

A Substantive Due Process Challenge to the War on Drugs

by Warren Redlich

We cannot go into tomorrow with the same formulas that are failing today. We must not blindly add to the body count and the terrible cost of the War on Drugs, only to learn from another Robert McNamara 30 years from now that what we've been doing is, "wrong, terribly wrong." - Walter Cronkite, 1995¹

ABSTRACT

Since the early 1970s, the United States has experienced a massive increase in the incarceration of drug offenders. This so-called War on Drugs is widely considered a failure by critics from a variety of ideologies and backgrounds. Litigants have challenged drug war policies from many different angles. Their efforts have been largely unsuccessful and the drug war continues unabated. Law review articles have been home to a decades-long discussion regarding whether substantive due process can limit the legislative power to determine what should be a crime. Substantive due process doctrine requires that government policy be narrowly tailored to advance compelling governmental interests if fundamental rights are infringed. Freedom from incarceration is a fundamental right. A factual review shows that the drug war's goals are not being achieved. Since governmental interests are not being advanced, the incarceration of drug offenders cannot meet the Court's requirement of narrow tailoring. The problems caused by the drug war amount to a genuine parade of horrors, sufficient to overcome the Supreme Court's reluctance to expand the concept of substantive due process. At the same time, the Court's reluctance can serve to limit the reach of substantive due process and thus calm fears of judicial activism.

TABLE OF CONTENTS

- I. Introduction
 - A. The Drug War
 - B. Substantive Due Process
 - C. The Police Power and a Substantive Criminal Law
- II. Substantive Due Process Analysis of the Incarceration of Drug Offenders
 - A. Framework
 - B. The Fundamental Liberty Interest: Freedom from Incarceration
 - C. Identifying the State's Interests
 - D. Defining Narrow Tailoring
 - E. Advancing Governmental Interests

- F. Alternative Means
- G. The Incarceration of Drug Offenders is Not Narrowly Tailored
- III. The Court's Reluctance
 - A. Background
 - B. The Drug War's Genuine "Parade of Horribles"
 - C. Preserving Judicial Restraint
- IV. Conclusion

I. INTRODUCTION

A. The Drug War

Walter Cronkite is not alone. The "War on Drugs"² has been criticized for nearly as long as the war metaphor has been used.³ Opponents come from left,⁴ right⁵ and center.⁶ Complaints fly not only from defense lawyers,⁷ but also from police,⁸ prosecutors⁹ and judges.¹⁰ Official studies have put prohibitionist drug policies through the mill for more than a century.¹¹ Of course the drug war has been attacked,¹² defended¹³ and discussed¹⁴ in law review and journal articles.

Litigants have fought against drug war policies in a number of different ways. Constitutional challenges have been raised under the First¹⁵, Fourth¹⁶, Fifth¹⁷, Sixth¹⁸, and Eighth¹⁹ Amendments. Questions have also been raised regarding the Second²⁰, Seventh²¹, Ninth²² and Tenth²³ Amendments as well. The drug war has been challenged on various grounds regarding the use of marijuana for medical purposes.²⁴ Federal drug prohibition policies were also litigated early in the 20th Century.²⁵ Similar questions were raised about the prohibition of alcohol.²⁶

B. Substantive Due Process

Substantive due process doctrine arises out of the Due Process clauses of the Fifth²⁷ and Fourteenth²⁸ amendments to the United States Constitution. This notion, that the due process clauses place substantive limits on governmental infringement of fundamental rights, dates back to late in the 19th century in cases such as *Allgeyer v. State of Louisiana*:

To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution.²⁹

The doctrine has a rich history and has been considered in a variety of areas,³⁰ including criminal matters.³¹ Supreme Court decisions invoking substantive due process have been perhaps the most controversial of all. *Lochner v. New York*³² led to “the fabled ‘switch in time that saved nine.’”³³ After thirty years there has yet to be a decision as controversial as *Roe v. Wade*.³⁴ Rumors of the doctrine’s death have been so frequently exaggerated³⁵ that it must have feline origins. This paper suggests a substantive due process challenge to the War on Drugs³⁶, and in particular to the legislative³⁷ decision to incarcerate drug offenders.³⁸

The Supreme Court has “always been reluctant to expand the concept of substantive due process.”³⁹ The harsh reality of the drug war overcomes that reluctance. Meanwhile, the application of substantive due process can be limited to the drug war without expanding it to other fields.

C. The Police Power and a Substantive Criminal Law

In 1851, Chief Justice Shaw of the Massachusetts Supreme Court discussed “the police power”:

Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. ... The power we allude to is ... the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.⁴⁰

It is the police power that allows legislatures to define what is a crime.⁴¹ The notion of a substantive criminal law, imposing limits on that power, can be somewhat controversial.⁴² Law reviews have been home to a decades-long discussion over this very issue, beginning with Henry Hart and Herbert Packer in the late 1950s and 1960s.⁴³

Some authors have come very close to the approach suggested in this paper. Most notable in this regard is a brilliant 1994 article by Professor Sherry F. Colb that has been almost completely overlooked.⁴⁴ This paper will mirror Colb’s application of substantive due process to the fundamental right to liberty from confinement but with a different approach. While Colb’s article is a general discussion of substantive due process and incarceration, this paper focuses on the drug war. Colb does address the drug war briefly, contending that the government’s interests are not compelling. Unlike Colb, I concede for the sake of argument that drug policy may involve compelling interests and concentrate instead on a factual analysis of the narrow tailoring question. Further, this article shows why the drug war overcomes the Court’s reluctance and discusses how that reluctance can nevertheless preserve judicial restraint.

In the *Pennsylvania Law Review* some 15 years before Colb, Professor Thomas Hindes

seemed to have Colb's argument on the tip of his pen:

If a statute must be predicated upon a compelling interest, it is virtually certain to be invalidated, but if only a rational relationship between means and ends need be shown, the individual bringing the challenge will rarely be able to overcome the presumption of constitutionality.

In the context of the specific types of criminal statutes discussed earlier, proscription of marijuana sale and possession, sodomy, and obscenity, the present [1970s] Court would probably not find any fundamental rights infringed.

Presumably no fundamental right exists to use marijuana or view dirty movies.

This type of approach, however, bypasses the really crucial issue. Courts are not being asked to decide whether the Constitution implicitly says anything about smoking marijuana; they are being asked if there is any good reason for putting someone in jail for smoking marijuana.

No principled evaluation of these cases can avoid reference to the broader social purpose of a criminal prosecution.⁴⁵

Hindes apparently did not see the argument that freedom from incarceration is a fundamental right. Professor Claire Finkelstein, writing in the 2000 California Law Review, also came close in comparing substantive due process in the criminal arena to the demise of *Lochner*:

Rejecting oversight of economic regulation on the basis of a generic due process right to liberty does not entail the rejection of substantive federal oversight of legislation infringing the right to be free from bodily restraint.⁴⁶

She came close again as she laid a framework for substantive due process in the criminal law:

The Constitution explicitly equips citizens with certain rights against their governments, such as the right to freedom of speech, and where legislation infringes one of these rights, federal judges may invalidate the legislation to protect the right if the state cannot justify the measure by reference to a "compelling state interest." But outside the area of fundamental rights the answer does not come easily. While the tradition of substantive due process provides the most likely source of these restrictions, due process positivism suggest that a legislature has unbounded discretion to decide what to criminalize and how to do so, as long as the statute does not infringe a fundamental right. Large portions of our constitutional jurisprudence of liberty, however, belie this suggestion. And if there is a general due process interest in liberty, then at least some of the justifications a state could offer for the use of the criminal sanction would fail to override the background right citizens have to be free from punishment.⁴⁷

Finkelstein characterized the right to be free from punishment as a "background right." She did not address freedom from incarceration itself as a fundamental right, nor mention Colb's article. If freedom from incarceration is a fundamental right, then substantive due process could subject any incarcerative criminal statute to strict scrutiny as Colb suggests.

II. Substantive Due Process Analysis of the Incarceration of Drug Offenders

A. Framework

In *Washington v. Glucksberg*, Chief Justice Rehnquist described the framework for substantive due process analysis:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."⁴⁸

Applying this method, one must first examine freedom from incarceration to determine if it is a fundamental right. If so, government policies that require the incarceration of offenders, including drug offenders, must serve compelling interests and be narrowly tailored to achieve them.⁴⁹ This article assumes for the sake of argument that drug problems give rise to compelling state interests.⁵⁰ It then reviews the interests asserted by the government in its pursuit of its drug war policies and the results of those policies to determine whether the policy of incarcerating

drug offenders is narrowly tailored to those asserted interests.⁵¹

B. The Fundamental Liberty Interest: Freedom from Incarceration

Federal and state laws subject drug offenders to incarceration.⁵² Incarceration is a tremendous deprivation of liberty⁵³ that triggers the protections of the Due Process Clause.⁵⁴ The Supreme Court has recognized this right on a number of occasions. In *DeShaney v. Winnebago County DSS* for example, the court held:

[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause⁵⁵

Perhaps the earliest explicit recognition by the Supreme Court of freedom from incarceration as a fundamental right under substantive due process came in *Allgeyer*:

The 'liberty' mentioned in [the fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.⁵⁶

An 1891 law review article⁵⁷ noted that Blackstone described “freedom from restraint of the person” as “perhaps the most important of all civil rights,”⁵⁸ and that Lord Coke felt “the liberty of a man’s person is more precious to him than everything else that is mentioned [in the Magna Charta].”⁵⁹ Blackstone states that “the rights of all mankind . . . may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property.”⁶⁰ Indeed, the original Latin in the Magna Charta’s “law of the land” clause

uses the term “imprisonetur.”⁶¹

No court has invalidated a criminal statute through the application of substantive due process analysis to the fundamental right of freedom from incarceration. At the same time, no court has ruled to the contrary. The Supreme Court avoided the question in *Reno v. Flores*:

The “freedom from physical restraint” invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, “juveniles, unlike adults, are always in some form of custody,” and where the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so.⁶²

This analysis would not apply to adult drug offenders. The Fourth Circuit also avoided addressing freedom from incarceration as a fundamental right in *Hawkins v. Freeman*:

Hawkins's rhetorical reference to the right as being “freedom from unjust incarceration,” and that of amicus, American Civil Liberties Union of North Carolina, as the “right to be free from arbitrary incarceration,” are issue-begging generalizations that cannot serve the inquiry. A properly precise description can, however, be found in the facts and legal authorities relied upon by Hawkins in support of his claim. From these, we deduce that the precise right asserted is that of a prisoner to remain free on erroneously granted parole so long as he did not contribute to or know of the error and has for an appreciable time remained on good behavior to the point that his expectations for continued freedom from incarceration have “crystallized.”⁶³

Hawkins is distinguishable because it deals with an inmate whose parole was revoked. In any event, the casual dismissal as an “issue-begging generalization” flies in the face of nearly 800 years of common law tradition and over a century of Supreme Court decisions recognizing freedom from incarceration as a fundamental right. Indeed the language of the Supreme Court’s *Ingraham* decision supports the application of substantive due process proposed in this paper:

While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. It is

fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.⁶⁴

The Court also stressed this fundamental liberty interest in *Foucha v. Louisiana*, a case involving the confinement of a person found not guilty by reason of insanity:

Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty.⁶⁵

While the *Foucha* Court indicated that "a State may imprison convicted criminals for the purposes of deterrence and retribution," the remark was dicta and did not involve any discussion of substantive limits on the police power.⁶⁶ In *Meachum v. Fano* the Court made a similar remark in the context of a case dealing with prison conditions: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him."⁶⁷ Again there was no discussion of substantive limits on the police power. Indeed the previous sentence noted: "The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause."⁶⁸

Recently in *Zadvydas v. Davis*, the Court noted:

The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person ... of ... liberty ... without due process of law." Freedom from imprisonment--from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that Clause protects.⁶⁹

Freedom from incarceration is not just a fundamental right. It is the one of the most fundamental of rights.

C. Identifying the State's Interests

Governmental drug policy interests identified in federal statutes include “demand reduction,”⁷⁰ “supply reduction,”⁷¹ and “reducing drug abuse and the consequences of drug abuse in the United States, by limiting the availability of and reducing the demand for illegal drugs.”⁷²

Federal law sets specific goals for the National Drug Control Strategy. These include:

“Reduction of unlawful drug use to 3 percent of the population”;⁷³
“Reduction of adolescent unlawful drug use to 3 percent of the adolescent population”;⁷⁴
“Reduction of the availability of cocaine, heroin, marijuana, and methamphetamine”;⁷⁵
“Reduction of the respective nationwide average street purity levels for cocaine, heroin, marijuana, and methamphetamine”;⁷⁶ and
“Reduction of drug-related crime.”⁷⁷

Goals are also set forth with regard to drug-related crime:

(i) reduction of State and Federal unlawful drug trafficking and distribution; (ii) reduction of State and Federal crimes committed by persons under the influence of unlawful drugs; (iii) reduction of State and Federal crimes committed for the purpose of obtaining unlawful drugs or obtaining property that is intended to be used for the purchase of unlawful drugs; and (iv) reduction of drug-related emergency room incidents⁷⁸

The Office of National Drug Control Policy indicates:

The goals of the program are to reduce illicit drug use, manufacturing, and trafficking, drug-related crime and violence, and drug-related health consequences.⁷⁹

In its 2002 National Drug Control Strategy Report, ONDCP stated:

Reduced to its barest essentials, drug control policy has just two elements: modifying individual behavior to discourage and reduce drug use and addiction, and disrupting the market for illegal drugs.⁸⁰

For its part the DEA aims to “reduc[e] the availability of illicit controlled substances on the domestic and international markets.”⁸¹

Morality is sometimes advanced as a governmental interest in the drug war.⁸² Under that

view, drug use is immoral and is prohibited for that purpose. Whether morality constitutes a rational or substantial basis for law is an open question,⁸³ but it is not a compelling interest.⁸⁴ To meet strict scrutiny under substantive due process, a policy must be narrowly tailored to compelling interests. Morality does not pass that test.

In reviewing the many statements about the purposes of drug policy, it appears that the primary goal is to reduce the use of illicit drugs by both adults and children. The government seeks to accomplish this along with a number of related goals, including demand reduction, supply reduction, purity reduction, reduction of drug-related crime, and reduction of drug-related health consequences.

D. Defining “Narrow Tailoring” in the Context of Substantive Due Process

Assuming that the governmental interests are compelling, we must determine whether the incarceration of drug offenders is narrowly tailored to achieving them. The government must show that its policy passes strict scrutiny.⁸⁵ The concept of narrow tailoring is not well defined in the context of substantive due process, but has been fairly well defined in regard to the First Amendment⁸⁶ and Equal Protection.⁸⁷ Equal Protection cases also arise out of the Fourteenth Amendment.⁸⁸ In *Wygant v. Jackson Bd. of Education* the Supreme Court held: “Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.”⁸⁹ In a footnote, the Court described narrow tailoring in even further detail:

The term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the

classification at issue must "fit" with greater precision than any alternative means. "[Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense."⁹⁰

The *Wygant* Court concluded that the race-based remedial measures at issue were not narrowly tailored because "less intrusive means" were "available."⁹¹ The policy at issue must fit better than any available alternatives. In considering "fit," we must consider whether the policy is more effective than the alternatives, and also whether the alternatives are less intrusive.

It is important to note here that a policy that does not advance the government's interests violates substantive due process regardless of how it compares with the alternatives. If it does not accomplish its purpose, logic dictates it cannot be specifically and narrowly framed to accomplish its purpose.

E. Advancing Governmental Interests

Congress has identified certain tools for assessing the national drug control strategy.⁹² The National Household Survey is the measure for "unlawful drug use."⁹³ Similarly, "adolescent unlawful drug use" is to be measured "by the Monitoring the Future Survey of the University of Michigan or the National PRIDE Survey conducted by the National Parents' Resource Institute for Drug Education."⁹⁴ On these measures, the goals are not being reached.

Consider a recent press release headline for the Monitoring the Future Survey:

*Rise in ecstasy use among American teens begins to slow.*⁹⁵

Despite its creative phrasing, this headline is an example of failure in the War on Drugs. Ecstasy use among teens is growing.⁹⁶

The measure of adolescent drug use that was specifically identified by Congress, illicit drug use in the past 30 days, worsened in 2001.⁹⁷ More than 25% of US twelfth graders reported using illicit drugs in the past 30 days. That is nearly double the figure for 1992 and more than eight times the stated goal of 3%.⁹⁸ Over 40% of 12th graders tried an illicit drug in the past year.⁹⁹

The PRIDE Survey and National Household Survey show similar results.¹⁰⁰ The National Household Survey notes:

The estimated number of past month illicit drug users in the United States in 2001 (15.9 million) is somewhat higher than the estimate based on the 1992 NHSDA (12.0 million), which reflects a low point in levels of illicit drug use in the United States. The higher number in 2001 is due to several factors, including a much higher rate of use among youths (10.8 percent in 2001 vs. 5.3 percent in 1992), a slight increase in the rate of use among adults that is partly due to the aging of younger drug-using cohorts (6.6 percent in 2001 vs. 5.9 percent in 1992), and a 10 percent increase in the size of the U.S. population.¹⁰¹

The 2002 PRIDE Survey indicates that over 37% of 12th graders used illicit drugs during the year 2001, including 7% who used cocaine and 4% who used heroin.¹⁰²

There has been no significant reduction in illicit drug use in recent years. Illicit drug use is far more common today than it was ten years ago. The drug war has failed to make any progress toward its primary goal - reducing illicit drug use by adults and children. Even the drug war's staunchest supporters, such as former Drug Czar William Bennett, provide evidence showing the policy's failure:

Between 1992 and 1999, rates of current drug use -- defined as using once a month or more -- increased by 15%. Rates of marijuana use increased 11%. The situation was far worse among our children: Lifetime use of illegal drugs increased by 37% among eighth-graders and 55% among 10th-graders. We have reached the point where more than one-quarter of all high school seniors are current users of illegal drugs; indeed, rates of monthly drug use among high

school seniors increased 86% between 1992 and 1999.¹⁰³

Bennett, the former drug czar, suggests that a return to aggressive enforcement would make a difference. His attack on former President Clinton ignores the fact that drug incarceration rates increased dramatically during Clinton's presidency.¹⁰⁴

The drug war has also failed in its other goals. The Monitoring the Future Survey tracks how twelfth graders perceive the availability of drugs.¹⁰⁵ Reducing availability is an explicit goal of the drug war.¹⁰⁶ The perceived availability of marijuana in 2001 was slightly higher than in 1975.¹⁰⁷ The figures for harder drugs are more disturbing. From 1975 to 1986, roughly 20% of twelfth graders said heroin was easy to get.¹⁰⁸ That number shot up in the late 1980s and has remained consistently higher than 30%.¹⁰⁹ Cocaine remains widely available to our youth, with nearly 50% of twelfth graders saying it is easy to get.¹¹⁰ The survey began measuring the availability of ecstasy in 1989, when only 22% of twelfth graders felt it was easy to get.¹¹¹ In 2001, that number went over 61%, having jumped from 51% the year before.¹¹²

With drugs so widely available, the drug war is failing to reduce the supply of drugs or their purity.¹¹³ The National Drug Control Strategy Report shows that, for cocaine and heroin, price has decreased and purity has increased since 1981. For small purchases the 2000 prices are roughly half the 1981 prices, while the prices for larger quantities are roughly one-quarter the 1981 prices. Cocaine purity has diminished somewhat from its peak but is still far higher than in 1981. Heroin purity is at or near its peak.¹¹⁴ In the words of a government-contracted report:

[T]he nation's ability to reduce drug availability and to increase drug prices appears to be limited. Since about 1988, the prices of cocaine, heroin and methamphetamine have all fallen or remained about the same, despite what was inaugurated in the late 1980s as a war on drugs.¹¹⁵

This same report addressed the “key question [of] whether or not the targets set by the National Strategy are obtainable.”¹¹⁶ Regarding marijuana it found that use was likely to decline for demographic reasons and that higher prices would “reinforce this change”, but “as of yet there is no evidence of domestic programs that would substantially increase marijuana prices”¹¹⁷ It noted that “similar patterns apply to cocaine” and that projections about heroin and methamphetamine were less certain.¹¹⁸ Among the report’s conclusions was the following:

Given experiences since the beginning of the war on drugs, which initiated major expansions in expenditures on supply-based programs, it seems more reasonable to conclude that the Nation will not be able to have any large future influence on decreasing the availability and increasing the price of illicit drugs.¹¹⁹

The drug war worsens drug-related health problems and has been linked to the spread of hepatitis and AIDS, an increased risk of fatal and near-fatal overdoses and problems in prison health issues.¹²⁰ Ernest Drucker noted “dramatic increases in drug-related emergency department visits and drug-related deaths coinciding with this period of increased enforcement.”¹²¹ He concluded:

Drugs can certainly cause harm, but our selective application of punitive drug prohibition laws are at least as dangerous. These laws have spawned a lethal biosocial ecology in which the poorest nations and communities are ravaged by uncontrolled criminal drug markets, emerging infectious diseases, and the widespread corruption of civil society.¹²²

Ostrowski discussed drug-related health problems at length:

Because there is no quality control in the black market, prohibition also kills by making drug use more dangerous. Illegal drugs contain poisons, are of uncertain potency, and are injected with dirty needles. Many deaths are caused by infections, accidental overdoses, and poisoning. At least 3,500 people will die from AIDS each year from using unsterile needles, a greater number than the combined death toll from cocaine and heroin. . . . Drug-related AIDS is almost exclusively the result of drug prohibition. Users inject drugs rather than taking them in tablet form because tablets are expensive; they go

to “shooting galleries” to avoid arrests for possessing drugs and needles; and they share needles because needles are illegal and thus difficult to obtain. In Hong Kong, where needles are legal, there are no cases of drug-related AIDS. . . . As many as 2,400 of the 3,000 deaths attributed to heroin and cocaine use each year – 80 percent – are actually caused by black market factors. For example, many heroin deaths are caused by an allergic reaction to the street mixture of the drug, while 30 percent are caused by infections.¹²³

The drug war also worsens drug-related crime:¹²⁴

After spending billions of dollars on law enforcement, doubling the number of arrests and incarcerations, and building prisons at a record pace, the system has failed to decrease the level of drug-related crime. Placing people in jail at increasing rates has had little long-term effect on the levels of crime. In fact, wholesale incarceration may actually increase recidivism and corresponding crime rates. . . . In the 1980s, California's prison population increased by a staggering 450% with no apparent effect on the number of crimes. Considering that prisons still primarily emphasize security over rehabilitation, the reason for this increase becomes obvious.¹²⁵

Drug war policies are not achieving the stated drug war goals. They cannot be “specifically and narrowly framed to accomplish their purpose”¹²⁶ because they are not accomplishing their purpose. Drug use has not been reduced in any significant way, and levels of drug use are far above the stated goals.¹²⁷ Our children have easy access to drugs.¹²⁸ We can't even keep drugs out of jails.¹²⁹ The drug war and the incarceration of drug offenders have also failed to achieve secondary goals regarding supply, demand, purity, drug-related health problems and drug-related crime. The policy of incarcerating drug offenders does not “directly advance[] the governmental interest asserted.”¹³⁰ The War on Drugs is not working.¹³¹

F. Alternative Means

Even if a court is persuaded that incarceration advances the government's interests, the government must also show that its policy choice fits better than the alternatives. Critics of the drug war encompass a broad spectrum of backgrounds,¹³² and the range of "solutions" is just as wide.¹³³ Libertarians and others favor outright legalization of drugs.¹³⁴ The legalization of marijuana¹³⁵ is a somewhat popular variation of overall legalization, and there are other variations such as the legalization of marijuana for medical purposes¹³⁶ and decriminalization of drugs or marijuana.¹³⁷ Another leading approach, known as harm reduction, looks at drugs from a public health perspective.¹³⁸

The effectiveness of some of these alternatives is difficult to assess. Even so, certain comparisons can be made. Advocates of treatment point to studies showing that treatment is much more effective than incarceration.¹³⁹ Spencer notes:

The recidivism rate for first time Dade County drug offenders was sixty percent, but for those who successfully completed the Dade County Drug Court treatment programs, the recidivism rate reported by Dade County officials was only seven percent. Drug court treatment programs are also cost effective. It costs Florida only \$2,000 to put a drug offender through a drug court program, as compared to \$17,000 per drug offender for incarceration. As a result, other drug court programs are being established throughout the country.¹⁴⁰

Similarly, a Rand study found treatment to be seven times more cost-effective than current supply-control policy in reducing cocaine consumption.¹⁴¹

Harm reduction supporters point to the Netherlands, which has a far less intrusive drug policy.¹⁴² Dutch drug policy separates the "hard" and "soft" drug markets, condoning the use of soft drugs, such as marijuana.¹⁴³ Drug users are not locked up, but rather are provided with "a range of prevention and care services, with an emphasis on harm reduction."¹⁴⁴ Finally, law

enforcement is aimed not at users and dealers, but “at the bigger national and international drug trade, which includes organized crime.”¹⁴⁵ The Netherlands has had much better results than the U.S., with fewer heroin users, fewer drug-related AIDS cases, less drug overdoses, and fewer homicides while spending far less on drug law enforcement.¹⁴⁶

Legalization advocates can point to our nation’s experience with alcohol prohibition.¹⁴⁷

One author summarized Alcohol Prohibition as follows:

Millions of drinkers scoffed at Prohibition. With its legitimate manufacture eliminated, liquor in the form of “moonshine” and “bathtub gin” were simply produced in thousands of homemade stills across the country. Between 1921 and 1925 alone, the government seized some 696,933 such stills. One area of Chicago, the most notorious booze-hustling city in the country, was estimated to have an average of one hundred stills per city block. . . .

Even though prohibition agents made more than 500,000 arrests for liquor violations between 1920 and 1930, the illegal flow of alcohol continued unabated.

...

Surveys showed, in fact, that the Prohibition Bureau’s agents were managing to stop only 5 percent of rum runners and just 10 percent of stills, much like drug trafficking statistics of today.

Unforeseen by many, Prohibition actually glamorized alcohol and *increased* its abuse in some places. . . .

Prohibition also spurred the growth of organized crime and gang warfare and was the direct cause of hundreds of murders. . . .

By 1929 it became increasingly clear that Prohibition was largely unenforceable. The public was either opposed to it, apathetic, or profiting too highly from it. By then, five states were refusing to enforce Prohibition altogether, leaving the job to Federal authorities.¹⁴⁸

That description mirrors the results of the drug war.

It seems widely accepted that alcohol prohibition was a failure.¹⁴⁹ In fact, Prohibition worsened alcohol problems. Writing for the libertarian Cato Institute, Mark Thornton ably described Prohibition’s failure to achieve its goals:

Although consumption of alcohol fell at the beginning of Prohibition, it subsequently increased. Alcohol became more dangerous to consume; crime

increased and became "organized"; the court and prison systems were stretched to the breaking point; and corruption of public officials was rampant.¹⁵⁰

He went on to discuss at length what he called “the Iron Law of Prohibition” – that Prohibition increases the dangers of the prohibited substance:

That law states that the more intense the law enforcement, the more potent the prohibited substance becomes. When drugs or alcoholic beverages are prohibited, they will become more potent, will have greater variability in potency, will be adulterated with unknown or dangerous substances, and will not be produced and consumed under normal market constraints. The Iron Law undermines the prohibitionist case and reduces or outweighs the benefits ascribed to a decrease in consumption. . . .

Before Prohibition, Americans spent roughly equal amounts on beer and spirits. However, during Prohibition virtually all production, and therefore consumption, was of distilled spirits and fortified wines. Beer became relatively more expensive because of its bulk, and it might have disappeared altogether except for homemade beer and near beer, which could be converted into real beer. . . .

There were few if any production standards during Prohibition, and the potency and quality of products varied greatly, making it difficult to predict their effect. The production of moonshine during Prohibition was undertaken by an army of amateurs and often resulted in products that could harm or kill the consumer. Those products were also likely to contain dangerous adulterants, a government requirement for industrial alcohol. According to Thomas Coffey, "the death rate from poisoned liquor was appallingly high throughout the country. In 1925 the national toll was 4,154 as compared to 1,064 in 1920. And the increasing number of deaths created a public relations problem for . . . the dries because they weren't exactly accidental." Will Rogers remarked that "governments used to murder by the bullet only. Now it's by the quart."

Patterns of consumption changed during Prohibition. It could be argued that Prohibition increased the demand for alcohol among three groups. It heightened the attractiveness of alcohol to the young by making it a glamour product associated with excitement and intrigue. The high prices and profits during Prohibition enticed sellers to try to market their products to nondrinkers – undoubtedly, with some success. . . .

Prohibition may actually have increased drinking and intemperance by increasing the availability of alcohol. One New Jersey businessman claimed that there were 10 times more places one could get a drink during Prohibition than there had been before. It is not surprising that, given their hidden locations and small size, speakeasies outnumbered saloons. Lee found that there were twice as many speakeasies in Rochester, New York, as saloons closed by Prohibition. That was more or less true throughout the country. . . .

Prohibitionists wanted and expected people to switch their spending from alcohol to dairy products, modern appliances, life insurance, savings, and education. That simply did not happen. Not only did spending on alcohol increase, so did spending on substitutes for alcohol. In addition to patent medicines, consumers switched to narcotics, hashish, tobacco, and marijuana. Those products were potentially more dangerous and addictive than alcohol, and procuring them often brought users into contact with a more dangerous, criminal element. The harmful results of the Iron Law of Prohibition more than offset any benefits of decreasing consumption, which had been anticipated but did not occur.¹⁵¹

Joseph D. McNamara, a former police chief, has been an outspoken critic of the drug war.¹⁵² He points to the comments of another former police chief:

Former Los Angeles Police Chief August Vollmer, often referred to as the father of professional police administration, wrote this in 1936: "Stringent laws, spectacular police drives, vigorous prosecution, and imprisonment of addicts and peddlers have proved not only useless and enormously expensive as means of correcting this evil, but they are also unjustifiably and unbelievably cruel in their application to the unfortunate drug victims. Repression has driven this vice underground and produced the narcotic smugglers and supply agents, who have grown wealthy out of this evil practice and who by devious methods have stimulated traffic in drugs. Drug addiction, like prostitution, and like liquor, is not a police problem; it never has been, and never can be solved by policemen."¹⁵³

Our nation's experience with alcohol prohibition demonstrates that it did not achieve its goals. It was not effective at reducing alcohol use or abuse, made some of those problems worse, and caused a variety of other problems.¹⁵⁴ Meanwhile, the enforcement of Prohibition was, obviously, more intrusive than its non-enforcement after Prohibition was repealed.

G. The Incarceration of Drug Offenders is Not Narrowly Tailored

Incarceration involves a far greater infringement of fundamental rights than alternatives which are both more effective and less intrusive.¹⁵⁵ The incarceration of offenders is not advancing the state's asserted interests. The drug war is not narrowly tailored, failing the

Supreme Court’s “established method of substantive-due-process analysis” as described by Chief Justice Rehnquist.¹⁵⁶ The laws requiring the incarceration of drug offenders are therefore unconstitutional, if substantive due process analysis is applied.

III. The Supreme Court’s Reluctance

A. Background

The Supreme Court has expressed a reluctance to apply substantive due process analysis on a number of occasions.¹⁵⁷

[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.¹⁵⁸

As noted earlier the right to be free from physical restraint and incarceration is at the core of substantive due process.¹⁵⁹ One argument is then that the application of substantive due process to incarceration is not an expansion of the concept at all.¹⁶⁰ It is a new application to be sure, but only because no one has argued it. Nevertheless, the Court may still be reluctant.

Whenever possible, the Court prefers “an explicit textual source of constitutional protection” to “the more generalized notion of ‘substantive due process’”¹⁶¹ Here there is no such explicit source. The Fourth Amendment has no application to the use of incarceration after a conviction.¹⁶² As for the Eighth Amendment, the argument here does not suggest that the use of incarceration is cruel, nor that the sentences are disproportionately long.¹⁶³ Rather, this is a challenge to the legislative decision to incarcerate drug offenders as a policy choice that infringes fundamental rights.

Collins v. Harker Heights described what it takes to overcome this reluctance by quoting from the DeShaney case:¹⁶⁴ “[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’”¹⁶⁵ Daniels v. Williams similarly referred to the role of the Due Process Clause:

[B]y barring certain government actions regardless of the fairness of the procedures used to implement them, [the Due Process Clause] serves to prevent governmental power from being “used for purposes of oppression.”¹⁶⁶

The Court also discussed the standard for overcoming its reluctance at length in County of Sacramento v. Lewis:

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action: ... “to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.”

We have emphasized time and again that “[t]he touchstone of due process is protection of the individual against arbitrary action of government,” whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective. . . .

To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience . . . and violates the “decencies of civilized conduct.” . . . While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, “poin[t] the way.”¹⁶⁷

The legislative power is not absolute.¹⁶⁸ The Court’s reluctance is overcome when power is abused and employed as an instrument of oppression, in a manner that shocks the conscience. These are strong words. They fit the War on Drugs.

B. The Drug War’s Genuine “Parade of Horribles”¹⁶⁹

The War on Drugs is racist.¹⁷⁰ It is racist in effect.¹⁷¹ Blacks comprise only thirteen

percent of drug users but seventy-four percent of those sentenced for drug possession are black.¹⁷² “Fifty-six percent of drug offenders in state prison nationwide are black . . . [and] the proportion of drug offenders admitted to state prison greatly exceeds the proportions of the state population that is black.”¹⁷³ It is racist in the policies used to implement it, such as racial profiling.¹⁷⁴ The drug war is an instrument of oppression, especially of black males.¹⁷⁵ It is racist even in its origins.¹⁷⁶

Our excessive use of incarceration in the drug war has gotten us to the point where we “have overtaken Russia as the world’s most aggressive jailer.”¹⁷⁷ There are now some two million people behind bars in this country, with a further 4.5 million on probation or parole.¹⁷⁸ Regarding drug offenses in particular, the incarceration rate has multiplied tenfold from 1980 to 1996.¹⁷⁹ Incarceration devastates families. There are hundreds of thousands of children with incarcerated mothers, and most likely millions with incarcerated fathers.¹⁸⁰ In some cases imprisoned parents are forced to surrender their parental rights and their children are adopted away from them.¹⁸¹

The drug war has been marked by countless abuses of power. Police drug corruption scandals regularly visit to the pages of our newspapers.¹⁸² Reviews of police corruption show a direct connection to drugs.¹⁸³ Both federal agencies¹⁸⁴ and foreign leaders¹⁸⁵ have been implicated in drug smuggling and corruption. The use of confidential informants in drug prosecutions has also been soundly criticized.¹⁸⁶

Drug war policies have been blamed for a variety of other problems, including the funding of criminal and terrorist organizations,¹⁸⁷ environmental damage in Colombia from the aerial spraying of defoliant on suspected coca plantations, along with political instability and

civil war there¹⁸⁸ and the spread of HIV here in the US.¹⁸⁹ The drug war is also characterized by rank hypocrisy. Two of the four leading presidential candidates in 2000 admitted past drug use, while a third, President George W. Bush, declined to answer.¹⁹⁰ The fourth candidate, John McCain, denied any history of illegal drug use, but his wife was caught stealing prescription narcotics from a charity she directed.¹⁹¹ All four supported continuing the drug war. Meanwhile the President's niece has managed to avoid prison despite repeated drug offenses, a not-uncommon scenario among powerful families.¹⁹²

Perhaps most troubling are the stories of innocent deaths. What follows are a number of stories of people killed during incidents caused by the War on Drugs. The list, while lengthy, is by no means exhaustive. The more research one does, the more deaths one finds.¹⁹³

May 24, 1972: Mrs. Lillian Davidson shot Patrolman Lewis W. Hurst, Jr., age 22, as he attempted to batter down her locked bedroom door at 3 a.m. in Norfolk, Virginia. The raid was premised on incorrect information from a former drug addict.¹⁹⁴

April 24, 1972: During a drug raid near Eureka, California, a federal narcotics agent shot 24-year-old Dirk Dickenson in the back, killing him. The agents had assaulted Dickenson's cabin to seize a drug lab. No drug lab was found.¹⁹⁵

May 12, 1971: Francisco Garcia and his wife Adelina were shot by police during a drug raid at a ranch near Indio, California. Mr. Garcia was killed. Marijuana was found on the ranch, but Mr. Garcia was never implicated in the drug operation.¹⁹⁶

October 3, 1969: Howard Henry Dyer, 22, was in his mother-in-law's apartment while there was a drug raid going on in the apartment above. One of the officers accidentally fired his rifle. The bullet crashed through the ceiling and pierced Dyer's skull, killing him instantly as he sat in the living room cradling his infant son.¹⁹⁷

October 17, 1988: NYPD Officers Christopher Hoban, 26, and Michael Buczek, 24, were killed on the same day in two separate drug operations.¹⁹⁸

February 27, 1988: NYPD Officer Edward Byrne, 22 years old, a rookie, was shot

and killed execution-style while he was guarding the home of a witness in a drug case in South Jamaica, Queens.¹⁹⁹

April 27, 1988: NYPD Sgt. John F. McCormick, 43, a 19-year veteran of the department, died during a wild shootout in the Inwood section during a drug raid. He was killed as two other officers were trying to wrest a gun from a suspect, but ballistics tests later showed that the fatal shot came from the gun of one of the officers.²⁰⁰

August 16, 1988: NYPD Officer Joseph Galapo, 30, a five-year veteran, was fatally wounded as he and a sergeant, both in plainclothes, were trying to arrest four drug suspects in the Sunset Park section of Brooklyn. The shot came from the service revolver of Sgt. William Martin, 37, who told a court hearing that he accidentally fired when a suspect being taken into custody jostled him.²⁰¹

June 12, 2002: Deputy Sheriff Shane Bennett of Harris County, Texas, was shot in the back of the head by a fellow deputy during a gun battle after a home invasion. Twenty-eight years earlier another Harris County deputy, Rodney Scott Morgan, was shot and killed by a Houston police officer during a drug operation.²⁰²

August 3, 1989: Essex County police officer Keith Neumann, 24 years old, was killed as he burst into a house in a drug raid. He had just helped break down a metal door with a battering ram and was one of six officers squeezing through a 30-inch opening into the building when the 12-gauge shotgun carried by Sgt. Willie Thomas discharged into his lower back.²⁰³

December 12, 1986: Officer Ronald Cox was shot by another officer who mistook him for an armed suspect during a drug raid on an apartment in North Dallas, Texas.²⁰⁴

March 13, 1996: Oxnard, CA, police officer Jim Jensen was accidentally shot to death in a smoke-filled hallway by his friend and mentor, Sgt. Daniel Christian, during a drug raid of an unoccupied residence. Christian shot Jensen three times at close range. His partner mistook him for a suspected drug dealer and fired three shotgun rounds into his back and side.²⁰⁵

June 15, 1990: Sacramento, CA, officer James H. McKnight, 39, died when he was shot in the head during a drug raid on an alleged cocaine smuggling operation.²⁰⁶

October 31, 1988: Prince George's County Cpl. Mark Kevin Murphy was shot and killed accidentally by a fellow police officer during a drug raid.²⁰⁷

October 10, 1989: Baltimore police officer William J. Martin, 37, a 10-year member of the police force and a father of two, was shot twice in the left side of the head at close range, as he and his partner tried to break up a suspected drug sale.²⁰⁸

March 24, 1989: Dexter Herbert, 20, was killed when he ran into the line of fire as a Gardena, CA, police officer shot at an armed drug suspect during an early morning drug raid.²⁰⁹

October 20, 1989: An Anne Arundel County police officer shot and killed a pregnant woman during a drug raid on a suspected crack house. Officer Thomas Tyzack Jr. was trying to help Crystal Nelson to her feet when she fell. Police reports said Tyzack tried to catch her, but his gun went off, striking her in the back and killing her.²¹⁰

March 12, 1988: Tommie Dubose, 56, was shot to death during a nighttime raid staged by San Diego officers who charged into his home while executing a search warrant. The police were looking for Dubose's son. Four of the five bullets hit Dubose in the back.²¹¹

March 15, 2000: Patrick Dorismond, age 26, was waiting for a taxi near 8th and 37th near the Port Authority bus terminal. A plainclothes NYC detective asked to buy drugs. Angry words were exchanged, a scuffle ensued, and another detective shot and killed Dorismond.²¹²

September 29, 1999: Ismael Mena, a 45-year-old Mexican immigrant, worked in a Coca-Cola bottling plant in Denver. He was at home when 14 Denver SWAT officers came through his door in a no-knock drug raid. Mena was shot eight times and killed. The warrant had the incorrect address. A remarkably similar set of facts killed John Adams, 64, in Lebanon, Tennessee on October 4, 2000.²¹³

August 9, 1999: Los Angeles County sheriffs shot and killed Mario Paz, a retired grandfather, during a drug raid. No drugs were found.²¹⁴

February 6, 2001: St. Louis County police broke down the front door of Annette Green's home to serve a search warrant on the suspected crack cocaine dealer. The officers said they believed Green was carrying a gun or knife after a flashlight picked up a glint from her hand. When Green ignored calls to stop and drop the object, one of the officers fired four times at her. Three of the bullets struck her and she was killed. It was later determined that the shiny object in Green's hand was a silver 12-inch metal bolt. The previous year St. Louis police killed two unarmed black men, Earl Murray and Ronald Beasley, in what was supposed to

be a drug bust.²¹⁵

April 17, 1995: Sheriffs in Beaver Dam, Wisconsin, raided the home of Scott Bryant, a 29-year-old tech college student living in a trailer with his eight-year-old son. The first officer through the door shouted, "Search warrant! Search warrant!" Then, as Bryant was being placed on the couch to be handcuffed, detective Robert Neuman came through the door and shot him in the chest. A small amount of marijuana was found in the trailer.²¹⁶

October 12, 1995: Police officer Tony Patterson was killed in a drug raid in Topeka, Kansas. Patterson and his fellow officers were battering down a door when the suspect fired through the door at the unknown intruders.²¹⁷

October 1992: Twenty-seven law enforcement agents, allegedly acting on a tip that up to 4,000 marijuana plants were growing there, raided millionaire Donald Scott's ranch, just across the Ventura County line from Malibu. Scott, 61, brandishing a handgun after being startled awake, was shot fatally by the deputy in charge. No marijuana was found.²¹⁸

Feb. 13, 1999, 1:25 a.m.: "[I]n Osawatomie, Kan., police set off a flash-bang grenade before bursting into the home of Willie Heard, looking for cocaine. The explosion startled Heard's 16-year-old daughter, who screamed. Heard, in his bedroom and thinking his daughter was in danger, grabbed a .22 bolt-action rifle. When police smashed into the bedroom they saw Heard with the rifle and shot him dead. The entire incident lasted 11 seconds."²¹⁹

September 1, 2000: Prince Jones, a 25-year-old unarmed college student, was killed in the early hours of Sept. 1 after being trailed for 15 miles by an undercover narcotics detective who thought he was following someone else.²²⁰

March 22, 1996: 73-year-old Richard Brown was killed in a hail of 122 bullets during a drug raid. Five years later, five Miami police officers were indicted by a federal grand jury for lying and fabricating evidence to cover up their part in the fatal shooting.²²¹

January, 1997: David Aguilar, 44, of Three Points, Arizona, was shot outside his home after confronting James Laverty, an undercover Drug Enforcement Administration agent. Laverty, 27, a former Chicago police officer who had been with the DEA for less than a year, was sitting in an auto outside Aguilar's home west of Tucson, conducting surveillance. Aguilar approached Laverty's unmarked car twice. First, he asked the agent why he was parked near Aguilar's home and asked him to leave; then, when the agent refused, he returned with a sawed-off weapon. Laverty fired 11 times from his semiautomatic handgun.²²² Aguilar's 15-year-old son saw him get shot.²²³

September 22, 2000: Lynette Gayle Jackson, 29, of Riverdale, Georgia, was shot after she pointed a gun at SWAT team officers when they entered her bedroom during a drug raid. Jackson's home had been broken into less than a month earlier when she was home.²²⁴

July 12, 1998: Pedro Oregon Navarro, 22, was killed when Houston Police officers raided his brother's apartment without a warrant. Navarro was shot 12 times, including nine shots in the back.²²⁵

March 25, 1994: Acting on a drug informant's tip, a 13-member Boston SWAT team burst through the door of 75-year-old Rev. Accelyne Williams' home. They chased him through his apartment, threw him face down on the floor and handcuffed him. He began vomiting, had difficulty breathing, and died 45 minutes later of a heart attack.²²⁶

2001: A Peruvian Air Force jet under the guidance of a CIA surveillance plane shot down a missionary flight.²²⁷ The CIA plane had mistakenly indicated that the unarmed propeller plane was running drugs. Veronica Bowers and her daughter Charity were killed. Charity was seven months old.

January 29, 1997: Detective Willie Neal was killed by his partner when their meeting with a suspected drug dealer went awry.²²⁸

December 15, 1999: Troy James Davis, 25, was killed by police in North Richland Hills, Texas. The incident apparently started as a misdemeanor marijuana investigation.²²⁹

November 1991: Eight-year-old Xavier Antone Bennett Jr. died in a shootout between his stepfather --- a suspected drug dealer --- and Atlanta police.²³⁰

April 19, 2002: During a botched drug raid in Suffolk County, New York, one officer tripped over a tree root and bumped into another, setting off his gun. Three shots were fired from the gun, and one hit 20-year-old graphic arts student Jose Colon in the head, causing his death.²³¹

January 7, 1996: Ulises Zambrano, 17, was shot and killed by a Huntington Beach, CA, police officer during a drug raid after officers entered the home with a battering ram. Officers indicated that Zambrano had "made a suspicious movement, as if grabbing for a weapon." No weapon was found in the home.²³²

August 18, 1982: Officer Kathleen Schaefer, was working in plain clothes while on a drug bust. When she pulled her service weapon to cover a uniformed officer,

she was mistakenly perceived to be a threat by another responding officer and was shot and killed.²³³

May 20, 1997: Esequiel Hernandez was shot dead while herding his family's goats near the Mexican border.²³⁴ A U.S. Marine antidrug patrol suspected he was a drug smuggler and shot him when he appeared to aim at them with the rifle he used to protect the goats. Hernandez had just turned 18.

September 13, 2000: Police burst into a home in Modesto, California early in the morning as part of a federal drug sweep.²³⁵ They found Alberto Sepulveda in his room and ordered him to lay face-down on the floor with his hands over his head. Officer David Hawn kept his shotgun aimed at Alberto. For reasons that remain uncertain, Hawn's gun "accidentally" went off.²³⁶ The 1-ounce rifled slug entered Alberto's back and came to rest in his left nipple. Alberto Sepulveda died instantly. He was eleven years old.

The policy of incarcerating drug offenders is the root cause of these deaths. Street-crime unit buy-and-busts, no-knock raids and the shooting down of unarmed planes are dangerous tactics.²³⁷ They lead to accidental deaths. Such tactics are permitted because the drug war defines the offenses as very serious, requiring prison time for those convicted.²³⁸ Each death is an accident in the context of its own story. Collectively, however, they are not accidents. They are a foreseeable consequence of our policy choices.

It is time to "break new ground" with "the utmost care."²³⁹ The cry for an end to the War on Drugs overcomes the Supreme Court's reluctance because of the breadth and depth of problems caused by the drug war's infringement of "the most important of all civil rights."²⁴⁰

C. Preserving Judicial Restraint

There are many other areas where substantive due process analysis could conceivably be applied, such as capital punishment,²⁴¹ and homosexual rights.²⁴² It could even be applied to all criminal cases. The court's reluctance should assuage fears of a radical expansion of the scope of

substantive due process.

The 1986 case of *Bowers v. Hardwick* presented a challenge to Georgia's sodomy laws on the notion that homosexuality was protected by the right of privacy.²⁴³ I do not suggest here that drug use is so protected. The argument presented in this article hinges not on privacy nor any right to use drugs, but rather on the fundamental right to be free from incarceration. *Hardwick* might have presented a similar argument,²⁴⁴ but it is doubtful that he would have overcome the Court's reluctance. The problems caused by the incarceration of homosexuals on sodomy charges do not reach the same level as those caused by the drug war because so few homosexual sodomy cases are prosecuted.²⁴⁵ The negative results of capital punishment would similarly fail to overcome the Court's reluctance.²⁴⁶ Those concerned about judicial activism²⁴⁷ can take comfort that this analysis can be limited to the drug war. One must wonder, however, whether it would be such a tremendous burden on the courts – or such an odious limit on legislative discretion – to follow Professor Colb's approach and ensure that the use of incarceration is narrowly tailored to compelling interests regardless of the nature of the crime.²⁴⁸

A court decision such as the one suggested here would certainly be controversial. Our nation survived the tumult over *Lochner* and continues to wrestle with the consequences of *Roe v. Wade*. Seventy years have passed since the end of Alcohol Prohibition. In the light of these Himalayan societal changes an end to the drug war will cast a small shadow.

IV. CONCLUSION

It is true that the approach suggested in this paper would limit the police power. Constitutional protection of individual rights exists for that very purpose.²⁴⁹ We face coercive

government action, carried out in a corrupt and racist manner, with military and paramilitary assaults on our homes, leading to mass incarceration and innocent deaths. We can never forget the tyranny of a government unrestrained by an independent judiciary.²⁵⁰ Our courts must end the War on Drugs.

¹ *The Cronkite Report: The Drug Dilemma* (Discovery Channel, June 20, 1995).

² The phrases “drug war” and “War on Drugs” will be used interchangeably in this paper. It is generally thought that the use of “war” metaphor began with President Richard M. Nixon. E.g., WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS: THE TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS 103-127 (Greenwood Publishing Group 1994); Roseanne Scotti, Comment: *The ‘Almost Overwhelming Temptation’: the Hegemony of Drug War Discourse in Recent Federal Court Decisions Involving Fourth Amendment Rights*, 10 TEMPLE POL. & CIV. RTS. L. REV. 139, 139, 141-142 (Fall 2000); Milton Friedman, *There’s No Justice in the War on Drugs*, THE NEW YORK TIMES, January 11, 1998.

³ Milton Friedman, the Nobel Prize-winning economist and advisor to a number of Presidents, has been one of the most enduring and vocal critics. He began his outspoken attacks in 1972:

Prohibition undermined respect for the law, corrupted the minions of the law, created a decadent moral climate - but did not stop the consumption of alcohol. Despite this tragic object lesson, we seem bent on repeating precisely the same mistake in the handling of drugs.

Milton Friedman, *Prohibition and Drugs*, NEWSWEEK, May 1, 1972. Some 26 years later, his criticism remained eloquent:

Can any policy, however high-minded, be moral if it leads to widespread corruption, imprisons so many, has so racist an effect, destroys our inner cities, wreaks havoc on misguided and vulnerable individuals, and brings death and destruction to foreign countries?

Milton Friedman, *There’s No Justice in the War on Drugs*, THE NEW YORK TIMES, January 11, 1998. See also Milton Friedman, *The War We Are Losing*, SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES at 53-67 (Melvyn B. Krauss and Edward P. Lazear, eds., Hoover Institution Press, Stanford, 1991); Milton

Friedman, *Stop Taxing Non-Addicts*, REASON MAGAZINE, October, 1988; Milton Friedman, *An Open Letter to Bill Bennett*, THE WALL STREET JOURNAL, September 7, 1989; Milton Friedman, *Bennett Fears Public Policy Disaster!—It's Already Here*, THE WALL STREET JOURNAL, September 29, 1989; Milton Friedman, *A War We Are Losing*, THE WALL STREET JOURNAL, March 7, 1991; Milton Friedman, *The Drug War as a Socialist Enterprise*, FRIEDMAN & SZASZ ON LIBERTY AND DRUGS (Arnold S. Trebach and Kevin B. Zeese eds., Drug Policy Foundation, Washington, DC, 1992).

⁴ Max Frankel, *The Call of the Andes*, THE NEW YORK TIMES, April 30, 2000; John Veit, *The Drug War Industrial Complex Interview with Noam Chomsky*, HIGH TIMES MAGAZINE, April 1998; Alexis Chiu, *ACLU, US Clash on Pot Rules*, SAN JOSE MERCURY NEWS, August 4, 2000; *ACLU: Drug War Increases Racial Profiling on Our Roads*, ST. PETERSBURG TIMES, June 3, 1999; Louise Montgomery, *Speakers Reveal Downside to War on Drugs*, ANCHORAGE DAILY NEWS, July 2, 2001 (Amnesty International and the Institute for Policy Studies); *'Not Part of My Sentence': Violations of the Human Rights of Women in Custody*, AMNESTY INTERNATIONAL USA WOMEN'S HUMAN RIGHTS PROGRAM REPORT, 1999.

⁵ Jennifer Mena, *Strong Ideas on Drug War*, SAN JOSE MERCURY NEWS, November 7, 1997, 1B (discussing former Secretary of State George Shultz and his criticism of the drug war); MACNEIL-LEHRER NEWSHOUR, January 8, 1990 (interview with Shultz); William F. Buckley, Jr., *High on Drug-Warring*, NATIONAL REVIEW, January 26, 2001; William F. Buckley, Jr., *Judicial High in California*, MEDICAL MARIJUANA MAGAZINE, January 9, 1998 at <http://www.mapinc.org/drugnews/v98/n023/a13.html?10865>; David Boaz, ed., THE CRISIS IN DRUG PROHIBITION, Cato Institute Press, 1990; Timothy Lynch, ed., AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY, Cato Institute Press, 2000 (Cato Institute); Hon. Dan Burton (R-Illinois), House Government Reform Committee Hearing, December 12, 2002.

⁶ Christopher Wren, *War on Drugs Called More Harm Than Good*, NEW YORK TIMES, June 9, 1998 (referring to letter circulated by George Soros "asserting that the global war on drugs is causing more harm than drug abuse itself. ... The signers include the former U.N. Secretary-General Javier Perez de Cuellar, the former U.S. Secretary of State George Shultz, the Nobel peace laureate Oscar Arias of Costa Rica, the former CBS television anchorman Walter Cronkite, two former U.S. senators, Alan Cranston and Claiborne Pell, and the South African human rights activist Helen Suzman."); Russ Kick, *World Leaders on Dope*, VILLAGE VOICE, May 30, 2001 (former US Presidents Bill Clinton and Jimmy Carter, former US Vice-President Dan Quayle, Hawaii Governor Ben Cayetano, former Mayor of Baltimore Kurt Schmoke, former San Francisco Mayor Frank Jordan, Congressman Ron Paul, Mexican President Vicente Fox, President of Uruguay Jorge Batlle, President of Portugal Jorge Sampaio, and many others); Abigail Van Buren, *Dear Abby: Legalized Drugs an Idea to Consider*, LOS ANGELES TIMES, 5/3/94, E4; *Teens Applaud Gov. Johnson*, SANTA FE NEW MEXICAN, March 13, 2002; Jesse

Ventura, *DO I STAND ALONE? GOING TO THE MAT AGAINST POLITICAL PAWNS AND MEDIA JACKALS*, Pocket Books, 2000; Barbara Walters, *Interview with Hugh Downs*, ABC 20/20, September 24, 1999; see also *Hugh Downs Interview*, PEOPLE MAGAZINE, September 27, 1999; Mark A. R. Kleiman, *An Informed Approach to Substance Abuse*, ISSUES IN SCIENCE & TECHNOLOGY, Fall 1998, v. 15, no. 1, page 45 (Federation of American Scientists); Edward M. Brecher et al., LICIT AND ILLICIT DRUGS, THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA-INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL, 397 (1972) (from the publisher of Consumer Reports); Mo Mowlam, *Better Drug Laws Will Cut Gun Crime*, THE GUARDIAN (UK), January 9, 2003 (Mo Mowlam was in charge of British drug policy from 1999-2001).

⁷ Don Erler, *Drugs: It's Time for a Different Kind of Stop Sign*, FT. WORTH STAR TELEGRAM, February 8, 2001 (National Association of Criminal Defense Lawyers).

⁸ Barry Bortnick, *Metro: Sheriff scoffs at drug war*, THE GAZETTE (Colorado), December 10, 2001, page Metro 1; Nancy Lofholm, *Libertarian Sheriff Just Says No to the Drug War*, Denver Post, August 28, 2000, page B1; Joseph D. McNamara, *Costly, Counterproductive, Crazy*, ORANGE COUNTY REGISTER, November 17, 2002; JOSEPH D. MCNAMARA, *GANGSTER COPS: THE HIDDEN COST OF AMERICA'S WAR ON DRUGS* (2000); Joseph D. McNamara, *The Police and Violent Crime*, 51 WASH. & LEE L. REV. 491 (1994); Michael W Lynch, *Battlefield Conversions*, REASON MAGAZINE, January 1, 2002, page 36; Sean Kirst, *Drug War's Strategy Fatally Flawed, Ex-Cop Says*, SYRACUSE POST-STANDARD, November 22, 2002.

⁹ Richard S. Miller, *A New Voluntary Committee of Lawyers Questions Drug Policies*, 2-FEB HAW. B.J. 32 (February 1998) (referring *inter alia* to Nicholas Katzenbach and Elliot Richardson, former U.S. Attorneys General); Maria Botey Pascual, *Toward Drug Legalization: A Conversation with Gustavo de Greiff*, POR ESTO! (Mexico), November 14, 2002 (former Attorney General of Colombia).

¹⁰ HON. JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS*, Temple Univ. Press, 2001; Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 774-775 (2002) (Federal Judges Sweet, Weinstein and Knapp, and California Judge James Gray). Judges have been critical of the drug war since its beginning. While upholding New York's harsh drug laws, the Judges of the Court of Appeals eloquently wrote of their concerns:

In so holding, in the exercise of judicial restraint and with respect for the separation of powers, the court does not necessarily approve or concur in the Legislature's judgment in adopting these sanctions. Their pragmatic value might well be questioned, since more than a half century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of

drug abuse. The premises upon which the Legislature has proceeded have been subjected to vigorous dispute. Indeed, the debate moves beyond the wisdom of substituting long mandatory prison terms in place of flexible sentencing, of emphasizing isolation and deterrence over rehabilitation. Even the questions whether "the policy of criminalization, which raises the cost and increases the difficulty of obtaining drugs, does in fact make the drug user a proselytizer of others in order that he may obtain the funds to acquire his own drugs", and whether "the compulsion of the addict to obtain drugs and the moneys to purchase them causes him to commit collateral crime that otherwise he might not commit", are questions about which reasonable men can and do differ. Given the present state of criminological knowledge, perhaps only time will tell whether the course pursued will prove effective or will fail as every similar effort since the Harrison Act of 1914 has failed.

People v. Broadie, 332 N.E.2d 338, 346 (1975) (citations omitted). Twenty years later the same court faced the same issue and made similar comments:

That is not to say that we disagree with the strongly held convictions of our dissenting colleagues . . . that the harsh mandatory treatment of drug offenders embodied in the 1973 legislation has failed to deter drug trafficking or control the epidemic of drug abuse in society, and has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the cost of imprisonment would have been better spent on treatment and rehabilitation. The experience of the last two decades has clearly vindicated the doubts Chief Judge Breitel expressed in *People v. Broadie* on the wisdom of the draconian drug sentencing laws.

People v. Thompson, 633 N.E.2d 1074, 1080-81 (1994) (citations omitted).

¹¹ INDIAN HEMP DRUG COMMISSION, REPORT OF THE INDIAN HEMP DRUG COMMISSION 1893-1894, 1971 Reprint, New York: Johnson Reprint Corporation (Originally issued by the Government of India Central Printing Office in Simla); *Marijuana Smoking in Panama*, THE MILITARY SURGEON, v. 73 - July-December 1933 (US military committee "designated to reinvestigate the effect of the smoking of marijuana [sic] on military personnel"); REPORT OF THE NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT RELATIVE TO THE FACTS AS TO THE ENFORCEMENT, THE BENEFITS, AND THE ABUSES UNDER THE PROHIBITION LAWS, BOTH BEFORE AND SINCE THE ADOPTION OF THE EIGHTEENTH AMENDMENT TO THE CONSTITUTION, ENFORCEMENT OF THE PROHIBITION LAWS IN THE UNITED STATES, H.R. Doc No. 722 (3d Sess. 1931) (The Wickersham Commission); THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK: SOCIOLOGICAL, MEDICAL, PSYCHOLOGICAL, AND PHARMACOLOGICAL STUDIES (1944) (The LaGuardia

Commission); JOINT COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND AMERICAN MEDICAL ASSOCIATION ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE, Indiana University Press (1961); MARIHUANA: A SIGNAL OF MISUNDERSTANDING, FIRST REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE (1972); THE REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE (1973). See also Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 346 (1977) (summarizing history of governmental studies of drug use at footnote 4); Ronen Shamir and Daphna Hacker, *Colonialism's Civilizing Mission: The Case of the Indian Hemp Drug Commission*, 26 LAW & SOC. INQUIRY 435 (2001).

¹² Andrew D. Leipold, *The War on Drugs and the Puzzle of Deterrence*, 6 J. GENDER RACE & JUST. 111 (2002); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839 (2002); Frank Rudy Cooper, *The Un-balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Jefferson M. Fish, *Rethinking Our Drug Policy*, 28 FORDHAM URB. L.J. 9 (2000); Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235 (2000); Elliot G. Hicks, *Shooting Ourselves in The Foot in The Drug War*, 1999-APR W. VA. LAW. 4; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 206 (1998); John F. Galliher, David P. Keys and Michael Elsner, *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 88 J. CRIM. L. & CRIMINOLOGY 661 (1998); Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998); *Towards a Compassionate and Cost-Effective Drug Policy: A Forum on The Impact of Drug Policy on the Justice System and Human Rights*, 24 FORDHAM URB. L.J. 315 (Symposium 1997); Edward McGlynn Gaffney, Jr., *On Ending The War on Drugs*, 31 VAL. U. L. REV. XVII (1997); Daniel D. Polsby, *Ending The War on Drugs And Children*, 31 VAL. U. L. REV. 537 (1997); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483 (1997); Steven Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571 (1995); Steven Jonas, *The Drug War: Myth, Reality And Politics*, 27 CONN. L. REV. 623 (1995); Helen M. Kemp, *Presumed Guilty: When the War on Drugs Becomes a War on The Constitution*, 14 Q. L. Rev. 273 (1994); Mike O'Callaghan, *Commentary: War on Drugs Hitting Innocent Citizens*, 47 CONSUMER FIN. L.Q. REP. 380 (1993); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); D. Brian Boggess, *Exporting United States Drug Law: An Example of The International Legal Ramifications of The 'War on Drugs,'* 1992 B.Y.U. L. REV. 165; Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242 (1991); David Elkins, *Drug Legalization: Cost Effective and Morally Permissible*, 32 B.C. L. REV. 575 (1991); John A. Powell and Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, The Constitution and The Black Community*, 24 U.C. DAVIS L. REV. 557 (1991); David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C.

DAVIS L. REV. 655 (1991); James Ostrowski, *The Moral And Practical Case For Drug Legalization*, 18 HOFSTRA L. REV. 607 (Symposium on Drug Decriminalization, Spring 1990); Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990); Christopher D. Sullivan, "User Accountability" Provisions in the Anti-drug Abuse Act of 1988: Assaulting Civil Liberties in the War on Drugs, 40 HASTINGS L.J. 1223 (1989); Steven Wisotsky, *The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

¹³ William H. Ryan, Jr., *Fighting the War on Drugs in the Twenty-First Century: A Prosecutor's Perspective*, 47 VILL. L. REV. 809 (2002); Molly McConville, *A Global War on Drugs: Why the United States Should Support The Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75 (2000); Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers Under Current Theories of Enterprise Liability*, 7 CORNELL J.L. & PUB. POL'Y 757 (1998); Hon. Sheila M. Murphy, *Drug Courts: An Effective, Efficient Weapon in the War on Drugs*, 85 ILL. B.J. 474 (1997); Wayne L. Mowery, Jr., *Stepping Up the War on Drugs: Prosecution and Enhanced Sentences for Conspiracies to Possess or Distribute Drugs Under State and Federal Schoolyard Statutes*, 101 DICK. L. REV. 703 (1997); Robert B. Charles, *Back to the Future: The Collapse of National Drug Control Policy and a Blueprint for Revitalizing the Nation's Counternarcotics Effort*, 33 HARV. J. ON LEGIS. 339 (1996); Gregory A. Loken, *The Importance of Being More than Earnest: Why The Case for Drug Legalization Remains Unproven*, 27 CONN. L. REV. 659 (1995); Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613 (1994); Mitchell Rosenthal, *In Opposition to Drug Legalization*, 24 U.C. DAVIS L. REV. 637 (1991); Charles Rangel, *Our National Drug Policy*, 1 STAN. L. & POL'Y REV. 43 (1989).

¹⁴ Congressman Bob Barr v. Mr. Eric Sterling, *The War on Drugs: Fighting Crime or Wasting Time?*, 38 AM. CRIM. L. REV. 1537 (2001); *Winning the War on Drugs: A "Second Chance" For Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485 (2000); Joshua C. LaGrange, *Law, Economics, And Drugs: Problems With Legalization under a Federal System*, 100 COLUM. L. REV. 505 (2000); Hon. Juan R. Torruella, *The 'War on Drugs': One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235 (1997); Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to The War on Drugs*, 19 AM. J. CRIM. L. 219 (1992); Hon. Reggie Walton, *War on Drugs*, 34 HOW. L.J. 506 (1991).

¹⁵ Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990); see also John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

¹⁶ The number of cases where drug prosecutions were challenged on Fourth Amendment grounds is overwhelming. Some examples include: U.S. v. Place, 462 U.S. 696 (1983); Florida v.

Royer, 460 U.S. 491 (1983); U.S. v. Johns, 469 U.S. 478 (1985); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Ohio v. Robinette, 519 U.S. 33 (1996); Florida v. Jimeno, 500 U.S. 248 (1991); Delaware v. Prouse, 440 U.S. 648 (1979); Whren v. U.S., 517 U.S. 806 (1996); Kyllo v. U.S., 533 U.S. 27 (2001); U.S. v. Espinoza, 256 F.3d 718 (7th Cir. Wis. 2001), *cert. den.* 122 S.Ct. 905 (2002); Florida v. Bostick, 501 U.S. 429 (1991). *See also, e.g.*, Frank Rudy Cooper, *The Un-balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Roseanne Scotti, *The 'Almost Overwhelming Temptation' – The Hegemony of Drug War Discourse in Recent Federal Court Decisions Involving Fourth Amendment Rights*, 10 TEMP. POL. & CIV. RTS. L. REV. 139 (2000); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237 (1994); Diane-Michele Krasnow, *To Stop the Scourge: the Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219 (1992); Michael D. Blanchard and Gabriel J. Chin, *Identifying The Enemy in the War on Drugs: a Critique of The Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV. 557 (1998); Matthew I. Farmer, *Go Greyhound and Leave The Fourth Amendment to Us: Florida v. Bostick*, 23 LOY. U. CHI. L.J. 533 (1992); Christian J. Rowley, *Florida v. Bostick: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601; Charles Patrick Garcia, *The Knock And Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685 (1993).

¹⁷ *E.g.*, Caplin & Drysdale, *Chartered v. U.S.*, 491 U.S. 617 (1989); Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994). *See also* Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 at 1432-1433 (1993); Kevin B. Zeese, *Supreme Court Upholds Forfeiture of Legal Fees*, 2 DRUG L. REP. 109 (1989); Quin, *Mythical Traditions and Fictions: The Rehnquist Court and United States v. Ursery*, 1 J. GENDER RACE & JUST. 295 (1997); Dirnbeck, *The Supreme Court Confiscates an Unjust Weapon Used in the "War on Drugs"*, 20 S. ILL. U. L.J. 353 (1996); Durkin, *Civil Forfeiture under Federal Narcotics Law: The Impact of the Shifting Burden of Proof upon the Fifth Amendment Privilege Against Self Incrimination*, 24 SUFFOLK U. L. REV. 679 (1990); Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159 (1995).

¹⁸ *E.g.*, Caplin & Drysdale v. U.S., *supra* note 17; Melinda Hardy, *Sixth Amendment-Applicability of Right to Counsel of Choice to Forfeiture of Attorneys' Fees*, 80 J. CRIM. L. & CRIMINOLOGY 1154 (1990).

¹⁹ Harmelin v. Michigan, 501 U.S. 957 (1991); People v. Broadie, 332 N.E.2d 338 (NY 1975); People v. Thompson, 633 N.E.2d 1074 (NY 1994); State v. Stewart, 791 A.2d 143 (Md. 2002); People v. Mershon, 874 P.2d 1025 (Colo. 1994); *see also* Dana M. Seshens, *Appellate Review of Sentences*, 89 GEO. L.J. 1819 (2001); Stephen T. Parr, *Symmetric Proportionality: a New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000);

Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000); Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums And the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389 (1996); Steven Grossman, *Proportionality in Non-Capital Sentencing: the Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995-1996); Stephen E. Meltzer, *Harmelin v. Michigan: Contemporary Morality and Constitutional Objectivity*, 27 NEW ENG. L. REV. 749 (1993); Scott Petersen, *The Punishment Need Not Fit the Crime: Harmelin v. Michigan and the Eighth Amendment*, 20 PEPP. L. REV. 747 (1993); Edward J. McGowan, *Eighth Amendment Proportionality in the Aftermath of Harmelin v. Michigan*, 10 N.Y.L. SCH. J. HUM. RTS. 185 (1992); John VanOphem, *Harmelin v. Michigan: Eighth Amendment Proportionality and Getting Tough on Drugs*, 1992 DET. C.L. REV. 655 (1992); Bruce Campbell, *Proportionality and the Eighth Amendment: Harmelin v. Michigan*, 15 HARV. J.L. & PUB. POL'Y 284 (1992); G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 27 HARV. C.R.-C.L. L. REV. 262 (Winter 1992); *Cruel and Unusual Punishments Clause -- Proportionality in Sentencing: Harmelin v. Michigan*, 105 Harv. L. Rev. 245 (1991).

²⁰ E.g., Finkelman, *supra* note 17 at 1397-98.

²¹ *Id.* at 1451-52.

²² *Id.* at 1397-98; see also Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000).

²³ Guerra, *supra* note 17 at 1169; Fish, *Rethinking Our Drug Policy*, 28 FORDHAM URB. L.J. 9, 217 (2000).

²⁴ E.g., *U.S. v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001). While the Court did not address any constitutional questions, Justice Thomas' opinion for the majority left open the possibility of a Commerce Clause challenge to federal drug policy: "Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause." *Id.* at 495, n. 7. See also *National Organization for Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration*, U. S. Dept. of Justice, 559 F.2d 735 (D.C.Cir. 1977); *U.S. v. Fogarty*, 692 F.2d 542 (8th Cir. 1982); *U.S. v. Burton*, 894 F.2d 188 (6th Cir. 1990); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 930 F.2d 936 (D.C. Cir. 1991); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994); *U.S. v. Richards*, 737 F.2d 1307 (4th Cir. 1984); Neusch, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201 (2001); Dana Graham,

Decriminalization of Marijuana: An Analysis of The Laws in the United States and the Netherlands and Suggestions for Reform, 23 LOY. L.A. INT'L & COMP. L. REV. 297 (2001); Andrew J. LeVay, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699 (2000); Marsha N. Cohen, *Breaking the Federal/State Impasse over Medical Marijuana: A Proposal*, 11 HASTINGS WOMEN'S L.J. 59 (2000); Dixon, *Conant v. McCaffrey: Physicians, Marijuana, and the First Amendment*, 70 U. COLO. L. REV. 975 (1999); Laura M. Rojas, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions?*, 30 MCGEORGE L. REV. 1373 (1999); Lauretta Higgins Wolfson, *A Quality of Mercy: The Struggle of the AIDS-Afflicted to Use Marijuana as Medicine*, 22 T. JEFFERSON L. REV. 1 (1999); Marcia Tiersky, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U. L. REV. 547 (1999); Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate a Smoke Screen for Movement Toward Legalization?*, 19 J. LEGAL MED. 273 (1998); Dogwill, *The Burning Question: How Will the United States Deal with the Medical- Marijuana Debate?*, 1998 DET. C.L. MICH. ST. U. L. REV. 247; Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707 (1998); Suzanne D. McGuire, *Medical Marijuana: State Law Undermines Federal Marijuana Policy-Is the Establishment Going to the Pot?*, 7 SAN JOAQUIN L. REV. 73 (1997).

²⁵ There was no shortage of questions about drug prohibition when it began with the Harrison Tax Act of 1914, 38 Stat. 785, 1-12 (1914), amended by 40 Stat. 1130, 1006 (1919) (repealed 1939). *E.g.*, *United States v. Jin Fuey Moy*, 241 U.S. 394 (1916); *United States v. Friedman*, 224 F. 276 (W.D. Tenn. 1915); *United States v. Woods*, 224 F. 278 (D. Mont. 1915); *United States v. Doremus*, 249 U.S. 86 (1919); *Webb v. United States*, 249 U.S. 96(1919); *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920); *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41 (1921); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 507-11 (1997).

²⁶ Writings critical of alcohol prohibition at the time touch on many of the same concerns as those raised by drug war critics and as seen in constitutional challenges to drug enforcement. An early critic anticipated Prohibition's failure: "The combined armies of the world could not prevent the growers of apples or grapes from allowing cider or wine to ferment and become alcoholic." Otto Erickson, *The Federal Prohibition Amendment*, 22 LAW NOTES 4, 7 (1918). Another commented:

[T]he Eighteenth Amendment inverts the declared purpose of this government. It establishes the paternity of the state and the consequent subjection of the citizen. ... It reestablishes the old order from which we revolted in 1776, namely; that the subject has no right that his sovereign is bound to respect.

Clarence Manion, *What Price Prohibition?*, 2 NOTRE DAME LAWYER. 73, 78 (January

1927). Manion also noted that “John Hancock was technically a bootlegger, and the stamp collectors of Great Britain were undoubtedly engaged in law enforcement.” *Id.* at 86. A writer in the 1920's noted that Prohibition “had not accomplished its purposes and never will . . . [O]ther vices have largely increased in consequence . . . [including] an unwarranted and unreasonable infringement of individual liberty . . .” Rachemann, *The Experiment of Prohibition*, 12 CONST. REV. 181 (1928). Racheman also drew an interesting parallel to the prohibition of cotton in France from 1686-1759. *Id.* Another 1920's critic commented:

[A] law which attempts to regulate the private morals of the individual apart from his public duties and obligations as a citizen, not only cannot be effectually enforced but will inevitably lead to evils greater than those which it attempts to suppress. . . . [Criminals] have developed an industry that is one of the greatest and most profitable in existence. The profits are so great and the chance of detection and conviction have proven to be so slight that the industry is attaining greater proportions every day.

Carrington, *The Aftermath of the Eighteenth Amendment*, 8 VA. L. REG. 1, 1-2 (1922) (New Series). The president of Columbia University was one of Prohibition's most strident critics and he touched on both the failings and some of the constitutional issues:

The phrase “law enforcement” sounds as if it meant something, but it does not. . . . Laws must be respected and obeyed, and when they are not ... they cease to be laws If law enforcement means the enforcement of the Eighteenth Amendment . . . then [it] means lawlessness. It means the kind of murder that has been going on over this land for four years. It means the invasion of the right of privacy; . . . search without warrant; . . . the abolition or limitation of trial by jury. It means overturning all sorts of things which we have supposed to be fundamental. . . . There are not enough people . . . who habitually use liquor to bring about this reform; it has got to be brought about by total abstainers, who realize that a terrible mistake has been made; that instead of aiding temperance, we have obstructed it; that instead of building character, we have torn it down; that instead of promoting public honesty, we have multiplied political hypocrisy.

Butler, *The Problems of the Eighteenth Amendment*, 62 AM. L.REV. 193, 207-13 (1928). The attacks on Prohibition continued in the 1930's:

They predicted an end to poverty and continuous prosperity for all but the country is now going through one of the severest depressions They prophesied that the jails would soon be practically empty and crime reduced to a minimum, but . . . our jails are crowded to the bursting point and the building of bigger and better jails is going on merrily . . . while [sic] many millions of us felons merely awaiting detection and conviction. They . . . foretold [an abstinent] generation . . . ,

but the class of 1931 at Princeton admitted that 263 of its members drank alcoholic beverages as against 74 who abstained . . . and the Wickersham Commission has reported sadly upon the prevalence of drinking among boys and girls of high school age.

Craighill, *Why Prohibition Failed*, 35 LAW NOTES 183 (1932). Fourth Amendment concerns were also raised. *E.g.*, Wilson, *Search and Seizure Under National Prohibition*, 12 CONST. REV. 189 (1928):

[T]he zeal for enforcement of the Prohibition Amendment should not blind us to the potential evils involved in permitting stealthy encroachments upon the right of immunity from unreasonable searches.

See also Results of Alcohol Prohibition (A Selected Bibliography), 17 J. CRIM. L. 283 (1926).

²⁷ The fifth amendment provides, in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law” U.S. CONST. amend. V.

²⁸ The fourteenth amendment provides, in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend. XIV.

²⁹ *Allgeyer v. State of La.*, 165 U.S. 578, 591 (1897). *See also* *Calder v. Bull*, 3 U.S. (3 Dall.) 385 (1798); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (Bradley, dissenting); *Davidson v. City of New Orleans*, 96 U.S. 97 (1877); *Hurtado v. People of State of Cal.*, 110 U.S. 516 (1884); *Lochner v. New York*, 198 U.S. 45 (1905). For general discussions of substantive due process doctrine and its development over the years, *see e.g.*, Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM J. LEGAL HIST. 265 (1975); Michael J. Hutter, *Kelly v. Johnson and Tonsorial Tastes: The Death Knell of Substantive Due Process*, 41 ALB. L. REV. 411, 421-440 (1977); Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Reeder, *The Due Process Clauses and "The Substance of Individual Rights,"* 58 U. PA. L. REV. 191 (1910); Warren, *The New 'Liberty' Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Green, *The Allgeyer Case as a Constitutional Embrasure of Territoriality*, 2 ST. JOHN'S L. REV. 22 (1927); Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583 (1930); J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Graham, *Procedure to Substance – Extra-Judicial Rise of Due Process, 1830-1860*, 40 CAL. L. REV. 483 (1952); Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125 (1956); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); Ratner, *The Function of the*

Due Process Clause, 16 U. PA. L. REV. 1048 (1968); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 42 (1972); Tribe, *The Supreme Court, 1972 Term – Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937 (1973); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ L. REV. 479 (1973); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection*, 72 MICH. L. REV. 821 (1974); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (1982); *A House Divided: Substantive Due Process in the Twentieth Century*, 62 NEB. L. REV. 316 (1983); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993); Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049 (1997); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997); Robert C. Post, *Defending The Lifeworld: Substantive Due Process in The Taft Court Era*, 78 B.U. L. REV. 1489 (1998); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453 (1998); Toni M. Massaro, *Reviving Hugo Black? The Court's 'Jot for Jot' Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086 (1998); Laurence H. Tribe, Comment, *Saenz sans Prophecy: Does the Privileges or Immunities Revival Portend the Future--or Reveal the Structure of the Present?*, 113 HARV. L. REV. (1999); Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197 (2000); Ronald A. Parsons and Sheila S. Woodward, *The Heart of the Matter: Substantive Due Process in the South Dakota Courts*, 47 S.D. L. REV. 185 (2002).

³⁰ E.g., Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958); Note, *Unenumerated Rights--Substantive Due Process, the Ninth Amendment, and John Stuart Mill*, 1971 WIS. L. REV. 922 (1971); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973); Comment, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973); Note, *Roe v. Wade and Doe v. Bolton: The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628 (1973); Comment, *Roe v. Wade – The Abortion Decision – An Analysis and Its Implications*, 10 SAN DIEGO L. REV. 844 (1973); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974); Dilloff, *Federal Court Litigation Over the Regulation of Adult Grooming*, 38 ALB. L. REV. 387 (1974); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975); Wilkinson, *Goss v. Lopez, The Supreme Court As School Superintendent*, 1975 SUP. CT. REV. 25; Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976); Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699; Tom Gerety, *Redefining Privacy*, 12 HARV. C. R.-C. L. L.

REV. 233, 272 (1977); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); *Developments in the Law - The Constitution and the Family: II. Sources of Constitutional Protection for Family Rights*, 93 HARV. L. REV. 1161 (1980); John Hart Ely, *Democracy and the Right to Be to be Different*, 56 N.Y.U. L. REV. 397 (1981); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1064 (1981); *Substantive Due Process Limits on the Duration of Civil Commitment for the Treatment of Mental Illness*, 16 HARV. C.R.-C.L. L. REV. 205 (1981); *Termination of Parental Rights: the Substantive Due Process Issue*, 26 ST. LOUIS U. L.J. 915 (1982); *Corporal Punishment in Public Schools: A Violation of Substantive Due Process?*, 33 HASTINGS L.J. 1245 (1982); Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988); *Note: Substantive Due Process Comes Home to Roost: Fundamental Rights, Griswold to Bowers*, 10 WOMEN'S RTS. L. REP. 177 (1988); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237 (1990); Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537 (1990); Bobb & Coleman, *Webster and the Future of Substantive Due Process*, 28 DUQ. L.REV. 271 (1990); Moyer-Schönberger, *Substantive Due Process and Equal Protection in the Fundamental Rights Realm*, 33 HOW. L.J. 287 (1990); Hochlinger, *Substantive Due Process Analysis and the Lochner Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990); Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991); Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567 (1991); Dennis D. Hirsch, *The Right to Economic Opportunity: Making Sense of The Supreme Court's Welfare Rights Decisions*, 58 U. PITT. L. REV. 109 (1996); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555 (1997); Susan R. Klein, *The Discriminatory Application of Substantive Due Process: a Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453 (1997); Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427 (1997); *Human Cloning And Substantive Due Process*, 111 HARV. L. REV. 2348 (1998); Stephen A. Newman, *Human Cloning and the Substantive Due Process Riddle*, 8 S. CAL. INTERDISC. L.J. 153 (1998); Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and The Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3 (1999); Aaron J. Rappaport, *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy*, 2001 UTAH L. REV. 441; Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987 (2002).

³¹ Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at 'Substantive Due Process'*, 44 S. CAL. L. REV. 490 (1971); Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 346 (December 1977); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002).

³² *Lochner v. New York*, 198 U.S. 45 (1905); *see also* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

³³ *E.g.* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994).

³⁴ 410 U.S. 113 (1973).

³⁵ Mark Twain, NEW YORK JOURNAL (June 2, 1897). McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Hutter, *supra* note 34; Helen Garfield, *Privacy, Abortion, and Judicial Review; Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986); Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Myers, *The End of Substantive Due Process*, 45 WASH. AND LEE L. REV. 557 (1988); Williamson, Note, *The Constitutional Privacy Doctrine After Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297 (1989); James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147 (1999); McGreal, *Why Repeal of the Death Tax Means the Second Demise of Substantive Due Process*, 39 SAN DIEGO L. REV. 551 (2002) (a lighthearted look at substantive due process); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993). *See also* William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

³⁶ At least one court has applied substantive due process analysis to invalidate a statute in a drug case. *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The Alaska Supreme Court applied its own standard:

It is appropriate in this case to resolve Ravin's privacy claims by determining whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose. If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial.

Id. at 498. The Court's decision was heavily influenced by the adoption of an explicit right to privacy in Alaska's State Constitution. ALASKA CONST. art. 1, § 22. In the end, the Court ruled the statute invalid as applied to an adult's personal consumption at home:

Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult

for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.

The state has a legitimate concern with avoiding the spread of marijuana use to adolescents who may not be equipped with the maturity to handle the experience prudently, as well as a legitimate concern with the problem of driving under the influence of marijuana. Yet these interests are insufficient to justify intrusions into the rights of adults in the privacy of their own homes.

Id. at 511. The Alaska Supreme Court discussed *Ravin* recently in *Brown v. Ely*, 14 P.3d 257 (Alaska 2000). *See also* Winters, *Ravin Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?*, 15 ALASKA L. REV. 315 (1998); Orlansky & Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1 (1998).

³⁷ Supreme Court jurisprudence arguably reflects a difference between legislative and executive action in substantive due process analysis. *E.g.* *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); *but see id.* at 861-62 (Scalia, J. concurring) (“The proposition that ‘shocks-the-conscience’ is a test applicable only to executive action is original with today’s opinion. ... [I]t is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures.”). *See also* *The Supreme Court, 1997 Term: Leading Cases*, 112 HARV. L. REV. 192 (1998); Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437 (2001); Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981 (2000).

³⁸ *See, e.g.,* *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485 (2000) (“Since the mid-1980s, the United States has undertaken an extensive effort to incarcerate drug offenders . . .”).

³⁹ *Collins v. Harker Heights*, 503 US 115, 125 (1992) (“The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.”); *see also* *County of Sacramento*, *supra* note 37 at 842-43; *Albright v. Oliver*, 510 U.S. 266, 272 (1994); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993) (“[G]iven the potentially sweeping implications of a prohibition against governmental arbitrariness and the tainted history of substantive due process adjudication, the Supreme Court has developed a variety of avoidance strategies.”); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 137-

138 (2000) (criticizing undue judicial reluctance in substantive due process jurisprudence).

⁴⁰ *Commonwealth v. Alger*, 61 Mass. 53 (1851), cited favorably in *Slaughter-House Cases*, 83 U.S. 36, 62 (1872); *see also* *Thurlow v. Com. of Mass.*, 46 U.S. 504 (1847):

But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.

It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.

The police power was also discussed at length in *Lochner*:

There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere.

...

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,--become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him

appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law.

But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

Lochner v. New York, 198 U.S. 45, 53-57 (1905); *see also* Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 24-25 (1905). For an early discussion of the limits of the police power, *see* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886). *See also* Glenn H. Reynolds and David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511 (2000); Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 497 (2000); Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1304-05 (1990); Patrick C. McGinley, 'Regulatory Takings': *The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. 10369 (1987); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 383-385, 388-390; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 430-431 (1995).

⁴¹ *E.g.*, Fenster v. Leary, 229 N.E.2d 426 (New York 1967); *see also* Black, *The "Penumbra Doctrine" in Prohibition Enforcement*, 27 ILL. L.REV. 511 (1933); Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 201 (1912); Purity Extract & Tonic Co. v. Lynch, 56 So. 316 (Miss. 1911). In *People v. Gillson*, the New York Court of Appeals distinguished "the legislative power to enact what shall amount to a crime" as separate from "the police power":

Many other instances could be given where the interference of the legislature with the personal liberty of the citizen would be at once regarded as proper, or at least legal, under the exercise of the police power. But there is a limit to such interference, in my judgment, and there does come a time when the constitutional provision, so often herein quoted, steps in to protect the citizen.

Nor can this act stand as a valid exercise of legislative power to enact what shall amount to a crime. The power of the legislature to so declare is exceedingly large, and it is difficult to define its exact limit. But that there is a limit, even to that power, under our constitution, we entertain no doubt

People v. Gillson, 17 N.E. 343, 348 (1888). *See also* Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521 (Fall 1998); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61 (1999)

(“As individuals living in a society, our liberty is not absolute and must bow to the public’s legitimate need for safety. Typically, to meet this need, the government exercises its police power by enacting criminal laws.”). Congress lacks “a general federal police power.” *US v. Lopez*, 514 US 549, 564-68 (1995); *see also id* at 584-85 (Thomas, J. concurring) (“The Federal Government has nothing approaching a police power.”).

⁴² Louis D. Bilonis, *Process, The Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1294 (1998). Bilonis describes “a coherent, process-oriented and institution-sensitive model of the relationship between the Constitution and criminal law”:

Criminal law choices are controvertible, fundamentally political, and thus best left to the political departments. There indeed is a risk that criminal law might drift too far from its moral moorings. Our chief protection against that risk, however, comes not from Platonic guardians, but from the safeguards of the political process and the opportunities for individualized, discretionary justice that are layered institutionally throughout the criminal process.

See also Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 489-90 (1989):

The focus is now on what the criminal law, and a finding that it has been violated represents. In a democratic system, the answer is that the criminal law represents the behavior which society through its elected representatives has determined so violates societal norms that it should be condemned and punished as criminal. The societal judgment may vary with the times, sometimes being lenient and other times more strict, but the criminal code is the vehicle through which the judgment is expressed.

Packer, *supra* note 36, 44 S.CAL. L.REV. at 490; Remington, *The Future of the Substantive Criminal Law Movement - Theoretical and Practical Considerations*, 19 RUTGERS L.J. 867 (1988); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996). *See also* *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514, 532-33 (1968):

The State of Texas thus has not sought to punish a mere status, as California did in *Robinson* Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards ... and which offends the moral and esthetic sensibilities of a large segment of the community. ... *Robinson* so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming ... the ultimate arbiter of the standards of criminal responsibility, in diverse areas of

criminal law, throughout the country.

Medina v. California, 505 U.S. 437 (1992) discussed deference in this context:

[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area.

⁴³ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971); *see also* Louis D. Billionis, *Process, The Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1269 (1998).

⁴⁴ Sherry F. Colb, *Freedom from Incarceration: Why Is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994). Colb's article appears to have been cited only 6 times in other law review articles. Most of those articles lack a substantive discussion of her argument.

⁴⁵ Hindes, *supra* note 11 at 381.

⁴⁶ Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335, 359 (2000).

⁴⁷ *Id.* at 369-370.

⁴⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). *See also supra* notes 27-38 and accompanying text; Long, *Appeasing a God: Rawlsian Analysis of Herrera v. Collins and a Substantive Due Process Right to Innocent Life*, 22 AM. J. CRIM. L. 215 (1994); John P. Safranek, M.D. & Stephen J. Safranek, *Can the Right to Autonomy Be Resuscitated After Glucksberg?*, 69 U. COLO. L. REV. 731 (1998); Galloway, *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625 (1992).

⁴⁹ Colb, *supra* note 44; Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends and Burdens Reconsidered*, 33 S. TEX. L. REV. 492 (1992).

⁵⁰ Colb argues that drug policy does not involve compelling interests. Colb, *supra* note 44 at 825-826. The application of "compelling interests" can be quite limited. For example, the

Supreme Court has indicated that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). However, it is likely that the Court would find that drug policy relates to compelling interests. For example, in a discrimination case, the Court reasoned:

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson* . . . ; racial segregation in primary and secondary education prevailed in many parts of the country. This Court's decision in *Brown v. Board of Education* . . . signalled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education. An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals. . . . Congress clearly expressed its agreement that racial discrimination in education violates a fundamental public policy. . . . The Executive Branch has consistently placed its support behind eradication of racial discrimination.

Bob Jones University v. U.S., 461 U.S. 574, 592-94. Applying the foregoing analysis, there is clearly “a firm national policy” related to drugs supported by numerous court decisions, “and myriad Acts of Congress and Executive Orders.” *Id.* See also *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996) (protection of children is a ‘compelling interest’). While this definition could (and should) be argued, such an argument is unnecessary for the purposes of this paper.

⁵¹ It should be noted that the burden is on the government to show that its means are narrowly tailored. *E.g.*, *Burson v. Freeman*, 504 US 191, 217-218 (1992) (Stevens, J., dissenting) (“Tennessee . . . bears the heavy burden of demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest. . . . [A] State must demonstrate that the particular means it has fashioned to ensure orderly access to the polls do not unnecessarily hinder last-minute campaigning.”); *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 838 (1996) (Thomas, J., concurring) (“The United States has carried its burden of demonstrating that § 10(b) and its implementing regulations are narrowly tailored to satisfy a compelling governmental interest.”); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 701 (1990) (Kennedy, J., dissenting) (“The State cannot

demonstrate that a compelling interest supports its speech restriction, nor can it show that its law is narrowly tailored to the purported statutory end.”); *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, 2534-35, 70 USLW 4720 (2002) (“Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest.”); *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (“North Carolina . . . must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that ‘its districting legislation is narrowly tailored to achieve [that] compelling interest.’”). *See also* Jeremy Moeser, Comment, *Rough Terrain Ahead: A New Course for Racial Preference Programs*, 49 MERCER L. REV. 915, 926 (1998); Galloway, *supra* note 48; David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1523-24 (1992).

⁵² Federal statutes that require the incarceration of drug offenders include: 21 U.S.C. § 844 (penalties for simple possession); 21 U.S.C. § 960 (penalties for those who import or export, bring or possess on a vessel, aircraft or vehicle, manufacture or distribute a controlled substance); 21 U.S.C. § 841(1) (“unlawful ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”).

State statutes include:

Alabama: Title 13A, Ch. 12, Art. 5 (Drug Offenses)
Alaska: Title 11, Ch. 71 (Controlled Substances)
Arizona: Title 13, Ch. 34 (Drug Offenses)
Arkansas: Title 5, Subtitle 6, Ch. 64 (Controlled Substances)
California: Health and Safety Code, Division 10 (Uniform Controlled Substances Act)
Colorado: Title 18, Art. 18 (Uniform Controlled Substances Act of 1992)
Connecticut: Title 21A, Ch. 420B (Dependency-Producing Drugs)
Delaware: Title 16, Part IV, Ch. 47 (Uniform Controlled Substances Act)
District of Columbia: Div. VIII, Title 48, Subt. III, Ch. 9 (Controlled Substances)
Florida: Title XLVI, Ch. 893 (Drug Abuse Prevention and Control), §893.13
Georgia: Title 16, Ch. 13 (Controlled Substances)
Hawaii: Div 1, Title 19, Ch. 329 (Uniform Controlled Substances Act)
Idaho: Title 37, Ch. 27 (Uniform Controlled Substances)
Illinois: Ch. 720, Act 570 (Controlled Substances Act)
Indiana: Title 35, Art. 48 (Controlled Substances)
Iowa: Title IV, Subt. 1, Ch. 124 (Controlled Substances)
Kansas: Ch. 65., Art. 41 (Uniform Controlled Substances Act)
Kentucky: Title XVIII, ch. 218, 218A (Uniform Narcotic Drug Act; Controlled Substances)
Louisiana: Title 40, ch. 4, Part X (Uniform Controlled Dangerous Substances Law)
Maine: Title 17-A, Part 2, ch. 45 (Drugs)
Maryland: Criminal Law, Title 5, Subtitle 6 (Controlled Dangerous Substances)
Massachusetts: Part I, Title XV, ch. 94C (Controlled Substances Act)

Michigan: Ch. 333, Public Health Code, Article 7 (Controlled Substances)
Minnesota: Health, ch. 152 (Drugs, Controlled Substances)
Mississippi: Title 41, ch. 29, Art. 3 (Uniform Controlled Substances Law)
Missouri: Title 12, ch. 195, Narcotic Drug Act
Montana: Title 50, ch. 32 (Controlled Substances)
Nebraska: Ch. 28, Art. 4 (Drugs and Narcotics)
Nevada: Ti. 40, ch. 453 (Uniform Controlled Substances Act)
New Hampshire: Ti. XXX, ch. 318-B (Controlled Drug Act)
New Jersey: Ti. 2C, Subtitle 2, Part 5, ch. 35 (Controlled Dangerous Substances)
New Mexico: Ch. 30, Art. 31 (Controlled Substances)
New York: Penal Law Art. 220 (Controlled Substances Offenses)
North Carolina: N.C.G.S.A. Ch. 90, Art. 5 (Controlled Substances Act)
North Dakota: NDCC, 19-03.1 (Uniform Controlled Substances Act)
Ohio: OH ST T. XXIX, Ch. 2925 (Drug Offenses)
Oklahoma: OK ST T. 63, Ch. 2 (Uniform Controlled Dangerous Substances Act)
Oregon: OR ST T. 37, Ch. 475 (Controlled Substances et al.)
Pennsylvania: PA ST T. 35, Ch. 6 (The Controlled Substance, Drug, Device and Cosmetic Act)
Rhode Island: RI ST T. 21, Ch. 28 (Uniform Controlled Substances Act)
South Carolina: SC ST T. 44, Ch. 53, Art. 3 (Narcotics and Controlled Substances)
South Dakota: SD ST T. 22, Ch. 22-42 (Controlled Substances and Marijuana)
Tennessee: TN ST T. 39, Ch. 17, Pt. 4 (Drugs)
Texas: TX HEALTH & S T. 6, Subt. C, Ch. 481 (Controlled Substances Act)
Utah: UT ST T. 58, Ch. 37 (Controlled Substances)
Vermont: VT ST T. 18 T. 18, Pt. 5, Ch. 84 (Possession and Control of Regulated Drugs)
Virginia: VA ST T. 18.2, Ch. 7, Art. 1 (Drugs)
Washington: WA ST T. 69, Ch. 69.50 (Uniform Controlled Substances Act)
West Virginia: WV ST Ch. 60A (Uniform Controlled Substances Act)
Wisconsin: WI ST Ch. 961 (Uniform Controlled Substances Act)
Wyoming: WY ST T. 35, Ch. 7, Art. 10 (Controlled Substances)

⁵³ *E.g. The Legal Status of Convicts During and After Incarceration*, 37 VA. L. REV. 105 (1951); James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161 (2000).

⁵⁴ Colb, *supra* note 44 at 787-794.

⁵⁵ *DeShaney v. Winnebago County DSS*, 489 US 189, 200 (1989) (emphasis added); *see also Kansas v. Hendricks*, 521 U.S. 346, 356 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *U.S. v. Salerno*, 481 U.S. 739, 750-51 (1987); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell concurring in part and dissenting in part); *Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977); *Board of Regents of*

State Colleges v. Roth, 408 U.S. 564 (1972); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Munn v. People of State of Illinois*, 94 U.S. 113, 142 (1876) (Field, J. dissenting) (“By the term ‘liberty,’ as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison.”). *See also* Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* 15 HARV. J.L. & PUB. POL’Y 965, 1002-1008 (1992) (discussing an array of other “fundamental” rights).

⁵⁶ Allgeyer, *supra* note 34 at 589 (emphasis added).

⁵⁷ Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365 (1891). It is of some note that Shattuck is cited favorably on this very topic in *Ingraham v. Wright*, 430 U.S. 651, 673 at n. 41 (1977).

⁵⁸ *Id.* at 377.

⁵⁹ *Id.* at 374.

⁶⁰ Blackstone, Vol. 1, Part Second at page 121 *et. seq.*

⁶¹ MAGNA CHARTA c. 39 (1215).

⁶² *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations omitted).

⁶³ *Hawkins v. Freeman*, 195 F.3d 732, 747 (4th Cir. 1999) (citations omitted).

⁶⁴ *Ingraham*, *supra* note 55 at 673-674.

⁶⁵ *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citations omitted).

⁶⁶ *Id.* at 72.

⁶⁷ 427 U.S. 215, 224 (1976). *See also* *Vitek v. Jones*, 445 U.S. 480, 493 (1980).

⁶⁸ Meachum, 427 U.S. at 224.

⁶⁹ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citations omitted). The Court continued:

[G]overnment detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and "narrow" nonpunitive "circumstances," where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint.

Id. *Zavydas* concerned the detention of an alien, rather than the enforcement of a domestic criminal statute, and the Court focused on the procedural aspects of the detention.

⁷⁰ 21 U.S.C. § 1701(1).

⁷¹ 21 U.S.C. § 1701(11).

⁷² 21 U.S.C. § 1705(1).

⁷³ 21 U.S.C. § 1705(a)(4)(A).

⁷⁴ 21 U.S.C. § 1705(a)(4)(B).

⁷⁵ 21 U.S.C. § 1705(a)(4)(C).

⁷⁶ 21 U.S.C. § 1705(a)(4)(D).

⁷⁷ 21 U.S.C. § 1705(a)(4)(E).

⁷⁸ *Id.*

⁷⁹ <http://www.whitehousedrugpolicy.gov/about/index.html>; *see also* ABT ASSOCIATES, ILLICIT DRUGS: PRICE ELASTICITY OF DEMAND AND SUPPLY, FINAL REPORT,

February 2000 at 1-3 (prepared for the National Institute of Justice) (identifying twelve “Impact Targets” from the ONDCP’s “97 performance targets and 127 associated measures”).

⁸⁰ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY REPORT, February 2002, NCJ 192260, <http://www.whitehousedrugpolicy.gov/publications/policy/03ndcs/index.html>. In the opening to this report, President George W. Bush explained his view on drug policy:

Illegal drug use threatens everything that is good about our country. It can break the bonds between parents and children. It can turn productive citizens into addicts, and it can transform schools into places of violence and chaos. Internationally, it finances the work of terrorists who use drug profits to fund their murderous work. Our fight against illegal drug use is a fight for our children’s future, for struggling democracies, and against terrorism. . . . This Strategy represents the first step in the return of the fight against drugs to the center of our national agenda. We must do this for one great moral reason: over time, drugs rob men, women, and children of their dignity and their character.

Id.

⁸¹ DEA Mission Statement, <http://www.dea.gov/agency/mission.htm>.

⁸² *E.g.* State v. Thrift, 480 P.2d 222, 223 (Wash. 1971); Lewis v. State, 254 S.E.2d 830 (Ga. 1979); Steve Terrell, *Skeen, Wilson join in criticism of GOP chairman*, THE SANTA FE NEW MEXICAN, March 9, 2001, at A1.

⁸³ *E.g.* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569-570 (1991); *Id.* at 575-580 (Scalia, J. concurring); *Id.* at 582 (Souter, J. concurring):

I . . . write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments.

Barnes was a 5-4 decision. As the fifth vote, Justice Souter’s avoidance of the morality question suggests a majority might not support morality as a rational basis for law. *See, e.g.*, Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L.J. 1, 15 (1997); Melanie Ann Martin, *Constitutional Law - Non-traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing under Barnes v. Glen Theatre, Inc.*, 27 WAKE FOREST L. REV. 1061, 1095 at n. 289 (1992); Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 652 (1992); Teno A. West, *First Amendment Protections Stripped Bare: Barnes v. Glen Theatre*,

Inc., 27 NEW ENG. L. REV. 475, 494 (1992); Elliot M. Mincberg, *The Supreme Court and the First Amendment: The 1990-1991 Term*, 9 N.Y.L. SCH. J. HUM. RTS. 1, 18 at n. 129 (1991); see also Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998); Hinds, *supra* note 11.

⁸⁴ Compare *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 822 (1996).

⁸⁵ *Supra* note 51.

⁸⁶ In First Amendment cases, statutes are narrowly tailored only if they employ the "least restrictive means":

The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

[T]he First Amendment mandates that speech restrictions be "narrowly drawn." The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. . . .

[W]e must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) (discussing application of First Amendment to commercial speech - a less restrictive standard).

Under strict scrutiny, the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest. If that interest could be served by an alternative that is less restrictive of speech, then the State must use that alternative instead.

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 582 (2001).

[I]f there is a less restrictive alternative to a challenged regulation, then the

ordinance is not as precise and narrowly drawn as it could be, and the regulation unnecessarily interferes with First Amendment rights.

City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (1986), *aff'd* 479 U.S. 1048 (1987).

⁸⁷ *E.g.*, *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280 (1986). *See also* Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491 (2002).

⁸⁸ “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV.

⁸⁹ *Wygant*, *supra* note 87 at 280.

⁹⁰ *Id.* at footnote 6 (quoting Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727, n. 26 (1974) and Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578-579 (1975)).

⁹¹ *Id.* at 283-284.

⁹² 21 U.S.C. 1705 (a)(4).

⁹³ 21 U.S.C. 1705 (a)(4)(A). The statute refers specifically to the measure of “overall illicit drug use in the past 30 days”.

⁹⁴ 21 U.S.C. 1705 (a)(4)(B). The statute refers specifically to the measure of “illicit drug use in the past 30 days”.

⁹⁵ *Rise in ecstasy use among American teens begins to slow*, UNIV. OF MICH. PRESS RELEASE, December 19, 2001 (<http://monitoringthefuture.org/pressreleases/01drugpr.pdf>). The press release explained further:

Since 1998, ecstasy use has roughly doubled among American teen-agers. While we are seeing a continuing increase again this year, we are also seeing evidence of a deceleration of this rise.

⁹⁶ *E.g.*, *Drug use: Teen-agers may go to marathon parties for dancing, but encounter sex and drugs*, BALTIMORE SUN, April 20, 2001 at 16A; *Teen-agers and temptation: Early use of booze, drugs leads to sex and problems*, SAN DIEGO UNION-TRIBUNE, January 23, 2000 at G1.

⁹⁷ E.g., National Institute on Drug Abuse (hereinafter NIDA), *Overview of Key Findings, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG ABUSE: 2001* at Table 2 (2002). Specific data available online at: <http://monitoringthefuture.org/>.

⁹⁸ *Id.* Indeed, 22.7% of 10th graders reported illicit drug use in the past 30 days, which was more than double the figure (11%) they reported in 1992.

⁹⁹ *Id.* More specific numbers may be useful to the reader:

<u>Drug</u>	Percent who used in the past	
	<u>year</u>	<u>30 Days</u>
Any illicit drug	41.0%	25.4%
Marijuana	36.2	21.5
Ecstasy	7.4	2.4
Cocaine	5.0	2.3
Crack	2.3	1.2
Heroin	1.0	0.5
Other narcotics	7.0	3.1
Amphetamines	11.1	5.5

Id.

¹⁰⁰ PRIDE Surveys, *PRIDE Questionnaire Report*, July 12, 2002; Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Hum. Servs., NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, online at: <http://www.samhsa.gov/oas/nhsda.htm#NHSDAinfo>.

¹⁰¹ NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (2001), *supra* note 100 at § 9.2.

¹⁰² PRIDE Surveys, *supra* note 100 at Table 7.23.

¹⁰³ William Bennett, *The Drug War Worked Once; It Can Again*, WALL STREET JOURNAL, May 15, 2001 at A26.

¹⁰⁴ Lisa Feldman, Vincent Schiraldi, and Jason Ziedenberg, *Too Little Too Late: President Clinton's Prison Legacy*, Press Release, The Justice Policy Institute (2001):

Under President Reagan's eight year term, the number of prisoners under federal jurisdiction rose from 24,363 (1980) to 49,928 (1988), and under President George Bush's four-year term, the federal system grew to 80,259 (1992). However, under President Bill Clinton, the number of prisoners under federal

jurisdiction doubled, and grew more than it did under the previous 12-years of Republican rule, combined (to 147,126 by February, 2001). As of December 31, 1999, a year prior to the completion of his term in office, the Clinton Administration already well outstripped the Reagan and Bush Administrations with a federal incarceration rate of rate of 42 per 100,000. This was more than double the federal incarceration rate at the end of President Reagan's term (17 per 100,000), and 61% higher than at the end of President George Bush's term (25 per 100,000). Fifty-eight percent of these inmates (63,448) are serving time for drug offenses--a 62% increase since 1990.

¹⁰⁵ NIDA, *supra* note 97, at Table 9.

¹⁰⁶ *Supra* notes 71, 72, 75, 81.

¹⁰⁷ NIDA, *supra* note 97, at Table 9.

¹⁰⁸ *Id.* This is the percentage of students who indicate that the substance is either “fairly easy” or “very easy” to get.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *E.g.* NATIONAL DRUG CONTROL STRATEGY REPORT *supra* note 80 at Table 33, <http://www.whitehousedrugpolicy.gov/publications/policy/03ndcs/table33.html>. *See also* ABT ASSOCIATES, THE PRICE OF ILLICIT DRUGS: 1981 THROUGH THE SECOND QUARTER OF 2000, October 2001 (prepared for the Office of National Drug Control Policy); ABT ASSOCIATES, ILLICIT DRUGS: PRICE ELASTICITY OF DEMAND AND SUPPLY, FINAL REPORT, February 2000 (prepared for the National Institute of Justice). *See also* Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 555-556 (1997); Tim Golden, *Mexican Drug Dealers Turning U.S. Towns Into Major Depots*, NEW YORK TIMES, November 16, 2002; Marsha Rosenbaum, *Anti-Drug Programs Miss Mark /*

Efforts to curb heroin supply fail to affect demand, SAN FRANCISCO CHRONICLE, January 8, 1999 (“[S]ince President Ronald Reagan began escalating the ‘war on drugs,’ worldwide production of opium has expanded. The price of heroin has dropped and its purity has increased steadily. We cannot seem to make a dent in the supply, hence availability, of heroin.”); John Otis, *A Harvest of Dollars*, HOUSTON CHRONICLE, Sept. 29, 2002; Jonathan Rauch, *Cheer Up, Drug Warriors: Victory Is Just Around The Corner*, NATIONAL JOURNAL, June 2, 2001; Harvey A. Siegal, *U.S. Needs Better Balance in War on Drugs*, DAYTON DAILY NEWS, May 29, 2001 at 6A. For an argument that the drug war has raised prices and decreased purity, see John P. Walters, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 107, 128-129 (1994).

¹¹⁴ NATIONAL DRUG CONTROL STRATEGY REPORT, *supra* note 80 at Table 33.

¹¹⁵ ABT ASSOCIATES, *ILLCIT DRUGS: PRICE ELASTICITY OF DEMAND AND SUPPLY*, FINAL REPORT, February 2000 at vi (prepared for the National Institute of Justice).

¹¹⁶ *Id.* at vii.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at viii.

¹¹⁹ *Id.*

¹²⁰ Ernest Drucker, *Drug prohibition and public health: 25 years of evidence*, PUBLIC HEALTH REPORTS, January 1, 1999; JAMES OSTROWSKI, *THINKING ABOUT DRUG LEGALIZATION*, (Policy Analysis No. 121, Cato Institute 1989) at notes 47-51 and accompanying text; Scott Burris, *Introduction: Ask, Tell, Help*, 11 Health Matrix 1 (2001); Mark Parts, *Disease Prevention as Drug Policy: A Historical Perspective on the Case for Legal Access to Sterile Syringes as a Means of Reducing Drug-Related Harm*, 24 FORDHAM URB. L.J. 475 (1997); Gostin & Lazzarini, *Prevention of HIV/AIDS Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 EMORY L.J. 587 (1997); Ian Malkin, *Establishing Supervised Injecting Facilities: A Responsible Way to Help Minimise Harm*, 25 MELB. U. L. REV. 680, 681, 686 (2001); Larry Gostin, *The Interconnected Epidemics of Drug Dependency and AIDS*, 26 HARV. C.R.-C.L. L. REV. 113 (1991); James Ostrowski, *supra* note 12 at 653-655; Steven B. Duke, *Drug Prohibition: an Unnatural Disaster*, 27 CONN. L. REV. 571, 585-586 (1995); James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 76-77(1997).

¹²¹ Drucker, *supra* note 120 at 14.

¹²² *Id.*

¹²³ Ostrowski, *supra* note 120 at notes 47-51 and accompanying text.

¹²⁴ Doug Bandow, *Drug Prohibition: Destroying America to Save It*, 27 CONN. L. REV. 613, 616-617 (1995); Jeffrey A. Miron, *Violence and the U.S. Prohibitions of Drugs and Alcohol*, AM. L. & ECON. REV., 1, Fall 1999, 78-114 (“drug and alcohol prohibition have substantially raised the homicide rate in the United States over much of the past 100 years”); Ostrowski, *supra* note 100 at notes 37-46 and accompanying text (Policy Analysis No. 121, Cato Institute 1989); James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 63-64, 77-78 (1997).

¹²⁵ Brown, *supra* note 120 at 63-64, 77-78.

¹²⁶ Wygant, *supra* note 87 at 280.

¹²⁷ Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 365-372 (1995) (discussing the failure of incarceration).

¹²⁸ *Supra* notes 105-112 and accompanying text.

¹²⁹ BUREAU JUST. STAT., DRUG USE, TESTING AND TREATMENT IN JAILS, 2000, available at <http://www.ojp.usdoj.gov/bjs/abstract/duttj.pdf> (noting that 10% of jail inmates tested positive for drugs in a 1998 study); *see also* Fish, *supra* note 12, 28 FORDHAM URB L.J. at 96-97; Pamela White, *Locked Away to Die*, BOULDER WEEKLY, December 2, 2002.

¹³⁰ *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

¹³¹ *See, e.g., Too Many Convicts*, THE ECONOMIST, August 10, 2002, page 9:

America’s fiercest prisoner, Texas, ... has far worse crime statistics than New

York state, where the imprisonment rate has risen much more slowly. And when it comes to drugs and violent crime, the two plagues hard sentencing was supposed to cure, it has failed dramatically. Drug-taking is as widespread as ever, and America's murder rate is still nearly four times higher than the European Union's.

See also Mark Parts, *Disease Prevention as Drug Policy: A Historical Perspective on the Case for Legal Access to Sterile Syringes as a Means of Reducing Drug-Related Harm*, 24 FORDHAM URB. L.J. 475 (1997); Pew Research Center, *74% Say Drug War Being Lost*, Survey conducted from February 14-19, 2001, available at: <http://028.240.91.18/drugs01que.htm> (74% of survey respondents agreed with the statement "We are losing the drug war.").

It is actually difficult to find sound arguments that the War on Drugs is working. Some drug war proponents do claim that it is a success, or at least that it could be if it were done properly. For example, William H. Ryan, Jr., a prosecutor, contends:

[A] close look at the statistics show that there was real success in this war on drugs [in the 1980s] because the number of people doing marijuana, doing cocaine, doing other hard drugs, dropped significantly. Progress against drug abuse continued, admittedly unevenly, throughout the 1990s. Today, I do not think anyone involved in the war on drugs, either as a law enforcement officer, a probation officer, or a drug counselor, would deny, if that individual has been around for the last twenty years, that we are in much better shape today than we were in the early 1980s. The reason we are in better shape is because society has taken a stand and been aggressive at every level in combating drug abuse. We may not be as far along as we would like, but we are still making real progress in the war.

Ryan, *supra* note 13 at 810-811. Ryan does not support his claim about statistics and it flies in the face of the evidence. Similarly, his assertion that all involved agree that "we are in much better shape today" is utter nonsense. *See supra* notes 4-10 and accompanying text.

Robert B. Charles claims the drug war had "successes in the 1980s and early 1990s." Charles, *supra* note 13 at 358. Charles was a congressional staffer for the Republican majority at the time. In a partisan attack, he blames the drug war's failures on President Clinton's "anemic" leadership and alleged failure to support interdiction. *Id.*; *see also* Mark C. DeMier, *Squeezing Blood from a Stone: The Elusive Nature of an Effective US Antidrug Policy*, NATIONAL DEFENSE COUNCIL FOUNDATION, 1996.

In other words, the drug war was working until President Clinton ruined it. His argument parallels one by William Bennett, mentioned earlier, and it ignores massive increases in drug incarcerations during Clinton's presidency. *See supra* notes 103-104 and accompanying text.

Charles' reliance on interdiction also ignores the famous comments of his own drug war hero, President Ronald Reagan:

I've had people talk to me about increased efforts to head off the export into the United States of drugs from neighboring nations. With borders like ours, that, as the main method of halting the drug problem in America, is virtually impossible. It's like carrying water in a sieve. It is my belief, firm belief, that the answer to the drug problem comes through winning over the users to the point that we take the customers away from the drugs, not take the drugs necessarily. Try that, of course. You don't let up on that. But it's far more effective if you take the customers away than if try to take the drugs away from those who want to be customers.

President's News Conference, March 6, 1981 (available online at <http://www.reagan.utexas.edu/resource/speeches/1981/30681a.htm>). See also *Drug Wars: Part One*, PBS FRONTLINE, October 9, 2000 (online at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/etc/script.html>). Nor is his view supported by the evidence. See, e.g., Wood et al, *Impact of Supply-Side Policies for Control of Illicit Drugs in the Face of the Aids and Overdose Epidemics: Investigation of a Massive Heroin Seizure*, 2003 CANADIAN MED. ASSOC. J. 168 (January 21, 2003). Charles' partisanship also ignores the leadership of conservatives and Republicans in criticizing the drug war. See *supra* note 5.

¹³² See *infra* notes 3-14 and accompanying text.

¹³³ E.g. LYNCH, *AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY* (Cato Press 2000); Spencer, *supra* note 127 at 372-381.

¹³⁴ E.g. Bergland, *Libertarianism, Natural Rights and the Constitution: A Commentary on Recent Libertarian Literature*, 44 CLEV. ST. L. REV. 499 (1996); Kleinman & Sager, *Drug Legalization: The Importance of Asking the Right Question*, 18 HOFSTRA L. REV. 527 (1990); but see LaGrange, *Law, Economics, and Drugs: Problems with Legalization under a Federal System*, 100 COLUM. L. REV. 505 (2000).

¹³⁵ E.g. Kleinman & Sager, *supra* note 134 at 554-561; DiChiara & Galliher, *Dissonance and Contradictions in the Origins of Marihuana Decriminalization*, 28 LAW & SOC'Y REV. 41 (1994).

¹³⁶ E.g. Tiersky, *Medical Marijuana: Putting the Power Where It Belongs*, 93 NW. U. L. Rev. 547 (1999); Abrams, *Speeches: The Criminalization of Medicinal Marijuana*, 11 HASTINGS WOMEN'S L.J. 75, 78 (2000); Garner, *Up In Smoke: The Medicinal Marijuana Debate*, 75 N.D. L. REV. 555 (1999)

¹³⁷ *E.g.* DiChiara & Galliher, *supra* note 135; Graham, *Decriminalization of Marijuana: An Analysis of the Laws in the United States and the Netherlands and Suggestions for Reform*, 23 LOY. L.A. INT'L & COMP. L. REV. 297 (2001); Greene, *Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457 (1990); Spencer, *supra* note 127 at n. 206. While her article is otherwise valuable, Spencer casually dismisses decriminalization in a footnote:

Decriminalization, in theory and in practice, can not be seen as an alternative solution to the drug crisis. To eliminate drug-related crime under a "decrim" scheme, all drugs, including crack, heroin, ice and any new drug that may come on the market, must be available to everyone, including juveniles. These drugs must also be supplied in unlimited quantities. If not, the demand would continue for drugs by juveniles, for drugs not yet legalized, and for additional quantities of drugs. The gap would be filled by a flourishing black market. Moreover, although there is a link between violent crime and drug trafficking, most drug-related crime is committed by drug users and buyers, not sellers. Drug users, many with little or no income, commit crimes either in support of their addiction or because of the pharmacological effect of drugs. Even if legalization reduces the cost of drugs, it will not affect these crimes. Finally, the numbers of pregnant addicts and drug-addicted babies would increase, rather than decrease, with decriminalization. This problem, alone, should be sufficient to warrant continued criminalization.

Id. (emphasis added). Her analysis of decriminalization is rife with ridiculous assumptions and faulty logic, but her attitude is not unusual. There is some value in dissecting her thinking. First, decriminalization does not require that all drugs be available to anyone. Alcohol has been legal since 1933. It is not legal in all of its forms, and is not legally available to juveniles. Second, if a gap did remain, it might not be filled at all. In any event, that black market would be much smaller than the one that exists now under drug prohibition. If there is a black market for alcohol, it is a trivial one. Third, reducing the cost of drugs would certainly reduce property crimes committed by addicts to support their addiction. Few cigarette addicts commit crimes to support a habit that costs less than \$50/week. A \$1000/week heroin addiction requires the addict to commit a lot of crime unless her take-home pay is well over \$50,000/year. Finally, it is not at all clear that the problems associated with pregnant addicts would increase with decriminalization. Alcohol prohibition led to the widespread use of dangerous, unregulated alcohol, with severe effects on public health. *See* THORNTON, *ALCOHOL PROHIBITION WAS A FAILURE* (Policy Analysis No. 157, Cato Institute 1991); *WARBURTON, THE ECONOMIC RESULTS OF PROHIBITION* (New York: Columbia University Press, 1932).

¹³⁸ *E.g.*, Kay, *The Agony of Ecstasy: Reconsidering the Punitive Approach to United States Drug Policy*, 29 FORDHAM URB. L.J. 2133 (2002); Fish, *Rethinking Our Drug Policy*,

28 FORDHAM URB. L.J. 9 (2000); Margolis, *Connecticut's War on Drugs: A Peace Proposal*, 70 CONN. B.J. 372 (1996); Parts, *Disease Prevention as Drug Policy: A Historical Perspective on the Case for Legal Access to Sterile Syringes as a Means of Reducing Drug-Related Harm*, 24 FORDHAM URB. L.J. 475 (1997); Gostin & Lazzarini, *Prevention of HIV/AIDS Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention*, 46 EMORY L.J. 587 (1997).

As it is used, the “decriminalization” approach appears similar to harm reduction. E.g. Kurt Schmoke, *An Argument in Favor of Decriminalization*, 18 HOFSTRA L. REV. 501 (1990). Schmoke, the former mayor of Baltimore, has been another of the drug war’s most persistent critics. As he puts it:

[There are] two inescapable facts which have persistently hampered the federal government's attempts to stamp out narcotics use through prohibition. First, drug addiction is a disease and addicts need medical care. Second, in the absence of access to legitimate sources of drugs, addicts will look to the criminal underworld for the drugs they cannot otherwise obtain.

Id.

¹³⁹ Martin Y. Iguchi, *Drug Treatment Alternatives to Incarceration*, (testimony presented to the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House Committee on Government Reform, February 17, 2000), RAND, CT-169, April 2000; Jonathan P. Caulkins with James R. Chiesa and Susan Everingham, *Response to National Research Council's Assessment of RAND's Controlling Cocaine Study*, RAND MR-1265-DPRC, 2000; M. Douglas Anglin, Douglas Longshore, and Susan Turner, *Treatment Alternatives to Street Crime: An Evaluation of Five Programs*, CRIMINAL JUSTICE AND BEHAVIOR, 26(2):168-195, June 1999; Gernot Tragler, Jonathan P. Caulkins, and Gustav Feichtinger, *Optimal Dynamic Allocation of Treatment and Enforcement in Illicit Drug Control*, OPERATIONS RESEARCH, 49 (3):352-362, 2001; Jonathan P. Caulkins, C. Peter Rydell, William L. Schwabe, and James Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?*, RAND, MR-827-DPRC, 1997; C. Peter Rydell and Susan S. Everingham, *Controlling Cocaine: Supply Versus Demand Programs*, Santa Monica, Calif.: RAND, MR-331-ONDCEP/A/DPRC, 1994.

¹⁴⁰ Spencer, *supra* note 127 at 377-378.

¹⁴¹ C. Peter Rydell, Susan S. Everingham, *Controlling Cocaine: Supply Versus Demand Programs*, RAND/MR-331-ONDCEP/A/DPRC, 1994; S. Everingham, C. Peter Rydell, *Modeling*

the Demand for Cocaine, Susan RAND/MR-332-ONDCP/A/DPRC, 1994. Robert Charles sharply criticized the effectiveness of drug treatment and the 1994 Rydell/Everingham RAND study. Charles, *supra* note 13 at 389-393. In doing so he relies, at least in part, on work by Mark Kleiman. *Id* at 389. Kleiman, however, is hardly a drug warrior:

INTERVIEWER: What do you say to a drug warrior who would say, "What's wrong with what we're doing now?"

KLEIMAN: Well, what's wrong with what you're doing now is that we now have 400,000 Americans behind bars at any one time for drug law offenses. That's an awful a lot of people to be caged up. And despite that, the price of cocaine and the price of heroin are close to their all time lows. We're not succeeding through enforcement in getting drug prices up and drug availability down nearly as much as I would have expected. We continue to have a huge problem of drug abuse that doesn't seem to be touched very much by our current policies.

Busted: America's War on Marijuana, PBS FRONTLINE, April 28, 1998 (online at: <http://www.pbs.org/wgbh/pages/frontline/shows/dope/interviews/kleiman.html>); *see also* Mark A.R. Kleiman, *The Problem of Replacement and the Logic of Drug Law Enforcement*, FEDERATION OF AMERICAN SCIENTISTS DRUG POLICY ANALYSIS BULLETIN, September 1997 (online at: <http://www.fas.org/drugs/issue3.htm#3>); Mark A.R. Kleiman, *Drugs and Drug Policy: The Case for a Slow Fix*, ISSUES IN SCIENCE AND TECHNOLOGIES, Fall 1998 (online at: <http://www.fas.org/drugs/slowfix.htm>).

¹⁴² Fish, *supra* note 12 at 201-205. *See also* Eric Thomas Berkman, *Sacrificed Sovereignty?: Dutch Soft Drug Policy in the Spectre of Europe Without Borders*, 19 B.C. Int'l & Comp. L. Rev. 173 (1996); Henk Jan van Vliet, *The Uneasy Decriminalization: a Perspective on Dutch Drug Policy*, 18 Hofstra L. Rev. 717 (1990); Lisa M. Bianculli, *The War on Drugs: Fact, Fiction and Controversy*, 21 Seton Hall Legis. J. 169 (1997); Dana Graham, *Decriminalization of Marijuana: An Analysis of the Laws in the United States and the Netherlands and Suggestions for Reform*, 23 Loy. L.A. Int'l & Comp. L. Rev. 297 (2001); Lane Porter, *Comparative Drug Treatment Policies and Legislation*, 29 Int'l Law. 697 (1995). *But see* Mitchell Rosenthal, *In Opposition to Drug Legalization*, 24 U.C. Davis L. Rev. 637 (1991).

¹⁴³ Fish, *supra* note 12 at 201.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Fish, *supra* note 12 at 202-205.

¹⁴⁷ See *supra* note 26; Friedman, *supra* note 3; Thornton, *supra* note 137. See also Robert J. MacCoun and Peter Reuter, *What We Do and Don't Know About the Likely Effects of Decriminalization and Legalization: A Brief Summary* (testimony presented to the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the House Committee on Government Reform, July 13, 1999), RAND, CT-161, 1999.

¹⁴⁸ MARC MCCUTCHEON, *THE WRITER'S GUIDE TO EVERYDAY LIFE FROM PROHIBITION THROUGH WORLD WAR II*, 41 *et seq.* (Writer's Digest Books 1995). McCutcheon also notes that "Prohibition increased the crime rate considerably. There were hundreds of gangland murders (some drive-by shootings with machine guns and sawed-off shotguns) in Chicago alone throughout the 1920s." *Id.* at 121. McCutcheon also quoted a New York Times article from 1931:

Five children were wounded, one of them mortally, early last night by gangsters who opened fire with shotguns and machine-guns on a man lounging in front of the Helmar Social Club at 208 East 107th St. [NY]. The intended victim escaped injury by lying down, and, as the gangsters' car sped away, got up and disappeared. . . . The shooting, which occurred less than four blocks from the East 104th Street police station, was ascribed by police to the Harlem-Bronx beer war between the gangs of Joe Rao, an ally, temporarily of Arthur (Dutch Schultz) Flegenheimer, and Vincent Coll.

Id. at 138 (quoting *Child Slain, Four Shot as Gangsters Fire on Beer War Rival*, NEW YORK TIMES, July 29, 1931).

¹⁴⁹ *E.g.*, Thornton, *supra* note 137; Ostrowski, *supra* note 120; but see Mark Moore, *Actually Prohibition Was a Success*, NEW YORK TIMES, Oct. 16, 1989 (cited on DEA website: <http://www.usdoj.gov/dea/demand/druglegal/17dl.htm>). Moore's analysis of cirrhosis rates and alcohol prohibition are disputed in ANGELA DILLS and JEFFERY A. MIRON, *ALCOHOL PROHIBITION, ALCOHOL CONSUMPTION, AND CIRRHOSIS*, 2001 (available online at <http://econ.bu.edu/miron/images/cirrho.pdf>).

Some drug war supporters attempt to distinguish Prohibition from the drug war. Loken, for example, asserts:

[E]ven if history shows alcohol to be . . . the worst of the popular recreational drugs, it has such a unique place in our national history and psyche that our experience with it provides little guide to current policymaking on other drugs.

Gregory A. Loken, *supra* note 13 at 665-666. Loken provides little support for this rather bold and circular assertion.

Rosenthal not only concedes that “Prohibition was a failure,” but further agrees that “[t]he dichotomy . . . between alcohol and illicit drugs is not based on any sort of scientific or policy oriented justification.” Instead, he admits: “it is simply a matter of public preference.” Mitchell Rosenthal, *supra* note 13 at 645.

¹⁵⁰ Thornton, *supra* note 137.

¹⁵¹ *Id.* In a footnote, Thornton attributed the term “Iron Law” to Richard Cowan, *How the Narcs Created Crack*, NATIONAL REVIEW, December 5, 1986, pp. 30-31.

¹⁵² *Supra* note 8.

¹⁵³ McNamara, *Costly, Counterproductive, Crazy*, *supra* note 8.

¹⁵⁴ Supporters of the drug war often assert or assume that an end to the war would increase drug availability, use, abuse and all their associated problems. *E.g.* Charles, *supra* note 13 at 347-350; Rosenthal, *supra* note 13 at 642-643, 648-649; Loken, *supra* note 13 at 681; Ryan, *supra* note 13 at 811-812; Rangel, *supra* note 13 at 51-52. Thornton’s analysis provides a thoughtful rebuttal to that claim. Drugs are so widely available today (as alcohol was during Prohibition) that it is hard to imagine their availability could increase. Ryan, *supra* note 13 at 811, also repeats a common response of drug warriors:

The problem with legalization, to me, is rather simple. If we legalize drugs, we are telling people, especially young people, that society does not care if they do drugs or not.

The problem with this analysis is also simple. First, Ryan and others incorrectly assume that legalization is the only alternative. Second, they falsely assume that an alternate course means society is somehow saying that drug use is okay.

Charles, *supra* note 13 at 348-350, also attacks the alternatives:

While indulgent and defeatist arguments for drug legalization and decriminalization have been bandied about at different points during the course of the Nation’s historic fight against drug abuse and international drug trafficking, most recently by President Clinton’s then-Surgeon General, Jocelyn Elders – these ideas have seldom been taken seriously. The empirical reasons for dismissing the legalization argument, beyond the body of science supporting direct and indirect health damage resulting from narcotics, the immorality of drug

use, and broader social issues, are: (1) the close proven correlation between high street availability, high purity, low price and increased casual drug use, particularly by children ages twelve to seventeen; (2) the proven link between violent crime and drug use, in particular user-crime, rather than dealer- or internecine gang-crime; and (3) the clear relationship between casual drug use and addiction, including the percentage of casual users who will, by virtue of regular or continuing use, become addicted (with the attendant harms of addiction). . . . [U]ntil we begin seriously considering the legalization of murder, child abuse, and similar crimes, there is no room in the public dialogue for discussing the legalization of narcotics.

Charles is the prototypical drug warrior, and his argument shows the flaws common to the breed. He makes it obvious that he has never taken the alternatives seriously. In doing so, he incorrectly asserts that no one else has, and disregards many drug war critics including a number of prominent Republicans and conservatives who do not fit with his attempt to politicize the issue. *See supra* notes 3-14 and accompanying text. He also refuses to accept that there are a variety of alternatives: “There have been sporadic efforts to legalize narcotics, often under the rubric of ‘legalization,’ ‘decriminalization,’ ‘medicalization,’ or ‘harm reduction’” Charles, *supra* at note 21.

Charles completely ignores any comparison with alcohol and alcohol prohibition. The term alcohol appears only five times in his eighty-page paper. All five of these occurrences are in footnotes. Four of them appear as part of an organization’s name (*Id* at notes 16, 19, 21, and 78), while the fifth does not discuss alcohol in any material way. *Id* at note 41. All of his concerns about illicit drugs also apply to alcohol, yet it is widely agreed that Prohibition failed. The drug warrior’s failure to address alcohol prohibition is a serious flaw.

Charles also incorrectly assumes that drug war critics universally disregard the harm caused by drug use and abuse, a position that is actually quite rare. The “classic” drug war criticism is that the drug war causes more harm than the drug problem, a position which explicitly acknowledges that drugs are harmful. *E.g.* Wren, *supra* note 6 (“the global war on drugs is causing more harm than drug abuse itself”). Most striking about Charles’ comments is that he equates drug use with murder and child abuse. Essentially, the drug warrior view is that drugs are evil, the drug war is righteous, and any criticism of the drug war is an endorsement of evil.

¹⁵⁵ *See* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1 (1998); Barr, *The Faceless Offender: The Effects of Incarceration on Families, Women, and Minorities*, ATLA ANNUAL CONVENTION, REFERENCE MATERIALS, Volume 2, Family Law Section, 2 Ann.2001 ATLA-CLE 2071 (2001).

¹⁵⁶ *Washington v. Glucksberg*, *supra* note 48, 521 U.S. at 720-21.

¹⁵⁷ *Supra* note 39. See also Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 864-871 (2002).

¹⁵⁸ *Collins v. Harker Heights*, 503 US 115, 125 (1992).

¹⁵⁹ *Supra* Section II. B. in this paper.

¹⁶⁰ This argument is implicit in Colb's analysis. Colb, *supra* note 44.

¹⁶¹ *Graham v. Connor*, 490 U.S. 386, 395 (1989); see also *Whitley v. Albers*, 475 U.S. 312, 327-28 (1986); *County of Sacramento*, *supra* note 37.

In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

Medina v. California, 505 U.S. 437, 443 (1992) (citations omitted).

In the more than 100 years since *Hurtado* was decided, the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth Amendment. ... This course of decision has substituted, in these areas of criminal procedure, the specific guarantees of the various provisions of the Bill of Rights embodied in the first 10 Amendments to the Constitution for the more generalized language contained in the earlier cases construing the Fourteenth Amendment. It was through these provisions of the Bill of Rights that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. Where a particular Amendment "provides an explicit textual source of constitutional protection against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Albright v. Oliver, 510 U.S. 266, 272-274 (1994). Colb, *supra* note 44 at 810-813 criticizes the Court's use of other amendments to limit substantive due process protections.

¹⁶² *E.g.*, *Torres v. McLaughlin*, 163 F.3d 169, 173-175 (3rd Cir. 1998); *Donahue v. Gavin*, 280 F.3d 371, 380-381 (3rd Cir. 2002).

¹⁶³ *See supra* note 19.

¹⁶⁴ *DeShaney v. Winnebago County Dept. of Social Services*, 489 US 189 (1989).

¹⁶⁵ *Id.* at 196 (quoting *Davidson v. Cannon*, 474 US 344, 348 (1986)).

¹⁶⁶ *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)).

¹⁶⁷ *County of Sacramento v. Lewis*, 523 U.S. 833, 845-47 (1998) (citations omitted).

¹⁶⁸ The limits of legislative power were recognized as early as 1798:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul [sic]; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republicans governments, which will determine and over-rule an apparant and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

Calder v. Bull, *supra* note 29, 3 U.S. at 387-88 (1798). *County of Sacramento* actually describes

a tougher standard for litigants challenging executive power. *Supra* note 167. While the standard for challenging legislative power would be lower, the consequences of the drug war overcome the higher standard.

¹⁶⁹ The term “parade of horrors” was first used by the Supreme Court in 1948. *Shapiro v. U.S.*, 335 U.S. 1, 55 (1948) (Frankfurter dissenting). *See also* Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590-91 (1990).

¹⁷⁰ *See, e.g.*, Graham Boyd, *The Drug War is the New Jim Crow*, NORTH AMERICAN CONGRESS ON LATIN AMERICA, Jul/Aug 2001, page 1822; Andrew N. Sacher, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149 (December 1997); *Winning the War on Drugs*, *supra* note 14; Michael Tonry, *Toward a Rational Drug Policy: Race And The War on Drugs*, 1994 U. CHI. LEGAL F. 25 (1994); David Rudovsky, *Toward a Rational Drug Policy: the Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237 (1994). *But see* John Walters, *Toward a Rational Drug Policy: Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 107 (1994); Siltan, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53 (2002); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994); Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443 (2001); *compare* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1825 (1998) (“One need not assume racism to explain these phenomena. On the contrary, we might easily have seen the same law enforcement patterns we have seen over the past dozen years in a society in which racial division did not exist. But in a society where racial division is all too real, decisions that have no racial cause may still have a very powerful racial meaning.”).

¹⁷¹ *E.g.*, Meares, *supra* note 12 at 205-208.

¹⁷² MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 9, 13 (1995); *see also* Leonard E. Birdsong, *Drug Decriminalization and Felony Disenfranchisement: The New Civil Rights Causes*, 2 BARRY L. REV. 73, 75 (2001); Coramae Richey Mann, *We Don't Need More Wars*, 31 VAL. U. L. REV. 565, 567 (1997). Birdsong’s analysis of the drug war’s effect on black voting rights could even conceivably be advanced as another fundamental right infringed by drug war policies.

¹⁷³ *See, e.g.*, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUMAN RIGHTS WATCH REPORT, Vol. 12, No. 2, May 2000 (<http://www.hrw.org/reports/2000/usa/>); *Winning the War on Drugs*, *supra* note 14 at 1485, 1489 (discussing disparities in drug arrests, convictions and sentences, by race as compared to drug use by race); Christi Parsons, *Race Report Singles out Illinois for Drug-Conviction Disparity*,

CHICAGO TRIBUNE, June 8, 2000, page 1; Clifford W. Thornton Jr., *Drug War Is Just More of The Same*, THE HARTFORD COURANT, June 28, 2000, page B4.

¹⁷⁴ *New Jersey Confronts its Past*, ST. LOUIS POST-DISPATCH, December 2, 2000, page 34 (New Jersey State Police “routinely stopped and searched motorists based solely on the color of their skin”, and “the federal Drug Enforcement Agency and the U.S. Department of Transportation had encouraged local police departments and state troopers to use race as a profiling criterion for stopping suspected drug traffickers on the nation's highways.”). See also Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: a "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Cooper, *supra* note 12; Powell & Hershenov, *supra* note 12.

In describing an outbreak of violent drug raids in the early 1970s, the New York Times noted:

[M]embers of the more vocal middle class are now being subjected to rigorous police techniques that some alleged some officers have long used in black communities.

Andrew H. Malcolm, *Violent Drug Raids Against the Innocent Found Widespread*, N.Y. TIMES, June 25, 1973, at 22.

¹⁷⁵ Boyd, *supra* note 170 (“More than ten states have disenfranchised over 20% of their male black citizens.”) (citing *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the U.S.*, HUMAN RIGHTS WATCH REPORT, 1998 (<http://www.hrw.org/reports98/vote/>)); see also *Prison and Beyond: A Stigma That Never Fades*, THE ECONOMIST, August 8, 2002.

¹⁷⁶ “The outcry against marijuana use was directed at a perceived threat from immigrant and migrant Mexicans, African- Americans, and Asians who were thought to smoke the narcotic plant.” Susan David Dwyer, *The Hemp Controversy: Can Industrial Hemp Save Kentucky?*, 86 KY. L.J. 1143 (1997-98) (citing Richard J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES 32-52 (1974)); “Anslinger's appeal to racism and hysteria was unabashed.” Vitiello, *supra* note 24 at 749 (citing RICHARD LAWRENCE MILLER, THE CASE FOR LEGALIZING DRUGS 99 (1991)).

Prejudice was also common during alcohol prohibition. When a Mrs. Etta Mae Miller was sentenced to life in prison for selling two pints of liquor (her fourth offense), Dr. Clarence True Wilson, General Secretary of the Board of Temperance, Prohibition and Public Morals, said:
Our only regret is that the woman was not sentenced to life imprisonment before her ten children were born. When one has violated the Constitution four times, he

or she should be segregated from society to prevent the production of subnormal offsprings.

McCutcheon, *supra* note 148 at 44 (*quoting* Time Magazine, January 14, 1929).

¹⁷⁷ *Prison and Beyond*, *supra* note 175 (“[T]he United States locks up nearly 700 people per 100,000, compared with 102 for Canada, 132 for England and Wales, 85 for France and a paltry 48 in Japan.”) (citing INTERNATIONAL CENTRE FOR PRISON STUDIES, King’s College London); *see also* Sentencing Project, *New Inmate Population Figures Show Continued Growth, Prospects for Change in Policy Unclear*, April 2002 (analyzing report from Bureau of Justice Statistics) (<http://www.sentencingproject.org/news/inmatepop-apr02.pdf>); Michael Niman, *Incarceration Nation: The U.S. is the World’s Leading Jailer*, BUFFALO BEAT, January 4, 2000 (available at: <http://mediastudy.com/articles/incarceration.html>); *Too Many Convicts*, THE ECONOMIST, August 10, 2002, page 9; *Estimated Drug Arrests, U.S., 1985-2001*, THE CJIS LINK, Federal Bureau of Investigation, Criminal Justice Information Services Division, v. 6, no. 3, pages 6-7 (Fall 2002) (the 1.6 million drug arrests in 2001 “are the highest arrest total ever recorded for drug abuse violations”); Community Justice Centre webpage, <http://iisd1.iisd.ca/50comm/commdb/desc/d20.htm> (discussing the Community Justice Centre in New York City).

¹⁷⁸ *Prison and Beyond*, *supra* note 175; *see also* *Corrections Population More Than 6 Million*, LEADER-HERALD (Gloversville, NY), August 26, 2002 at 1 (Assoc. Press).

¹⁷⁹ *Prison and Beyond*, *supra* note 175; *see also* *Winning the War on Drugs*, *supra* note 14 at 1485 (“over half the new felony convictions involve young, nonviolent drug offenders”). Alcohol prohibition also led to heavy use of criminal prosecution and incarceration. McCutcheon, *supra* note 148 at 44, quotes an article in Outlook from 1930:

Mrs. Sallie Glassgow, sixty-two years old, who stood trial for selling one pint of liquor and four quarts of beer. Convicted. . . . Mrs. P.P. Ridley, seventy-two years old, who confessed she had sold a quart of blackberry wine. . . . Clyde Cox, eleven years old, who pleaded guilty to selling liquor. His father had run a barbecue stand and Clyde made the deliveries. . . . Such absurd trials go on daily throughout the country with preliminary hearings being conducted even on Sunday in New York in futile efforts to clear up congested calendars.

See also Ostrowski, *supra* note 120 at notes 17-23 and accompanying text:

Enforcement efforts escalated throughout the duration of Prohibition. Convictions rose from 18,000 in 1921 to 61,000 in 1932. Prison terms grew longer and were meted out with greater frequency in the latter years of Prohibition. The enforcement budget rose from \$7 million in 1921 to \$15 million in 1930. The

number of stills seized rose from 32,000 in 1920 to 282,000 in 1930.

¹⁸⁰ Velma LaPoint, *Prison's Effect on the African-American Community*, 34 HOW. L.J. 537, 539 (1991) (“One study indicates that in 1980 there were approximately 225,000 children with incarcerated mothers. Surely, this number has risen significantly since the incarcerated female population has risen since 1980. . . . [W]e have no such information on children of incarcerated fathers.”).

¹⁸¹ David Crary (Associated Press), *When Law Kicks In, Rights Disappear*, ALBANY TIMES UNION, 1/6/2003.

¹⁸² E.g. Sandra Bass, *The Thin White Line; Drugs at Heart of Recent Police Scandals*, LOS ANGELES DAILY NEWS, October 24, 1999, page V1; Jack Nelson, *More and More Police Officers Are Wearing Badges of Dishonor Justice*, LOS ANGELES TIMES, November 22, 1998, A22; *A Matter of Trust*, CHICAGO SUN-TIMES, December 21, 1998, page 29 (“string of corruption charges against [Chicago] police officers”); *More Charges Filed Against Ex-Drug Agent*, LOS ANGELES TIMES, December 19, 1998, page B4 (“former state narcotics agent accused of stealing more than 500 pounds of cocaine”); *S. Texas Police Chief Sentenced in Drug Case*, THE DALLAS MORNING NEWS, December 18, 1998, page 24A, (“Former ... Police Chief ... sentenced to 10 years in federal prison after being convicted on drug and corruption charges”); *Bribery-Conspiracy Accusations Against Jailers Very Troubling*, SUN-SENTINEL FT. LAUDERDALE, December 14, 1998, 24A (“Fourteen county jailers ... in a massive federal bribery-conspiracy scandal ... accused of smuggling contraband into prisons that included cocaine Some ... accused of letting inmates use phones to run drug-dealing operations”); *Schenectady Cops Charged after Probe*, ALBANY TIMES UNION, December 31, 2000, C1; Marv Cermak, *Five Guards Likely to Lose Jobs*, ALBANY TIMES UNION, December 13, 2001, B13 (“Schenectady Sheriff ... expected to announce the firing of five jail guards [after] correction[s] officer[] ... charged with possession of nine bags of cocaine”); Victor Merina, *Ex-Sergeant Implicates Lapd Detectives in Drug Trial*, LOS ANGELES TIMES, October 17, 1991, page B-1; Eric Harrison, *Police Scandal Rocks Indiana Steel Town as Officers Are Accused of Drug Thefts*, LOS ANGELES TIMES, August 24, 1991, page A-20; Daryl Kelley and Victor Merina, *3 More Drug Cases Dropped as Result of Deputy Scandal*, LOS ANGELES TIMES, October 6, 1989, page 2-1; Nancy Lewis & Sharon LaFraniere, *165 District Drug Cases In Jeopardy; U.S. Prosecutors Say Probe Findings May Taint Police Work*, WASHINGTON POST, September 12, 1987, page A1.

¹⁸³ E.g., *Anatomy of Failure: A Path for Success*, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PRACTICES OF THE POLICE DEPARTMENT, City of New York (July 7, 1994) (Mollen Commission Report); *The Knapp Commission Report on Police Corruption*, NEW YORK [CITY] COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE CITY'S ANTI-CORRUPTION PROCEDURES 91-92 (1973) (Knapp Commission Report); Harold Baer, Jr. and Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L.

SCH. L. REV. 73 (1995); JOSEPH D. MCNAMARA, GANGSTER COPS: THE HIDDEN COST OF AMERICA'S WAR ON DRUGS (2000); Steven Wisotsky, *Exposing the War on Cocaine: The Futility And Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305 (1983); Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, at n. 253-255 and accompanying text (Winter 1998):

Drug law enforcement ... is ... plagued by a higher degree of lawlessness and corruption than any other area of law enforcement. Its reliance on informants and undercover work puts officers in intimate contact with criminals, money, and drugs, while simultaneously shielding their activities from public view. For dishonest officers, these circumstances are tantamount to a license to steal, deal drugs, plant evidence, or perjure themselves with impunity. Defendants are unlikely to benefit from complaining about police theft of their drugs or money, and otherwise honest officers who learn of police illegality confront intense institutional pressures not to report fellow officers.

John T. Schuler and Arthur McBride, *Notes from the Front: A Dissident Law-enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893 (Spring 1990) (list of news stories on police drug corruption at footnote 79).

¹⁸⁴ Tim Weiner, *Anti-drug unit of CIA sent ton of cocaine to U.S. in 1990*, NEW YORK TIMES, November 20, 1993, page 4; Pete Carey, *Two Years Later, CIA-Drug Controversy Continues*, SAN JOSE MERCURY NEWS, Nov. 22, 1998; Marisa Taylor, *More Drug Officials Succumb to Bribes - Border Agents at Risk for Corruption, Study Says*, THE FORT WORTH STAR-TELEGRAM, March 7, 1999, page 1; David LaGesse and George Rodrigue, *Drug War Often Finds CIA at Odds with DEA*, THE DALLAS MORNING NEWS, page 1J, Feb. 16, 1997 (“Drug enforcement officials say their CIA counterparts let Gen. Guillen ship at least a ton of cocaine to the United States.”); Ron Chepesiuk, *Are CIA's hands clean on drugs?*, THE HERALD ROCK HILL, SC, January 30, 1997, 11A (“[T]he U.S. Justice Department revealed that in 1990 and 1991 a special Venezuelan anti-drug unit, funded by the CIA, smuggled more than 2,000 pounds of cocaine into the United States with the agency's knowledge.”); Pamela Coyle, *DEA Worker Accused of Selling Info to Pusher*, THE NEW ORLEANS TIMES-PICAYUNE, May 28, 1999, page B1; Lee Hancock, *DEA Misled Panel in Drug Inquiry, Records Show: E-mails Point to Pressure on Investigation of Rap Entrepreneur*, THE DALLAS MORNING NEWS, October 27, 2000, page 39A.

¹⁸⁵ *Venezuelan Aide Convicted of Smuggling Drugs to U.S.*, XINHUA ENGLISH NEWSWIRE, Sept. 30, 1997; *Court Showing Unlikely*, SUN-SENTINEL FT. LAUDERDALE, Feb. 21, 1997, page 3B (“Venezuela's former drug czar is unlikely to answer U.S. charges that he smuggled cocaine while working for the CIA.”); Tracey Eaton, *Drug Allegations Strain Mexico Ties - Officials Say Leaks Embarrass Government*, THE DALLAS MORNING NEWS, June 3, 1999, page 10A (“drug-corruption allegations against some of Mexico's prominent political

figures”).

¹⁸⁶ *E.g., Snitch*, PBS FRONTLINE, January 12, 1999 (online at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/>).

¹⁸⁷ In 1990, former Secretary of State George Shultz appeared on the MacNeil-Lehrer Newshour after suggesting the legalization of drugs. He commented:

The second aspect of this problem is this huge criminal network that's there. And the thing that has gotten to me is: Here is this big network and the criminals have an incentive to develop their market. They want to create addicts. I think that's one of the reasons why you see these young kids being recruited, to go to other kids and try to get them addicted, because they are trying to develop a market. And they use the youngsters because they are less liable to criminal prosecution, than people who are older.

Now why is it that we have this big market? It is because we have created a situation where the price you can get for drugs far exceeds its cost. So these people have money coming out of their ears. And we are financing a gigantic criminal network. . . .

Interview with George Shultz, MACNEIL-LEHRER NEWS HOUR, January 8, 1990. *See also* William B. Scott, *Terrorism Thrives on "Dirty Money,"* AVIATION WK. & SPACE TECH. 64, November 25, 2001; Raphael F. Perl, *The Threat Posed by the Convergence of Organized Crime Drug Trafficking, and Terrorism*, CONGRESSIONAL TESTIMONY, December 13, 2000, 2000 WL 28973186 (“Terrorists increasingly rely on drug money for funding.”); Josh Meyer, *Ashcroft says one-third of terror groups also traffic drugs*, LOS ANGELES TIMES, July 31, 2002, page 4 (“about one-third of foreign terrorist organizations are trafficking in narcotics on a large scale”).

¹⁸⁸ *Bush's Dirty War: George Monbiot Colombia's Peasant Farmers Are Being Driven off Their Land. And We Are Helping*, THE GUARDIAN (UK), May 22, 2001; John Otis, *A Harvest of Dollars*, HOUSTON CHRONICLE, Sept. 29, 2002 (“Fumigation kills coca, but the peasants go deeper into the jungle to cut down more forest and to continue planting drug crops.”); David Adams & Paul De La Garza, *Rising Violence Precedes 'Plan Colombia,'* ST. PETERSBURG TIMES, November 5, 2000, 1A (“Critics say the huge, U.S.-backed counterdrug effort will just add fuel to the fire in Colombia's fighting.”). *See also* Tad Szulc, *The Ghost of Vietnam Haunts "Plan Colombia,"* LOS ANGELES TIMES, August 20, 2000, M2; Michael Easterbrook (AP), *Officials Dismiss Allegations over Anti-drug Fumigations*; SAN JOSE MERCURY NEWS August 6, 2001 at 4A; *Colombia Says Drug Lords Are Using Smear Tactics*, SAN JOSE MERCURY NEWS, August 6, 2001, 4A; George M Anderson, *Of Many Things*, AMERICA, May 14, 2001:

The herbicide does indeed kill the coca and poppy fields from which cocaine and heroin are made. But it has also killed many poor families' basic food crops planted nearby, such as yucca, avocados, maize and plantains. Also damaged have been the cananguchal palm trees, a staple of life for indigenous people, who use them not only for food and drink, but who also employ even the fibers from the leaves for clothing and roofing material. The aerial spraying, moreover, contaminates streams and ponds, and has caused the sickening of domestic animals. Chickens often die after drinking the polluted water, and humans too are being adversely affected. Eye inflammation, skin problems, diarrhea and headaches are just some of the effects, which have been especially harmful for children.

See also Solimar Santos, *Comment: Unintended Consequences of United States' Foreign Drug Policy in Bolivia*, 33 U. MIAMI INTER-AM. L. REV. 127 (2002).

¹⁸⁹ Robert Gehrke, *Governor Finds Support for His Campaign to Legalize Pot*, THE COLUMBIAN, April 20, 2001, page A3; Andre Picard, *Study charges U.S. losing war on drugs*, TORONTO GLOBE & MAIL, October 19, 1999 (citing study by the U.S. National Association for Public Health Policy in the U.S. Journal of Public Health Policy).

¹⁹⁰ E.g. Gore, *Bradley Exchange Words on Health Care*, CNN, December 17, 1999 (available online at: <http://www.cnn.com/1999/ALLPOLITICS/stories/12/17/nightline.forum/>); See also Shamed Dogan, *The War on Drugs: This Time, it's Personal*, YALE FREE PRESS, 1999 (available online at: http://www.yale.edu/yfp/archives/99_warondrugs.html).

¹⁹¹ John Donnelly, *Apart From Personal Use, A Key Issue Stays Away*, BOSTON GLOBE, March 5, 2000.

¹⁹² E.g., Ethan A. Nadelmann, *A Sound Basis for a Drug Policy*, DENVER POST, February 10, 2002.

¹⁹³ The stories are not meant to be a comprehensive catalog of drug war deaths. That research task would be formidable. I have left out entire categories of deaths that are arguably caused by the drug war, such as trafficking murders. This list consists of victims that even the most hardened drug warriors would concede are innocent.

¹⁹⁴ Andrew H. Malcolm, *Violent Drug Raids Against the Innocent Found Widespread*, N.Y. TIMES, June 25, 1973, at 22.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ William G. Blair, *Man Found Guilty in Narcotics Officer's Death*, NEW YORK TIMES, December 2, 1989, page 1-30; Sarah Lyall, *Second Suspect Held in Slaying Of a Patrolman*, NEW YORK TIMES, October 22, 1988, page 1-31; Peter Kerr, *12,000 Form Ranks to Mourn 2 Slain Policemen*, NEW YORK TIMES, October 23, 1988, page 1-1; James Barron, *2 Policemen Are Shot and Killed In Separate Manhattan Incidents*, NEW YORK TIMES, October 19, 1988, page A-1; David E. Pitt, *Ward Orders Officers to Use Protective Vest*, NEW YORK TIMES, October 20, 1988, page B-1. Ostrowski *supra* note 120 notes:

About 10 law enforcement officers are killed enforcing drug laws each year. These men . . . [are] also victims of drug prohibition.

See also The Nation, LOS ANGELES TIMES, September 4, 1989, page 1-2 (reporting that “14 officers died in drug raids and arrests and in serving warrants, including one who was assassinated in New York. [S]uch killings have averaged seven a year since 1972.”)

¹⁹⁹ *7 Officers Killed On Duty in '88*, NEW YORK TIMES, October 19, 1988, page B-4.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Dale Lezon, *Deputy Was Shot by Fellow Officer*, HOUSTON CHRONICLE, July 27, 2002.

²⁰³ Joseph F. Sullivan, *Police Gun's Blast Kills Officer on a Drug Raid*, NEW YORK TIMES, August 4, 1989, page B-2.

²⁰⁴ *Slain Officer's Family Awarded \$2.1 Million*, LOS ANGELES TIMES, October 13, 1988.

²⁰⁵ Tracy Wilson, *Reflecting on Fatal Shooting*, LOS ANGELES TIMES, March 20, 1996, page A-3; Hilary E. MacGregor, *Family of Slain Officer Can Sue City*, LOS ANGELES TIMES, May 29, 1998, page B-1; James Bovard, *FLASH BANG YOU'RE DEAD: SWAT Teams Make Dramatic TV but Horrible Justice*, PLAYBOY MAGAZINE, March 1, 2000, page 53.

²⁰⁶ *Officer, Shot During Raid, Dies*, LOS ANGELES TIMES, June 17, 1990, page A-41.

²⁰⁷ Jeff Sklansky, *Gunman Wounds Pr. George's Officer Probing Suspected Theft*, WASHINGTON POST, September 4, 1988, page B6.

²⁰⁸ Lisa Leff, *Baltimore Officer Slain, 2nd Wounded in Drug Arrest*, WASHINGTON POST, October 11, 1989, page D6.

²⁰⁹ *Metro Digest: Man Accidentally Slain by Policeman*, LOS ANGELES TIMES, March 25, 1989, page 2-2.

²¹⁰ *Anne Arundel Shooting Sparks Probe*, WASHINGTON POST, October 28, 1989, page B8.

²¹¹ Leonard Bernstein, *City to Pay Dubose's Widow \$1,200 per Month*, LOS ANGELES TIMES, August 2, 1989, page 2-1; Leonard Bernstein, *Settlement With Dubose's Widow to Cost City \$218,833*, LOS ANGELES TIMES, August 5, 1989, page 2.

²¹² William K. Rashbaum, *Unarmed Man Is Shot to Death in Scuffle with Undercover Detectives*, NEW YORK TIMES, March 17, 2000.

²¹³ Kevin Vaughan, *Cop Charged In Mena Killing*, DENVER ROCKY MOUNTAIN NEWS, February 5, 2000; see also Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 604-605 (2001) (discussing mediation efforts in the family's action against the city); Bruce Finley, *\$400,000 Settles Mena Case: Webb Steps in to Broker Deal in Fatal No-Knock Raid*, DENVER POST, Mar. 24, 2000, at 1A.

²¹⁴ Ann-Marie O'Connor, *Bereft Family Disputes Police Shooting Report*, LOS ANGELES TIMES, August 26, 1999, page A1.

²¹⁵ *Officers Cleared Of Fatality In Drug Raid*, LAWRENCE JOURNAL-WORLD, March 10, 2001; Bill McClellan, *Two Police Shootings Show Upside-Down*, ST. LOUIS POST-DISPATCH, February 11, 2001.

²¹⁶ James Bovard, *FLASH BANG YOU'RE DEAD: SWAT Teams Make Dramatic TV but Horrible Justice*, PLAYBOY MAGAZINE, March 1, 2000, page 53.

²¹⁷ *Id.*

²¹⁸ *Fair End in Key Police Abuse Case*, LOS ANGELES TIMES, January 13, 2000, page B9; see also Vin Suprynowicz, *Boy Do They Ever Want Trails End Ranch*, LAS VEGAS REVIEW-JOURNAL, September 2, 2001, page 2E

²¹⁹ *When SWAT Raids Go Wrong*, THE CAPITAL TIMES (Wis. St. J.), August 18, 2001, page 5A (2001 WL 25522513).

²²⁰ Jamie Stockwell and David Fahrenthold, *Decision on Jones Questioned; Activist Suggests County Police Reform Training*, WASHINGTON POST, October 26, 2000, page M3; Jamie Stockwell, *Jeep Driver Surrenders in Pr. George's; Man Slain in Fairfax Mistaken for Suspect*, WASHINGTON POST, October 26, 2000, page B1; Tracey A. Reeves and Hamil R. Harris, *State Senator Calls for Farrell to Resign*, WASHINGTON POST, September 21, 2000, page M3; *see also* Tom Jackman, *NAACP Protests Prosecutor's Absence: Horan Not at Meeting On Police Shooting*, WASHINGTON POST, November 30, 2000, page B1.

²²¹ Gail Epstein Nieves, *Jury Indicts 5 Miami Police Officers*, MIAMI HERALD, March 15, 2001.

²²² *Metro Briefing*, ARIZONA DAILY STAR, December 13, 2001, page B1.

²²³ Laura Brooks, *Victim Thought DEA Man Was Rapist - Son Testifies in Three Points Killing*, ARIZONA DAILY STAR, June 17, 1999, page 3B.

²²⁴ Joshua B. Good, *Fulton Woman Slain During Drug Raid*, THE ATLANTA JOURNAL - CONSTITUTION, September 23, 2000, page E3.

²²⁵ Bardwell, *Police shot man 12 times in raid /Autopsy report indicates that nine shots were in the back*, HOUSTON CHRONICLE, July 21, 1998, page 1; *see also* Pineda v. City of Houston, 291 F.3d 325 (5th Cir. Tex. 2002).

²²⁶ Toni Locy, *Bungled raid raises questions on reliability of police informants*, BOSTON GLOBE, March 27, 1994; Joseph Mallia & Maggie Mulvihill, *Minister Dies as Cops Raid Wrong Apartment*, BOSTON HERALD, Mar. 26, 1994, at 1; Maggie Mulvihill & Joseph Mallia, *Boston Police 'Sorry' For Fatal Mistake*, BOSTON HERALD, Mar. 27, 1994, at 1; *see also* Fish, *supra* note 12 at 216; David B. Kopel & Paul H. Blackman, *The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment*, 18 HAMLINE J. PUB. L. & POL'Y 1, 48-49 (1996).

²²⁷ *See, e.g.* Anthony Faiola, Karen DeYoung and Ellen Nakashima, *US Notified Peru Of Suspect Plane*, WASHINGTON POST, April 22, 2001; Robertson, *Able to Forgive, Not Forget, Peru Air Attack: Missionary Wants CIA to Apologize For 2001 Incident*, WASHINGTON POST, July 6, 2002, page B8 (AP). In a 1996 article, congressional staffer and drug warrior Robert B. Charles touted "the successful Peruvian 'shoot down' policy." Robert B. Charles, *supra* note 13 at n. 86 and also at 409.

²²⁸ Tim Bryant, *Suspect Pleads Guilty to Role in Shooting That Killed Detective*, ST. LOUIS POST-DISPATCH, April 7, 1998, page B4; *see also* Joe Holleman, *Panel Faults Procedures in Failed Drug Deal*, ST. LOUIS POST-DISPATCH, June 28, 1997, page 3.

²²⁹ *Troy Davis' Death*, FORT WORTH STAR-TELEGRAM, January 6, 2000, page 8; *see also* Evan Moore, *Tale of intrigue stranger than fiction*, HOUSTON CHRONICLE, August 23, 2000, page 1.

²³⁰ Cynthia Tucker, *The Villages of East Lake: Hope from the Ground Up*, THE ATLANTA JOURNAL AND CONSTITUTION, October 17, 1999, page G1.

²³¹ Elisa Gootman, *Fatal Shooting of Suffolk Man Was an Accident, Police Say*, NEW YORK TIMES, April 22, 2002; Bruce Lambert, *No Indictment In Shooting Of Young Man In Suffolk Raid*, NEW YORK TIMES, August 9, 2002.

²³² Geoff Boucher, *Slain Boy's Kin: Police Warning Not in Spanish*, LOS ANGELES TIMES, January 9, 1996, page B-1.

²³³ *Police Shoot Police Most Often in Raids*, DALLAS MORNING NEWS, December 20, 1986, page 1A; *see also* <http://www.nleomf.com/FallenOfficers/LineofDuty/drugwars.html>.

²³⁴ Paulsen, *Drug War Masquerade*, DETROIT METRO TIMES, September 9, 1998; Thaddeus Herrick, *Marine On Anti-Drug Duty Shoots, Kills Student*, HOUSTON CHRONICLE, May 22, 1997, at A37; Sam Howe Verhovek, *In Marine's Killing of Teenager, a Texas Border Town Mourns and Wonders Why*, NEW YORK TIMES, June 29, 1997. *See also* MAJOR GENERAL JOHN T. COYNE, INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE JOINT TASK FORCE-6 (JTF-6) SHOOTING INCIDENT THAT OCCURRED ON 20 MAY 1997 NEAR THE BORDER BETWEEN THE UNITED STATES AND MEXICO, US Marine Corps, 5800 JAGT/jtc, April 7, 1998; Lieutenant Colonel W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, Roe & the Rules of Deadly Force*, 2000-NOV ARMY LAW. 1, 1-2 (2000); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 730-731 (2000); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: a "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); John Flock, *The Legality of United States Military Operations along the United States-Mexico Border*, 5 SW. J.L. & TRADE AM. 453 (1998); W. Kent Davis, *Swords into Plowshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61, 71-72 (1998); Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 at n. 293 (Winter 1998).

²³⁵ JAMES C. BRAZELTON (Stanislaus County District Attorney) and MICHAEL A. CANZONERI (Supervising Deputy Attorney General), REPORT AND EVALUATION OF

THE APPLICABILITY OF CRIMINAL CHARGES TO THE CIRCUMSTANCES SURROUNDING THE SHOOTING DEATH OF ALBERTO SEPULVEDA, February 22, 2001 (available online at: <http://www.stanislaus-da.org/PDF/report.pdf>); *see also Boy's death ruled accidental*, MODESTO BEE, September 17, 2000.

²³⁶ The report indicates that Haw'n's knife was sticking out of his vest and may have caught on the trigger causing the gun to fire. Brazelton, *supra* note 237 at 10.

²³⁷ The consequences of drug raids are not new. Malcolm relates the details of early drug raids:

Details of each raid vary, but generally they involve heavily armed policemen, arriving at night, often unshaven and in slovenly "undercover" attire, bashing down the doors to a private home or apartment and holding the innocent residents at gunpoint while they ransack the house. . . . Frequently the raiding party is rude, abusive and . . . shouts obscenities at its terrified victims. . . [T]aken together the mistaken raids paint a picture of strong-arm police tactics, shoddy or nonexistent pre-raid police investigation and the pressures and brutalizing impact on the police of constant contact with what they call "society's scum," the drug pusher. . . . The reasons behind these mistaken raids are varied and complex. But they are tied intimately to the veritable explosion of Government drug enforcement activities in recent years. At its formation in 1968 the Bureau of Narcotics and Dangerous Drugs, the main Federal arm against drugs, had 615 agents and a \$14-million budget. Now it has 1,586 domestic agents and a \$74-million budget. On July 1, a new Drug Enforcement Administration will absorb most of the Federal efforts, including the bureau. These efforts cost about \$245 million a year.

Andrew H. Malcolm, *Violent Drug Raids Against the Innocent Found Widespread*, N.Y. TIMES, June 25, 1973, at 1.

Alcohol prohibition had similar results. McCutcheon, *supra* note 128, relates the following story:

One of the most outrageous cases of Dry zeal occurred on April 8, 1929, when Deputy Sheriff Roy Smith went with a search warrant to the home of suspected bootlegger Joseph DeKing in Aurora, Illinois. When DeKing refused to let the deputy sheriff in, three more deputies were called in and stormed the house with mustard bombs. They knocked DeKing out with a club, and shot DeKing's wife dead with a shotgun blast to the abdomen (she had been screaming "help" into the telephone). In horror, the DeKing's 12-year-old son grabbed a revolver and shot the Deputy Sheriff in the leg. Later one gallon of wine was found. From his hospital bed, Smith stated, "I wish there was no such thing as Prohibition. I'm through with it. Try to enforce the law and see what happens."

²³⁸ E.g. Harmelin, *supra* note 19, 501 U.S. at 1002-1005 (Kennedy, J. concurring). On no-knock drug raids, *see e.g.* Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson v. Arkansas, 514 U.S. 927 (1995); U.S. v. Tisdale, 195 F.3d 70 (2nd Cir. 1999); U.S. v. Brown, 276 F.3d 14 (1st Cir. 2002); Robert J. Driscoll, *Unannounced Police Entries and Destruction of Evidence after Wilson v. Arkansas*, 29 COLUM. J.L. & SOC. PROBS. 1 (1995); Charles Patrick Garcia, *Note: The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685 (1993). On buy and bust operations, *see, e.g.*, U.S. v. Cattouse, 846 F.2d 144 (2nd Cir. 1988).

²³⁹ Collins, *supra* note 158, 503 U.S. at 125 (“The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field [of substantive due process].”).

²⁴⁰ Shattuck, *supra* note 57, 4 HARV. L. REV. at 377.

²⁴¹ E.g., Steven H. Jupiter, *Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy*, 23 FORDHAM URB. L.J. 437 (1996); Kathryn R. Urbonya, *Public School Officials' Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1, 28 (2000) (“when a claim falls under either the Fourth Amendment or Eighth Amendment, substantive due process does not apply”). *See also* Whitley v. Albers, 475 U.S. 312, 327 (1986):

We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. . . . Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.

²⁴² E.g., Bowers v. Hardwick, 478 U.S. 186 (1986). *See also* Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

²⁴³ Hardwick’s argument was similar to Ravin’s argument in Ravin v. Alaska, *supra* note 27.

²⁴⁴ That is, Hardwick could have argued that Georgia’s anti-sodomy law violated his

fundamental right to be free from incarceration, was not narrowly tailored to a compelling interest, and therefore violated his 14th Amendment substantive due process rights.

²⁴⁵ *But see, e.g.*, James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 LAW & SEXUALITY 1 (2001); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103 (2000); Teresa Eileen Kibelstis, *Preventing Violence Against Gay Men and Lesbians: Should Enhanced Penalties at Sentencing Extend to Bias Crimes Based on Victims' Sexual Orientation?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309 (1995); Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209 (1994).

²⁴⁶ *But see, e.g.*, John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283 (1998); Paul V. Regelbrugge, *Barbarism in the Plastic Bubble: An Application of Existentialist Theory to Capital Punishment in the United States*, 1990 DET. C.L. REV. 1011 (1990).

²⁴⁷ *E.g.* Thomas L. Jipping, *from Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365 (2000); Roger A. Fairfax, Jr., *Wielding the Double-edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17 (1998); Hon. Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?: A Retrospective*, 21 HARV. J.L. & PUB. POL'Y 607 (1998); Charles J. Ogletree, Jr., *Judicial Activism or Judicial Necessity: The D.C. District Court's Criminal Justice Legacy*, 90 GEO. L.J. 685 (2002); Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism after All?*, 21 HARV. J.L. & PUB. POL'Y 219 (1997); Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141 (2002); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 (2002); Jennelle London Joset, *May it Please the Constitution: Judicial Activism and its Effect on Criminal Procedure*, 79 MARQ. L. REV. 1021 (1996); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057 (2002); Hon. Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1984); Christopher E. Smith and Avis Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53 (1993).

²⁴⁸ Linde made a similar remark in the context of rational basis scrutiny: "Would anyone argue that laws should not be rational means toward legitimate ends? Of course not." Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

²⁴⁹ *E.g.*, *Boyd v. United States*, 116 U.S. 616, 635 (1886): "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon;" Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); see also *W. Va. State Bd. of Educ. v. Barnette*, 319

U.S. 624, 638
(1943):

One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

²⁵⁰ *E.g.*, JUDGMENT AT NUREMBERG (United Artists, 1961); UNITED NATIONS WAR CRIMES COMMISSION, 6 LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (Trial of Josef Altstotter and Others, Nuremberg, Feb. 17, 1947 to Dec. 4, 1947); *see also* Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, 18 LAW & HIST. REV. 281 (2000); Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 U.S.F. L. REV. 991 (1996); Matthew Lippman, *The Prosecution of Josef Altstoetter et al.: Law, Lawyers and Justice in the Third Reich*, 16 DICK. J. INT'L L. 343 (1998); Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199 (1997); Matthew Lippman, *The White Rose: Judges and Justice in the Third Reich*, 15 CONN. J. INT'L L. 95 (2000).