky modified this statement to "the War on Drugs has failed to reduce significantly, much less eliminate, drugs as a problem in our society." David Rudovsky, The Impact of the War on Drugs on Procedural Fairness and Racial Equality, 1994 U Chi Legal F 237, 237.
² Id.
³ Id at 237-38.
⁴ Id at 238.
⁵ Rudovsky, 1994 U Chi Legal F at 238 (cited in note 1).
were created during the Supreme Court's activist period in the 1960s. If the war on drugs has contributed to the perceived need for this reexamination, which has not yet materialized in any significant manner, this is something to applaud rather than lament. I do not suggest that the needs of law enforcement should dictate the scope of rights, only that the latter should be based upon something more than a dogmatic hostility towards law enforcement or the agencies that engage in law enforcement. The law of criminal procedure needs to regain the insight that constitutional liberties can be compatible with common sense. More important, academics who write in this area need to put aside old lenses that cannot focus beyond the thinking of the Warren Court.

Although the primary purpose of this Article is to dispute Professor Rudovsky's claim that the war on drugs is undermining constitutional liberties, particularly in the Fourth Amendment area, Part I briefly examines whether the war on drugs is indeed a failure. Were the drug war really an incurable failure, even its mere potential for eroding constitutional liberties might seem intolerable. While the analysis in this Part is not meant to be exhaustive, it will hopefully show that this issue does have two sides. Part I also challenges the claim that the war on drugs is racially discriminatory.

Part II addresses and rejects the claim that the war on drugs has diluted Fourth Amendment rights. In particular, Part II examines three Fourth Amendment areas: governmental activity that constitutes a Fourth Amendment search, the relationship between the law governing what is a "seizure" and the law of consent searches, and the meaning of probable cause. While Professor Rudovsky correctly states that the Court has made some mistakes along the way, the Court's cases do not reflect the broad retreat that he portrays. If anything, the Court has been too reluctant to reexamine first principles.

I. IS THE WAR ON DRUGS A FAILURE?

To measure whether any program is a failure, one needs both a clear view of the program's objectives and a baseline from which to measure. If, as is not the case, the drug war aimed to

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eliminate drug use and dependence in a relatively short time, then it unquestionably has failed, and miserably so. If, however, the drug war aimed to reduce the use of drugs by some substantial amount, then determining whether the drug war has succeeded or failed is more difficult. Even if overall drug use has remained static, we cannot measure to what extent rigorous law enforcement has helped to deter new users and to prevent new addictions.

This important consideration aside, however, some evidence supports former drug czar William Bennett's claim that the number of people, including adolescents, using illegal drugs has declined somewhat in recent years. For example, data from drug testing in 1990 indicates that drug use among arrestees was lower than in the two preceding years. Although much of this decline was attributable to a reduction in the use of marijuana, cocaine use among arrestees in some places dropped significantly during these same three years. Moreover, according to a survey done by the National Institute on Drug Abuse, the percentage of 12- to 25-year-olds using marijuana, cocaine, hallucinogens, stimulants, and sedatives declined between 1982 and 1991.

The argument that the war on drugs should be suspended or modified because it has failed to curb the drug problem could be made about law enforcement efforts in other areas as well. According to the Federal Bureau of Investigation's Uniform Crime Reports, the murder rate in the United States in 1991 was 9.8 per 100,000 people; the rate for forcible rape was 42.3; the rate for robbery was 272.7; and the rate for the eight index crimes taken together was a staggering 5,897.8. In 1982, these rates respectively were 9.1, 33.6, 231.9, and 5,553.1. Put in terms of the report's "time clock," a murder occurred every twenty-one minutes in 1991, compared to every twenty-five minutes in 1982;

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7 Jesse Jackson, Both Sides with Jesse Jackson, Cable News Network (Jan 11, 1992) (interview with William Bennett).
9 Id. For example, the rate in Detroit declined from 51 percent in 1988 to 38 percent in 1990. Id at 3.
a forcible rape occurred every five minutes, compared to every seven minutes; and a robbery occurred every forty-six seconds, compared to every fifty-nine seconds. Still, despite dispiriting increases both in the absolute numbers and in the rates of these crimes, no serious person advocates legalization or reduced law enforcement efforts with regard to murder, rape, or robbery. Whether certain activity should or should not be legal, and whether law enforcement should or should not be rigorous, hopefully depends on more than the likelihood that law enforcement will “succeed.”

Also unconvincing is Professor Rudovsky's argument that the war on drugs is suspect because it brings a disproportionate number of black men into the criminal justice system. Unfortunately, blacks are disproportionately overrepresented across the spectrum of criminal offenses. In 1991, blacks accounted for 54.8 percent of the arrests for murder and nonnegligent manslaughter; 43.5 percent of the arrests for rape; 61.1 percent of the arrests for robbery; and 34.6 percent of the arrests for the eight index crimes. The relatively high clearance rates for murder and forcible rape suggest that these arrest figures may correlate fairly well with offense figures. If one concentrates on juvenile crime, the black arrest rates for murder, forcible rape, and robbery have been substantially higher than the white arrest rates for the last thirty years, and the gap has grown in recent years. Whatever the reasons, the fact is that blacks have been

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14 Rudovsky, 1994 U Chi Legal F at 289-70 (cited in note 1). For an argument that such allegations of racial oppression are usually overblown, counterproductive, and harmful to the black community, see Kennedy, 107 Harv L Rev at 1255-61 (cited in note 6).

15 1991 Uniform Crime Reports at 231 (cited in note 11). Ronald Reagan cannot be blamed. The rates for blacks in 1982 for murder, rape, robbery, and the eight index crimes, respectively, were practically the same: 49.7, 49.7, 60.7, and 35.6. 1982 Uniform Crime Reports at 184 (cited in note 12).


17 Id at 281-84. The other side of the coin, of course, is that the number of black victims is also disproportionately high. See Kennedy, 107 Harv L Rev at 1255 n 2 (cited in note 6) (also acknowledging that whites are disproportionately represented as victims of interracial crime). As Kennedy points out:

The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity. Id at 1259. But see Richard Delgado, Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat, 80 Va L Rev 503, 524-31 (1994) (without refuting the data regarding black violent crime, nevertheless contending that the lower white rate fails to account for deaths and injuries caused by corporate malfeasance, un-
committing a disproportionate amount of serious crime. Surely, however, disproportionate racial impact standing alone would not count as a serious argument against rigorous law enforcement in these areas, and standing alone it should not count as a serious argument against the war on drugs.

Of course, more complex arguments can be made against the war on drugs. It may be, for example, that the war on drugs takes too many resources away from society's more urgent needs, although care must be taken against double-counting costs, such as for prisons and personnel, that might exist even if drugs were legalized. In any event, reasonable people can be expected to disagree over the value judgments underlying such an argument. Similarly, it may be, as Professor Rudovsky suggests, that some agencies involved in the war on drugs are engaging in intentionally discriminatory law enforcement practices by targeting minority communities for drug arrests. If so, this argument justifies modifying rather than abrogating the law enforcement effort.

Even regarding the issue of intentional discrimination, however, the data must be interpreted carefully. For example, it makes sense to focus finite law enforcement resources on those areas having the greatest density of drug "victims." If drug abuse is concentrated in the inner cities and more dispersed elsewhere, focusing on the inner cities would produce racially disproportionate arrests and yet not necessarily be discriminatory. Indeed, under such circumstances, the failure to concentrate law enforcement efforts on the inner cities might appropriately be viewed as demonstrating a not-so-benign indifference to the plight of racial minorities.

The number of babies born to drug-addicted mothers in inner-city hospitals strongly suggests that drug abuse is rampant in these areas. Moreover, in 1991, the National Institute on Drug Abuse reported that the percentage of blacks ever having necessary medical procedures, marketing of infant formula in foreign countries, and undeclared wars).

18 Rudovsky, 1994 U Chi Legal F at 250-51 (cited in note 1).

19 "[T]he principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but under-enforcement of the laws." Kennedy, 107 Harv L Rev at 1259 (cited in note 6) (emphasis in original). Regarding drug enforcement in particular, Kennedy states that "to the extent that the heavier punishment for possession of crack falls upon blacks, it falls not upon blacks as a class but rather upon a subset of the black population—those in violation of the law who are apprehended." Id at 1269.

used marijuana, cocaine, and crack was higher for every age group between twelve and thirty-five than the percentage for whites. Given the demographics, this would suggest that more drug activity is occurring on a per capita basis in the inner cities.

Putting aside possibly desirable changes in law enforcement strategies, three basic choices exist regarding drugs: to maintain (or begin to take seriously) the "war" on drugs; to keep drugs illegal but to decrease the law enforcement effort against them; or to legalize drugs and perhaps regulate them like alcohol and cigarettes. Each of these choices is compatible with dedicating more resources to education and treatment. Decreasing the law-enforcement effort against drugs is probably the least attractive of the three choices because most of the problems attributable to criminalization would persist while the benefits produced by rigorous law enforcement would be lost. Although market prices might drop with a reduction in law enforcement, presumably the dealers would still have to stay underground, and turf wars might even escalate as profit margins dropped.

The choice between rigorous law enforcement and legalization is more difficult than the legalization advocates acknowledge. By removing the taboo and sanctions against drugs, legalization, even if combined with an educational campaign, might result in increased drug use. This concern is more than idle speculation. Heroin abuse apparently increased dramatically after Italy legalized the personal use of drugs, and concomitantly so did the number of overdose deaths and concern about the spread of AIDS.

Moreover, the libertarian argument for individual autonomy on matters supposedly of personal concern seems inapposite here, even if one puts aside the welfare costs of drug abuse and addiction. For example, prenatal drug abuse seems causally related to spontaneous abortion, premature birth, low birth weight, Sudden Infant Death Syndrome, physical impairments, and neurobehavioral disorders. Prenatal drug abuse is also "associated with increased levels of parenting stress and child maltreatment." In addition, the connection between drug abuse and criminal behavior cannot be discounted. For example, while most

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drug-related homicides seem to be associated with drug-dealing activities, the loss of control that can result from drug abuse seems to be a factor in certain homicides and other incidents of violent behavior.  

Finally, legalizing drugs would create a new set of problems. As Professor Jacobs has written, we would first have to decide whether drug distribution should be controlled by the free market, health care professionals, or a government monopoly. We would also need to decide whether presently illegal narcotics would be exempt from the requirement of FDA approval. Distribution and advertising of drugs to children presumably would need to be regulated, if not prohibited; if prohibited, many of the problems associated with criminalization would remain. Taxation issues also would arise. If, as some politicians currently favor for alcohol and cigarettes, we were to impose high taxes on drugs to discourage their use, both the black market in drugs and the street crime that is motivated by the need for drug money might persist. We would also need to address liability for drug-related tort and health claims. Underlying these issues, of course, is the larger issue of federalism: would (should) the national government impose legalization and a corresponding regulatory system on reluctant states?  

As an experiment, legalization could have disastrous consequences, especially in the inner cities, where the struggle to persuade children to resist drugs is particularly difficult. We simply do not know the effect of the added admonition, “it is illegal.” Given the unknowns and the problems outlined in the preceding paragraph, we cannot ignore the possibility that legalization would be even more costly, both economically and morally, than the supposedly failing war on drugs.

II. Are Fourth Amendment Rights Being Diluted?

Professor Rudovsky claims that partly because of the “special weight given to the ‘drug crisis,’” the Supreme Court’s “deci-

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26 James B. Jacobs, Imagining Drug Legalization, 101 Public Interest 28, 29 (Fall 1990).
27 Id at 31-32.
28 Id at 37-38.
29 Id at 32-33.
30 Jacobs, 101 Pub Interest at 34 (cited in note 26).
31 Rudovsky, 1994 U Chi Legal F at 240 (cited in note 1).
sions on Fourth Amendment issues have been sharply one-sided.\textsuperscript{32} In reality, it is Professor Rudovsky's analysis that is so one-sided.\textsuperscript{33} To be sure, as this Part will discuss, the Court has issued some bad opinions, and Professor Rudovsky's objections to these opinions are well-taken. That the war on drugs has been the impetus for all these decisions, however, is far from clear. In any event, Professor Rudovsky's meritorious criticisms can easily get lost in the broadside that he has launched against the Court.

More fundamentally, the claim that constitutional rights have been diluted requires a baseline of comparison. Like so many academics, Professor Rudovsky simply assumes that Warren Court decisions are correct. Even with this assumption, however, the Court's recent record is not as one-sided as Professor Rudovsky claims. The vast majority of controversial Warren Court decisions have not been overruled; at best, some retrenchment has occurred, largely at the margins. What the Warren Court constructed during its second and revolutionary phase between 1961 and 1968 remains essentially in place a quarter of a century later.\textsuperscript{34}

During this second phase, the Warren Court's interpretations of the Constitution and its views concerning law enforcement and criminal procedure were unlike those of any Court that had preceded it or, so far, that has followed it. Given what must be regarded as an aberrational period of constitutional interpretation, critics of the current Court cannot rest on the assumption that the Constitution and the Warren Court's interpretations of the Constitution are the same thing. That is, critics of the current trend must be prepared to defend Warren Court decisions as actually required by our Constitution.\textsuperscript{35} When crime was less of a problem, perhaps the luxury of not challenging first principles was affordable, but today we can no longer indulge the simplistic

\textsuperscript{32} Id.

\textsuperscript{33} This assertion is not the only hyperbolic statement in Professor Rudovsky's article. He claims, for example, that the government is engaged in an "assault on individual rights," id at 239, that the Court's current approach is "organized emphatically to expand governmental power," id at 259, and that the Court's more ambitious agenda to curtail constitutional rights has reduced the Fourth Amendment to "little more than an honor code," id at 262.

\textsuperscript{34} During its first phase, 1953-1959, the Warren Court was fairly conservative in criminal procedure cases. See, for example, Cicenia v LaGay, 357 US 504 (1958) (holding that the right to counsel does not apply to police interrogation).

\textsuperscript{35} See William W. Van Alstyne, Interpretations of the First Amendment 13 (Duke University Press, 1984) (stressing the importance of remembering that a judge's job is to interpret "this Constitution," not the one the judge wishes we had) (emphasis in original).
assumption that unnecessary obstacles to successful law enforcement and criminal prosecution do not matter.

The truth is that crime, including violent crime, is out of control in the United States. The previously-cited statistics\textsuperscript{36} simply confirm in cold terms what most of our citizens have known for years—far too many from personal experience—and what most of us have intuited from the anecdotal evidence that pervades the daily news. They also confirm my wife's impression, formed after sitting for two years as a judge on the Michigan Court of Appeals, that unspeakably gruesome and gratuitous violence is prevalent rather than exceptional in our society. Thus, even cynically discounting for political motives, most of us understand the desperation that recently led the mayor of Washington, D.C. to ask the President to authorize the National Guard to police that city's streets.\textsuperscript{37}

Eliminating the war on drugs would not end the violence, as some wishful thinkers would like us to believe. Indeed, one study recently pointed out that "[a]bout 50 percent of delinquent youngsters are delinquent before they start using drugs."\textsuperscript{38} The study doubted "that even major reductions in the numbers of people who use illicit drugs could significantly reduce the numbers of incidents of predatory crime."\textsuperscript{39} Moreover, given the coexistence of both large numbers of guns and large numbers of people inclined to violence and predatory crime, we can be sure that our crime crisis would not evaporate with the termination of the war on drugs.

With the fear of crime almost as rampant as crime itself, the pressure to concede to law enforcement the investigatory tools it needs or wants will remain significant even in the absence of a war on drugs. For example, it has recently been estimated that 430,000 children brought weapons to school during a six-month period in 1989.\textsuperscript{40} As the number of shootings in the public schools escalates, pressure appropriately mounts to disarm students, and this in turn increases the pressure on the courts to

\textsuperscript{36} See pages 299-300.
\textsuperscript{37} B. Drummond Ayres, Jr., Washington Mayor Seeks Aid of Guard in Combatting Crime, NY Times 1-1 (Oct 23, 1993).
\textsuperscript{39} Id at 234.
\textsuperscript{40} Dr. M. Joycelyn Elders, Surgeon General, testifying before the House Human Resources and Intergovernmental Relations Subcommittee (Nov 1, 1993).
grant appropriate leeway for weapons searches.\textsuperscript{41} Certainly, the risk to the security and safety of students is sufficiently great that we do not (or should not) want erroneous interpretations of the Constitution to thwart officials in determining whether guns are present in schools.

A. Activity That Constitutes a Search

Claiming correctly that \textit{Katz v United States}\textsuperscript{42} expanded the scope of Fourth Amendment protection by redefining what constitutes a "search," Professor Rudovsky complains that a differently constituted Court has manipulated \textit{Katz} so that it now limits rather than expands privacy rights.\textsuperscript{43} To be sure, \textit{Katz} substituted the reasonable-expectation-of-privacy test for the old trespass test\textsuperscript{44} and thereby for the first time held nontrespassory wiretapping to be a search.\textsuperscript{45} Justice Black, however, filed a lengthy dissent. Willing to "go as far as a liberal construction of the [Fourth Amendment] language" would take him, Justice Black said that he could not "in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage."\textsuperscript{46} Unlike Justice Black, Professor Rudovsky simply assumes the validity of the \textit{Katz} approach; measuring recent cases against the \textit{Katz} test, he finds the Court coming up short.

Defining the word "search" for Fourth Amendment purposes is no easy matter. For example, we probably would not be inclined to say that a search occurs when an officer goes to a place intending to observe what is open to public view. Professor Rudovsky, however, criticizes \textit{Florida v Riley}\textsuperscript{47} for holding that helicopter surveillance of a partially covered greenhouse containing marijuana plants was not a search.\textsuperscript{48} Yet, if the police had inadvertently made the same observation while engaged in a routine helicopter flight, almost certainly no search would have oc-

\textsuperscript{41} See, for example, \textit{People v Mayes}, 202 Mich App 181, 198-200, 508 NW2d 161, 169-70 (1993) (Corrigan concurring) (suggesting that a search of a car on school grounds, after the school's principal had received a tip from a student informant and then had informed police without revealing the student's identity, was reasonable).
\textsuperscript{42} 389 US 347 (1967).
\textsuperscript{43} Rudovsky, 1994 U Chi Legal F at 253-54 (cited in note 1).
\textsuperscript{44} See \textit{Olmstead v United States}, 277 US 438, 457-66 (1928).
\textsuperscript{45} \textit{Katz}, 389 US at 353.
\textsuperscript{46} Id at 373 (Black dissenting).
\textsuperscript{47} 488 US 445 (1989).
\textsuperscript{48} Rudovsky, 1994 U Chi Legal F at 256 (cited in note 1).
A REPLY TO PROFESSOR RUDOVSKY

Suppose now that the police had made the same observation while using a helicopter to track a felon fleeing across back yards, or, more difficult yet, while on a routine neighborhood crime-prevention helicopter patrol. Would Professor Rudovsky deem these observations reasonable searches, unreasonable searches, or simply not Fourth Amendment searches at all? Professor Rudovsky simply does not acknowledge that unless one takes a purely result-oriented approach, the issue of what makes police activity a search is terribly complex and frustrating. Katz, with its reasonable-expectation-of-privacy approach, hardly solved all the problems.

Nevertheless, I share Professor Rudovsky's concern that the Court is too readily concluding that police activity is not a search. Indeed, I voiced a similar concern even before President Reagan announced his war on drugs. The Court's approach completely immunizes certain police practices from any Fourth Amendment scrutiny, for what is not a search does not need to satisfy the Amendment's reasonableness requirement. In particular, I agree with Professor Rudovsky that cases like Smith v Maryland were wrongly decided.

Smith is a good case to illustrate both the pressure that the crime problem places on the judiciary and the need to rethink some of our doctrinal premises. A woman who had been robbed gave the police a description of the robber and of a 1975 Monte Carlo that she had observed near the scene of the robbery. Afterwards, the woman began to receive threatening and obscene calls from a man who described himself as the robber. Stepping out on her front porch in response to one of these calls, the woman observed the Monte Carlo moving slowly down her street. Shortly thereafter, the police observed a man, who fit the robber's description, driving down the woman's street in a 1975 Monte Carlo. The police traced the license plate to the defendant.

The next day the police, acting without a warrant, asked the phone company to place a pen register on the defendant's phone. The pen register, which records numbers dialed but does not in-

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49 See Riley, 488 US at 455 (O'Connor concurring).
50 See United States v White, 401 US 745, 786 (Harlan dissenting) (stating that the Katz formula can "lead to the substitution of words for analysis").
53 Rudovsky, 1994 U Chi Legal F at 254 (cited in note 1).
tercept conversations, indicated that the defendant placed a call to the woman's home. With a search warrant, the police then searched the defendant's home and found a phone book with the page containing the woman's number turned down. The police then arrested the defendant and placed him in a lineup, during which the woman identified him.  

Alleging a warrantless search, the defendant moved unsuccessfully to suppress the pen register evidence and the "fruits" derived from the pen register's use.  On appeal, the United States Supreme Court upheld the conviction. The Court concluded that the pen register did not intrude upon the defendant's reasonable expectations of privacy and, thus, that its use did not constitute a search for Fourth Amendment purposes. Justices Stewart and Marshall, each joined by Justice Brennan, wrote separate dissents. They argued that the numbers one dials can reveal intimate details about one's life, and that by using the phone, a caller does not assume that these numbers will become a matter of public information.

In my view, the dissents and Professor Rudovsky are correct. "Smith did not intend his disclosure to the phone company to be a disclosure to the government." The decision, moreover, was not just about defendant Smith's expectations. Rather, the decision necessarily means that each of us cannot expect Fourth Amendment protection to prevent the government from obtaining access to the numbers we dial from our phones whenever it wants. This result seems antithetical to the defining norms of a free society, and, more on point, it seems to conflict with the Fourth Amendment's underlying purposes.

If the Court had announced that use of the pen register constituted a search, however, it would have had to reverse the conviction of a robber and potential sex offender. The police clearly had probable cause for the pen register, but no existing exception to the warrant requirement authorized this warrantless "search." Moreover, the doctrine of third-party consent probably could not have salvaged this search. Because of the judicially-created exclusionary remedy, the pen-register evidence, being the direct

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54 Smith, 442 US at 737.
55 Id.
56 Id at 745-46.
57 Id at 746-48 (Stewart dissenting); id at 748-52 (Marshall dissenting).
58 Rudovsky, 1994 U Chi Legal F at 254 (cited in note 1).
result of an unconstitutional search, would have had to be suppressed. The fruit-of-the-poisonous-tree doctrine would then have cast doubt on the admissibility of the phone book and the lineup identification.\footnote{Rudovsky, 1994 U Chi Legal F at 259-60 (cited in note 1).}

Under this scenario, the police "infraction"—the failure to obtain a warrant that surely would have been issued and that existing law did not clearly require—pales when compared with the defendant's crime and post-crime behavior. Moreover, the police deserved to be commended for waiting to invade the defendant's home until their probable cause had become a virtual certainty that he was the caller and robber, and for showing respect for the law by obtaining a search warrant before they searched the defendant's home. Yet, while deploring the Court's treatment of the search issue, Professor Rudovsky fails to recognize that, properly or not, the irrational and draconian nature of the exclusionary rule, especially as applied in this context, may have influenced the Court's holding that the use of the pen register did not constitute a search. On the contrary, with his 1960s spectacles, Professor Rudovsky laments the Court's recent adoption of a good faith exception to the exclusionary rule in search warrant cases\footnote{See United States v Crews, 445 US 463, 473 n 18 (1980).}—an exception not even broad enough to save the evidence in \textit{Smith} if the Court had concluded that use of the pen register was a search.

A country that is confronting a crisis in crime cannot afford and will not long tolerate such irrational outcomes. Had the defendant won his release in \textit{Smith} because of the exclusionary rule, it would not have been possible to justify this result to his victim. Of course, one may respond that victims of crime are too emotionally involved to be rational, but a system that cannot justify its rules to those who must rely upon it is a system in trouble. Nor is it irrational to believe that a free and intelligent society like ours can find a means to control its police without the blunderbuss of a rigid exclusionary sanction. The inevitable price we pay for not rethinking this matter is that courts, as the \textit{Smith} Court arguably did, will reach correct results by wrong means. To paraphrase Professor Bickel, we get it right—on the wrong side, perhaps, but we get it right.\footnote{"But we should know also that we err—on the right side, perhaps, but we err." Alexander Bickel, \textit{The Morality of Consent} 78 (Yale University Press, 1975).}
B. Activity That Constitutes a Seizure and Consent Searches

Professor Rudovsky is also critical of the Court's decisions defining and applying the concept of *seizure* so as to immunize certain police encounters with citizens from Fourth Amendment scrutiny. "[T]he profile encounter is just the first step in the process. What often follows is questioning designed to obtain 'consent' or cause for a full search." Of course, as Professor Rudovsky is well aware, searches based on coerced consent are invalid, and he is right to condemn them. Surely, however, Professor Rudovsky would not want to leave the additional impression that even absent coercion such encounters are regrettable because they enable the police to engage in voluntary consent searches or to develop cause for further investigation.

Initially, a word should be said about the terminology that frames the Fourth Amendment issues in this area. Police-citizen "encounters" are sometimes loosely referred to as "stops." Such a use of the word "stop," although linguistically correct, can generate confusion, for the statement that the police have stopped someone might be understood to suggest that they have restrained the person, giving him no choice but to remain, at least temporarily, in their company. Police-citizen encounters, however, can be consensual or non-consensual, and if they are consensual, they are not seizures for Fourth Amendment purposes. To avoid confusion, therefore, it is preferable in analyzing police-citizen encounters to refrain from calling consensual encounters "stops" and to treat the terms "stop" and "seizure" as synonyms.

A preliminary word should also be said about the focus of this Part on both the seizure issue and the issue of consent searches. The seizure issue and the consent-search issue are treated together because these two issues often go hand-in-hand in actual police practice and because they are also conceptually related. If one voluntarily agrees to or acquiesces in an encounter with a police officer, one is not seized; likewise, if one voluntarily agrees to a search, the search is legal under the consent search doctrine. In both areas, voluntariness is the crucial element that

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64 Rudovsky, 1994 U Chi Legal F at 246 (cited in note 1).
66 Professor Rudovsky sometimes uses the terms differently. See Rudovsky, 1994 U Chi Legal F at 247 (cited in note 1) ("As long as the initial encounter is not a 'seizure' of the person, the basis for the stop is immaterial.").
must be satisfied, and in both areas this element means much the same thing and furthers the same policies.

"Seizure" was first defined by Justice Stewart in his (two-person) opinion in United States v Mendenhall; the Court later accepted this definition in Florida v Royer. In Mendenhall, Justice Stewart wrote that a person is seized for Fourth Amendment purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Justice Stewart explained that the Fourth Amendment was intended "not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" Thus, Justice Stewart concluded that two federal agents did not seize a woman when they approached her in an airport concourse after she exited a plane, identified themselves, and asked, but did not demand, to see her identification and airline ticket. In Justice Stewart's view, none of this activity suggested that the woman had "any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way."

One may object that a reasonable person in Ms. Mendenhall's position hardly would have felt free to disregard the agents' requests and go about her intended business. This objection, however, misses Justice Stewart's point. As Professor LaFave has observed, Justice Stewart's Mendenhall opinion should be understood as premised on the view that no seizure occurs unless the officer improperly adds to the pressures that are inherent in his approach and his badge. "[T]he confrontation is a seizure only if the officer adds to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse." Thus, as examples of circumstances that might indicate a seizure, Justice Stewart listed the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of

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67 446 US 544, 553-54 (1980) (plurality opinion).
69 Mendenhall, 446 US at 554.
70 Id at 553-54, quoting United States v Martinez-Fuerte, 428 US 543, 554 (1976).
71 Id at 547-49, 555.
72 Id at 555.
73 Wayne LaFave, 3 Search and Seizure § 9.2(h) at 411-12 (West Publishing Co., 2d ed, 1987).
74 Id.
language or tone of voice indicating that compliance with the
officer's request might be compelled." In Professor LaFave's
words, the critical factor is whether the officer behaves in "a
manner which would be perceived as a nonoffensive contact if it
occurred between two ordinary citizens."76

One may ask, however, why the officer's behavior rather
than the inherent pressure of the encounter should be the critical
factor in determining whether a seizure occurred. As Professor
LaFave describes it, Justice Stewart's *Mendenhall* approach re-
flects the view that the police should be able to seek a citizen’s
cooperation, even though inconveniencing the citizen, without
being required to justify the encounter by articulating a certain
degree of suspicion.77 More fundamentally, Justice Stewart’s ap-
proach reflects the view that the police do nothing wrong under
the Fourth Amendment when they take advantage of the moral
or instinctive pressures that the individual may feel to cooper-
ate.78 Indeed, it may be regarded as a societal good that people
feel such pressure to cooperate and that they in fact respond by
cooperating.

This reading of *Mendenhall* is supported by Justice Stewart’s
1973 opinion for the Court in *Schneckloth v Bustamonte*,79 a sig-
nificant consent-search case having nothing to do with drugs.
Rejecting the argument that the state can prove the
voluntariness of consent only by showing that the person knew
that he or she could refuse to consent, Justice Stewart’s opinion
spoke favorably of consent searches:

Nor can it even be said that a search, as opposed to an
eventual trial, is somehow “unfair” if a person consents
to a search. . . . [T]here is nothing constitutionally sus-
pect in a person’s voluntarily allowing a search. . . .
And, unlike those constitutional guarantees that protect
a defendant at trial, it cannot be said every reasonable
presumption ought to be indulged against voluntary
relinquishment. . . . “[I]t is no part of the policy under-
lying the Fourth and Fourteenth Amendments to dis-
courage citizens from aiding to the utmost of their abili-
ty in the apprehension of criminals.” . . . Rather, the

75 Mendenhall, 446 US at 554.
76 LaFave, 3 Search and Seizure at 412 (cited in note 73).
77 Id at 411.
78 Id at 411-12.
community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime. . . .

Certainly, if the Fourth Amendment does not protect people from the inherent pressures that arise when an officer seeks consent to search, it cannot protect people from the inherent pressures that arise when an officer makes a less intrusive request to ask some questions. A different approach to the seizure issue, therefore, would require the Court to reject Schneckloth and its entire approach to consent searches. In both contexts, the Court consistently and wisely has decided that there is nothing constitutionally suspect in citizen cooperation with the police.

Professor Rudovsky rejects this underlying philosophy. Professor Rudovsky's vehement attack on the Court's cases suggests that he views consensual encounters and consent searches as suspect and that he believes that every reasonable presumption should be indulged against them. For example, without considering that widespread citizen cooperation in the war against crime or drugs may be a societal good, Professor Rudovsky is troubled by the many cases in which these encounters are not productive, meaning presumably that innocent citizens were asked to cooperate. Of course, if a greater number of these encounters proved fruitful, this would probably be cited as evidence of coercion on the theory that guilty people, having everything to lose, would only cooperate if they were coerced.

Professor Rudovsky's apparent hostility to consent searches might be more comprehensible if consent were understood as a waiver of Fourth Amendment rights. Having implicitly rejected this idea in Schneckloth, however, the Court explicitly rejected it in Illinois v Rodriguez. In Rodriguez, which embraced the doctrine of apparent authority, the Court stated that "what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated."
With waiver not in issue, the Court's seizure and consent-search cases appropriately focus on the police's behavior when seeking a citizen's cooperation. Indeed, such a focus is unavoidable given that the legal standard is voluntariness or coercion rather than waiver. By their very nature, the concepts of voluntariness and coercion require normative rather than empirical judgments; they ask not simply whether the individual was under pressure, but whether that pressure was *undue*. The Court's cases reflect the perfectly plausible judgment that a police officer's request for cooperation is not rendered "unreasonable" simply because of the officer's badge or authority. In other words, they reflect a normative judgment that the inherent pressure to cooperate generated by such encounters is not undue. Professor Rudovsky gives us no reason to reject this judgment.

This does not mean, of course, that "anything goes" in the effort to enlist citizen cooperation in the war on crime. In particular, the above reasoning notwithstanding, Professor Rudovsky may be correct in his criticism of the Court for going too far in *Florida v Bostick*. Bostick reversed a Florida Supreme Court opinion that had found a seizure when police officers boarded a bus at a rest stop and directed both questions and a request for consent to search at the defendant and another passenger. Professor LaFave, who, as noted above, agrees that inherent compulsion by itself does not convert a consensual encounter into a seizure, argues that the "bus-sweep" cases involve more than inherent compulsion. Nevertheless, the Court's holding was only that the Florida court erred in adopting a *per se* rule that all such bus encounters are seizures; in fact, the Court stressed that it was not deciding whether a seizure occurred on the facts of the case. Given the limited nature of the Court's holding, Professor Rudovsky overstates his argument both by dwelling on the facts of the particular case and by asserting that the Court's opinion, "driven by the exigencies of the War on Drugs, departs from reality."
C. The Requisite Standard of Cause

Professor Rudovsky also complains that the Court has diluted the requirement of probable cause. In particular, he criticizes *Illinois v Gates* for relaxing the two-pronged *Aguilar-Spinelli* test, which essentially required the police to show that tips from anonymous informants came from credible persons who had reliably obtained their information. The prongs were independent because an honest person can give a tip based upon mere rumor while a person claiming first-hand knowledge can be dissembling. Both *Aguilar* and *Spinelli* were decided during the second phase of the Warren Court, the latter case coming at the very end of the Warren Court era. This fact, of course, does not make these cases wrong, but it also does not make them right. Simply assuming that these cases were right, Professor Rudovsky uses them as the baseline for evaluating *Gates*.

Much can be said in favor of the two-pronged test. Indeed, that a judge of the caliber of Justice Harlan wrote *Spinelli* is reason enough to take that decision seriously. That judges of the caliber of Justices Black, Fortas, and Stewart dissented, however, is reason at least to be open-minded about whether *Spinelli* adopted too stringent a standard. When one adds to this that Justice White concurred "especially since a vote to affirm would produce an equally divided Court," the conclusion is hard to resist that *Spinelli* is hardly the kind of case that one takes as a given.

The dissenting justices in *Spinelli* believed that the decision tilted the scales too much against legitimate law enforcement interests. Indeed, Justice Fortas, hardly a civil liberties slouch, insisted that "a policeman’s affidavit is entitled to a commonsense evaluation." Applying common sense to the affidavit at issue in the case, Justices Fortas and Black agreed that the six-two majority opinion in the lower court had not erred in upholding the magistrate’s finding of probable cause.

I have previously defended *Gates* at some length, and

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91 Id at 259-61.
93 The test was articulated in two cases, the latter clarifying the former. See *Aguilar v Texas*, 378 US 108, 114-15 (1964); *Spinelli v United States*, 393 US 410 (1969).
94 Rudovsky, 1994 U Chi Legal F at 260 (cited in note 1).
95 393 US at 439 (Fortas dissenting).
96 Id at 439 (Fortas dissenting).
97 Id at 435-39 (Fortas dissenting); id at 429-35 (Black dissenting). The lower court opinion is *Spinelli v United States*, 382 F2d 871 (8th Cir 1967) (en banc).
98 Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illi-
there would be little point in simply rehashing the same arguments here. Suffice it to say that both the English statutory and common law and the early American statutes and cases support the view that probable cause was a much less demanding concept than the *Spinelli* majority thought. Indeed, the original understanding of probable cause seemed to equate it with a moderate degree of suspicion; at best, the requisite level of cause for arrests and intrusive searches was equivalent to what is now required for so-called stops and frisks. This understanding of probable cause persisted well into the current century.

Consider, for example, these facts. On September 29th of last year, federal undercover agents attempted to purchase cocaine from two men. The men left the meeting by car purportedly to obtain the cocaine from their source, but they never returned, and no sale was ever consummated. On October 6th, the same agents observed the same men in the same car on a highway between a source city for cocaine and the city, 150 miles away, in which the attempted purchase had been made; the agents, however, failed in their attempt to follow the men. The agents made the same observation on December 15th, but this time they stopped the car, searched it, and found cocaine.

I would confidently predict that most criminal procedure buffs would conclude not only that the search was illegal but also that the stop was illegal. The suspicion of current wrongdoing seems considerably weaker than that in *Alabama v White*, where the Court found reasonable suspicion to stop a car based on a weakly corroborated anonymous informant’s tip. At least the tip in *White* named a specific car at a specific time going to a particular destination, but even at that Professor LaFave has found much to be critical of in the Court’s opinion. In the hypothetical facts, there seems to be little beyond a narcotics transaction that never materialized three months earlier.

Change the hypothetical facts so that the year now is 1921, the object of the attempted purchase and later search is bootleg...
whiskey, the source city is Detroit, and the other city is Grand Rapids. These are the facts, of course, in *Carroll v United States*, the case that is well-known for establishing the automobile exception to the warrant requirement. What is often conveniently overlooked, however, is that *Carroll* also held that the agents had probable cause for their intrusive search, which involved tearing open the car's rear upholstery to find the whiskey. The Court relied on the facts that the same men were in the same car and that Detroit, which is located across the river from Canada, was a source city of bootleg whiskey. Clearly, the requirement of probable cause, to the *Carroll* Court, did not impose anything close to a more-probable-than-not test; whether it amounted to what is today called reasonable suspicion may even be doubted.

My own view is that *Carroll* went too far in deferring to the agents. By this, I mean that it departed from the common-law probable cause standard, a standard that required reasonable and usually particularized suspicion. My point is not to defend *Carroll* but to illustrate that probable cause historically was not the rigorous, demanding standard that critics like Professor Rudovsky assume it to be. Nor can *Carroll* be dismissed as an aberration. Rather, even if it went too far, *Carroll* reflects the common law view, which still informs the English cases, that probable cause is suspicion arising at the beginning of an investigation and justifying those investigative steps necessary to build a *prima facie* case.

**CONCLUSION**

If one starts with the premise that everything the modern Court does should be measured against what the Warren Court did in the 1960s, then one can conclude, as Professor Rudovsky does, that our civil liberties are being eroded, although even at that they are being eroded at a much slower pace than Professor Rudovsky assumes. Moreover, it is both easy and convenient to blame the war on drugs for the perceived erosion of these rights. If, however, one can see beyond the 1960s, what seems at first

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105 Id at 162.
106 Id at 160.
107 For a case more than twenty years later in which the suspicion was only slightly stronger, see *Brinegar v United States*, 338 US 160 (1949).
like erosion may come to be seen as restoration. And by broadening one’s perspective, one may see that it is the problem of crime in general, not just the problem of drugs, that has provided the impetus for rethinking Warren Court decisions. While our fear of crime cannot justify any particular decision, it does justify, if not actually mandate, our willingness to reexamine whether the Constitution really means everything that the Warren Court said it means. To be sure, this rethinking may produce some mistakes, just as the Warren Court’s intensive reconsideration of old principles surely produced some mistakes. The more serious cause of regret, however, is that the present Court, unlike the Warren Court, has been so reluctant to return to first principles.