

## Race and the War on Drugs

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# Race and the War on Drugs

Michael Tonry†

“Take no prisoners,” a slogan of wars ruthlessly fought, has as its equivalent in the War on Drugs launched and conducted by the Reagan and Bush administrations, “make them all prisoners.” American prison and jail populations tripled between 1980 and 1993,<sup>1</sup> primarily due to increased numbers of drug convictions<sup>2</sup> and longer sentences for drug offenders.<sup>3</sup> These patterns, the intended effects of recent drug policies, might have been justifiable if there had been grounds when the war was first launched in 1988 and 1989 for believing that drug use was increasing or that tougher penalties would reduce drug trafficking. To the contrary, drug use in America had been declining since the early 1980s,<sup>4</sup> and there existed no plausible grounds for believing that increased penalties would reduce drug trafficking.

The War on Drugs included law enforcement, treatment, and educational components, but the White House Office of National Drug Control Policy (“ONDCP”) loudly proclaimed that emphasis should be given to law enforcement. One sign of the law enforcement emphasis was an ONDCP insistence, year after year, that federal funding be split 70-30 in favor of law enforcement over other programs.<sup>5</sup> Another sign was its persistent refusal to accept a “treatment on demand” approach to drug treatment even when it was known that tens of thousands of drug users in cities wanted but could not gain admission to treatment programs.<sup>6</sup>

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<sup>1</sup> Bureau of Justice Statistics, *Trends in the U.S. Correctional Populations: Recent Findings From the Bureau of Justice Statistics* table 1 at 1 (1994). See also Bureau of Justice Statistics, *Historical Statistics on Prisoners in State and Federal Institutions, Year-end 1925-1986* (1988).

<sup>2</sup> See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* table 5.15 at 486 (1993).

<sup>3</sup> 1992 *Sourcebook*, table 5.69 at 538 (cited in note 2); Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1982* table 5.11 at 479 (1983).

<sup>4</sup> See page 29.

<sup>5</sup> Office of National Drug Control Policy (“ONDCP”), *1990 National Drug Control Strategy—Budget Summary* 100 (1990).

<sup>6</sup> See Dean R. Gerstein and Henrick J. Harwood, eds, *Treating Drug Problems* 230 (National Academy Press, 1990).

Three effects of the War on Drugs stand out. First, in its own terms, it was a failure. Its ostensible goals were to reduce drug use and trafficking. Drug policy analysts generally use drug prices as a measure of law enforcement effectiveness; if drugs are harder to find, they should be more expensive. The street price of cocaine, the War's signature drug, should have risen if dealing was becoming riskier and drugs less available; prices fell.<sup>7</sup> Massive arrests and street sweep tactics in many cities, backed up by harsh mandatory prison sentences, should have cleared out the drug dealers and made drugs harder to find; they did not. Most analysts and many police officials believe that arrested street dealers are nearly always replaced by others who are willing to take the risks in order to gain incomes not otherwise available in high poverty neighborhoods.<sup>8</sup> Finally, there is no evidence that crime control efforts reduced levels of drug use in the United States. Drug use was declining years before the War was declared,<sup>9</sup> and the War can claim no credit for the continuation of pre-existing trends. There are reasons to believe that mass media and public education initiatives reduced drug use, especially among school age people, but that is a different matter.

Second, although the War accomplished few if any of its goals, it did so at great cost. The doubling of arrests in the 1980s, combined with harsher penalties, more than doubled the police, jail, prosecution, and court case flows and costs associated with drugs.<sup>10</sup>

The War's effects on prisons and correctional programs were even greater. Drug offense sentences are the single most important cause of the trebling of the national prison population since 1980. In the federal prisons, for example, drug offenders constituted 22 percent of admissions in 1980, 39 percent in 1988, and 42 percent in 1990.<sup>11</sup> In 1980, 25 percent (4,912) of federal prisoners were drug offenders; by 1991, 56 percent (30,754) were drug offenders; and by 1992, 59 percent were offenders.<sup>12</sup> Guarding, housing, feeding, and caring for all these prisoners costs a great deal. Typical estimates of the average annual cost of holding one prisoner range from \$20,000 to \$30,000.<sup>13</sup> Typical esti-

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<sup>7</sup> ONDCP, *Price and Purity of Cocaine* 6 (1992).

<sup>8</sup> See page 70.

<sup>9</sup> See page 29.

<sup>10</sup> See, for example, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1990* table 5.10 at 478 (1991).

<sup>11</sup> 1992 *Sourcebook*, table 6.87 at 638 (cited in note 2).

<sup>12</sup> Id table 6.85 at 636.

<sup>13</sup> See Douglas C. McDonald, *The Costs of Operating Public and Private Correctional*

mates of the cost of building new prisons, depending on climate and security level, range from \$50,000 to \$200,000 per prisoner.<sup>14</sup> Not untypically for American government, many of those costs were not paid from current tax revenues. Construction costs often were paid with borrowed money, to be repaid with interest in future years. Operating costs are paid from current revenues; the future burden will come from debt service and the need to continue year after year to pay to house drug offenders sentenced to ten-, twenty-, and thirty-year sentences.

Third, as if the ineffectiveness and immense, avoidable cost were not indictment enough, they pale before the most fundamental objection. The War on Drugs foreseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged Americans, especially black Americans, and undermined decades of effort to improve the life chances of members of the urban black underclass. The War was fought largely from partisan political efforts to show that the Bush and Reagan administrations were concerned about public safety, crime prevention, and the needs of victims (as if Democrats, or any responsible mainstream political figure, were not). The bodies counted in this war, as they lay in their prison beds, however, are even more disproportionately black than prisoners already were. War or no war, most people are surprised and saddened to learn that for many years, 30 to 40 percent of those admitted to prison were black.<sup>15</sup> The law enforcement emphasis of the War on Drugs was foreordained to increase those percentages, and it succeeded.

This essay presents the evidence on which the preceding observations are based and explains from both an ethical and policy perspective why the War on Drugs, because of its implications for black Americans, should never have been launched, and why American drug policies should be radically altered. I first examine whether on substantive, as opposed to ideological or partisan political, grounds there was any reason to launch the War on Drugs. I then trace out the effects of the Drug War on disadvantaged young people; because of the particularly heavy burdens borne by the War's black victims, the emphasis of this essay is on

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*Facilities*, in Douglas C. McDonald, ed, *Private Prisons and the Public Interest* 103 (Rutgers University Press, 1990).

<sup>14</sup> See McDonald, *The Costs of Operating Public and Private Correctional Facilities* at 106 (cited in note 13).

<sup>15</sup> Michael Tonry, *Racial Disproportion in United States Prisons*, 34 *British J Criminol* 97, 101 (1994).

them. I consider why so many young blacks were willing to risk injury, death, or prison in order to sell drugs, and why policymakers should have taken this into account in formulating government policy. Finally, I show why the War's planners should be held morally accountable for what they have done to damage young black Americans.

### I. WHY THE WAR SHOULD NOT HAVE BEEN DECLARED

The Reagan administration's declaration of a war on drugs resembles Argentina's declaration of war against Nazi Germany in 1945.<sup>16</sup> It was late and beside the point. Just as it was clear by 1945 that Germany was in military decline, it was clear in 1987 that drug use was in decline in the United States, and that it had been since the early 1980s.

There was no need in the late 1980s for a War on Drugs. Although good-faith arguments could be made for continuing efforts to target major importers, distributors, and traffickers, for increased support for drug education programs in schools, and for drug treatment for those who wanted it, none could be made for vastly increased emphasis on law enforcement directed at users, user-dealers, and street-level trafficking. Nor could good faith arguments be made for widespread enactment of mandatory penalty laws or for harsher penalties in general. The ostensible goal of the drug war was to diminish drug abuse, and that goal, evidenced by a steady and continuing decline in drug use, had been achieved before the war began. By all available measures of drug use in the general population, use of the major illicit substances, except cocaine, began to decline in the early 1980s, and the use of cocaine declined from the mid-1980s onward.<sup>17</sup>

By some disingenuous measures, the War on Drugs was bound to succeed, and both President Bush and William Bennett, the first "Drug Czar" and ONDCP director, made these disingenuous claims. Thus, in December 1990, citing data on long-term drug use trends showing a 44 percent decline since 1985 in the number of people who use illegal drugs monthly, President Bush said, "I am pleased to say that the news we have today suggests that our work is paying off, and that our national strategy is hav-

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<sup>16</sup> *Argentina*, in William H. Harris and Judith S. Levy, eds, *The New Columbia Encyclopedia* 43 (Columbia University Press, 1975).

<sup>17</sup> See Figures 1-1 to 1-6.

ing an effect."<sup>18</sup> Both William Bennett and Louis Sullivan, Secretary of Health and Human Services, made similar claims.<sup>19</sup>

Because of the long-term decline in drug use, any comparison of levels of use in 1985, before the ONDCP was established, with levels of use in 1989 and 1990, after the war was launched, would appear to demonstrate that toughened drug laws and enforcement practices had deterred people from buying and using drugs, and accordingly that the war had succeeded. This is a mistake commonly made when attempting to understand the effects of legal or policy changes. A simple comparison of conditions before and after the change will be misleading if there is a long-term trend of which both years are a part, in which case the change may have had nothing to do with events in the world. A homely example: a healthy ten-year-old child, if given cucumber sandwiches for lunch every day for a year, will be taller and heavier at year's end; a claim that the cucumbers caused the child to grow would be incorrect. The child might have grown more or less or in different ways on a different diet, but figuring that out requires more sensitive research designs than a simple before and after comparison. And so it is with drug use; year-to-year changes are meaningless except in the context of known long-term trends.

Figures 1-1 to 1-6, all based on surveys of large representative samples of the United States population conducted for or by the National Institute on Drug Abuse (generally referred to as "NIDA"), show steady downward trends in use of dangerous substances over long periods for different age groups. All are based on surveys in which sample members are asked, in confidence, to answer questions about their use and frequency of use of different substances.<sup>20</sup>

Figure 1-1 provides data for the period 1975-1991 from a series of annual surveys on drug use by high school seniors. The samples are huge, ranging between 15,000 and 18,000 students per year.<sup>21</sup> Figure 1-1 shows the percentages admitting to any use of marijuana, cocaine (any form), heroin, or alcohol during

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<sup>18</sup> Thomas Ferraro, *Bush Releases Upbeat Report, says Drug War "Paying Off"*, United Press International (Dec 19, 1990).

<sup>19</sup> See Timothy J. McNulty, *United States Report Finds Teen Drug Use Still Falling*, Chi Trib 3-8 (Feb 14, 1990); *Bennett Says He Leaves Winning Legacy*, USA Today 2A (Nov 13, 1990).

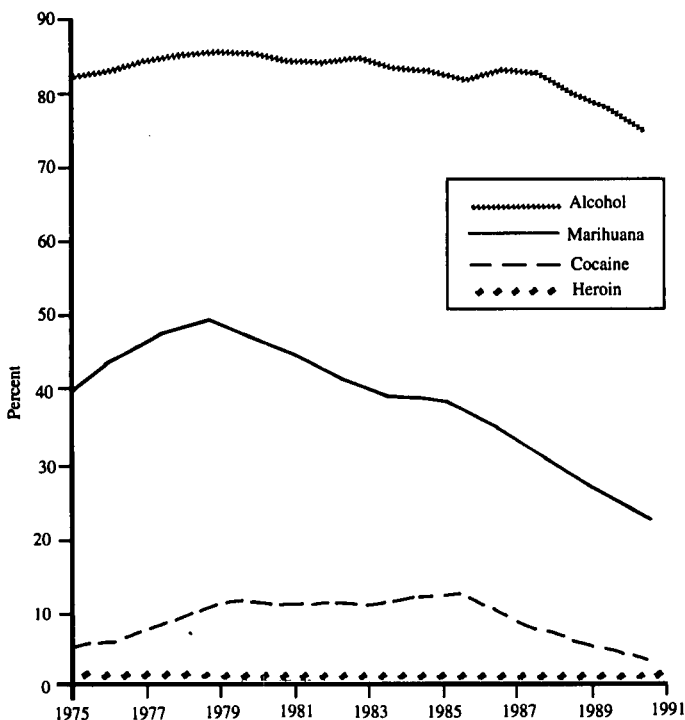
<sup>20</sup> See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1987* 575 (1988).

<sup>21</sup> Id.

the preceding twelve months. Because "any use" includes even a single use, this is the broadest measure of use and includes casual one-time experimenters. For each substance, reported use declined. Heroin use fell but from a very low starting point. The percentage reporting marihuana use began at 40 percent in 1975, climbed to 51 percent in 1979, and fell continuously thereafter to 24 percent in 1991. The pattern is similar for cocaine, but with a later peak and a steeper drop. Fewer than 6 percent reported use in 1975, followed by a rise to 12 percent in 1979; reported levels of use fluctuated around 12 percent, reaching a 13 percent peak in 1985 after which there was a precipitate drop to 3.5 percent in 1991. Even alcohol follows the same pattern, rising to a modern high in 1979 and falling thereafter to a level in 1991 below the starting point.

Figure 1-1

Reported Drug Use (within last 12 months)  
U.S. High School Seniors, 1975-91



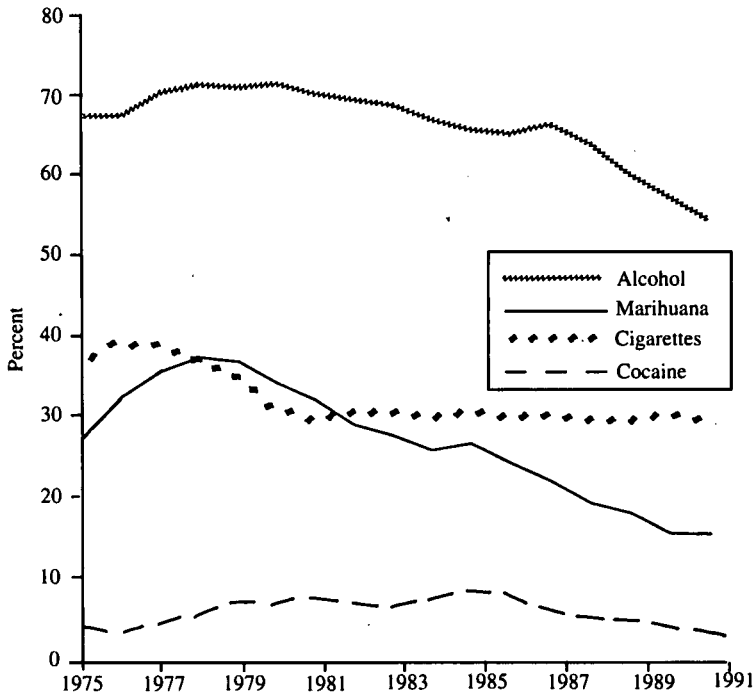
Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1987* table 3.66 at 281 (1988); Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* table 3.92 at 346 (1992).

It is, of course, possible that casual use of drugs might have been declining while regular use by smaller numbers of people was increasing. If so, the decline in drug use shown in Figure 1-1 might be misleading. Figure 1-2, however, shows that the number of frequent users was also declining.

Figure 1-2 shows data from the same source on the percentages of high school seniors reporting use of marihuana, cocaine, alcohol, or cigarettes within the preceding thirty days. Heroin is omitted because levels of use are so low (usually since 1976, 0.2 percent). Cigarettes are included because they confirm the general trend toward decreasing levels of use by young people of addictive substances.

Figure 1-2

Reported Drug Use (within last 30 days)  
U.S. High School Seniors, 1975-91



Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1987* table 3.67 at 282 (1988); Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* table 3.93 at 347 (1992).



Most of those reporting drug use in the preceding thirty-day period covered in Figure 1-2 are likely to be occasional or regular users. Some presumably were one- or few-time experimenters who just happened to conduct their experiments immediately before the survey was conducted. The ratio of regular to experimental users may change over time, with experimentation falling, but steady users persisting. If that were true, the trend lines in Figure 1-2 should be very different from those in Figure 1-1. They are not. It thus appears that both experimental and regular use were falling.

The trend lines in Figure 1-2 closely resemble those in Figure 1-1. The cigarette pattern is striking because it anticipates the pattern for alcohol and illicit drugs. The percentage reporting cigarette use within the preceding thirty days climbed to 39 percent in 1976, fell steeply to 30 percent, around which it fluctuated from 1980 to 1985, and thereafter declined to 28 percent in 1991.

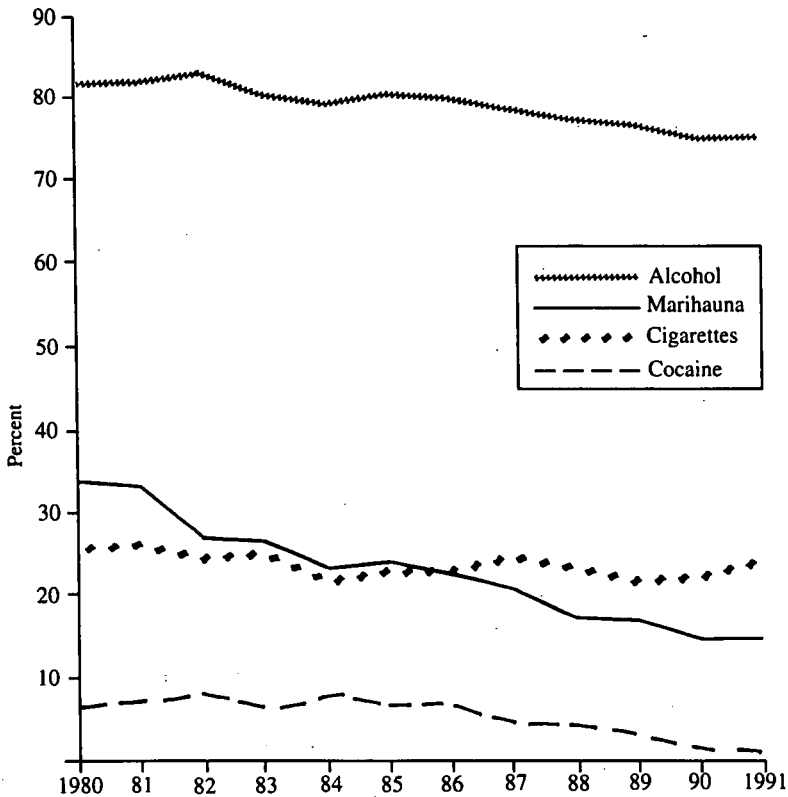
To show that the patterns in the high school surveys are real and believable, Figures 1-3, 1-4, 1-5, and 1-6, encumbered with less textual summary and description, present data from the other major long-term surveys of Americans' drug use. Figure 1-3 shows trends in self-reported use within the preceding thirty days of marihuana, cocaine, alcohol, and cigarettes by full-time American college students one to four years beyond high school.<sup>22</sup> Heroin is omitted because reported use levels are generally below 0.1 percent.<sup>23</sup>

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<sup>22</sup> 1992 *Sourcebook* at 718 (cited in note 2).

<sup>23</sup> See *id.* table 3.87 at 330.

Figure 1-3  
Reported Drug Use (within last 30 days)  
U.S. College Students, 1980-91



Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* table 3.95 at 348 (1992).

Because of self-selection, and economic and social background considerations that lead only some young people to college, the college survey represents a different and less heterogeneous population than the high school surveys. Nonetheless, the trends are the same as those for high school students. Marihuana and alcohol use declined steadily from the early 1980s onward, cigarette use declined somewhat, and the decline in cocaine use came slightly later for college than for high school students but was steeper. That there were steeper declines in marihuana and cocaine use than cigarette and alcohol use is not surprising: the latter two, after all, are not illegal substances.

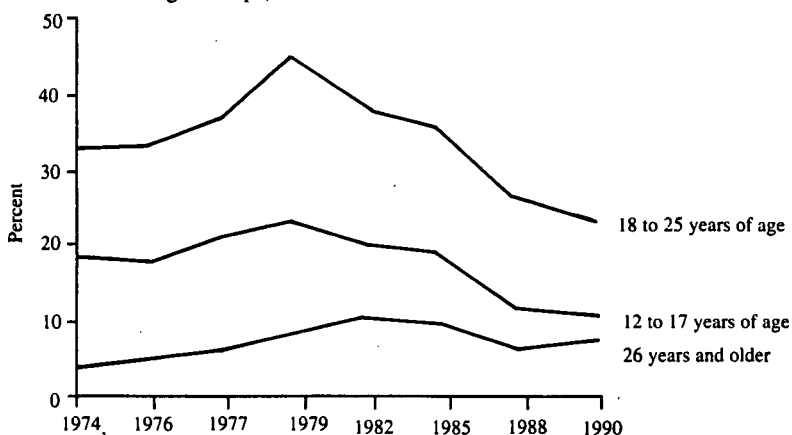
Figures 1-4 to 1-6, based on the National Household Surveys on Drug Abuse, summarize data on drug use among the Ameri-

can household population aged 12 and over and have been conducted periodically since 1972 for the National Institute on Drug Abuse and the National Institute on Alcohol Abuse and Alcoholism. The 1990 survey, the tenth conducted, included 9,259 interviews.<sup>24</sup>

Figures 1-4, 1-5, and 1-6 show percentages of survey respondents reporting use during the preceding year of marijuana, cocaine, and alcohol. Data are presented separately for respondents 12- to 17-year-olds, 18- to 25-year-olds, and those over 25. For the two younger age groups, the trends for each substance are similar to those from the high school and college student surveys. Only among the oldest age group, those over 25, do the patterns differ. Most initiation and termination of drug use occurs in the teenage years or the early twenties. People over 25 who report drug use are likely to be committed users, and for both marijuana (Figure 1-4) and cocaine (Figure 1-5), reported levels of use fell somewhat by the mid-1980s; thereafter, the curves are flatter than for the younger groups. For the younger groups, however, as in the high school and college surveys, marijuana use peaked in the late 1970s and fell sharply thereafter. For 18- to 25-year-olds, cocaine use peaked around 1979 and declined thereafter. Finally, Figure 1-6 shows, for comparison purposes, that self-reported use of alcohol, a licit drug (except for underage drinkers), peaked in the early 1980s for each age group and fell sharply after the mid-1980s.

Figure 1-4

Estimated Prevalence of U.S. Marijuana Use by Age Group (within last 12 months), Selected Years, 1974-90

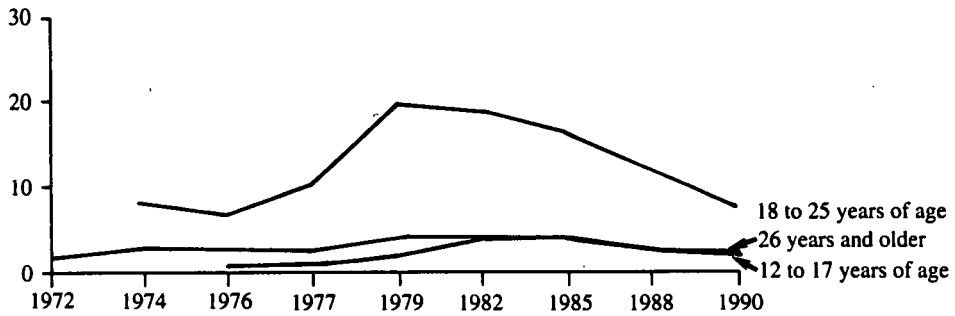


Source: 1991 Sourcebook, table 3.101 at 354.

<sup>24</sup> Id table 3.95 at 336.

Figure 1-5

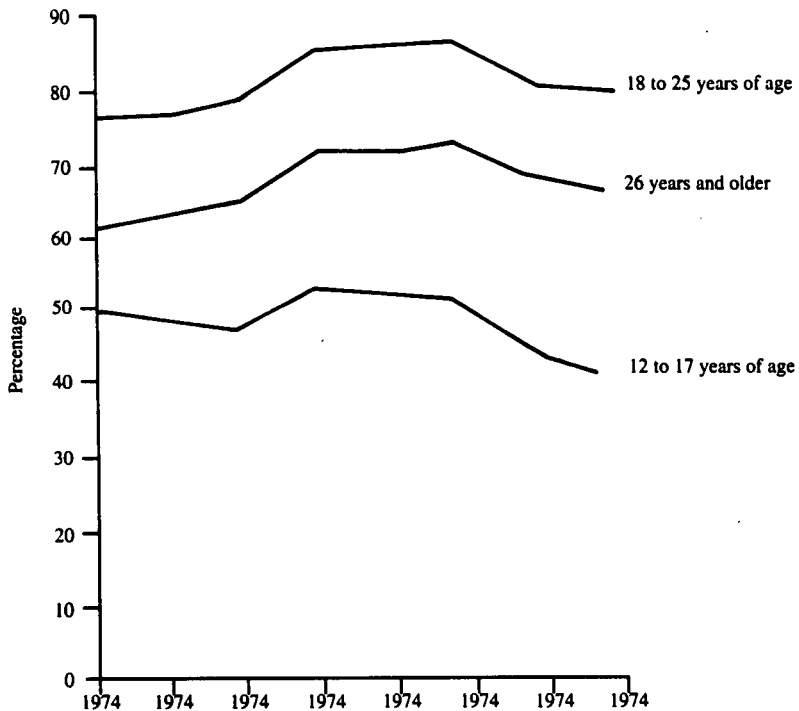
Estimated Prevalence of U.S. Cocaine Use by Age Group (within last 12 months), Selected Years, 1972-90



Source: 1991 Sourcebook, table 3.101 at 354.

Figure 1-6

Estimated Prevalence of U.S. Alcohol Use by Age Group (within last 12 months). Selected Years, 1974-90



Source: 1991 Sourcebook, table 3.101 at 354

Something was changing American attitudes toward drugs in the 1970s and early 1980s, long before the politics of crime control led the Bush administration to establish the ONDCP and appoint a Drug Czar. We can only theorize why that was happening. It is too soon for social histories to be written, and explanations inevitably fall into the realm of pop sociology. The cigarette and alcohol trends are important because they signal a broadly based and widely shared change in American attitudes toward ingestion of dangerous or unhealthy substances that can have little to do with the deterrent effects of law enforcement strategies or criminal sanctions. If NIDA had surveyed Americans on their use of caffeinated coffee since the 1970s, the use trends would probably resemble those for cigarettes and alcohol. The Department of Agriculture does measure food consumption per capita over time. Coffee consumption per person in the United States fell by a fifth between 1970 and 1990, from 33.4 gallons per person to 26.7,<sup>25</sup> and consumption of most fatty and high cholesterol foods fell sharply, including red meat (from 132.0 pounds per capita in 1970, to 126.4 pounds in 1980, and to 112.4 pounds in 1990), whole milk (from 213.5 pounds per person in 1970, to 141.7 pounds in 1980, and to 87.6 pounds in 1990), and lard (from 4.6 pounds per person in 1970, to 2.2 pounds in 1990).<sup>26</sup>

No doubt for a variety of reasons—a reaction to the hedonism of the 1970s, growing concern for personal health and fitness, and a resurgence of social puritanism—Americans in the late 1970s became less enamored of drugs of most sorts and less inclined to use them. Only cocaine followed a somewhat different trajectory, with use peaking later (but still before the declaration of war), and then declining more steeply.

The steep decline in drug use was well known among public officials and drug policy scholars in the late 1980s when the drug wars were initiated. Although specialized statistical reports like those published by the National Institute on Drug Abuse are seldom seen or read by lay people or journalists, they are well known among professionals. Only the wilfully blind could have failed to know that no war was needed.

Something else was known about American drug policy that should have made government officials especially hesitant to

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<sup>25</sup> Bureau of the Census, *Statistical Abstract of the United States—1993* table 220 at 143 (1993).

<sup>26</sup> *Id.*

launch a war. Well-documented historical experience instructs that policymakers overreact in formulating and executing anti-drug policies at times when social mores are becoming less accepting of drug use and use is falling. David Musto, the leading historian of American drug policy, notes that "in the decline phase of drug use . . . [w]e tend to have an overkill, that is to say people become so righteous and so zealous that we can have excesses in the name of fighting drugs. There is very little opposition to draconian policies because no one wants to stand up for using drugs."<sup>27</sup>

Musto has described a cyclical pattern of American tolerance and intolerance of alcohol and drugs. At least three times since the beginning of the nineteenth century, the United States has moved from periods of widespread, tolerated, even approved recreational use of alcohol and drugs to puritanical periods of uncompromising prohibition. The first period of intolerance began in the 1820s and culminated in the prohibition of alcohol in a dozen states by the 1850s. The temperance movement of the late nineteenth century led to national Prohibition; more generalized intolerance of drug use and users produced the first major federal narcotics legislation, the Harrison Act of 1914, and the first federal marijuana law, the Marijuana Tax Act of 1937. The contemporary period of intolerance began around 1970, a cusp during which the United States Congress repealed most mandatory sentencing laws, many concerned with drug crimes, because they were too harsh, and as a result were too often evaded by judges and lawyers uncomfortable with imposing what they viewed to be unjust sentences. Also by 1970, however, the Nixon administration had declared its war on drugs. Within a few years, New York was widely portrayed as suffering a heroin "epidemic," which was followed in the 1980s by successive cocaine and crack epidemics in various parts of the country.<sup>28</sup>

Public tolerance of drug use has declined. Mandatory penalties for drug crimes have proliferated, and are now the harshest in the nation's history; many drug dealers now face mandatory prison terms of up to thirty years and life-without-possibility-of-parole, especially in the federal system and often in cases in

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<sup>27</sup> David Musto, in Jeffrey Roth, Michael Tonry, and Norval Morris, eds, *Drugs and Crime: Workshop Proceedings* 42 (1987) (report of the 1986 National Academy of Sciences Conference of Drugs and Crime Research).

<sup>28</sup> David Musto, *The American Disease: Origins of Narcotic Control* 244-77 (Oxford University Press, 1987).

which tiny amounts of drugs are involved. Indeed, the Supreme Court in *Harmelin v Michigan*<sup>29</sup> upheld the constitutionality of life sentences without possibility of parole for traffickers with no prior criminal record. Drug testing of an extent and intrusiveness that would have been unthinkable twenty years ago is now commonplace.

The important lesson to be drawn is not about the details of drug policy history, but about the cycles that characterize public tolerance of drug use. According to Musto, live-and-let-live attitudes prevailed during periods of tolerance, such as the 1890s and 1960s. In the 1890's, for example, cocaine and opium (including derivatives) were widely used in patent medicines, and cocaine was generally seen as a harmless recreational drug.<sup>30</sup> In the 1960s and 1970s, marijuana was widely and openly used; it and many hallucinogens were seen by many as recreational drugs that were less harmful than alcohol.<sup>31</sup>

During such periods of relative tolerance, traditional American notions of individualism and personal autonomy prevail, drug use is widely seen as only mildly, if at all, deviant, and people are comfortable arguing in favor of the benefits of drug use, for individuals' rights to make their own choices, and against state intrusion into people's private behavior. In periods of intolerance, by contrast, drug use is widely seen as deviant, and few people feel comfortable risking moral disapproval or stigmatization by arguing in favor of drug use or tolerance of drug users.<sup>32</sup>

The most intrusive laws and the cruelest penalties tend to be enacted *after* intolerance has reached its peak and when drug use is already falling.<sup>33</sup> That is when self-righteousness is most uncompromising and voices in favor of tolerance are least audible. Those with reservations, particularly elected officials, are reluctant to speak out for fear of being disparaged as "soft on drugs." And that is where the danger lies.

We know from personal experience that overreactions are likely when we are angry or overwrought. There are times when we are upset and our better judgment tells us that we are likely to act rashly or unfairly. Anger and emotion sometimes result in outraged letters which, our cooler self knows, should be put aside

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<sup>29</sup> 501 US 957 (1991).

<sup>30</sup> Musto, *The American Disease* at 3, 5 (cited in note 28).

<sup>31</sup> See *id.* at 264.

<sup>32</sup> See *id.* at 251.

<sup>33</sup> See *id.*

and reread tomorrow. When tomorrow comes, our cooler selves often win out and no letter is sent, or a different one is sent. Similarly, parents know that their own anger or tiredness or frustration can lead to overreaction to children's behavior. Either we listen to our doppelganger's warning to get hold of ourselves and not take out our frustrations on the child, or we do not, and we feel guilty afterwards. When we are angry or upset, we tend to overreact. In private life we try to restrain these impulses. In public life, another doppelganger is talking, but policymakers too seldom listen.

Musto has described the dynamic that characterizes a period of declining tolerance:

Soon the trend reverses; drug use starts to decline faster and faster. Public opinion turns against drugs and their acceptability begins to evaporate. Gradually, drug use becomes associated, truthfully or not, with the lower ranks of society, and often with racial and ethnic groups that are feared or despised by the middle class. Drugs begin to be seen as deviant and dangerous and become a potent symbol of evil.<sup>34</sup>

The key words are "drug use becomes . . . associated with the lower ranks of society and often with racial and ethnic groups that are feared or despised by the middle class." Throughout this century, in periods of high intolerance of drug use, minority group stereotypes have been associated with deviant drug use. Early in this century, although mainstream women were the modal category of opiate users, images of Chinese opium smokers and opium dens were invoked by opponents of drug use and form part of the backdrop to the Harrison Act.<sup>35</sup> Cocaine was also covered by the Harrison Act, in part, Musto reports, because of anti-black sentiments in the South and the fear that black users might "become oblivious of their prescribed bounds and attack white society."<sup>36</sup> In the 1930s, imagery linking Mexicans to marihuana use was prominent in the anti-marihuana movements that culminated in the Marijuana Tax Act of 1937 and in many state laws prohibiting marihuana use.<sup>37</sup> In the anti-drug hyste-

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<sup>34</sup> Daniel Kagan, *How America Lost Its First Drug War*, Insight 8 (Nov 20, 1989).

<sup>35</sup> Id at 10-13.

<sup>36</sup> Musto, *The American Disease* at 6 (cited in note 30).

<sup>37</sup> See, for example, Richard J. Bonnie and Charles H. Whitebread II, *The Marihuana Conviction: A History of Marihuana Prohibition in the United States* 72-76 (University Press of Virginia, 1974).



ria of the 1980s, crack cocaine, the emblematic drug of the latest war, is associated with disadvantaged minority residents of the inner cities.

Given what we know about past periods of intolerance of drug use and tendencies to scapegoat minority groups, and given that disadvantaged urban blacks are the archetypal users of crack cocaine, and therefore the principal possessors, sellers, and low-level distributors, anyone who knew the history of American drug policy would have foreseen that this war on drugs would target and mostly engage young disadvantaged members of minority groups as the enemy. And it has.

A policy that would foreseeably damage many young blacks and Hispanics was bad enough; this one, however, was worse than it appeared, because the damage to minority-group members would be inflicted primarily for the benefit of the great mass of mostly white, non-disadvantaged Americans. Explaining why requires some discussion of how laws influence behavior and a look back at our knowledge from NIDA surveys of drug use patterns since 1975.

Politicians proposing new, tougher laws tend to argue that longer sentences will deter or incapacitate prospective offenders. The research evidence on the deterrent and incapacitative effects of penalties is ambiguous and inconclusive,<sup>38</sup> but there is no basis for believing that altering penalties for most kinds of crime will significantly affect behavior. This is especially true of many drug crimes. Declining cocaine prices and the common experience that arrested dealers are replaced on the streets within days suggest that traditional law enforcement strategies are an ineffective way to diminish drug use.<sup>39</sup>

There is, however, a broader way to think about how criminal laws operate that goes back at least to Emile Durkheim, one of the nineteenth century pioneers of modern sociology. Durkheim proposed that laws operate in diffuse ways to define and reinforce social norms. The criminal laws define the outer limits of acceptable behavior, and they change over time and as different groups espousing different values achieve greater or lesser influence. In thinking about the effects of criminal laws, we

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<sup>38</sup> See *Report of the Panel on Research on Deterrent and Incapacitative Effects*, in Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Criminal Rates* 46 (National Academy Press, 1978).

<sup>39</sup> Peter Reuter, Robert MacCoun, and Patrick Murphy, *Money from Crime—A Study of Drug Dealing in Washington, D.C.* (Rand Corporation, 1990).

should look not simply to their direct short-term effects but also to what modern philosophers like the Norwegian Johannes Andenaes call their moral-educative effects. The announcement, application, and enforcement of laws have dramaturgical properties that are part of the process by which individuals' values and beliefs are shaped and sustained. Apprehension, trial, and punishment of wrongdoers bring home the inappropriateness of their behavior. Social learning occurs in part by example. Most people abstain from crime not because of the immediate threat of penalties but because they are socialized to believe that the behaviors are wrong; they are not the kind of people who are tempted (or tempted enough) to do such things. Thus, at least in part, criminal law shapes behavior not only through the short-term deterrent effects of legal threats but also dramaturgically by reinforcing values and norms that make people less likely to commit crimes.<sup>40</sup>

The notion that law affects behavior indirectly no doubt is correct, although at best it can only be a partial explanation of why people obey laws. However, it has the problem that it is amoral. If laws exist to underscore norms about the boundaries of legitimate behavior, legitimacy and hence criminality will depend on what groups' values are ascendant. In Germany in the 1930s, for example, Goebbels might have argued that laws forbidding political dissent and authorizing denial of legal and human rights of Jews should be vigorously enforced, not only to achieve short-term instrumental objectives, but also to help shape German mass public opinion to support the policies and credos of National Socialism.

Marxists argue that the class interests of those who control the means of production dominate government and that laws are biased in favor of the wealthy and their values. Hence, Anatole France's aphorism that the law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread. Similarly, feminists argue that many laws reflect traditional male domination of society and that government expresses "patriarchal" values and male interests. Members of minority groups argue that many laws reflect traditional white domination of society and government. Bias in favor of whites is illustrated by the contrast between aggressive enforcement and strict penalties for violent and common law property

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<sup>40</sup> David Garland, *Sociological Perspectives on Punishment*, in Michael Tonry, ed, 14 *Crime and Justice: A Review of Research* 115, 123 (University of Chicago Press, 1991).

crimes, which blacks disproportionately commit, and alleged half-hearted enforcement and trifling penalties for white collar financial and environmental crimes, which whites disproportionately commit.<sup>41</sup>

Laws, including criminal laws, are not disembodied timeless statements of eternal values. In the United States, it would be difficult to deny that politicians and officials respond to and represent the interests of the great mass of the population whose behavior is captured in the NIDA surveys. Thus it might be argued that the goal of the War on Drugs in an era in which drug use is declining is to reinforce values and norms that are influencing the decline and, through dramas of crime and punishment, repeatedly to affirm that drug use is immoral and wrong. That argument assumes, however, that there are no competing values that are violated by the use of law to shape norms. There are.

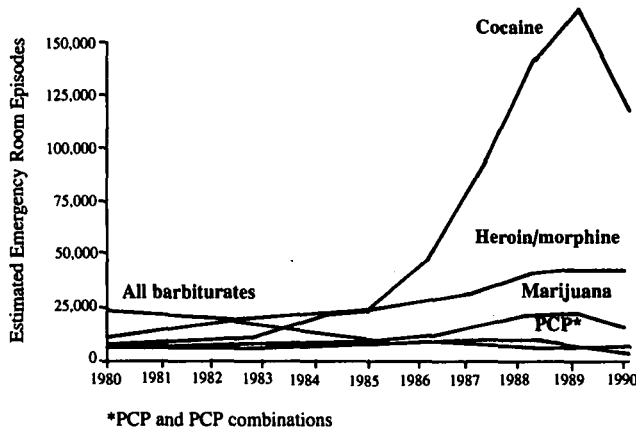
The moral problem with the rationale of the War on Drugs as an exercise in moral education is that it destroys the lives of young people, principally members of minority groups, in order to reinforce existing norms of the political majority, most of whom are white. Put crudely if explicitly, the lives of black and Hispanic ghetto kids have been destroyed in order to reinforce white kids' norms against drug use.

At the same time that the NIDA surveys were showing broad-based declines in drug use in the late 1980s, two other drug use indicators, drug-related admissions to hospital emergency rooms and urinalyses of felony defendants across the country, suggested stable or rising levels of drug use. Figure 1-7, based on a NIDA-sponsored reporting program called the Drug Abuse Warning Network ("DAWN"), shows drugs involved in drug-related emergency room admissions in hospitals in metropolitan areas from 1980 to 1990. Contrary to the patterns shown in the NIDA surveys, the DAWN data indicate that mentions of cocaine, heroin, and marihuana increased slowly but steadily through mid-decade, and rapidly thereafter.

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<sup>41</sup> See, for example, Clarence Lusane, *In Perpetual Motion: The Continuing Significance of Race and America's Drug Crisis*, 1994 U Chi Legal F 83, 95-102.

Figure 1-7



Source: Bureau of Justice Statistics, *Drugs, Crime and the Justice System* 11 (1992).

The differences between the NIDA and DAWN data series may be less surprising than initially appears. People admitted to hospital emergency wards are, after all, likely to be the heaviest abusers of drugs. Data from a number of sources suggest that three to five years typically separate the initiation of drug use from the onset of acute medical disorders.<sup>42</sup> If that is so, the peak of cocaine emergency room admissions in 1988 followed by a decline in 1989 is consistent with peaks in self-reported use in 1985, with declines afterward.

Even greater discrepancies with the NIDA survey findings are revealed by urinalyses of felony arrestees conducted in American cities since 1987 as part of the Justice Department's Drug Use Forecasting program ("DUF"). The DUF data show astonishingly high levels of drug use. Up to 80 percent of arrestees test positive in some cities.<sup>43</sup> Table 1-1 shows 1991 findings on positive urinalyses for male arrestees in twenty-three cities in 1991 for any drug, for cocaine, for marijuana, and for heroin. Positive test results for any drug ranged from a high in San Diego of 75 percent to a low in Omaha of 36 percent, and for cocaine ranged downward from highs of 62 percent in Manhattan and Philadel-

<sup>42</sup> Denise B. Kandel, *The Social Demography of Drug Use*, 69 *The Milbank Quarterly* 380, 383 (1991).

<sup>43</sup> *Drug Use Forecasting: 1991 Annual Report: Drugs and Crime in America* 30-31 (National Institute of Justice, 1992).

phia. Table 1-2 provides comparable data for female arrestees and shows even higher levels of positive test results, ranging from a high of 79 percent in Cleveland for any drug to a low of 45 percent in San Antonio, and ranging from a high of 76 percent for cocaine in Cleveland, to a low of 25 percent in San Antonio.

Table 1-1

Percent of Male Arrestees Testing Positive by  
Urinalysis for Any Drug, Cocaine, Marijuana, Heroin, 1991

<u>City</u>	<u>Any Drug</u>	<u>Cocaine</u>	<u>Marijuana</u>	<u>Heroin</u>
Atlanta, GA	63 %	57 %	12 %	3 %
Birmingham, AL	63	52	16	5
Chicago, IL	74	61	23	21
Cleveland, OH	56	48	12	3
Dallas, TX	56	43	19	4
Denver, CO	50	30	25	2
Detroit, MI	55	41	18	8
Fort Lauderdale, FL	61	44	28	1
Houston, TX	65	56	17	3
Indianapolis, IN	45	22	23	3
Kansas City, MO	53	37	18	1
Los Angeles, CA	62	44	19	10
Manhattan, NYC	73	62	18	14
Miami, FL	68	61	23	2
New Orleans, LA	59	50	16	4
Omaha, NE	36	14	26	2
Philadelphia, PA	74	62	18	11
Phoenix, AZ	42	20	22	5
Portland, OR	61	30	33	9
St. Louis, MO	59	48	16	6
San Antonio, TX	49	31	20	16
San Diego, CA	75	45	33	17
San Jose, CA	58	33	25	8
Washington, DC	59	49	11	10

Note: Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepines, barbiturates, and propoxyphene.

Source: National Institute of Justice Research, *Drug Use Forecasting—1991: Annual Report* (1992).

Table 1-2  
 Percent of Female Arrestees Testing Positive by  
 Urinalysis for Any Drug, Cocaine, Marijuana, Heroin, 1991

City	Any Drug	Cocaine	Marijuana	Heroin
Atlanta, GA	70 %	66 %	8 %	4 %
Birmingham, AL	62	44	10	11
Chicago, IL	-	-	-	-
Cleveland, OH	79	76	7	6
Dallas, TX	56	45	11	9
Denver, CO	54	41	16	2
Detroit, MI	68	62	4	11
Fort Lauderdale, FL	64	55	14	4
Houston, TX	59	52	8	4
Indianapolis, IN	54	26	22	11
Kansas City, MO	64	56	13	4
Los Angeles, CA	75	62	9	18
Manhattan, NYC	77	66	11	21
Miami, FL	-	-	-	-
New Orleans, LA	50	42	7	7
Omaha, NE	-	-	-	-
Philadelphia, PA	75	64	14	9
Phoenix, AZ	61	45	14	17
Portland, OR	68	40	28	17
St. Louis, MO	54	47	8	7
San Antonio, TX	45	25	9	21
San Diego, CA	73	40	20	21
San Jose, CA	52	30	13	7
Washington, DC	75	68	6	16

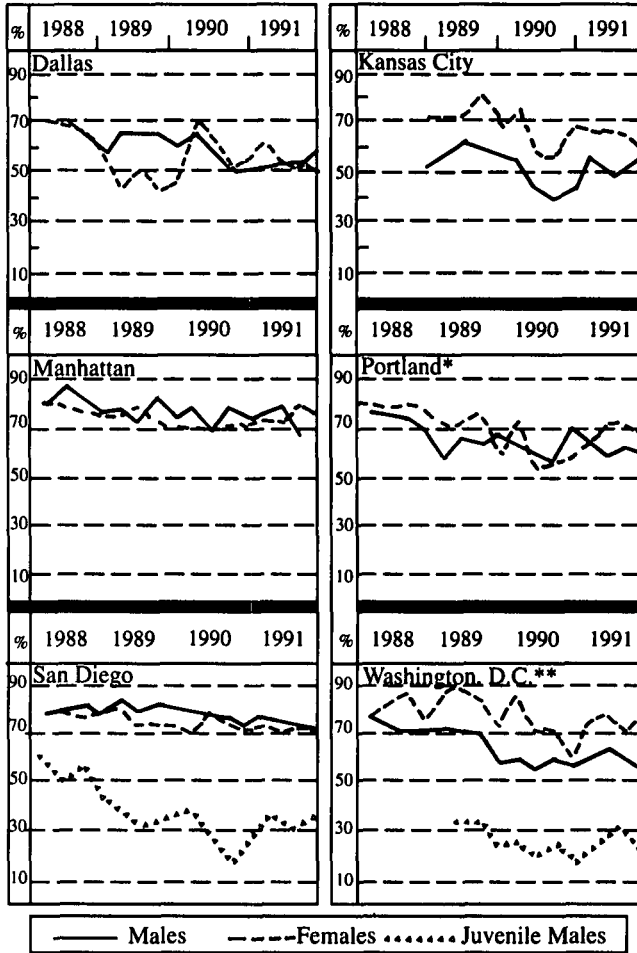
Note: Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepines, barbiturates, and propoxyphene.

Source: National Institute of Justice Research, *Drug Use Forecasting—1991: Annual Report* (1992).

The patterns shown by the 1991 DUF data are remarkably stable. Figure 1-8 shows positive drug urinalysis test results for booked felony arrestees in Dallas, Kansas City, Manhattan, San Diego, Portland, Oregon, and Washington, D.C. for 1988 to 1991. These six cities were picked because they represent all regions of

the country. Although the proportions of positive test results among arrestees vary between cities—around 80 percent in Manhattan, 60 percent in Portland and Dallas, and 50 percent in San Antonio—within any single city they are either stable or declining slightly.

Figure 1-8



Notes: Positive by urinalysis. Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepines, barbiturates, and propoxyphene. Gaps on graph represent periods when data were not collected.  
 \* Prior to 1991, site did not test for all 10 drugs (listed above).  
 \*\* 1988 Washington, D.C. data based on arrestees tested by D.C. Pretrial Services Agency. Drugs tested for by the agency include cocaine, opiates, PCP, amphetamines, and methadone. Data collected after 1988 are from the DUF program.

Source: National Institute of Justice Research, *Drug Use Forecasting—1991: Annual Report* (1992).

Most felony defendants, whatever their race, tend to be poor, ill-educated, un- or underemployed, and not part of a stable household. Disproportionately, they are black. In 1990, for example, 29 percent of all felony arrests were of blacks, as were 44 percent of persons arrested for violent index offenses, and 58 percent of persons arrested for the three most serious crimes—murder, rape, and robbery.<sup>44</sup> Similar patterns hold among arrestees included in the DUF program. Table 1-3 shows positive test results, by race, for males in the twenty-three DUF cities in 1991 for any drug, and for cocaine, marihuana, and heroin. In no city is the percentage of whites testing positive for any drug or for cocaine higher than the black percentage (although they are equal or close in some sites), most probably a result of the different offenses for which people of different races are arrested. A larger percentage of whites than blacks are arrested for relatively less serious property crimes which are less strongly associated with drug-using subcultures. It is reasonable to hypothesize that blacks and whites arrested for comparable crimes and who have comparable criminal records would exhibit comparable patterns of drug use (although perhaps they would use different drugs because of differing subcultural preferences).

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<sup>44</sup> Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* table 4.9 at 444 (1992).



Table 1-3  
Percent of Male Arrestees, by Race Testing Positive  
by Urinalysis for Any Drug, Cocaine, Marijuana, Heroin, 1991

City	Any Drug			Cocaine			Marijuana			Heroin			
	Black 65 %	White 48 %	Hispanic -	Black 59 %	White 33 %	Hispanic -	Black 2 %	White 20 %	Hispanic -	Black 3 %	White 4 %	Hispanic -	Other -
Atlanta, GA	66	55	-	59	27	-	13	27	-	2	13	-	-
Birmingham, AL	75	72	72	63	60	53	23	20	30	23	16	11	-
Chicago, IL	61	41	44	56	21	38	10	21	15	3	2	0	-
Cleveland, OH	59	55	45	50	35	30	18	24	20	4	6	3	-
Dallas, TX	61	41	49	47	16	25	22	25	31	1	*	3	0
Denver, CO	56	49	-	41	40	-	19	9	-	8	12	-	-
Detroit, MI	71	53	41	58	32	26	29	28	26	1	2	3	-
Fort Lauderdale, FL	77	59	41	70	49	29	16	17	18	3	4	4	-
Houston, TX	45	44	-	30	10	-	18	29	-	4	2	-	-
Indianapolis, IN	56	41	-	43	16	-	17	20	-	1	2	-	-
Kansas City, MO	77	65	51	63	27	38	17	28	17	10	11	9	0
Los Angeles, CA	77	74	68	68	59	54	17	17	19	12	20	16	-
Manhattan, NYC	76	57	56	70	44	40	26	17	17	2	7	1	-
Miami, FL	60	51	-	54	28	-	16	18	-	4	4	-	-
New Orleans, LA	44	32	31	23	6	10	27	25	24	1	2	0	0
Omaha, NE	75	65	76	66	41	68	17	24	19	8	15	22	-
Philadelphia, PA	53	43	37	41	17	15	16	24	22	4	6	4	8
Phoenix, AZ	66	58	73	46	18	64	27	37	19	9	8	19	3
Portland, OR	60	54	-	53	26	-	12	36	-	6	5	-	-
St. Louis, MO	55	48	48	45	18	30	22	26	18	2	9	21	-
San Antonio, TX	79	74	75	59	22	54	29	35	36	11	12	25	0
San Diego, CA	72	59	56	54	25	33	35	32	21	5	8	8	3
San Jose, CA	60	49	-	51	26	-	11	18	-	10	22	-	-
Washington, DC													

Note: Drugs tested for include cocaine, opiates, PCP, marijuana, amphetamines, methadone, methaqualone, benzodiazepines, barbiturates, and propoxyphene. \* = less than 20 cases.

Source: National Institute of Justice Research, *Drug Use Forecasting—1991: Annual Report* (1992).

If such large percentages of arrestees in the DUF program test positive for drugs, and nearly half of those arrested for the most serious crimes in the United States are black, that must mean that drug use among some black groups has remained high. Moreover, the DUF data show drug use levels that held stable or declined slightly from 1988 to 1991 while the NIDA surveys showed steady declines in self-reported use. How can those patterns be reconciled with the NIDA surveys? We now know the answer: they cannot.

It is now well understood that the NIDA surveys, although they are a reasonably reliable indicator of drug use by most Americans, are not based on a representative sample of the American population. Like the decennial population counts of the United States Bureau of the Census and the ongoing National Crime Victimization Survey conducted for the Department of Justice, the NIDA surveys undercount young, mobile, inner-city people. This means that all three purportedly representative surveys miss large numbers of minority men and women living in American cities. The nature of the NIDA surveys probably exacerbates this problem. The high school surveys are of high school seniors; they miss young people who leave school before their senior year.<sup>45</sup> Even among registered seniors, truancy rates are high among disadvantaged students. Students absent when surveys are administered are likely disproportionately to include disadvantaged minority youth.<sup>46</sup> The broadest survey, the National Household Survey on Drug Abuse, carefully describes its effort as an attempt "to measure the prevalence of drug use among the American *household* population aged 12 and over."<sup>47</sup> It therefore excludes the homeless, people with no permanent residence, and people institutionalized in jails and prisons. The homeless include higher-than-normal percentages of drug users.<sup>48</sup> Those without permanent residences or in jails or prisons are disproportionately young, poor, and members of minority groups.<sup>49</sup>

The NIDA surveys and other indicators of drug use like DAWN and DUF are not inconsistent. They simply measure dif-

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<sup>45</sup> 1992 *Sourcebook* at 718 (cited in note 2).

<sup>46</sup> See *id.* at 720.

<sup>47</sup> National Institute on Drug Abuse, *National Household Survey on Drug Abuse: Population Estimates—1990* 1 (1991).

<sup>48</sup> Gerstein and Harwood, *Treating Drug Problems* at 84 (cited in note 6).

<sup>49</sup> See 1992 *Sourcebook*, table 6.78 at 630, table 6.87 at 639 (cited in note 2); Jamshid A. Momeni, ed, *Homelessness in the United States* 136 (Greenwood Press, 1989).

ferent things. Several years ago, Senator Joseph Biden, Democratic Chairman of the United States Senate Judiciary Committee, and William Bennett, then head of the White House Office of National Drug Control Policy, fought a drug policy duel using little-read government reports as weapons. Bennett, using NIDA data, claimed that the Bush administration was winning its drug war.<sup>50</sup> Biden riposted, citing DAWN and DUF data, and claimed that drug abuse was as bad as ever or worse.<sup>51</sup>

Biden and Bennett were both right. Among the more than 95 percent of the population whose experience is reliably captured by the NIDA surveys, drug use in the 1980s was declining.<sup>52</sup> Among disadvantaged young people in the inner cities, especially in minority areas of highly concentrated poverty, drug use was either not declining or not declining as much, and this was captured by the DUF and DAWN data.

The drug use indicators measure different phenomena, not unlike the way different oceanographic instruments measure deep currents and surface perturbations. In the deep currents of evolving values and norms, Americans in the 1980s were moving away from use of drugs and other substances perceived as harmful. At the surface, fierce storms were raging. By a variety of measures, including the concentration of urban poverty, labor force participation, illegitimate births, single-parent households, and general deterioration of neighborhoods, things were getting worse in the inner city in the late 1980s. Increased drug abuse and drug-related crimes were not unforeseeable correlates and consequences.

In the longer term, the deeper currents will likely affect most segments of the population. The social traumas affecting minority underclass areas buffered those attitudinal changes for some time, but eventually they should show up in reduced drug use. Already there are slight indications in the DUF urinalysis data (see Figure 1-8) of a downturn in positive drug tests among arrestees. Because there are no long-term drug-use surveys of youth in disadvantaged ghetto communities, long-term patterns cannot be documented. However, data on the high-risk group of truants show declines in drug use paralleling those of non-truants.<sup>53</sup>

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<sup>50</sup> ONDCP, *1990 National Drug Control Strategy* 1 (1990).

<sup>51</sup> Majority Staffs of the Senate Judiciary Committee and the International Narcotics Control Commerce, *Fighting Drug Abuse: A National Strategy* 11 (1990).

<sup>52</sup> See Figures 1-1 to 1-6.

<sup>53</sup> Kandel, *Social Demography* at 390 (cited in note 42).

Newspapers like the *New York Times* and the *Washington Post* have recently begun carrying stories reporting that drug use is falling out of favor with disadvantaged members of minority groups. A *Washington Post* story in 1993, for example, was titled "N.Y. Crack Epidemic Appears to Wane; Seeing Drug's Destructiveness, Younger People are Turning Away."<sup>64</sup>

The white-shirted-and-suspended officials of the Office of National Drug Control Policy understood the arcane intricacies of NIDA surveys, DUF, and DAWN better than anyone else in the United States. They knew in 1988 and 1989 that drug use was declining among the vast majority of the population. They knew that drug use was not declining among disadvantaged members of the urban underclass. They knew that the War on Drugs would primarily be fought in minority areas of American cities and that those arrested and imprisoned would disproportionately be young blacks and Hispanics. If the criminal law's *mens rea* equation of purpose with knowledge were applied to their decision to launch the War, knowing its likely effects on black Americans, the moral indictment would be nearly unanswerable: they knew exactly what they were doing, and they knew that blacks were likely to bear the War's brunt.

## II. THE HAVOC THE WAR HAS WROUGHT

The crucial question is whether the planners of the War on Drugs ought to be held morally accountable for the havoc they have wrought among the disadvantaged members of minority groups. The answer is that they should. This section explains why.

Two sets of issues arise. First, were the disparate impacts on black Americans foreseeable? The only possible answer, as the data presented in the following sections demonstrate beyond peradventure of doubt, is *yes*, they knew what they were doing. Second, setting aside the War's disparate impact implications, were there valid grounds for believing that the War's prohibitionistic approach would diminish drug trafficking and drug use? The answer is that there were no valid bases for believing that the War would accomplish its ostensible objectives.

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<sup>64</sup> Malcolm Gladwell, *N.Y. Crack Epidemic Appears to Wane: Seeing Drug's Destructiveness, Younger People are Turning Away*, *Washington Post* A1 (May 31, 1993).

### A. The Foreseeable Disparate Impact on Blacks

Urban black Americans have borne the brunt of the War on Drugs. They have been arrested, prosecuted, convicted, and imprisoned at increasing rates since the early 1980s, grossly out of proportion to their numbers in the general population or among drug users. By every standard, the War has been harder on blacks than on whites; that this was foreseeable makes it no less regrettable.

The drugs primarily targeted by the War—cocaine and more recently crack—are notoriously used and distributed in the inner city. The political symbolism of cocaine has been high since the mid-1980s. The United States invaded Panama in part because Manuel Noriega was believed to be cooperating with Colombian drug-lords.<sup>55</sup> In the United States, the Medellin and Cali cartels are among the best-known foreign business enterprises. Newspapers, television, and movies regularly portray trafficking in cocaine and crack as characteristic of inner-city minority neighborhoods. Any minimally informed person in the late 1980s knew that the major fronts in the drug wars were located in minority neighborhoods.

Even if media stereotypes did not focus the drug war on minority neighborhoods, institutional characteristics of urban police departments would have led to a tactical focus on disadvantaged minority neighborhoods. For a variety of reasons, it is easier to make arrests in socially disorganized neighborhoods than in urban blue collar and urban or suburban white collar neighborhoods. First, more of the routine activities of life, including retail drug-dealing, occur on the streets and alleys in poor neighborhoods. In working-class and middle-class neighborhoods, many activities including drug deals are likelier to occur indoors. This difference means that it is much easier for police to find dealers from whom to make an undercover buy in a disadvantaged urban neighborhood than elsewhere.

Second, because of social disorganization in poor urban minority neighborhoods, it is easier for undercover narcotics officers to penetrate networks of friends and acquaintances than in more stable and closely knit working-class and middle-class neighborhoods. The stranger buying drugs on the urban street corner or in an alley, or overcoming local suspicions by hanging around for

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<sup>55</sup> Linda P. Campbell, *Noriega Surrenders to US: Obstacles May Hinder Prosecution*, Chi Trib 3-1 (Jan 4, 1990).

a few days and then buying drugs, is commonplace. The substantial increases in the numbers of black and Hispanic police officers in recent decades make undercover narcotics work in such neighborhoods easier. A policeman of Irish or Polish descent in the 1960s was much less likely to be successful working undercover in a minority neighborhood than is a black policeman today working in Chicago's Woodlawn area or an Hispanic policeman in South Los Angeles.

A stranger trying to buy drugs in the working-class Highland Park neighborhood around the Ford plant in St. Paul, Minnesota, or in Highland Park, Illinois, a middle-class suburb of Chicago, is likely to have much less success. Drugs are used and sold in both places, but seldom in the streets and not to strangers. Police undercover operations can succeed in such places, but they take longer, cost more, and are less likely to succeed.

Both of these differences between socially disorganized urban neighborhoods and other neighborhoods make extensive drug law enforcement operations in the inner city more likely and, by police standards, more successful. Because urban drug-dealing is often visible, individual citizens, the media, and elected officials more often pressure police to take action against drugs there than in other kinds of neighborhoods. Although wholesale drug arrests are seldom strategically successful in reducing drug use or trafficking, they briefly disrupt the drug markets and win media and public approval.<sup>56</sup>

There is another more powerful reason why the police focus their attention on the inner city. Both for individual officers and for departments, numbers of arrests have long been a conventional measure of productivity and effectiveness. If it takes more work and time to make a single drug arrest in Highland Park than in Woodlawn, the trade-off may be between two arrests per month of an officer's time in Highland Park and eleven arrests per month in Woodlawn. From the perspectives of the individual officer's personnel record and the department's year-to-year statistical comparisons, arrests are fungible, and eleven arrests count for more than two. A primary reason, therefore, for the relatively higher rate of drug arrests in disorganized minority communities than elsewhere is that they are easier to make.

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<sup>56</sup> Lawrence W. Sherman, *Police Crackdowns: Initial and Residual Deterrence*, in Michael Tonry and Norval Morris, eds, *12 Crime and Justice: A Review of Research* 1, 3, 17 (University of Chicago Press, 1990).

Somewhat surprisingly, I am told by leading drug policy experts that there is no literature that confirms or contradicts this analysis, or that considers why police target drug law enforcement on minority communities. There are ethnographic and economic literatures on urban drug markets, and there are police and policy literatures on the tactics of street-level law enforcement and undercover narcotics work. The ethnographic literature documents the porousness of urban drug markets and, with the economic literature, it explains why arrested dealers are nearly always quickly replaced by successors willing to accept the risks; but neither sheds light on police tactics. The police and policy literatures explain how and why narcotics enforcement operates, but shed no light on why the emphasis of this enforcement is so much more often on the Woodlawn of America than on the Highland Parks.<sup>57</sup>

Experienced police officials and prosecutors do not disagree with this analysis. Former Kansas City prosecutor Albert Riederer, for example, is the first person who offered this analysis to me. Alfred Blumstein, in a 1993 analysis of the War on Drugs, offered a similar analysis and, because of the absence of literature on this issue, cited "personal communication with several individuals involved in drug-related police work."<sup>58</sup> Likewise, the police chief in Charlottesville, Virginia, justifying police targeting of casual drug dealing in University of Virginia fraternities, observed that anti-drug efforts were "directed mainly at minorities living in poor inner-city neighborhoods."<sup>59</sup>

Regardless of the reason why it happens, the police emphasis on disorganized minority neighborhoods produces racial arrest rates that do not mirror racial proportions in drug use. Figure 2-1 shows the percentages of blacks and whites among drug arrestees reported in the FBI's Uniform Crime Reports for the years 1976 to 1990. The black percentage climbed steadily throughout the period, and by two-fifths—from 30 to 42 percent of the total—between 1985 and 1989. Because the absolute number of arrests was also increasing, the number of arrests of blacks grew even faster. As Table 2-1 shows, between 1985 and 1989 the

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<sup>57</sup> See Reuter, MacCoun, and Murphy, *Money from Crime* (cited in note 39).

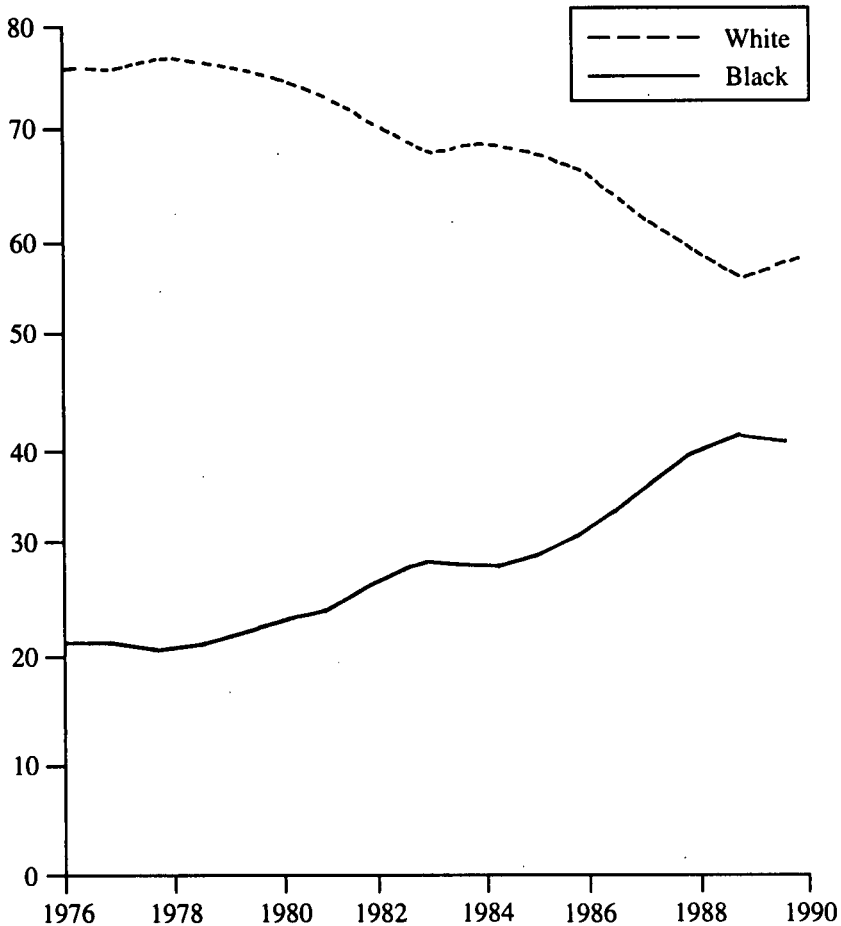
<sup>58</sup> Alfred Blumstein, *Making Rationality Relevant-The American Society of Criminology 1992 Presidential Address*, 31 *Criminol* 1, 4 n 3 (Feb 1993).

<sup>59</sup> B. Drummand Ayers, *Drug Charges Embarass University of Virginia*, *NY Times* 1-26 (Mar 24, 1991).

number of black arrests more than doubled, from 210,298 to 452,574. The number of white arrests grew by only 27 percent.

Figure 2-1

Percent U.S. Drug Abuse Violations, by Race, 1976-90



Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1978*, table 4.7 at 485 (1979) (“1978 Sourcebook”); 1979 *Sourcebook*, table 4.7 at 467; 1980 *Sourcebook*, table 4.7 at 345; 1981 *Sourcebook*, table 4.7 at 351; 1982 *Sourcebook*, table 4.7 at 403; 1983 *Sourcebook*, table 4.7 at 431; 1984 *Sourcebook*, table 4.8 at 483; 1985 *Sourcebook*, table 4.8 at 422; 1987 *Sourcebook*, table 4.8 at 378; 1988 *Sourcebook*, table 4.9 at 494; 1989 *Sourcebook*, table 4.9 at 432; 1990 *Sourcebook*, table 4.9 at 424; 1991 *Sourcebook*, table 4.9 at 445.



Table 2-1

## U.S. Drug Abuse Violations by Race, 1976-90

<u>Year</u>	<u>Total Violations</u>	<u>White</u>	<u>White %</u>	<u>Black</u>	<u>Black %</u>
1976	475,209	366,081	77	103,615	22
1977	565,371	434,471	77	122,594	22
1978	592,168	452,728	78	127,277	21
1979	516,142	396,065	77	112,748	22
1980	531,953	401,979	76	125,607	24
1981	584,776	432,556	74	146,858	25
1982	562,390	400,683	71	156,369	28
1983	615,081	423,151	69	185,601	30
1984	560,729	392,904	70	162,979	29
1985	700,009	482,486	69	210,298	30
1986	688,815	463,457	67	219,159	32
1987	809,157	511,278	63	291,177	36
1988	844,300	503,125	60	334,015	40
1989	1,074,345	613,800	57	452,574	42
1990	860,016	503,315	59	349,965	41

Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1978* table 4.7 at 485 (1979) ("1978 Sourcebook"); 1979 *Sourcebook* table 4.7 at 467; 1980 *Sourcebook* table 4.7 at 345; 1981 *Sourcebook* table 4.7 at 351; 1982 *Sourcebook* table 4.7 at 403; 1983 *Sourcebook* table 4.7 at 431; 1984 *Sourcebook* table 4.8 at 483; 1985 *Sourcebook* table 4.8 at 422; 1986 *Sourcebook* table 4.8 at 422; 1987 *Sourcebook* table 4.8 at 378; 1988 *Sourcebook* table 4.9 at 494; 1989 *Sourcebook* table 4.9 at 432; 1990 *Sourcebook* table 4.9 at 424; 1991 *Sourcebook* table 4.9 at 445.

The arrest percentages by race bear no relation to drug use percentages, as table 2-2 shows. Black Americans are less likely to have used drugs in their lives than whites for all major drugs of abuse except heroin. In 1990, for example, a year in which 41 percent of drug arrestees were black, NIDA's national household survey on drug abuse reported that only 10 percent of blacks reported that they had *ever* used cocaine (compared with 11.7 percent of whites and 11.5 percent of Hispanics), 1.7 percent reported *ever* using heroin (compared with 0.7 percent of whites and 1.2 percent of Hispanics), 31.7 percent reported *ever* using marijuana (compared with 34.2 percent of whites and 29.6 percent of Hispanics), 3.0 percent reported *ever* using hallucinogens (compared with 8.7 percent of whites and 5.2 percent of Hispan-

ics), and 76.6 percent reported *ever* using alcohol (compared with 85.2 percent of whites and 78.6 percent of Hispanics).<sup>60</sup>

The data presented in Table 2-2 on cocaine use within the last year and the last month do show higher levels of self-reported use by blacks than by whites. Arguably, recent user percentages are a better comparison to arrest percentages than are the "ever-used" percentages. However, because the absolute number of blacks is roughly one-seventh the number of whites, even the recent user data cannot explain racial arrest patterns. Six-tenths of one percent of 200 million whites would result in 1.2 million cocaine users, compared with 1.7 percent of 30 million blacks, or 510,000 users. This comparison is exaggerated because it does not adjust for children and the elderly. Nonetheless, the 12:5 ratio should be right. It would explain a black arrest percentage under 30 percent, as it was before the mid-1980s. It would not explain why blacks are 41 or 42 percent of persons arrested for drug crimes.

Table 2-2

## U.S. Percent Drug Use, by Race, 1990

	Alcohol			Marijuana			Cocaine			Hallucinogens	Heroin
	Ever used	Most Recent Use		Ever used	Most Recent Use		Ever used	Most Recent Use		Ever used	Ever used
		Within last year	Within last 30 days		Within last year	Within last 30 days		Within last year	Within last 30 days		
White	85.2	68.3	53.1	34.2	10.1	5.0	11.7	2.8	0.6	8.7	0.7
Black	76.6	55.6	43.7	31.7	11.2	6.7	10.0	4.0	1.7	3.0	1.7
Hispanic	78.6	64.5	47.1	29.6	10.9	4.7	11.5	5.2	1.9	5.2	1.2

Source: Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* tables 3.103, 3.104, 3.105, at 344-46 (1979).

Earlier, in explaining why the NIDA surveys are not fully representative of the United States population, I pointed out that they undercount disadvantaged and minority populations including mobile young people, the homeless, and people in correctional and mental health institutions. Since nearly half of prison and jail inmates are black,<sup>61</sup> and half to three-quarters of arrested felons are drug users,<sup>62</sup> adding these people into the NIDA surveys would increase the black "ever-used" percentages. However, the increases are unlikely to be large. As Table 1-3 shows, the absolute levels of positive test results for heroin among black arrestees in most DUF sites were low, and were generally lower

<sup>60</sup> 1991 *Sourcebook*, tables 3.103-3.105 at 356-58 (cited in note 44).

<sup>61</sup> See 1992 *Sourcebook*, table 6.78 at 630, table 6.87 at 639 (cited in note 2).

<sup>62</sup> See table 1-1 at page 44.

than those for white arrestees. Positive results for cocaine were high, and higher than those for whites, but the rates for whites, especially women, were substantial. Including the confined population in NIDA's household survey would raise reported drug use levels among blacks, but would also raise reported drug use levels among whites (though not as much; prisoners are a much smaller percentage of the white than of the black population).

The 1990 census, in what is acknowledged to be an undercount, reported that thirty million Americans in 1990 were black.<sup>63</sup> Over a half million blacks were in prison or jail on an average day in 1988.<sup>64</sup> If all of them were cocaine users, they would increase the estimated three million blacks (10 percent of thirty million) who have ever used cocaine by 17 percent, which might lift black "ever-used" rates to about the white and Hispanic levels. The largest estimates of the black underclass in the social welfare literature are around three million.<sup>65</sup> Even if all these people are unrepresented in the NIDA surveys and a third of them use drugs, both of which are unlikely, their inclusion would not raise the "ever-used" percentages substantially. The adjustment might raise black "ever-used" percentages for alcohol, marihuana, and cocaine to the white levels; the hallucinogen gap, however, looks too large to bridge.

Drug arrests are a principal reason why the proportions of blacks in prison, and more generally under criminal justice system control, have risen rapidly in recent years to the extraordinary levels indicated in Figures 2-2 and 2-3 (which show the percentages of blacks and whites among persons admitted to prisons and in prison on census dates over extended periods). The black percentages climbed slowly for several decades but rapidly after 1980.

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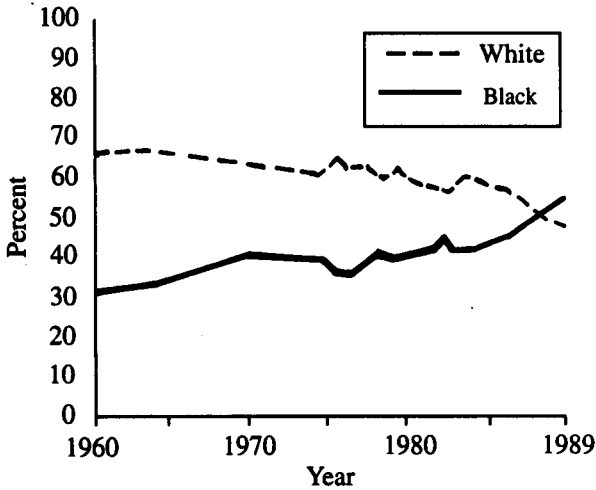
<sup>63</sup> *Statistical Abstract 1993*, table 12 at 14 (cited in note 25).

<sup>64</sup> *1992 Sourcebook*, table 6.38 at 596 (cited in note 2).

<sup>65</sup> See generally *Blacks in Poverty: An 'Underclass Exists,' But It's Small and Growing Slowly* *Researchers Say*, *St Louis Post-Dispatch* 6A (Feb 24, 1991).

Figure 2-2

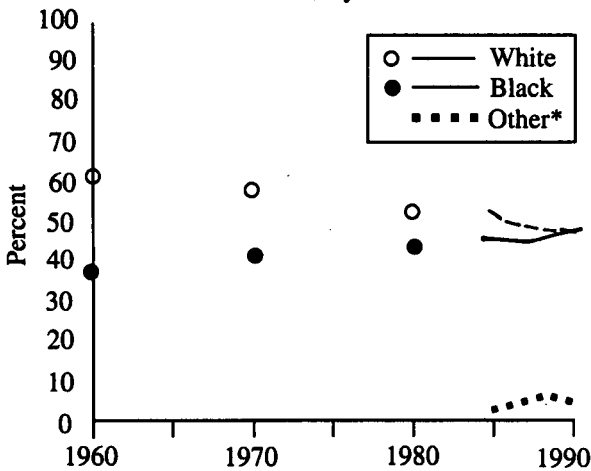
Admissions to Federal and State Prisons by Race, 1960-89



Source: Patrick A. Langan, *Race of Prisoners Admitted to State and Federal Institutions, 1926-86* 5 (Bureau of Justice Statistics, 1991); Bureau of the Census, *Statistical Abstract of the United States—1993* 210 (1993).

Figure 2-3

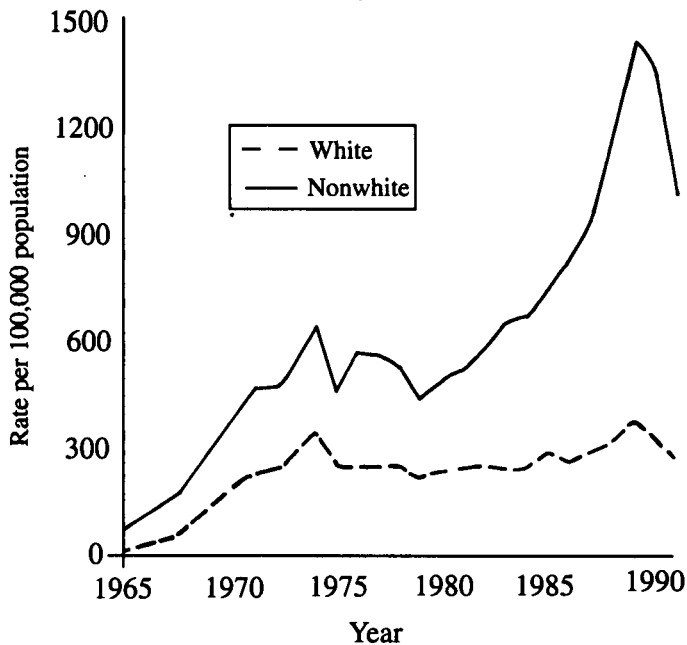
Prisoners in State and Federal Prisons on Census Date, By Race, 1960-90



\* Hispanics in many states, also Asians, Native Americans  
 Source: Patrick A. Langan, *Race of Prisoners Admitted to State and Federal Institution, 1926-86* (Bureau of Justice Statistics, 1991); Bureau of the Census, *Statistical Abstract of the United States—1993* 210 (1993); Bureau of the Census, *Statistical Abstract of the United States—1971* 155 (1993).

The pattern of increasing black percentages is apparent in both aggregate national data and state data on arrests. Figure 2-4 shows national arrest rates per 100,000 people for whites and non-whites from 1965 to 1991. Non-white rates are higher than white rates, usually at least double, throughout that period. From the early 1970s onward, white drug arrest rates were basically stable, fluctuating at about 300 per 100,000. After 1980, non-white rates rose steadily and then skyrocketed until they were five times higher than white rates by 1988.

Figure 2-4  
Arrest Rates for Drug Offenses,  
Juveniles, by Race, 1965-91

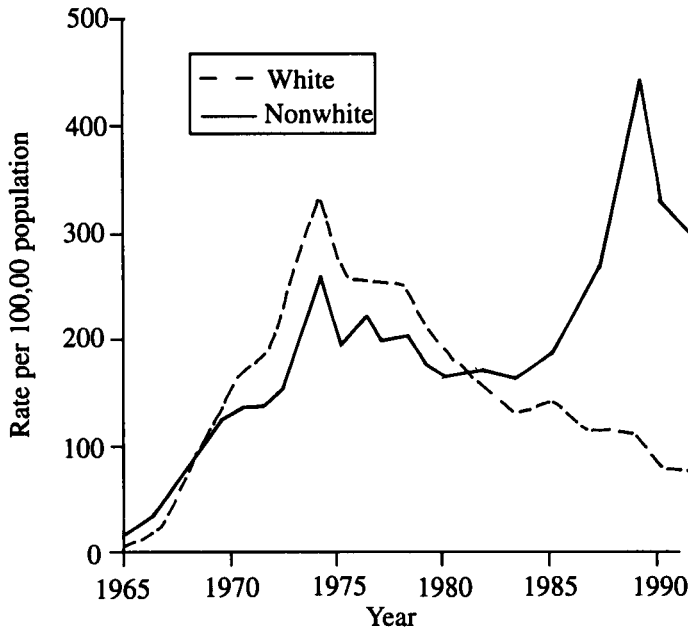


Source: Alfred Blumstein, *Making Rationality Relevant - The American Society of Criminology 1992 Presidential Address*, 31 *Criminology* 1, 16 (1993).

A more striking pattern of racial disparity is evident when juvenile drug arrests by race are examined. Alfred Blumstein, long-time dean of the Heinz School of Public Policy and Management at Carnegie-Mellon University, and America's leading authority on racial trends in criminal justice statistics, presented Figure 2-5 as part of a 1992 presidential address to the American

Society of Criminology.<sup>66</sup> White arrest rates for juvenile drug offenses were higher than those for black juveniles from the late 1960s to the early 1980s, although both rates fell sharply after 1974. After the early 1980s, white arrest rates continued to drop.

Figure 2-5  
Arrest Rates for Drug Offenses,  
Juveniles, by Race, 1965-91



Source: Alfred Blumstein, *Making Rationality Relevant—The American Society of Criminology 1992 Presidential Address*, 31 *Criminology* 1, 16 (1993).

Black rates shot up until the late 1980s when they were four to five times higher than white rates. Blumstein’s “our kids, their kids” explanation for those trends is that drug use in the 1970s was a middle-income, principally white phenomenon, which is why enforcement severely dropped, while in the late 1980s, drug use was a low-income, principally minority phenomenon, which is why enforcement was uncompromisingly aggressive:

<sup>66</sup> Blumstein, *Making Rationality Relevant* at 5 (cited in note 58).

The decline after the 1974 peak was undoubtedly a consequence of the general trend toward decriminalization of marijuana in the United States. A major factor contributing to that decriminalization was undoubtedly a realization that the arrestees were much too often the children of individuals, usually white, in positions of power and influence. Those parents certainly did not want the consequences of a drug arrest to be visited on their children, and so they used their leverage to achieve a significant degree of decriminalization.<sup>67</sup>

One irony attending the data on arrests is their juxtaposition with drug use patterns. They are out of synch. During the late 1970s and early 1980s, when arrests were falling or essentially stable, as previously shown by Figures 1-1 to 1-6,<sup>68</sup> drug use climbed to its modern peaks and began declining, well before arrests and arrest rates began their steep climb.

Blumstein's analysis of national drug arrest trends by race is mirrored in the states. Stevens Clarke of the Institute of Government of the University of North Carolina at Chapel Hill, the pre-eminent scholar of North Carolina criminal justice trends, reports that drug arrests of non-whites in that state climbed five times faster than white rates between 1984 and 1989.<sup>69</sup> Non-white drug arrests increased from 5,021 in 1984 to 14,192 in 1989, a 183 percent increase.<sup>70</sup> White drug arrests increased from 10,269 in 1984, twice the non-white number, to 14,007 in 1989, less than the black number, an increase of only 36 percent.<sup>71</sup> Similar patterns exist in other states, as of course they must, because the respective increases nationally in black and white drug arrests between 1985 and 1989 were 115 and 27 percent respectively.<sup>72</sup>

The drug war's effect on prison populations has been substantial, and since the mid-1980s it has been the single most important cause of prison population increases. Twenty-five percent of state prisoners in 1991 had been convicted of drug charges, as

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<sup>67</sup> Id at 4.

<sup>68</sup> See pages 30-36.

<sup>69</sup> Stevens H. Clarke, *North Carolina Prisons Growing*, 3(4) *Overcrowded Times* 1, 12 (1992).

<sup>70</sup> Id at 12.

<sup>71</sup> Id.

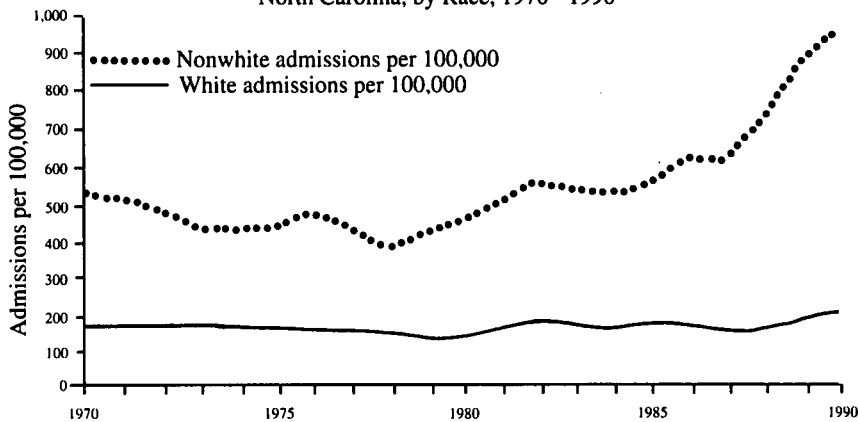
<sup>72</sup> Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1986* table 4.8 at 300 (1987); Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1990* table 4.9 at 424 (1991);

had 56 percent of those in federal prisons. Twelve years earlier, in 1979, a year for which a special population profile makes detailed state data available, 6.4 percent of state inmates and 25 percent of federal inmates had been convicted of drug crimes.<sup>73</sup>

At every level of the criminal justice system, empirical analyses demonstrate that increasing black disproportion has resulted from the War on Drugs—in juvenile institutions,<sup>74</sup> in jails,<sup>75</sup> and in state<sup>76</sup> and federal<sup>77</sup> prisons. The experience in several state prison systems is illustrative.

Figure 2-6 shows black and white admissions per 100,000 same-race population to North Carolina prisons from 1970 to 1990. White rates held steady during the entire period. Non-white rates doubled between 1980 and 1990 from a higher starting point, increasing most rapidly after 1987, the period when non-white drug arrests more than doubled.

Figure 2-6

Prison Admissions per 100,000 General Population,  
North Carolina, by Race, 1970 - 1990

Source: Stevens H. Clarke, *North Carolina Prisons Growing*, 3(4) *Overcrowded Times* 1, 11-13 (1992).

<sup>73</sup> Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1987* table 6.25 at 494 (1988); Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1981* table 6.40 at 490 (1982).

<sup>74</sup> Howard N. Snyder, *Arrests of Youth 1990*, in Bureau of Justice Statistics, *OJJDP Update on Statistics 10* (1990) (noting that drug abuse arrest rates for non-blacks declined during the 1980s, while drug abuse arrests for black youth increased by 200 percent between 1984 and 1989).

<sup>75</sup> 1992 *Sourcebook*, table 6.49 at 601 (cited in note 2).

<sup>76</sup> 1992 *Sourcebook*, table 6.70 at 623 (cited in note 2); Bureau of Justice Statistics, *National Corrections Reporting Program, 1989* table 1-1 at 8 (1989).

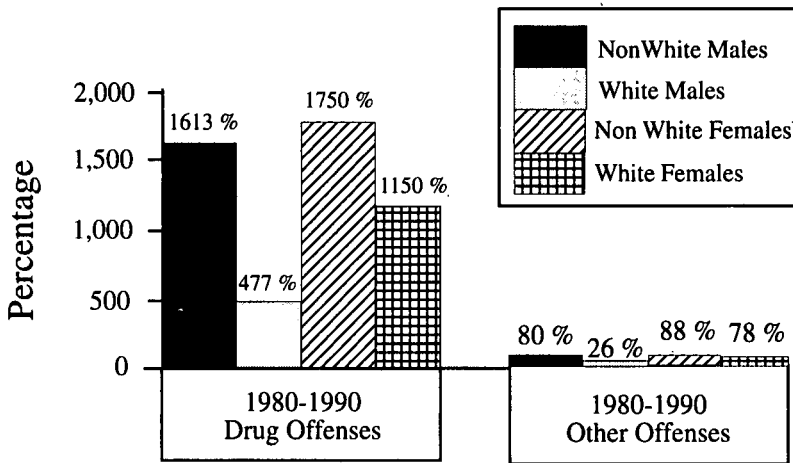
<sup>77</sup> See United States Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* (1991).



Figure 2-7 shows increases in prison commitments in Pennsylvania for 1980 to 1990 for drug and other offenses by race and sex. Drug commitments of black males increased by 1,613 percent during the decade; white males by 477 percent. The pattern for females was similar, although the differences by race were less dramatic. In 1990, 11 percent of Pennsylvanians were black; 58 percent of state prisoners were black.<sup>78</sup>

Figure 2-7

Percent Growth in Prison Commitments  
in Pennsylvania, by Race, Sex, and Offense, 1980 - 1990



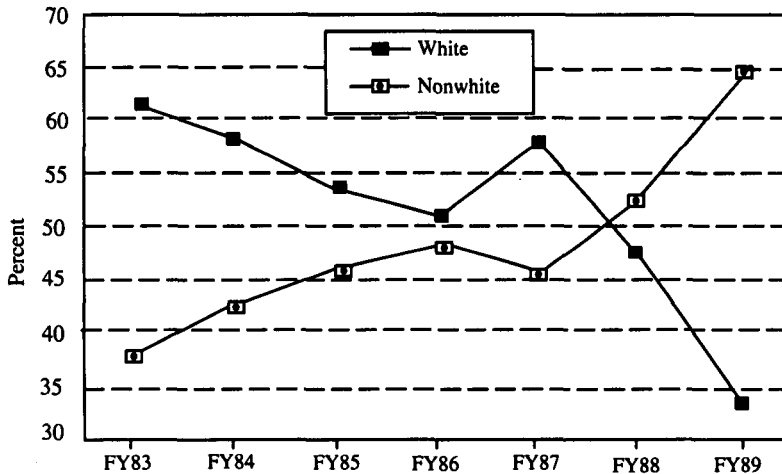
Source: Stover Clark, *Pennsylvania Correction in Context*, 3(4) *Overcrowded Times* 4,5 (1992).

Figure 2-8 similarly shows white and non-white drug commitments to Virginia prisons from 1983 to 1989. Sixty-two percent of drug offenders committed in 1983 were white, 38 percent were non-white. By 1989, however, those percentages had more than reversed; 65 percent of drug commitments were non-white, 35 percent were white. Drug commitments have continued to rise since 1989; current data would reveal an even more striking racial disproportion.

<sup>78</sup> Stover Clark, *Pennsylvania Corrections in Context*, 3(4) *Overcrowded Times* 5 (1992).

Figure 2-8

Percent of New Drug Commitments by Race, Virginia



James Austin and David McVey, *The 1989 N.C.C.D. Prison Population Forecast: The Impact of the War on Drugs*, National Council on Crime and Delinquency Focus (Dec. 1989).

These figures are illustrative of prison admission and population trends across the country. This worsening of racial incarceration patterns, cast in the most charitable light to the officials who launched and conducted America's latest War on Drugs, was a foreseen but not intended consequence. Less charitably, the recent blackening of America's prison population is the product of malign neglect.

#### B. The Case for the War

There was no basis on which policymakers could have believed in good faith that the main strategies of the War on Drugs would be so successful as to justify the burdens they would impose on minority citizens. By trying principally to reduce the supply of drugs, rather than the demand for them, and by adopting a prohibitionistic crime control approach, rather than a harm-reduction approach, policymakers chose strategies that had little prospect of succeeding but a high likelihood of aggravating racial disproportions in the criminal justice system.

The argument has two strands. The first concerns the evidence for the effectiveness of drug-law enforcement *per se*. The

second concerns the evidence on effectiveness of harsh crime control approaches generally.

A prefatory glossary may be helpful. Although it is an oversimplified distinction, discussions of drug policy typically distinguish between supply reduction and demand reduction.<sup>79</sup> Supply reduction strategies aim to reduce the availability of drugs and, by reducing supplies and increasing risks, to increase their prices. The major supply reduction approaches are source-country programs (crop eradication, financial support to other countries' drug law enforcement agencies, and extraterritorial assignment of American military and law enforcement personnel), interdiction programs (border patrols, air and marine surveillance and apprehension of importers, and baggage inspection at entry points), and law enforcement efforts at local, state, federal, and international levels aimed at arresting and punishing those involved in drug trafficking.

Demand reduction strategies, by contrast, aim to persuade people not to use drugs and not to buy them. The major demand reduction approaches are mass-media public education, drug education in elementary and secondary schools, drug abuse treatment, and law enforcement aimed at the possession of drugs. In addition (and this is why the broad distinction is oversimplified), supply reduction efforts have collateral demand reduction effects if their very existence and occurrence serve to create or reinforce social norms antithetical to drug use.

A second conventional distinction is between prohibitionistic and harm reduction strategies. Prohibitionistic strategies forbid the use or distribution of drugs and attempt to enforce those prohibitions by means of legal threats backed by the criminal justice system. Drug use and users are stigmatized as deviant and immoral. Principal reliance is placed on legal sanctions and, particularly in the United States, when the legal threats prove ineffective, the tendency has been to threaten increasingly harsher penalties. This tendency might be analogized to the American Vietnam War practice of responding by sending troops each time sending more troops failed to win victory.

The logic of prohibitionistic approaches implies primary emphasis on supply reduction strategies and on the criminalization of use, possession, and distribution of proscribed substances. That is why drug law enforcement has been the principal cause

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<sup>79</sup> See, for example, Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons from Economics*, 1994 U Chi Legal F 207, 216.

of rapid prison population increases and why the United States Congress and state legislatures in the 1980s repeatedly passed sentencing laws calling for mandatory minimum sentences for drug crimes.

Harm reduction strategies, by contrast, treat drug abuse as a social problem having undesirable effects on drug users and society, and attempt to minimize their aggregate adverse effects. Adopting the public health perspective on health problems—that it is more important to alleviate suffering and loss of health, life, and property than to render moral judgments on individual behavior—does not place principal reliance on criminal processes and legal threats. In the Netherlands, for example, although law enforcement targets the importation and manufacture of drugs and high-level trafficking, harm reduction approaches guide policy for handling social users, addicts, and user-dealers.<sup>80</sup> Needle exchange and methadone maintenance programs exist, serviced from mobile medical units and from clinics.<sup>81</sup> Addicts participate fully in the Dutch social welfare system and are entitled to both income support and health care.<sup>82</sup> Drug abuse treatment is available on demand through the national health system.<sup>83</sup> The effects are to weaken the illicit drug markets, to reduce drug-market-related violence, to reduce the health problems of drug-users, and to reduce the spread of AIDS. Dutch authorities also claim that their approach reduces crime generally by eliminating the need for addicts to steal in order to support their addiction. Moreover, they claim that their approach reduces drug use by making it less beguiling to experimenting young people; addicts are seen for what they are—inadequate welfare state clients—rather than countercultural outlaws symbolizing resistance to bourgeois values.<sup>84</sup>

No doubt drug warriors would challenge some or all of my description of the Dutch experience. I believe, however, that it is substantially accurate; more important, a picture of a harm-reduction approach has been sketched. In life, any country imaginable will simultaneously pursue elements of both prohibitionistic and harm reduction strategies, as the Dutch do and the United States does. The question is one of balance. In recent years, Ame-

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<sup>80</sup> Ed Leuw, *Drugs and Drug Policy in the Netherlands*, in Michael Tonry, ed, 14 *Crime and Justice: A Review of Research* 263, 265 (University of Chicago Press, 1991).

<sup>81</sup> *Id.* at 266-67.

<sup>82</sup> *Id.* at 257.

<sup>83</sup> *Id.* at 267.

<sup>84</sup> Leuw, 14 *Crime and Justice* at 263-69 (cited in note 80).

rican policy has tilted heavily toward prohibition. This is exemplified by a longstanding 70/30 federal funding split between law enforcement programs and treatment and education programs.<sup>85</sup> Too many people in prison and too few in treatment are among the results.

Every element of the supply reduction approach has been shown to be ineffective. James Q. Wilson, the country's leading conservative crime-control scholar, after surveying research and experience through 1990, concluded that "significant reductions in drug abuse will come only from reducing demand for those drugs. . . . [T]he marginal product of further investment in supply reduction is likely to be small."<sup>86</sup> Moreover, he reported that "I know of no serious law-enforcement executive who disagrees with this conclusion. Typically, police officials tell interviewers that they are fighting either a losing war or, at best, a holding action."<sup>87</sup>

Interdiction and source-country efforts have long been known by policy analysts and evaluators to be ineffective, but, because they have had relatively little effect on racial trends in prosecution and incarceration, little about them is said here. The problem with interdiction efforts is that the boundaries of the United States are so long and so porous, and the volume of legitimate movement across borders so large, that it is impossible to intercept more than a small percentage of incoming drugs. A series of RAND analyses and evaluations commissioned by the Department of Defense agree.<sup>88</sup> In addition, the cost of imported drugs to U.S. distributors accounts for less than 10 percent of their street price. A RAND analysis estimated that doubling the volume of intercepted drugs would increase street prices by only 10 percent.<sup>89</sup>

Knowledge about the effectiveness of source-country programs is even less encouraging. With the notable exception of reductions in Turkish production of opium in the early 1970s that temporarily interrupted the flow of heroin into the United States, source-country programs have been ineffective. This is partly

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<sup>85</sup> Id at 271.

<sup>86</sup> James Q. Wilson, *Drugs and Crime*, in Michael Tonry and James Q. Wilson, eds, *13 Crime and Justice—A Review of Research 534* (University of Chicago Press, 1990).

<sup>87</sup> Id.

<sup>88</sup> Peter Reuter, *Can the Borders be Sealed?*, 92 *Public Interest* 51 (Summer 1989).

<sup>89</sup> Peter Reuter, Gordon Crawford, and Jonathan Cave, *Sealing the Borders: The Effects of Increased Military Participation in Drug Interdiction* 96, 107 (Rand Corporation, 1988).

because suitable conditions for growing cocaine, opium, and marijuana exist in many countries, and production can always shift from less to more hospitable places. Many of these places, such as in the Andes, the "Golden Triangle" of Thailand, Burma, and Laos, and the mountainous regions of Southwest Asia, are outside effective control of any government. The ineffectiveness of source-country programs partly results from the unavailability of alternate cash crops for peasant farmers and of the economic infrastructure for marketing them. Again quoting Wilson's summary, ". . . we should not expect much gain from even sharply increased [source-country efforts] . . . It is a view shared by many top federal law-enforcement officials."<sup>90</sup>

Domestic law enforcement, the principal remaining supply-side strategy, has not had any greater demonstrated success. The ultimate measure of the effectiveness of drug-control efforts at reducing availability of drugs is their price. If drugs are getting scarcer, simple economic theory tells us they should become more costly. If the risks of arrest and incarceration associated with drug sales are increasing, simple economic theory tells us that those increased costs should be passed along and drugs should become more costly. To the contrary, since the early 1980s, prices of cocaine have fallen steadily, and prices of heroin have alternated between stability and decline.<sup>91</sup>

There are at least two other places to look for evidence of positive effects of supply-side efforts. One is to look at the literature on the effects of efforts to deter sales by increasing penalties. The most deliberate and publicized increase of drug penalties in this country occurred in the early 1970s in New York when the "Rockefeller Drug Laws" mandated harsh prison terms for traffickers and forbade plea bargaining that would avoid mandatory sentences.<sup>92</sup> A massive multiyear evaluation concluded that implementation of the laws had no effect on drug trafficking, drug use, or drug-related health problems.<sup>93</sup>

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<sup>90</sup> Wilson, *Drugs and Crime* at 531 (cited in note 86).

<sup>91</sup> Mark H. Moore, *Supply Reduction and Drug Law Enforcement*, in Michael Tonry and James Q. Wilson, eds, *13 Crime and Justice—A Review of Research 125* (University of Chicago Press, 1990).

<sup>92</sup> Joint Committee on New York Drug Law Evaluation, *The Nation's Toughest Drug Law: Evaluating the New York Experiences* 3-12 (Association of the Bar of the City of New York, 1977); 1973 NY Laws 276, 277, 278, 676, 1051; 1975 NY Laws 785, 832; 1976 NY Laws 480.

<sup>93</sup> *Id.*

Yet another approach is to look at the effects of street sweeps in which police saturate an area in order to eliminate drug dealing. This tactic is highly popular with the public and with some drug policy scholars, but the best evidence is that such sweeps move the drug markets around and, at least for some time, make drugs harder to find for some buyers; overall they have no effect on the volume of drug trafficking in a metropolitan area. Arrested dealers are quickly replaced by others willing to accept the risks in order to win the rewards.<sup>94</sup>

It is important to pause here to note that temporary disruption of the drug markets, and demonstration to neighborhood residents that the police will act to drive drug dealers out, are legitimate policy goals. As a minor part of a comprehensive drug strategy that emphasizes treatment and education, such tactics have a place. In the Reagan-Bush War on Drugs, however, law enforcement was the principal tactic, and was backed up by severe penalties that have crowded the prisons but not reduced cocaine use or prices.

One last approach is to stop up the lens to look generally at the evidence on crime-preventive efforts, particularly harsh penalties and "war-against" rhetoric. The War on Drugs was, after all, but one in a series of wars against crime waged by the Reagan and Bush administrations. If vigorous enforcement, and harsher and tougher penalties, can be shown to reduce crime generally, perhaps the War on Drugs can be justified as a specific application of that general proposition.

Here, too, the evidence is no more convincing. Although Reagan and Bush administration crime bills year after year increased penalties and extended mandatory minimum sentences for additional drug crimes, a conservative Sentencing Commission toughened penalties even more and insisted on their application, and prison populations tripled from 1980 onwards, there is little reason to conclude that crime was much reduced. On mandatory penalties, a considerable literature instructs that they have no, little, or transient deterrent effects.<sup>95</sup>

More generally, it has long been established, in this country and elsewhere, that imaginable increases in penalties are likely

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<sup>94</sup> Marcia Chaiken, ed, *Street Level Enforcement—Examining the Issues* 13 (National Institute of Justice, 1988).

<sup>95</sup> Sherman, *Police Crackdowns* (discussing the effects of police crackdowns that make punishment more certain) (cited in note 56). See also Michael Tonry, *Mandatory Penalties*, in Michael Tonry, ed, *16 Crime and Justice—A Review of Research* 243 (University of Chicago Press, 1992).

to achieve, at most, modest crime reduction through deterrence or incapacitation. The most recent authoritative survey of the subject comes from the National Academy of Sciences Panel on the Understanding and Control of Violence, created with support from the Reagan and Bush administration Departments of Justice, and composed of nationally prominent public officials and scholars. The Panel's origins and sources of funding are described to emphasize that it was a nonpartisan, establishmentarian effort of such credibility that both recent Republican regimes supported it. The fundamental question the Panel addressed: "What effect has increasing the prison population had on levels of violent crime?" The answer: "Apparently, very little."<sup>96</sup>

The last twenty years have provided a natural laboratory for assessing the effects of harsher penalties on behavior. Along with the trebled prison population since 1980, the Panel observed that "[w]hile average prison time served *per violent crime* roughly tripled between 1975 and 1989, reported levels of serious violent crime varied around the level of 2.9 million a year. . . . If tripling the average length of incarceration per crime had a strong preventive effect, then violent crime rates should have declined."<sup>97</sup> That experience is not compatible with any substantial deterrence effect because violent crime rates "generally rose after 1985."<sup>98</sup>

Appropriate skepticism about punitive crime control policies in general or about supply-side drug control strategy in particular does not mean that drugs should be legalized or that there are no social benefits from law enforcement efforts. Drug law enforcement, for example, through its clear message that drug trafficking is illegal and wrong, may help reinforce social norms against drug use. For so long as private drug sales remain illegal, no one can disagree with enforcement efforts targeted at distributors, manufacturers, and importers. Similarly, few would argue that it is inappropriate to try to stop the flow of drugs through airports, tollbooths, and seaports, or that police should not make arrests in drug-ridden neighborhoods to protect the right of residents to live in a safe and congenial environment. Even modest investments in source-country and extraterritorial interdiction

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<sup>96</sup> Albert J. Reiss, Jr. and Jeffrey A. Roth, eds, *Understanding and Preventing Violence* 6 (National Academy Press, 1993).

<sup>97</sup> Id.

<sup>98</sup> Id.



programs may be justifiable, albeit largely for dramaturgical reasons.

Much less need be said about demand-side tactics because the evidence is so much more positive. A sizable literature now documents the effectiveness of school-based drug education at reducing drug experimentation and use among young people.<sup>99</sup> Another sizable literature documents the capacity of drug-abuse treatment programs to reduce drug use and drug-related crime.<sup>100</sup> There is no credible literature that can document the effects of mass-media campaigns on drug use, but it is not unreasonable to believe that such campaigns ("Just say 'No'") have reinforced changing social norms that have led to across-the-board declines in drug use in the United States since 1980.

Supply-side strategy has a role, but so does demand-side strategy. The choice between them is a false one. The question is one of balance, and, in setting that balance, the likely effects of alternate choices on members of minority groups are ethically an inexorably relevant consideration. It is hard to imagine any legitimate rationale for the decision by the drug war's designers to adopt policies that were unlikely to achieve its ostensible goals and that were foreordained disproportionately to affect disadvantaged black Americans. Is there any arguable basis for justifying the War's foreseeable effects on black Americans? Particularly, what should be made of the standard defense of the War's racial effects, almost a confession in avoidance, that most crime is intraracial and that the War's strategies were devised not to damage blacks but to protect black victims and black communities?

### C. Justifying the Unjustifiable

It seems a bit odd in the 1990s to be having to explain why the adoption of policies with foreseeable racially disparate effects is a bad thing. Avoidance of unwanted side effects and rejection of iatrogenic policy options seems obviously right.

Consider, for example, the questions of registration of persons who are HIV positive and of notification of infection to family members and other intimates. Homosexuals have consistently

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<sup>99</sup> See Gilbert J. Botvin, *Substance Abuse Prevention: Theory, Practice, and Effectiveness*, in Michael Tonry and James Q. Wilson, eds, 13 *Crime and Justice—A Review of Research* 461, 462-63 (University of Chicago Press, 1990). See also Phyllis L. Ellickson and Robert M. Bell, *Prospects for Preventing Drug Use Among Young Adolescents* 36 (Rand Corporation, 1990).

<sup>100</sup> See M. Douglas Anglin and Yih-Ing Hser, *Treatment of Drug Abuse*, in Michael Tonry and James Q. Wilson, eds, 13 *Crime and Justice: A Review of Research* 393 (University of Chicago Press, 1990).

opposed registration laws and notification policies because of fears that these policies would be stigmatizing and would adversely affect homosexuals as a group.<sup>101</sup> Public health officials' views have changed over time. In the mid-1980s, many supported registration policies and contact-tracing.<sup>102</sup> More recently, because of concern that registration might deter people from being tested for HIV, most public health officials have been opposed.<sup>103</sup> Few such policies have been adopted in part from respect for homosexuals' concerns about their potential disparate impact.<sup>104</sup>

In employment discrimination law, proof of disparate impact on women or members of minority groups is enough to create inferences of discriminatory intent and to shift burdens of proof.<sup>105</sup> As a matter of policy, *de facto* discrimination on racial or ethnic grounds is as damaging to the people affected as *de jure* discrimination; the law's failure to treat them identically results not from a judgment that one form of discrimination is less harmful than another, but from practical concerns. Whether remediable by the courts or not, many claims of innocent *de facto* discrimination meet with skeptical reactions from bystanders.

There are a number of other ways to think about the ethical justification of the War on Drugs's disparate impact on blacks. The criminal law's *mens rea* analyses, for example, offer the law's most highly developed schema for analyzing culpability and moral responsibility. In the criminal law, purpose and knowledge are equally culpable states of mind. An action taken with a purpose to kill, for example, is no more culpable than an action taken with some other purpose but with knowledge that death would result. Blowing up an airplane to kill a passenger is equivalent to blowing up an airplane to destroy a fake painting and thereby to defraud an insurance company, knowing that the passengers will be killed. They are both murder. Most people would find the latter killing the more despicable.

Under the Model Penal Code, in which purpose and knowledge are alternate mental states of murder, a person acts knowingly concerning the results of conduct if "he is aware that it is

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<sup>101</sup> See David Elsner, *Stricter HIV Reporting Worries AIDS Activists*, Chi Trib 1-7 (Apr 26, 1994).

<sup>102</sup> See Nina Bernstein, *The Secret Life of Aids*, Newsday 7 (Jan 15, 1993).

<sup>103</sup> See Elsner, Chi Trib at 1-7 (cited in note 101).

<sup>104</sup> See Bernstein, Newsday at 7 (cited in note 102).

<sup>105</sup> See *Griggs v Duke Power Co.*, 401 US 424 (1971).

practically certain that his conduct will cause such a result."<sup>106</sup> He acts recklessly if he "consciously disregards a substantial and unjustifiable risk that [the harm] . . . will result from his conduct."<sup>107</sup> By either *mens rea* analogy, the War's planners are morally culpable for the racial disparities their policies produced. By analogy to the criminal law, the moral responsibility of the architects of contemporary crime control policies is the same as if their primary goal had been to lock up disproportionate numbers of young blacks.

The planners of the War on Drugs fare no better under the criminal law's *actus reus* analysis. Although the common law imposed no criminal responsibility for harms caused by omissions, unless the actor had put the victim at risk or had some duty for her care, this is almost universally regarded as a retrograde doctrine. If with no significant risk to himself, an individual can save a child from drowning in a shallow pool, why shouldn't he? In any case, regardless of what the criminal law provides, most people would hold the bystander morally responsible. If the planners of the War on Drugs could have adopted policies that would not have blighted the lives of so many young black Americans, as of course they could have, are they not morally responsible for having failed to do so?

Thus, there are a number of modes of analysis that condemn the conscious adoption of policies foreseeably detrimental to blacks. One final step is to examine defenses that have been or could be put forward by conservative crime controllers to justify the racial disparities they caused.

1. "Don't blame us."

The "don't blame us" defense posits that, in a democracy, public officials respond to the fears and preferences of the electorate, and, in the 1980s, the "public" was concerned about crime and drug abuse; the public wanted a drug war, and the federal government was simply, and rightly, giving the public what it wanted.<sup>108</sup>

The shortcoming of "don't blame us" is that it gets the causal chain backwards. Throughout the 1980s, and earlier, conservative politicians used "law and order" (remember Willie Horton?<sup>109</sup>) as an emotional issue to curry favor with voters, in

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<sup>106</sup> Model Penal Code § 2.02 (ALI, 1962).

<sup>107</sup> *Id.*

<sup>108</sup> John DiIulio, *No Escape* 71 (Basic Books, Inc., 1991).

<sup>109</sup> Timothy J. McNulty, *Angry Dukakis Rips Soft-On-Crime Label*, Chi Trib 3-1 (Oct

effect heightening voters' fears and then promising to assuage them. Common law and street criminals do not vote very much and do not evoke much sympathy from those who do vote. They are also disproportionately members of ethnic and racial minorities. It was easy to provoke voters' fears and, as both Dukakis's fumbling of the crime issue and the immobilizing fears of many elected officials to be portrayed as "soft on crime" attest, it was difficult for others to dampen these fears.

Almost all the premises underlying the "don't blame us" defense were wrong. First, as explained above, there is no basis for a claim of a good faith belief that harsh crime control policies can achieve their ostensible objectives.<sup>110</sup>

Second, although politicians' harping on rising crime rates made the public believe that crime was increasing, all of the evidence points the other way. FBI data on reported crimes showed that reported rates of all serious crimes fell from 1980 through 1984 and rose slowly thereafter (during the height of toughened crime control initiatives) to levels for many crimes in 1992 that remained below those in 1980.<sup>111</sup> The other source of national data on crime trends, data on victimization collected by the Bureau of the Justice Statistics, showed that victimization rates for all serious crimes (except murder) declined steadily during the 1980s.<sup>112</sup>

Third, politicians' claims that the public "wanted" tougher crime policies were disingenuously based on misleading poll results. It is true that, when asked simplistic questions such as "Are the sentences judges impose too harsh, too lenient, or about right?", most people will answer "too harsh," and they have done so for as long as such questions have been asked. Relying on such results as the basis for policy is no more warranted than relying on similar off-the-cuff answers to pollsters' questions about foreign policy or support of DNA research.

A huge body of available public opinion data shows that Americans have complicated opinions about crime and punishment, just as honest public officials do.<sup>113</sup> Most people want to

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20, 1988).

<sup>110</sup> See page 28.

<sup>111</sup> Federal Bureau of Investigation, *Uniform Crime Reports—1992* table 1 at 58 (1992).

<sup>112</sup> Bureau of Justice Statistics, *Criminal Victimization 1992* 1 (1993).

<sup>113</sup> See, for example, Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, in Michael Tonry, ed, 16 *Crime and Justice: A Review of Research* 99 (University of Chicago Press, 1992).

see offenders published, for example, but they also want to see them rehabilitated.<sup>114</sup> Americans believe that many offenders should be sentenced to meaningful community-based penalties rather than to prison. Americans believe that a disadvantaged upbringing is the primary cause of crime and want to see efforts made to rehabilitate offenders.<sup>115</sup> Surveys show that people who do not want their taxes increased to pay for more prisons would support tax increases to support drug treatment and other rehabilitative programs.<sup>116</sup> Similar findings exist in Australia, England and Wales, Canada, Germany, Scotland, and the Scandinavian countries. Complicated problems elicit complicated reactions.<sup>117</sup>

The point is not that Americans lack punitive instincts. They have them. But they also have other more generous instincts that policy makers can encourage or ignore. The architects of recent crime control policies chose to ignore them.

## 2. "It's their own fault."

The "it's their own fault" argument is that every person has the power to decide whether to commit a crime. If the government broadcasts the message, "Do the crime, do the time," and blacks continue to commit crimes, too bad. James Q. Wilson, the leading conservative crime scholar, attributes crime to defects in character. Wilson has argued that "the best way to reduce racism . . . is to reduce the black crime rate to equal the white crime rate" and has suggested that "decent black people" have special responsibility for doing so.<sup>118</sup> As President Bush's 1992 drug strategy expressed it, "drug use is the result of bad decisions by individuals exercising free will."<sup>119</sup>

If only life were so simple. At least in our culture, it is axiomatic that people are responsible for the moral choices they make. However, we know that individual behavior can be predicted and that the combination of being poor, being raised in a single-parent welfare household, being ill-educated, and having few or no marketable job skills is a powerful predictor of crime, drug

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<sup>114</sup> Id at 131.

<sup>115</sup> Id at 130.

<sup>116</sup> Nigel Walker and Michael Hough, eds, *Public Attitudes in Sentencing: Surveys from Five Countries* 41 (Gower Publishing Co., 1988).

<sup>117</sup> Id at 218-23.

<sup>118</sup> James Q. Wilson, *To Prevent Riots, Reduce Black Crime*, Wall St Journal A16 (May 6, 1992).

<sup>119</sup> ONDCP, *1992 National Drug Control Strategy* 3 (1992).

abuse, and drug trafficking. We also know from ethnographic and self-report studies of drug dealing that the promised financial rewards are a powerful inducement to disadvantaged young people.<sup>120</sup> When disadvantaged kids often make choices that privileged kids seldom make, it is hard to believe that they do so simply because they are bad people. Instead, they do it because they face conditions of life that make the wrong choice look like the right one. Unless we are prepared to conclude (I'm not) that disadvantaged kids are made from substandard human raw material, there is no alternative to accepting that their conditions of life have much to do with the choices they make.

Americans do believe that people should be held accountable, but we also know that social and economic conditions predispose people for and against crime and drug dealing. This is why disadvantaged minority youth are far likelier than affluent youths of any race to sell drugs and commit crimes.

Like most of life's hard problems, this one has no easy answers. The answer that "it's their own fault" for not resisting peer and subcultural pressures, for not acting like middle-class suburban kids, has an obvious consequence—vast numbers of disadvantaged minority youth are entangled in the tentacles of the criminal justice system. Some people have much harder choices to make than others do, and we do them and ourselves a disservice in pretending otherwise. "It's their own fault" is an adequate explanation for why so many young blacks are in prison or jail for drug crimes only if we do not care about the reasons they commit these crimes or about the resulting racial disparities.

### 3. "It's not unconstitutional."

A third defense, "it's not unconstitutional," contends that, despite their foreseeable disparate impact on blacks, punitive crime-control strategies were not wrong because they were not unconstitutional. This is a nonsequitur. It is true that, since *Washington v Davis*,<sup>121</sup> an intent to discriminate must be shown in order to establish a civil rights claim under the Constitution. Because courts will not look behind the ostensible crime- and drug-use reduction goals claimed for anti-crime and anti-drug

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<sup>120</sup> Reuter, MacCoun, and Murphy, *Money from Crime* at 102-05 (cited in note 39); Philippe Bourgois, *In Search of Horatio Alger: Culture and Ideology in the Crack Economy*, 16 *Contemporary Drug Problems* 619-49 (Winter 1989).

<sup>121</sup> 426 US 229, 239 (1976).

policies, the unconstitutionality claim can be set aside. However, that a policy is not unconstitutional does not make it right, or even not wrong. One need only look at the Supreme Court's death penalty jurisprudence to see that law and morality sometimes march in different directions.

4. *"We are concerned about black victims."*

Last, there is the "we are concerned about black victims and black communities" defense. As Attorney General Barr put it, "a failure to incarcerate criminals would result in disproportionate harm to law-abiding black citizens."<sup>122</sup> Fleshed out, the argument is that most crime is intraracial; that drug trafficking is associated with guns, gangs, and violence; that drug markets ruin neighborhoods and make it nearly impossible for law-abiding people to enjoy the peace and stability that should be every person's right; and that the War on Drugs was launched to vindicate that right. All the empirical statements that precede the last semicolon are true. What is false is the final clause. As previous parts of this essay demonstrate, the cure does not follow from the diagnosis.

A variation on the concern-for-black-victims defense is the assertion that black inner-city residents want the police to close down street markets and to arrest drug dealers, and that failure to do these things would be a form of prejudice against blacks. This also is a half-true argument. Presumably, virtually no one wants to live in a neighborhood in which drug dealing is common, in which gangs are active, in which children cannot be allowed out-of-doors, or in which ordinary citizens feel at risk. Minority citizens want help from the police in dealing with acute problems, even if the young men and women who will be arrested are their neighbors' sons and daughters, nieces and nephews. In a crisis, people need help and ask for it, and the police are often the only source of available help. There seems little reason to doubt that minority citizens want order brought to their communities.

Requesting help in a crisis, and supporting harsh crime and drug control strategies with racially disparate impacts, are not the same thing. The relevant distinction is between acute and chronic problems. Recent crime-control policies treat crime and drug trafficking as if they were only acute problems: apply a de-

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<sup>122</sup> William Barr, *The Case for More Incarceration* 19 (Office of Policy Development, 1992).

terrence and incapacitation poultice and the ailment will be cured. Inner-city crime and drug abuse and related social pathologies, however, are not acute problems amenable to easy solutions. They are symptoms of chronic social and economic conditions shaping disadvantaged inner-city communities and the life chances of people within them.

My guess—and I know of no directly applicable data—is that law-abiding minority citizens would much prefer policy solutions that preponderantly treat crime and drug abuse as chronic than as acute conditions. That people in frustration and desperation want to see their neighbors' children and their children's friends locked up (virtually no one wants to see their own children incarcerated) does not mean that they would not prefer policies that make the locking-up less likely. Given the choice, minority citizens would greatly prefer social policies that made it less likely that so many minority young people would wind up living lives in which crime and drugs are common. Most parents want good lives and rich opportunities for their children, and for other peoples' children. People who live in disadvantaged minority communities are not likely to have any lesser hopes for their children.

There is some evidence to support the preceding paragraph's speculations. First, there are chilling reports that large percentages of black Americans see contemporary crime and drug policies as a near-genocidal effort by whites to control blacks. University of Chicago law professor Norval Morris describes a seminar with black maximum security inmates in Stateville Prison in which patterns of race, crime, and punishment were discussed; of twenty-six prisoners present, only three doubted that American drug and crime control policies were a genocidal (their word) assault on blacks by whites.<sup>123</sup> Thomas and Mary Edsall, in their 1991 book, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*, describe focus groups held in the late 1980s under both Democratic and Republican party auspices; in every session with black participants, the view was expressed that crime and drug control policies are a conscious effort to undermine black communities.<sup>124</sup> A Democratic pollster, Ed Reilly, similarly reported a belief among Northern urban blacks "that there is an organized approach to keep them [blacks] isolated from mainstream America, that the government system is rigged

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<sup>123</sup> Personal communication with Norval Morris.

<sup>124</sup> Thomas Edsall and Mary Edsall, *Chain Reaction* 237 (W.W. Norton & Company Inc., 1991).



to keep them in poverty."<sup>125</sup> A *New York Times*/WCBS-TV news poll in 1990 likewise found that 29 percent of blacks (only 5 percent of whites) thought it was true or might be true that the HIV virus was "deliberately created in a laboratory in order to infect black people," that 60 percent (16 percent of whites) believed it was true or might be true that government makes drugs available "in poor black neighborhoods in order to harm black people," and that 77 percent believed government "singles out and investigates black elected officials in order to discredit them."<sup>126</sup>

Second, evidence from public opinion surveys over many years reveals that much larger percentages of blacks than whites believe that government has social welfare responsibilities to its citizens. In one recent poll, blacks by 64 to 36 percent stated that they believed the federal government had a responsibility to guarantee every adult a job and a good standard of living (whites came out the other way, by 66 to 34 percent). During most of the 1980s, whites split evenly on whether government should increase spending for improved services; blacks were in favor by margins as high as 77 to 23 percent.<sup>127</sup> According to surveys conducted from 1975 to 1989, 36 to 64 percent of blacks believed government has an obligation to help blacks improve their living standard.<sup>128</sup> Only 12 to 20 percent of whites agreed, and 60 percent of whites disagreed.<sup>129</sup> With similar and sometimes sharper racial contrasts, blacks supported and whites opposed more spending on welfare, on income redistribution, and on improving conditions in cities.<sup>130</sup>

### CONCLUSION

Crime and drug abuse do disproportionately affect disadvantaged minority communities. The amelioration of their effects should be a paramount policy priority. So much is clear. Racially sensitive policies would, however, take account of foreseeable racially disparate impacts as well as the policy's likely instrumental effects.

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<sup>125</sup> *Id.*

<sup>126</sup> Jason DeParle, *Talk of Government Being Out to Get Blacks Falls on More Attentive Ears*, *NY Times* B7 (Oct 29, 1990).

<sup>127</sup> Edsall and Edsall, *Chain Reaction* at 258 (cited in note 124).

<sup>128</sup> Floris Wood, ed, *An American Profile: Opinions and Behavior, 1972 - 1989* 506 (Gale Research Inc., 1990).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

All that is left is politics, the fifth and real reason why the War on Drugs targeted young blacks. Stereotypes of Willie Horton and law-and-order appeals were cynical efforts to win elections and public support by raising peoples' fears and pandering to their basest instincts. The title of a *Time* story in 1991 tells it all: "Why Bigotry Still Works at Election Time: When Politicians Rail about Crime, Welfare, or Big Government, They Are Often Really Talking About Race."<sup>131</sup> The War on Drugs and the set of harsh crime-control policies in which it was enmeshed were launched to achieve political, not policy, objectives. It is the adoption for political purposes of policies with foreseeable disparate impacts, the use of disadvantaged black Americans as means to achievement of white politicians' electoral ends, that must in the end be justified. It cannot.

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<sup>131</sup> Dan Goodgame Washington, *Why Bigotry Still Works at Election Time: When Politicians Rail About Crime, Welfare or Big Government, They Are Often Really Talking About Race*, *Time* 44 (Nov 25, 1991).

